IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, **v.** **JOHN CLYDE ABEL,** Defendant and Appellant.	S064733 **CAPITAL CASE**

Orange County Superior Court No. 95CF1690
The Honorable Robert R. Fitzgerald, Judge

RESPONDENT'S BRIEF

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

DANE R. GILLETTE
Chief Assistant Attorney General

GARY W. SCHONS
Senior Assistant Attorney General

ADRIANNE S. DENAULT
Deputy Attorney General

JAMES D. DUTTON
Supervising Deputy Attorney General
State Bar No. 73334

110 West A Street, Suite 1100
San Diego, CA 92101
P.O. Box 85266
San Diego, CA 92186-5266
Telephone: (619) 645-2212
Fax: (619) 645-2191
Email: Jim.Dutton@doj.ca.gov

Attorneys for Respondent

TABLE OF CONTENTS

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, **v.** **JOHN CLYDE ABEL,** Defendant and Appellant.	S064733 **CAPITAL CASE**

STATEMENT OF THE CASE

On January 24, 1997, the Orange County District Attorney filed a First Amended Information charging appellant John Clyde Abel (Abel) in Count 1 with murder (Pen. Code, § 187, subd. (a)). The First Amended Information further alleged that Abel personally used a firearm in the commission of the offense, within the meaning of Penal Code sections 1203.06, subdivision (a)(1), and 12022.5, subdivision (a); that the murder was committed while Abel was engaged in the commission of a robbery, within the meaning of Penal Code section 190.2, subdivision (a)(17)(i); and Abel killed the victim while lying-in-wait, within the meaning of Penal Code section 190.2, subdivision (a)(15). The First Amended Information further alleged five serious felony priors (robberies) within the meaning of Penal Code sections 667, subdivision (a)(1), and 1192.7, subdivision (c). (2 CT 495-496.) On May 27, 1997, the trial court granted the People's motion to strike the lying-in-wait special circumstance. (2 RT 80.)

Counsel gave opening statements on May 29, 1997. (2 CT 595A.) On June 16, 1997, the jury commenced their deliberations and found Abel guilty of murder, and the personal use of a firearm and special circumstance allegations to be true. (2 CT 786-789; 10 RT 749-753.)

The penalty phase commenced on June 18, 1997. (2 CT 790-793.) The jury returned a penalty verdict of death on June 25, 1997, after approximately three hours of deliberations. (3 CT 1039-1040; 12 RT 2139-2142.)

On September 26, 1997, the trial court sentenced Abel to death. (3 CT 1153-1155.)

STATEMENT OF FACTS

Guilt Phase

Introduction

Armando Miller was 26 years old when he was murdered. He worked at his family-owned business, Alameda Market, in the city of Orange. Every Friday morning, either Armando or his father would go to Sunwest Bank in Tustin to obtain $10,000 or $20,000, as part of the market's check-cashing business. On Friday morning, January 4, 1991, the victim obtained $20,000 in cash from Sunwest Bank for his family business and was shot by Abel in the bank's parking lot. Just prior to the shooting, a bank teller saw Abel outside the bank door where the victim was to exit. Another witness, from a vantage point from outside the bank, described Abel as the shooter. Within months of the shooting, Abel confessed to a female intimate and gave her the .22 caliber handgun he used in the murder. A .22 caliber shell casing was found at the crime scene.

Prosecution Evidence

Abel's Connection To The Victim's Family's Market

The victim, Armando Miller, was 26 years old at the time of his murder, and worked at his parents' (America and Robert Miller) business, Alameda Market, in the city of Orange. (5 RT 772-774, 779-780; 8 RT 1177.) The

market catered primarily to a Mexican-American clientele. (8 RT 1165, 1182.) A check-cashing business was part of the market's operations. (5 RT 779-780; 8 RT 1165.)

Lorraine Ripple (Ripple) testified that she became sexually intimate with Abel right after she was paroled in March 1991. (6 RT 850, 855, 904.) When they were in bed together, Abel told her that he killed someone coming out of a bank in Tustin, and described it as an "easy score" – the victim "had a business, a little mini-store, mini-mart, or whatever, and he cashed checks for a lot of 'wetbacks' that were up here . . . " (6 RT 850, 855, 904, 926.) Ripple told investigators on June 29, 1995, that Abel told her that the victim(s) would pick up money at a bank for cashing checks and Abel "hit them . . . coming out of the bank cause they usually - - they were alone or just one other person." (6 RT 925.)

Every Friday morning, either the victim or his father would go to the Sunwest Bank in Tustin, where the Millers had a bank account, to obtain $10,000 or $20,000 in cash for the their check-cashing business. (4 RT 480-481, 494-498, 500-501; 5 RT 691-692, 799-780.)

The Millers obtained a mortgage loan from James Gano (Gano) to expand their business. (5 RT 773-775.) Gano knew where the Millers banked; the information was on the loan documents the Millers gave to Gano. (5 RT 781.) Gano knew about the Millers' Friday morning cash withdrawals at Sunwest Bank. (5 RT 780.) Gano was well known at Alameda Market; he came in to play the lottery and buy beer. (5 RT 774; 8 RT 1178-1181; 9 RT 1403.) America Miller identified Abel in a photo line-up (Exh. 30, Photo No. 2) on March 6, 1995, as the person she saw at Alameda Market with Gano approximately six weeks prior to her son's murder. (5 RT 775-779; 9 RT 1356, 1350-1352.)

Gano was a possible suspect in the investigation at the time Mrs. Miller viewed the photo line-up. His physical appearance did not match the description of the shooter. (9 RT 1366, 1403-1404; Exh. 52.)[1/]

David Sano (Sano), a former federal parole officer, supervised Abel when he was on parole from February 6, 1990, to October 1991. (9 RT 1270, 1288.) Sano also supervised Gano during the same time period he supervised Abel and knew that they were associating with each other. (9 RT 1288.) Abel testified that he met Gano in the Lompoc Federal Prison in 1978 or 1979, and over the years he would bump into him while they were both incarcerated. (9 RT 1444, 1483.) Gano was the first to be released on parole, and after Abel's release in 1990, he and Gano associated outside of prison. (9 RT 1483-1484.) In the summer of 1990, Abel (under a fictitious name), played softball with Gano for the mortgage company where Gano worked. (9 RT 1444-1450.) In the 1990-1991 time period, Abel socialized with Gano and went to his house a half-dozen times. (9 RT 1446.) Abel thought he went to the Alameda Market on one occasion with Gano, in late-summer 1990, to eat. (9 RT 1459-1461.) In September 1990, Gano started his own mortgage company and Abel started working for him prior to his December 1990 departure from his job at Giovanni's Restaurant. (9 RT 1436-1437, 1448-1449.)

The January 4, 1991, Murder

At approximately 10:31 a.m. on Friday, January 4, 1991, victim Armando Miller was standing in line to cash a check at Sunwest Bank. (4 RT 479-483, 485; Exh. 2.) At 10:40 a.m., teller Linda Pratt (Pratt) went to the vault to obtain the cash while the victim stood at her teller window. (4 RT 486-487.)

---

1. Tustin Police Department Detective Tarpley testified that James Gano was a "huge" man, 6'4" tall and weighed 225 pounds, with red hair. (9 RT 1404.) Exhibit 52 is a photograph of Gano seized from the back of Abel's car in October 1991. (9 RT 1403.)

Pratt returned from the vault and gave bundles of cash to the victim, consisting of $14,000 in one hundred dollar bills, and $6,000 in twenty dollar bills. (4 RT 483, 487.) A few minutes after the victim left, Pratt heard a big pop or bang. (4 RT 487-488.) Pratt went to the drive-through teller window and saw a person wearing a blue stocking cap, and maybe a jacket, run through the bushes away from her, carrying a paper bag. (4 RT 488-489, 491.)

Colleen Heuvelman (Heuvelman) worked part of the day as a teller at Sunwest Bank on January 4, 1991. (5 RT 687-691.) As Heuvelman was leaving the bank with her son, she saw the victim at Pratt's teller window and chatted with him. (5 RT 687-693.) Heuvelman exited the rear door of the bank, which was near the location where the victim was conducting his transaction. (5 RT 692-694; Exh. 40.) Upon exiting, Heuvelman walked along the wall of the bank and went around the corner, almost running into a middle-aged white male who was standing against the wall. (5 RT 693-697; Exhs. 42, 43.) Heuvelman was very startled; she was face-to-face, approximately 18 inches away from the man. (5 RT 697, 702, 735-736.) Heuvelman had never seen anyone standing in that location in the six months she had worked at the bank. (5 RT 702.) The man's hands were in his pockets. (5 RT 701-702.) Heuvelman was standing face-to-face with the man for less than 30 seconds, but continued to observe him while she was putting her son in her car; she focused on him almost the entire time she was at her vehicle, which was well over a minute. (5 RT 702-703.) There was no one else in the parking lot. (5RT704.) Later that day, Heuvelman was told that the victim had been shot. She gave a statement to the police at approximately 3:00 p.m. that same day. (5 RT 704-705.)

On April 19, 1995, Heuvelman selected Abel from a photo line-up – she was absolutely sure that he was the person she almost bumped into outside the bank. (5 RT 711-713; 9 RT 1367-1368; Exh. 30.) At trial, during the

examination of Heuvelman, Abel's counsel had Abel stand up and remove his eyeglasses. (5 RT 714-715.) Heuvelman testified Abel was the person she almost bumped into outside the bank, and that she particularly remembered his eyes and cheek bones. (5 RT 714-715.)

Bettina Redondo (Redondo) worked in an office building next to Sunwest Bank. (4 RT 549.) At approximately 10:45 a.m. on January 4, 1991, she was in a parking lot near her building when she heard a gunshot coming from the direction of the bank's drive-through teller area. (4 RT 548, 554-556.) Redondo then observed a man, with his arm extended, holding a gun from which smoke was emanating. (4 RT 556-557.) The man then came through the bushes, and walked in Redondo's direction to where she was standing. (4 RT 557-558.) While Redondo stood in the parking lot, the man came within about 30 feet of her. (4 RT 558; Exh. 6.) Redondo ran into her office building and looked out the window at the parking lot. (4 RT 559-560.) Redondo looked directly at the man's face for 20-30 seconds from the office window. From this position, the closest he came to her was 12-15 feet. (4 RT 560-564.) Redondo got a good look at the man's face; nothing obstructed her view. She tried to make a mental note of every detail in order to tell the police. (4 RT 560-561.) The man was walking, carrying a handgun and a brown, holiday grocery bag. (4 RT 564.) Within five minutes of first seeing the shooter, she went to Sunwest Bank and gave a description of him to the police. (4 RT 565-567.)

On March 6, 1995, Redondo selected Abel from a photo line-up: "on the record she was 80% sure" he was the shooter, and "off the record", Redondo told Tustin Police Department Detective Tarpley that she was 100 % sure. (4 RT 583-586; 9 RT 1358; Exh. 30.) Redondo explained she was 80 % sure "on the record" because she was afraid of being the only person making the

identification. (4 RT 585.) Redondo became emotionally upset when she saw Abel's photo in the line-up and she began crying. (9 RT 1363.)[2/]

Officer Darryl Pang was at the scene of the shooting at about the same time as the 10:48 a.m. call for assistance was received; the Tustin Police Department was 500-600 feet from Sunwest Bank. (4 RT 504-505.) Redondo arrived at the bank at the same time as the police. (4 RT 565-566.) The victim was lying on the ground, in the eastern-most drive-through teller stall, next to the walkway that separated the parking lot from the drive-through area. (4 RT 488, 506, 508, 515, 530; Exhs. 6, 13.) The victim had a wound to the left side of his forehead and there was a considerable amount of bleeding. (4 RT 508-509, 511.) The victim's van was parked in the third stall of the parking lot, adjacent to the sidewalk that separated the parking lot from the drive-through teller island. (4 RT 513; Exhs. 7, 8, 12.) No money or weapons were found at the victim's location. (4 RT 510, 536.) An expended .22 caliber shell casing, from a handgun, was found at the crime scene. (4 RT 530-531, 545; Exhs. 15, 28.)

Dr. Aruna Singhania, a forensic pathologist, opined that Armando Miller was shot at a distance of more than several feet because there was no sooting or stipling in the area of the entrance wound. (5 RT 675-676, 680-682.) The victim's broken glasses were at the scene. (4 RT 530, 533-535; 7 RT 996; Exh. 51.) The victim died as a result of a gunshot wound; the bullet entered his left forehead and lodged in his brain. (4 RT 517; 5 RT 677-679.)

---

2. Respondent will request the transmittal of Trial Exhibit 30 (photo line-up shown to Heuvelman and Redondo in 1995, with Abel's photo being displayed at the upper-middle position [number 2]), along with Exhibits 29 (composite drawing of murder suspect) and 47 (photographs of Abel, taken June 14, 1991), to this Court pursuant to Rule 8.634 of the California Rules of Court.

Abel Gives Lorraine Ripple The .22 Caliber Handgun Used In The Murder

After Lorraine Ripple was paroled from prison on March 18, 1991, she saw Abel in possession of a .22 caliber handgun on more than one occasion. (6 RT 850, 853-854.) Shortly after Ripple's parole, Abel gave her the .22 caliber automatic handgun that he said he used in the Tustin murder.[3/] (6 RT 854-856, 888-902, 920, 932.) Ripple remembered the gun because she took the "hot" gun from Abel to use it for the same reason that it had been used before. (6 RT 888, 900-903.) Ripple was going to have the handgun "bored," but the person who was supposed to bore the gun was "tweaking" on speed so often that she traded the gun to one of her Mexican drug connections in exchange for drugs. (6 RT 857, 890, 896-897.)

Detective Steven Rubino of the Los Angeles County Sheriff's Department, was part of a criminal apprehension detail that was looking for Abel on October 5, 1991. (7 RT 998-1000.) On October 5, Abel and his wife pulled into a parking lot in Simi Valley in Abel's 1991 Toyota Tercel. (7 RT 1000-1002, 1008-1009.) Pursuant to the detail's intervention at that time, officers found a loaded .22 caliber handgun under the Toyota's driver's seat. (7 RT 1004-1005, 1010; 7 RT Index, p. 12; Exh. 49.) Ripple testified that she had seen Abel with the .22 caliber handgun (Exh. 49), but it was not the same gun Abel said he used in the Tustin murder. (6 RT 931-932.) Abel came into possession of Exhibit 49 (.22 caliber handgun) after Ripple disposed of the gun he used in the murder. Abel liked to use .22 caliber automatics. (6 RT 932-933.)

---

3. An automatic handgun ejects the shell casings, and bullets shot from an automatic gun will come out in a burst. (6 RT 856-857.)

Description Of Shooter And Man Outside The Sunwest Bank Given By Witnesses Redondo And Heuvelman The Day Of The Murder

Bettina Redondo gave a description of the shooter shortly after the murder on January 4, 1991, while it was still fresh in her mind.[4] (4 RT 566.) Redondo told the police that the shooter was a white male, of medium build, 5'9" to 5'11" in height, in his late 40's,[5] having a very defined face – his cheeks and jaw were very apparent, dark circles under his eyes or sunken eyes, unshaven or dirty face – with the beginning stages of a thin moustache, and he was not wearing glasses.[6] Redondo further stated that the shooter was wearing a blue, possibly black, dark-colored watchman cap with a cuff, a lightweight dark blue windbreaker, and loose trousers. (4 RT 569-570, 589.) Abel was seen wearing a blue windbreaker and a navy knit watchman's cap with a fold, on more than one occasion in 1991. (6 RT 861-863.)

Within a couple of hours of the murder, Redondo went to the Tustin Police Department where police artist Marilyn Droz drew a composite sketch of the shooter based on Redondo's description. (4 RT 572-574; Exh. 29.) The composite sketch (Exh. 29), and the June 14, 1991, photo of Abel (Exh. 47)[7] are a close match to the physical description given by Redondo and Heuvelman. (4 RT 572-573; Exhs. 29, 47.)

---

4. Redondo had good eyesight and did not wear glasses. (4 RT 561.)

5. Abel was 46 years old at the time of the murder. (9 RT 1408.)

6. In 1991, Abel wore glasses to read with, but did not usually wear glasses in normal, every-day life. (6 RT 851; see also Exh. 47 [photograph taken of Abel on June 14, 1991, where he is not wearing glasses]; 6 RT 862-863.)

7. The June 14, 1991, photograph shows Abel with several days' facial hair growth, and wearing a blue windbreaker and navy watchcap with a cuff. (6 RT 862-863.)

Heuvelman gave a description to the Tustin Police Department at approximately 3:00 p.m. on January 4, 1991, of the person she almost bumped into outside of Sunwest Bank.[8] (5 RT 696, 705.) Heuvelman described the person as a white male, age 46 to 48, greying hair on the sides of his face, three- or four-day growth of a moustache, very thin lips, pale complexion–kind of greyish, high cheek bones, dark eyes (his eyes and nose being his most significant characteristics), and he was not wearing glasses. (5 RT 698-701, 752.) Heuvelman further stated the person was wearing a dark blue or black round cap, and thought he was wearing a long, military-type coat.[9] (5 RT 697-700, 737.) Heuvelman made it clear to the police that she had focused on the man's face, not his jacket. (5 RT 737.)

Abel's Financial Motive

Abel left his job at Giovanni's Restaurant in mid-December 1990. (9 RT 1436-1437.) After leaving Giovanni's, he did not have full-time work. (9 RT 1483.) When James Gano opened his mortgage business in September 1990, Abel "fiddled" around with the mortgage business; he was learning, not very successfully, how to "drum-up" business. (9 RT 1445, 1448-1449.) Soliciting prospective loan clients was not to Abel's liking and he did not do it very often. (9 RT 1450.)

Abel gambled after he was paroled in 1990. (9 RT 1481-1482.) Abel gambled constantly, losing up to $10,000 at a time. (6 RT 922-923; 7 RT 1095.)

---

8. Heuvelman had no problem seeing that day; she had 20/20 vision with the contacts she was wearing at the time she observed the man outside the bank. (5 RT 698.)

9. Abel had a dark, navy blue peacoat in 1991. (6 RT 861.)

Abel told his Los Angeles County Probation Officer, Michael June, in approximately 1992, that he used heroin and cocaine daily in 1991. (9 RT 1496-1497.)

Abel purchased a mid-eighties Buick LeSabre in 1990, and then purchased a 1991 Toyota Tercel. (7 RT 998; 9 RT 1438.)

Defense Evidence

Abel testified in his own defense. (9 RT 1428-1491.) As of the time of trial, Abel was serving a 44-year, eight-month state prison sentence, and had a federal prison term of 53 years, eight months, and 25 days. Abel has an extensive record of prior felonies, including 15 armed robberies, two escape attempts, extortion, and racketeering. (9 RT 1429-1430, 1435, 1473-1478.)

Alibi For January 4, 1991

In the first week of January 1991, Abel was seeking loan applicants for Gano's mortgage company. (9 RT 1445, 1448-1451.) On January 4, 1991, Abel returned a loan application to Elaine Tribble (Tribble) at her residence in Long Beach. (8 RT 1143-1145; 9 RT 1453, 1455-1456.) Abel then attempted to deliver a loan application to a person at a residence in Willmington, and then tried to locate this person in San Pedro. (9 RT 1456-1458.) Then, just as it was getting dark, he stopped at Deborah Lankford's (Lankford) residence in Huntington Beach before going to Gano's residence in Anaheim Hills[10/]. (7 RT 1017, 1020-1021; 9 RT 1462-1463.)

Tribble testified that between Christmas 1990 and March 1991, she saw Abel at her Long Beach residence regarding an application for a loan; she does not remember the exact day(s). (8 RT 1143-1145, 1150-1151.) Tribble notified

---

10. Deborah Lankford is the correct spelling, her name is misspelled numerous times in the reporter's transcripts as Deborah "Langford". (6 RT 713; 941.)

Abel that she was getting a loan from another source (her parents), and requested that he return the mortgage application documents to her. (8 RT 1145-1146.) Tribble does not recall if the documents were returned. (8 RT 1146, 1150.)

Relationships With Lorraine Ripple, Vicki Ross Abel, And Deborah Lankford

On May 4, 1991, Abel married Vicki Ross (Ross) in Las Vegas. (9 RT 1305, 1431-1434; Exh. J.) Abel renewed his relationship with Ross after he was paroled. (9 RT 1439.) Abel moved from his Fullerton apartment in December 1990. He then stayed at a friend's house in Diamond Bar for one month before moving in with Ross in Simi Valley in the second week of January 1991. (9 RT 1439-1440.)

Abel and Lankford had been friends for a long time; he was fond of her. (9 RT 1463.) Abel met Ripple through Lankford in March or April 1991, in Lynwood, where they were roommates. (9 RT 1466-1467.) Abel was never sexually intimate with Ripple. (9 RT 1468.) Abel testified that he never told Ripple that the Sunwest Bank murder was an easy score, never gave her a .22 caliber automatic, and never said it was the "hot" gun from the murder. (9 RT 1468-1469.) Starting in June 1991 or later, Abel engaged in about ten robberies with Ripple. (9 RT 1488-1489, 1491.)

Purported Misidentification

Abel testified that he wore the glasses, made by Dr. Bass, on a consistent basis since he obtained them in February 1990. (9 RT 1442-1443.) Dr. Eric Bass, an optometrist, testified that he filled an eyeglass prescription for Abel in early 1990, that Abel had normal (20/20) vision in his left eye, and between 20/40 and 20/60 in his right eye. (9 RT 1412-1413, 1418-1419.) A person with this prescription can see at a distance without glasses, but would need

glasses to read. (9 RT 1416, 1420-1421.) Abel's May 1991, wedding photo shows him wearing glasses. (9 RT 1306-1307, 1310, 1439; Exh. J.)

The defense presented evidence of Heuvelman's and Redondo's responses to the 1991 photo line-ups, which did not contain the photo of Abel.[11/] (4 RT 574-578, 580-581, 611-613, 615; 5 RT 706-709, 711, 760-762; 8 RT 1193-1200, 1204-1205, 1213-1214, 1219-1222, 1247-1248.) The defense also presented evidence of Redondo's responses to a live line-up on March 13, 1991, in San Diego. Abel was not part of the line-up. (4 RT 578-580, 618-625; 5 RT 648; 8 RT 1231-1234, 1249-1250.)

At trial, on June 2, 1997, Redondo could not identify Abel as the shooter, stating "Too much time has gone by. I don't feel comfortable making that statement." (4 RT 629-630.) Redondo indicated that the person in photograph position number two of Exhibit 30 (Abel in the 1995 photo line-up), looked somewhat different than how Abel looked in the courtroom, with long hair and a suit; the person in the photograph looked more like the shooter.[12/] (5 RT 648-649.)

Abel testified that he never stood outside Sunwest Bank on January 4, 1991, never shot anyone coming out of the bank, and never stole their money. Abel claimed the first he learned of the bank robbery in mid-1995. (9 RT 1470.)

---

11. The Tustin Police Department chose the photographs in the line-ups shown to Redondo and Heuvelman in January 1991 on the basis that the men fit the general description of the suspect. (8 RT 1213-1214, 1220-1222, 1242-1244.)

12. In closing argument, Abel's trial counsel argued that evidence of the prior photo line-ups, the San Diego live line-up, and Redondo's lack of courtroom identification impeached the credibility of Redondo's and Heuvelman's identification of Abel. (10 RT 1601-1604, 1610.)

Penalty Phase

Introduction

Abel participated in 14 armed robberies, consisting of a 1981 bank robbery, 12 robberies of a bank or other commercial property committed within a four-month period in 1991, as well as a residential robbery committed during the same period. (11 RT 1775-1947.) The victim's parents testified about the impact their son's (Armando) murder had on their lives. (11 RT 1948-1959.) Abel did not present any evidence. (11 RT 1959.)

Fourteen Armed Robberies

Karen Staich (Staich) was a 21-year-old teller at a savings and loan in Bellflower when four armed males, including Abel, came into her bank on September 8, 1981. A gun was pointed in her face and she gave the robbers money from her teller drawer.[13/] (11 RT 1775-1779, 1792-1796.) Staich was terrified and she is still nervous about the incident. (11 RT 1777-1778.)

Carole Weadon (Weadon) was manager of the Hacienda Heights branch of Security Pacific Bank on June 14, 1991, when Abel and an accomplice, who were both armed, came into the bank. One of the men put an automatic weapon to her head and yelled "that if I didn't lay down real quick he would blow my 'f-ing' head off." (11 RT 1804-1810, 1828-1830.) Both of the men put their guns between the legs of the two male tellers, and told them, "if he - - they didn't give them more hundreds as fast as they could, they would again blow their 'f-ing' balls off." (11 RT 1807.) A baby was crying and the robber said, "If the baby didn't stop crying, they would hurt the baby too." (*Ibid.*) Weadon does not remember how much money the robbers took. (11 RT 1810.) It is still a terrifying experience for her. (11 RT 1807.)

---

13. Ten thousand dollars was stolen from the bank. (11 RT 1795.)

Vivian Neal (Neal) was a teller at the Rowland Heights branch of Citibank on June 25, 1991, when Abel and an accomplice entered the bank with guns, "hollering for people to get down". (11 RT 1825, 1830-1832, 1905-1907.) One man was at the bandit barrier window, and the other hit the window with a crowbar before taking the bank's money. (11 RT 1907-1911.)

On August 29, 1991, Abel robbed the Apothecary Pharmacy in San Pedro. On September 6, 1991, Abel robbed the Coover Pharmacy in San Pedro. (11 RT 1873-1879, 1901-1902, 1927-1930.)[14/] In the Apothecary Pharmacy robbery, Abel pointed an Uzi pistol at employee Jeannie Roberson's (Roberson) chest, and took money from the cash register and her purse. (11 RT 1875-1876.) In response to questions about Roberson being frightened, she testified "Oh, my god, yes." (11 RT 1877.) In the Coover Pharmacy robbery, Abel told employee Gigi Fadich "Don't follow me or I'll shoot." (11 RT 1928.)

On September 18, 1991, Abel put a gun to Sherry Barnes' head and had her open the cash register at her business, Lamppost Pizza, in Lakewood. (11 RT 1882-1883, 1937-1939, 1941-1942.) Barnes was scared; she fumbled with the cash register and Abel became upset. Barnes wet her pants. (11 RT 1939.) Abel took about $700 to $800 and told Barnes, as he was leaving, "Don't come out or I'll shoot you." (11 RT 1940.)

On September 28, 1991, Abel pulled a gun on employees of the Shoe Line shoe store in Bellflower, and told Terry Song "If you move, I'll kill you." (11 RT 1883-1884, 1915-1924.) Manager Mark Kim (Kim) struggled with

---

14. Abel also participated in the following robberies: Pizza Hut on September 4, 1991 (11 RT 1799-1801, 1902); Harbor City Florist on September 8, 1991 (11 RT 1840-1846, 1902-1903); Massey's Flowers on September 19, 1991 (11 RT 1866-1871, 1903); Rose Nail Salon on September 25, 1991 (11 RT 1903-1904, 1944-1947); and Ted's Dog and Cat Grooming Salon on October 1, 1991. (11 RT 1893-1898).

Abel over the gun and Abel made several attempts to shoot Kim, displaying movements of pulling the trigger, but the gun would not fire. (11 RT 1917-1919.)

On September 24, 1991, checker David Klure (Klure), working at the Alpha Beta grocery store in Hacienda Heights, apprehended a woman leaving the store as instructed by his manager. (11 RT 1850-1851.) Abel pulled up in front of the store in a new, white Toyota, entered the store, fired a shot into the ceiling, and then fired a second shot at Klure's feet in an effort to get Klure to release the woman. (11 RT 1852-1854, 1858-1859, 1881-1882, 1886.) Abel fired two more shots, one passing over Klure's head at a distance of one foot (11 RT 1854-1857). After the fourth shot, Klure released the woman and she got into the backseat of the Toyota, where another woman sat with a gun. (*Ibid.*) Once Mr. Klure released the woman, Abel said something to the effect of "Thank you very much," and "very casually" got back into the Toyota and drove away. (11 RT 1858.)

On October 3, 1991, Delores Clay[15/] and her husband, Fred Clay,[16/] while having lunch at the Clover Room, noticed Abel and a woman at the bar. (11 RT 1816, 1818-1819, 1825-1826.) Before lunch, Mrs. Clay went to the Security Pacific Bank in Long Beach and withdrew $400 in cash. (11 RT 1814-1815.) After lunch, the Clays went home and were sitting in their residence when Abel and the woman from the bar walked into their home. (11 RT 1816-1817.) Abel pointed his gun back and forth between the Clays and pushed Mr. Clay back into his chair. (11 RT 1817-1823.) Abel and his accomplice took the $400 Mrs. Clay had withdrawn from the bank, jewelry, and the couple's savings account passbook. (11 RT 1817-1819.) Abel

---

15. Mrs. Clay was 77 years old at the time of trial. (11 RT 1813.)

16. Mr. Clay was 73 years old at the time of trial. (11 RT 1823.)

disconnected one of their telephones and warned them not to call the police. (11 RT 1824.) Mrs. Clay was petrified. (11 RT 1817, 1820.)

Robert And America Miller's Victim Impact Testimony

Mr. and Mrs. Miller, parents of victim Armando, their eldest son, had owned Alameda Market for 20 years. (11 RT 1948-1949, 1955.) At the time of the murder, Armando had taken over the family business, helping his parents after his father had become ill. (11 RT 1950-1951, 1955.) When his son was dying at the hospital, Mr. Miller felt he was "falling in a hole"; it was hard to believe. (11 RT 1952.) The hurt and sadness is not completely gone for Mr. Miller. (11 RT 1953.)

America Miller described her son as being a "very, very happy man." (11 RT 1955.) Armando was anxious to be with his two-month-old daughter, who was so precious to him. (11 RT 1956, 1958.)

Armando's brother, Bobby, loved Armando and the things they used to do together. (11 RT 1958.) Armando's remaining siblings miss Armando very much. (11 RT 1958.)

ARGUMENT
I.

THE TRIAL JUDGE WAS IMPARTIAL AND DID NOT ENGAGE IN JUDICIAL MISCONDUCT

Abel contends that the trial court violated his constitutional rights and committed reversible error because it manifested judicial bias against Abel and engaged in numerous acts of judicial misconduct.[17/] (AOB 14-40.). Abel

---

17. Abel contends on appeal that the trial court's alleged misconduct violated his constitutional right to a fair trial, trial by an unbiased jury, due process, right to counsel, and a reliable penalty determination, as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the federal Constitution, and Article I, sections 7, 15, and 17 of the California Constitution. (AOB 14-15.)

forfeited his numerous claims of judicial misconduct and bias by failing to object to the incidents at issue at trial. Abel's claims also fail on the merits because the record does not establish that the trial court was partial or biased against Abel. Lastly, even assuming error, it was cured by admonition or was harmless because of the overwhelming evidence of Abel's guilt.

An appellant forfeits the issue of judicial misconduct for purposes of appeal when he neither objects nor requests the jury be admonished. (*People v. Monterroso* (2004) 34 Cal.4th 743, 761 [failure to object to over 40 judicial quips forfeited appellant's constitutional claims]; *People v. Snow* (2003) 30 Cal.4th 43, 78; *People v. Simon* (2001) 25 Cal.4th 1082, 1103; *People v. Fudge* (1994) 7 Cal.4th 1075, 1108; *People v. Harmon* (1992) 7 Cal.App.4th 845, 852; see also *People v. Brown* (2003) 31 Cal.4th 518, 583 [to preserve a claim of prosecutorial misconduct, defense must make a timely objection, make known the basis for the objection, and ask for an admonition].) An appellant also forfeits for purpose of appeal a claim of judicial bias against him (lack of impartiality) by failure to object. (*People v. Seaton* (2001) 26 Cal.4th 598 [appellant did not preserve claim – failed to object and never asked the trial court to recuse itself]; *People v. Hines* (1997) 15 Cal.4th 997, 1040-1041.)

Abel did not object, or ask for an admonition, in any of the following purported incidents of judicial misconduct: trial court's comment in closing argument to disregard either counsels' argument if the jury finds counsel is lying (10 RT 1644-1645, 1668, 1675-1676, 1709); trial court's responses to objections and comments about Abel's counsel's examination technique (5 RT 735, 801-804; 9 RT 1352); trial court's request that Abel take off his glasses as part of an identification process at trial, and the court's comments about the coat the perpetrator may have been wearing (4 RT 629; 5 RT 738); the trial court's comments, out of the presence of the jury, concerning whether the prosecutor

caused the arrest of Douglas Dean Portratz (defense investigator) for attempting to dissuade a witness (4 RT 592); trial court's denial of Abel's request for a "sidebar" (5 RT 654; 6 RT 936-937); trial court's comment that prosecution witness Lorraine Ripple was probably in custody at the time (6 RT 870-871); trial court's quip, outside the presence of the jury, about shackling Abel (2 RT 82); trial court's questioning of jurors as to whether they had the "intestinal fortitude" or "inner strength" to impose the death penalty or life in prison without the possibility of parole (2 RT 125, 126, 128, 129, 135; 3 RT 218, 246); trial court's comments about life without possibility of parole (2 RT 137; 3 RT 304); trial court's jest about having to shoot a juror if they talk about the case (3 RT 398); and the trial court's comments to the jury as to the necessity for testimony to be read back during deliberations (10 RT 1744-1755).

An appellant is excused from the general rule of forfeiture where an objection would have been futile and an admonition would not have cured the prejudice. (*People v. Hill* (1998) 17 Cal.4th 800, 821 [objections to the constant misconduct by the prosecutor in front of the jury would have been futile]; *People v. Monterroso, supra*, 34 Cal.4th at pp. 780-781 [issue forfeited; appellant did not show that an objection would have been futile or that an admonition would not have cured the harm].)

Here, Abel contends that any objection to the trial court's conduct would have been futile. (AOB 38.) The record shows that any proper objection would not have been futile. The above-summarized incidents of judicial conduct occurred over the course of a lengthy trial – 17 court days from the commencement of voir dire to the death penalty verdict. (2 CT 589-593, 595A, 596-600, 604-607, 610-613, 617-620, 624-626, 633-635, 638-641, 786-793; 3 CT 794-795, 797-780, 1039-1040.) There were numerous instances where the trial court sustained Abel's objections, made quips or other comments to the prosecutor in addition to the ones made to Abel's counsel, and the trial court

otherwise showed it supervised the case on an evenhanded basis. An analysis of the record for two days of the trial, June 9 and June 10, 1997, include the following examples when the trial court sustained Abel's objections or otherwise ruled in Abel's favor: objection sustained for being argumentative (8 RT 1151); objection to witness statement that her son was in jail and request that the reference be stricken – the trial judge struck the reference on his own initiative and admonished, "The jury is to disregard the last statement of the witness regarding her son being in jail" (8 RT 1152-1153); sustained objection on relevancy and being outside the scope (8 RT 1156); sustained objection as being non-responsive (8 RT 1177); trial court, without objection, interjected that the prosecutor's question was vague (8 RT 1181); pursuant to an objection, trial court told the prosecutor to not admonish the witness (9 RT 1277); sustained objection concerning question about Abel's association with people who use drugs (9 RT 1290); after voir dire of a witness, outside the presence of the jury, the trial court would not allow the prosecutor to question a witness about purported threats by Abel against the life of the witness (9 RT 1292-1300); sustained objection to question about Abel knowingly using drugs in 1999 (9 RT 1328-1329); and granted Abel's request for an early recess over prosecutor's objection (9 RT 1406).

Further, during these two days, several of the prosecutor's objections were overruled (8 RT 1228, 1229, 1231; 9 RT 1318-1320, 1388.) In addition, during the penalty phase, the trial court, pursuant to Abel's objection, excluded a photograph of the victim holding his two-month-old daughter. (11 RT 1958-1961; 12 RT 1967-1968.)

Abel argues that his counsel's objections would have been futile because of the trial court's hostility towards the defense. (AOB 38.) Abel mistakes a "no-nonsense" judge, who makes both sides "toe the line," for a hostile judge. There are several incidents, whether by quip or otherwise, where the trial court

made the prosecutor "toe the line" in front of the jury. The trial court informed the prosecutor that he put his foot in his mouth. (6 RT 851-852.) As indicated above, the trial court told the prosecutor not to admonish the witness. (9 RT 1277.) As to making objections, the trial court told the prosecutor "You got to think before you object." (9 RT 1399-1400.) During the penalty phase, the trial court told the prosecutor, "What you just said didn't make any sense." (11 RT 831.)

Lastly, any timely admonition(s) would have cured any potential prejudice caused by the trial court's purported misconduct. (See *People v. Sturm* (2006) 37 Cal.4th 1218, 1232 [trial court could have allayed prejudice derived from its derogatory comments by advising the jury to disregard them]; *People v. Melton* (1988) 44 Cal.3d 713, 753.)

Accordingly, Abel has forfeited his claim for purposes of this appeal. Even If Abel's claim was properly preserved for appeal, it is meritless.

Due process requires a fair trial before a judge with no actual bias against the defendant or interest in the outcome. (*Bracy v. Gramley* (1997) 520 U.S. 899, 904 [117 S.Ct. 1793, 138 L.Ed.2d 97]; *In re Murchison* (1955) 349 U.S. 133, 136 [75 S.Ct. 623, 99 L.Ed.2d 942]; see also *People v. Brown* (1993) 6 Cal.4th 322, 333 [due process right to an impartial judge].) The right to an impartial adjudicator is violated when the person has a direct pecuniary interest in the outcome and an official motive to convict. (*Tumey v. State of Ohio* (1927) 273 U.S. 510, 523, 535,[47 S.Ct. 437, 71 L.Ed.2d 749].)

In California, a trial judge can be recused by statute for judicial partiality based on pecuniary interest, relationship to one of the parties, or any other attributes of judicial partiality or bias. (Cal. Code of Civ. Proc., § 1170.1, subd. (a); see also *People v. Williams* (1997) 16 Cal.4th 635, 652-653 [fact that the witness was the nephew of the judge's son-in-law did not disqualify the judge under Code of Civil Procedure section 1170.1, subdivision (a), or violate the

due process guarantee of a fair trial before an impartial judge].) Judicial rulings alone almost never constitute a valid basis for a bias or partiality motion[18/] (motion to disqualify under 28 U.S.C. § 455). (*Liteky v. United States* (1994) 510 U.S. 540, 546-47, 555 [114 S.Ct. 1147, 127 L.Ed.2d 474].) There can be no disqualification of a judge for bias based on his rulings on questions of law alone. (*Calhoun v. Superior Court* (1958) 51 Cal.2d 257, 260.)

However, claims of judicial partiality and actual bias can be based solely on the manner in which the trial court conducted itself at the trial or hearing. (*People v. Seaton, supra*, 26 Cal.4th at p. 698 [no evidence of judicial bias against the defense despite claims of judicial hostility towards the defendant throughout the trial]; *People v. Jenkins* (2000) 22 Cal.4th 900, 1050 [record does not demonstrate that the trial court lost its impartiality because of conditions imposed upon the defendant during the penalty phase which the defendant claimed rendered the proceeding a sham]; *People v. Brown, supra*, 6 Cal.4th at pp. 332-340 [this Court rejected the due process challenge based on the purported partiality of the hearing judge].)

---

18. The United States Supreme Court went on to state:

> Opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or impartiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible. Thus, judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge. They *may* do so if they reveal an opinion that derives from an extrajudicial source; and they *will* do so if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible.

(*Ibid.*, emphasis in original.)

"Expressions of opinion uttered by a judge, in what he concedes to be a discharge of his official duties, are not evidence of bias or prejudice." (*Kreling v. Superior Court* (1944) 25 Cal.2d 305, 310-311.) There is a presumption that public officials properly discharge their official duties. (*Bracy v. Gramley, supra*, 520 U.S. at p. 909; Evid. Code, § 664.) There is a presumption of honesty and integrity in the people serving as adjudicators. (*Withrow v. Larkin* (1975) 421 U.S. 35, 47 [95 S.Ct. 1456, 43 L.Ed.2d 712].)

A judge, who was in firm control of the case, knows the answers to legal questions, and decides on strict, but proper grounds, is "easily accused of bias and prejudice against defendants." (*People v. Alfaro* (1976) 61 Cal.App.3d 414, 425.) Here, the trial court judge was in firm control of the case, and the record does not support Abel's claim of judicial bias or judicial partiality.

"'A trial court commits misconduct if it persistently makes discourteous and disparaging remarks to defense counsel so as to discredit the defense or create the impression it is allying itself with the prosecution.'" (*People v. Sturm, supra,* 37 Cal.4th at p. 1232 quoting *People v. Carpenter* (1997) 15 Cal.4th 312, 353, in accord, *People v. Snow, supra*, 30 Cal.4th at p. 78.) The record must be examined to determine if the judge's comments, singularly or collectively, discredited a defense theory, materially distorted the record, withdrew material evidence from the jury's consideration, expressly or impliedly directed a verdict, or created the impression that the judge had allied with the prosecution. (*People v. Monterroso, supra*, 34 Cal.4th at pp. 780, 784.)

The role of the reviewing court

> . . . is not to determine whether the trial judge's conduct left something to be desired, or even whether some comments would have been better left unsaid. Rather, we must determine whether the judge's behavior was so prejudicial that it denied [the defendant] a fair, as opposed to a perfect trial. [Citation.]

(*People v. Snow, supra*, 30 Cal.4th at p. 78.)

A. Abel Was Not Prejudiced By The Trial Court's Statement In Final Argument That The Jury Could Disregard An Attorney's Argument If They Find An Attorney Is Lying To Them

On June 12, 1997, during Abel's closing argument during the guilt phase, the prosecutor questioned whether there was evidence to support opposing counsel's statement that Craig Elz and James Gano were arrested for a bank robbery in 1995.[19] (10 RT 1644-1645.) The trial court commented, "I don't know if that's in evidence . . ." and told the jury:

> Ladies and gentlemen, if either side's attorney intentionally misrepresents any fact during the course of the trial, including their argument, of course, and you think they're lying to you, you can disregard their whole argument if you want to.

(10 RT 1645.)

On June 16, 1997, before the commencement of his rebuttal closing argument, the prosecutor requested an admonition as to the trial court's comment. (10 RT 1668; 3 CT 1177.) Abel did not join in the request and the request was denied. (10 RT 1668.) Abel's counsel then indicated that he was not thrilled with the trial court's comment, that if you believe an attorney is lying, "you can disregard the lawyer's entire argument." (*Ibid.*) The trial court responded, "I told them what is common sense." (*Ibid.*)

---

19. Abel's trial counsel played an audiotape of his investigator's (Douglas Portratz) January 31, 1997, interview of witness Bettina Redondo during her testimony. (5 RT 641-642.) The tape was introduced into evidence as Exhibit F and the transcript as Exhibit F-1. (5 RT 642-643; 9 RT 1494.) During the interview, investigator Portratz, as foundation to show Redondo a photograph of Craig Elz, told her that Craig Elz, a brother-in-law of James Gano, "was arrested with James Gano in a bank robbery in 1995, that started this whole thing." (Exh. F1; 3 CT 1165-1166.) There was nothing else about the 1995 bank robbery arrest presented to the jury during the evidentiary portion of the trial. Investigator Portratz did not testify at trial.

At the beginning of the rebuttal argument, the prosecutor emphasized that it was important for the jury to consider what opposing counsel said in closing argument, that counsel was not lying during his argument, and that he believed the trial court was trying to tell the jury that what the attorneys say is not evidence.[20] (10 RT 1671-1673.)

---

20. The prosecutor stated in his closing rebuttal argument:

> But, the court did make a reply to the effect that, well, if you think either attorney is lying in this case, you can disregard what that attorney says in final arguments. I ask that you not do that.
>
> I don't think Mr. Freeman was lying at any point in his argument. It's important that you do listen to him. Just because one attorney may have remembered the facts differently doesn't mean I would suggest to you that you should discount everything that attorney says:
>
> But I think what his honor was trying to tell you what the attorneys say is not evidence in this case.
>
> When I am talking right now, it is not evidence. When Mr. Freeman talks, it's not evidence. We are not witnesses in the matter. We are advocates for our clients.
>
> So, I would implore you, please, do not disregard everything Mr. Freeman said. He made some points.
>
> It's valid for you to listen to his points, to consider his points. And I would admit to you, and I would tell you right now, he did not intentionally misstate anything.
>
> He obviously, like me, we're thinking about a lot of things at once, and I think it was inadvertence. So, please, do not disregard his - - whatever he says during this trial because he does serve as much a valued function as me to ensure his client gets a fair trial.

Later that day, after the rebuttal argument, and before instructing the jury, the trial judge told the jury that he did not believe anyone lied to them and the lawyers involved in the case were the "finest lawyers around".[21] (10 RT 1709.)

On the same day, the jury was instructed on CALJIC No. 17.30, that the jury may not take a cue from the judge and should form their own conclusions. (10 RT 1738.)[22]

So, those are one of the things and these are distinctions. But it's important to be able to draw distinctions.

(10 RT 1671-1673.)

21. The trial court admonished the jury as follows:

> Sometimes the attorneys get overly sensitive about things that the court says. I just want you folks to know that I think the three lawyers that have worked in this case are the finest lawyers around. I have worked with them for years. They're honorable people.
>
> The court doesn't have any belief that anybody lied to you about anything. I made reference to that at the request of the prosecution.

(10 RT 1709.)

22. The trial court instructed the jury on CALJIC No. 17.30 as follows:

> I have not intended by anything I have said or done, or by any questions that I may have asked, or by any ruling I may have made, to intimate or suggest what you should find to be the facts, or that I believe or disbelieve any witness.
>
> If anything I have done or said has seemed to so indicate, you will disregard it and form your own conclusion.

(10 RT 1738; see also 2 CT 700.)

Abel suggests that the trial court's comments infringed on his right to give a closing argument in violation of his constitutional rights. (AOB 18-20.) It violates a defendant's Sixth Amendment right to counsel to deny counsel the opportunity to present a closing argument. (*Herring v. New York* (1975) 422 U.S. 853, 862, 865 [95 S.Ct. 2550, 45 L.Ed.2d 593].) However, a trial court must be given great latitude in controlling the scope and duration of closing arguments. (*Id.* at p. 862; see also *People v. Jenkins, supra*, 22 Cal.4th at p. 1044 [proper to sustain objection in closing argument when defendant commented on matters not within the evidence].)

Here, Abel's counsel was commenting on matters that were not before the jury as an issue of fact. (Counsel asserted as true his investigator's foundational statements in an interview of a key trial witness.) The trial court's comment after the prosecutor's interjection was neutral as to both counsel, and indicated in pertinent part, "If either side's attorney intentionally misrepresents any fact during the trial, . . . and you think they're lying . . . you can disregard their whole argument if you want to." (10 RT 1645.) Abel's counsel did in fact finish his closing argument without further intervention or objection. (10 RT 1645-1665.) Abel's trial counsel was allowed to argue extensively, without any time restriction. (10 RT 1582-1645.) The trial court's comment did not preclude counsel from arguing effectively. Moreover, there was no prejudice particularly given the prosecutor's argument and the trial court's subsequent admonition. (See *People v. Snow, supra*, 30 Cal.4th at pp. 93-94 [whether or not trial court's restriction on the division of defense argument violated Pen. Code, §1095, the record reflects no prejudice].)

The trial court's statement did not tell the jury that they had to disregard either counsels' closing arguments, nor that either counsel was lying. The trial court's comment was analogous to a CALJIC No. 2.52 flight instruction, which does not posit flight and the existence and significance of the "flight" are left

to the jury. (See *People v. Crandell* (1988) 46 Cal.3d 833, 870.) According to the trial court's comment, the jury must first find that one of the counsel is "lying" to them, before they can disregard either of the counsels' closing argument, "if you want to.") (10 RT 1645, emphasis added.) The trial court's admonition at the close of argument, that he held both counsel in high regard and "the court doesn't have any belief that anybody lied to you about anything," had the practical effect of instructing the jury that they could not find that either attorney lied to them, and thus the necessary condition precedent for the jury to disregard either counsel's argument could not be met. Thus, there was no prejudice.

As Abel sets forth in his brief (AOB 22), it is improper for a trial court to tell a jury of its negative personal view about the honesty, ethics, or competence of trial counsel. (*People v. Sturm, supra*, 37 Cal.4th at p. 1240.) Even if this Court were to view the trial court's neutral statement, directed to both counsel, as either impliedly reflecting a negative view towards Abel's counsel, or improperly restricting Abel's closing argument, any prejudice was cured by the trial court's admonition, the CALJIC No. 17.30 instruction, and the prosecutor's statements in his rebuttal argument. (See *People v. Lee* (1987) 43 Cal.3d. 666, 677-678 [prosecutor's final argument helped cure the trial court's instructional error]; *People v. Monterroso, supra*, 34 Cal.4th at pp. 782-783 [trial court's comment's did not prejudice defendant because of, inter alia, the court's jury instruction]; *People v. Harmon, supra*, 7 Cal.App.4th at pp. 852-853.)

Accordingly, any inference that the trial court's comments showed he had a negative view towards Abel's trial counsel was cured. (See *People v. Boyette* (2002) 29 Cal.4th 381, 460 [although the trial court's comments might have suggested that defense counsel engaged in misconduct and that his expert

witness was not to be believed, no prejudicial misconduct found in looking at the entirety of the judicial comments and considering the special jury instruction which cured any prejudice].)

B. The Trial Court's Humor Did Not Constitute Misconduct And Did Not Reflect Any Partisanship

Abel argues that three instances of judicial humor were improper. (AOB 23, 35-36.)

The first comment came before the commencement of voir dire, outside the presence of the jury, when the parties and the court were discussing Abel's custodial status and whether he would be handcuffed in front of the jury.[23/] Contrary to Abel's argument (AOB 36), the trial judge's comment, that he was 61, so Abel's age of 53 didn't impress him or make him feel sorry for Abel, was

---

23. The exchange at issue is as follows:

> The Court: There hasn't been an effort by anybody yet to determine the degree of his custodial status.
>
> Mr. Peters: My recollection - - you probably, without getting into that extensively, I think that you'll find that one is a 1967 walk-away or something, but Mr. Able's 53 years old. I think he's been around the block, he has no intention - -
>
> The Court: You know, I'm 61 and I'm going to outlive both of my bailiffs, so 53 doesn't impress me at all. Poor old gentleman. Am I supposed to feel sorry for him?
>
> Mr. Peters: No, it's just an indicator that - -
>
> The Court: All of that was silliness, for the record. Ultimately he's going to be unhandcuffed before the jury.
>
> Mr. Freeman: Yes, thank you.

(2 RT 82.)

not a derisive comment showing disfavor towards Abel; instead, it was clearly a harmless, humorous reflection about age. "Well-conceived judicial humor can be a welcome relief during a long, tense trial." (*People v. Melton, supra*, 44 Cal.3d at p. 753.) In any event, such remark made outside the presence of the jury did not cause any prejudice. (*People v. Sturm, supra*, 37 Cal.4th at pp. 1238-1239 [improper to rebuke an expert witness in front of the jury; trial judge could have expressed his concerns outside the presence of the jury]; *People v. Burnett* (1993) 12 Cal.App.4th 469, 475 [nine purported instances of judicial misconduct occurred outside the presence of the jury – could not have prejudiced appellants].)

The second comment in time occurred just after the jury was selected: "Every time at the recess I will simply say, 'Do not talk about the case.' It means what it says. Because if we catch you talking about the case, we have to have you shot, or some other reasonable form of punishment." (3 RT 398-399.) Again, this was an example of appropriate humor and did not distract from the seriousness of the case, or the particular admonition. (See *People v. Monterroso, supra*, 34 Cal.4th at pp. 762-763 [three occasions where the trial court quipped about jurors being shot, taken with the trial court's numerous other efforts at humor during the trial, "Do not so trivialize the proceeding as to raise the question whether the jurors were fully conscious of the gravity of their decision"].) At the time of this comment, the jury was accustomed to the humor by the trial judge and counsel as an acceptable means to relieve tension: the trial judge's comment, "I thought you were dead," to a prospective juror whom he had served with in Korea (2 RT 114); the trial judge's comment during voir dire indicating that he is the one who is allowed to mistreat the jurors at trial, which the jury responded to with laughter (3 RT 162); Abel's counsel's query of a perspective juror who worked at the district attorney's office, "Did Mr. Rosenblum [prosecutor] have anything to do with you being

here?", which the jury responded to with laughter (3 RT 184); and the prosecutor's comment to perspective jurors, "This is probably the quietest group I've seen in years," which the jury responded to with laughter (3 RT 193).

In voir dire, the trial court clearly conveyed the seriousness of the case to the jurors:

> Punishment should not be some kind of a reward because of a win. In other words, it has to be a reasoned judgment on the part of the jurors guided by the law that I give you. It has to be serious, serious stuff.
>
> Is there anyone that has a feeling that they'd just rather not get involved in this kind of a serious case?

(2 RT 137.)

The third comment occurred during Abel's cross-examination of Detective Tarpley, after the prosecutor objected to counsel testifying.[24/] In

---

24. The interchange was as follows:

> Q Now, the other individuals that you selected to be placed in that line-up, did you use any criteria consistent with the description that had been given by your witness Redondo?
>
> A No.
>
> Q Did you use any criteria consistent with the composite given by Redondo?
>
> A No.
>
> Q Withdraw that. You didn't put Rickard in here, correct?
>
> A Correct.
>
> Q Or Herrera?
>
> A Correct.
>
> Q Or Jones?

addition to Abel's counsel improperly testifying and summarizing Detective Tarpley's testimony, counsel's statement "But you made a decision not to put their photos in here," was argumentative.

A trial court has the inherent and statutory duty to control the trial, towards the objective of an expeditious and effective ascertainment of the truth. (*People v. Burnett, supra*, 12 Cal.App.4th at p. 475; Pen. Code, § 1044.[25]) It

---

A Correct.

Q Yet all their pictures were in the file [*sic*]

A Yes, sir.

Q Correct?

A Yes, sir.

Q But you made a decision not to put their photos in here. Were you - -

Mr. Rosenblum: Counsel again is testifying. He's trying to summarize - -

The Court: I don't know how to stop him; do you have a hint for me, Mr. Rosenblum?

Mr. Rosenblum: All I can do is object.

The Court: Start again, Mr. Freeman. Sustained.

(9 RT 1352-1353; emphasis added.)

25. Penal Code section 1044 provides:

> It shall be the duty of the judge to control all proceedings during the trial, and to limit the introduction of evidence and the argument of counsel to relevant and material matters, with a view to the expeditious and effective ascertainment of the truth regarding the matters involved.

is within a trial court's discretion to rebuke an attorney when he asks inappropriate questions. (*People v. Snow, supra*, 30 Cal.4th at p. 78.) Here, the trial court's comment cannot even be classified as a rebuke; it was just a witty reminder to ask appropriate questions.

While this Court recently observed that an attempt at humor by a trial court is "always a risky venture during a trial for a capital offense" (*People v. Sturm, supra*, 37 Cal.4th at p. 1238), the instances of humor cited by Abel, taken singularly or together, are not improper and in no manner come close to intemperate judicial conduct that would warrant reversal. (*People v. Melton, supra*, 44 Cal.3d at p. 754; see also *People v. Monterroso, supra*, 34 Cal.4th a p. 761 [over 40 judicial quips do not cast a doubt on the validity of defendant's conviction].)

C. The Trail Court Did Not Improperly Assist Prosecution with In-Court Identification of Abel

Abel contends that the trial judge improperly assisted the prosecution by having Abel remove his glasses as part of Abel's counsel's inquiry as to whether the witness[26] could make an in-court identification of Abel. (AOB 23-25.) Abel further contends that the trial court assisted the prosecution by commenting that the coat which Abel's counsel was showing witness Heuvelman was not a military-type coat. (AOB 24-25.) Contrary to Abel's claims, the trial court's interventions constituted a proper discharge of its duty to assist the jury in seeking the truth.

Redondo described the shooter as not wearing glasses, and Heuvelman described the person she almost bumped into outside the bank as not wearing

---

26. Abel's brief asserts that the witness was Colleen Heuvelman, when in reality it was Bettina Redondo.

glasses. (4 RT 569-570; 6 RT 700.) Lorraine Ripple, Abel's intimate companion in 1991, testified that Abel wore glasses to read, but did not usually wear glasses in normal, everyday life. (6 RT 851.)

During the cross-examination of Redondo, the trial court asked Abel to "Remove your glasses, please," just after Abel's counsel asked Redondo if the accused was the person she saw.[27/]

Heuvelman told the police in January 1991 that she thought the person she almost bumped into was wearing a long, military-type trench coat; however, she was focused on the person's face and not the coat. (5 RT 737, 739.)

---

27. The pertinent text of the exchange is as follows:

> Q [Defense counsel] Well, look at the accused. Can you identify him as being the person that you saw? Please look at the accused and ask - - I'm asking you, can you identify - -
>
> The Court: Hang on a minute. Remove your glasses, please. Thank you.
>
> Mr. Rosenblum: Your Honor, I'm going to object as well unless he puts a hat on.
>
> The Court: We're not going to do that right now. I just want to make sure that she sees at least the facial features; she can subtract the hair in her mind.
>
> . . . .
>
> By Mr. Freeman: Q Is this the guy you saw on January the 4th, 1991?
>
> A I cannot identify him after this much time, so - - too much time has gone by. I don't feel comfortable making that statement.
>
> The Court: Go ahead and put your glasses back on. Thank you.

(4 RT 629-630.)

During cross-examination of Heuvelman, Abel's counsel held up a coat, which he described as a long, military-type trench coat. (5 RT 737.) In response, both the trial court and the prosecutor pointed out for the record that the coat which counsel was holding was not a "military" coat.[28/]

---

28. The pertinent portion of the exchange is as follows:

Q [defense counsel] Does that refresh your recollection at all as to your statement to the officer back on January the 5th, or thereabouts, in 1991 that the person you bumped into was wearing a long, military-type trench coat?

A The only thing that's missing, sir, is that I said I thought he was wearing a long, military-type trench coat. And I made it clear to them that I was focused on his face and not the jacket.

Q Yes, I'm holding up here for you what purports to be a long, military-type trench coat. Was it similar to this?

A I cannot recall, sir, I'm sorry.

Q Pardon me?

A I cannot recall, I'm sorry. I cannot recall.

Mr. Rosenblum: Your Honor, the record should reflect he's holding up a blue trench coat.

The Court: Not military type.

Mr. Rosenblum: No, nothing military about that coat.

Mr. Freeman: Everybody's entitled to opinions.

The Witness: Oh, sir, my husband's military trench coat is much different than that.

The Court: So is mine, so is Mr. Rosenblum's, I'm sure.

A trial court has broad latitude to make fair comment on the evidence as necessary for the proper determination of the case. (*People v. Monterroso, supra*, 34 Cal.4th at p. 780; see also Cal. Const., art. VI, § 10.[29]) It is the duty of the trial judge, within reasonable limits, to bring out facts to elicit the truth and see that justice is done. (*People v. Carlucci* (1979) 23 Cal.3d 249, 256; *People v. Santana* (2000) 80 Cal.App.4th 1194, 1206; *People v. Rigney* (1961) 55 Cal.2d 236, 243-244.) Towards this end, the trial court can participate in the questioning of witnesses. (*People v. Carlucci, supra*, 23 Cal.3d at p. 256.)

Here, the trial court reasonably and properly had Abel take off his glasses for the possible courtroom identification because it was undisputed that the shooting suspect was not wearing glasses. (*People v. Breckenridge* (1975) 52 Cal.App.3d 913, 936 [does not violate a defendant's constitutional rights to require that he exhibit himself in court in a manner consistent with the observation(s) by the witness(es) of the perpetrator of the crime]; see *People v.*

> By Mr. Freeman: Q Well, did you tell the officer that the person you bumped into was wearing a long, military-type trench coat in '91?
>
> A I told them back then that I was not sure, but that I thought he was wearing a military-type trench coast. And it does not state that in that statement.
>
> Q Your words were: I thought was, I'm not sure?
>
> A I said I think he was wearing a military-type trench coat.

(5 RT 737-738.)

> 29. Article VI, section 10 provides, in pertinent part:
>
> The court may make any comment on the evidence and the testimony and credibility of any witness as in its opinion is necessary for the proper determination of the case.

Alfaro, supra, 61 Cal.App.3d at p. 426 [it was not error for the trial judge to add, "or broken" in reference to the victim's nose to defense counsel's question of a medical expert where it was undisputed that such was the condition (broken) of the victim's nose when the expert examined the victim].

Additionally, the trial court stated for the record that the trench coat Abel's counsel displayed to Heuvelman was not a military-type coat. (See *People v. Monterroso, supra*, 34 Cal.4th at p. 782 [trial judge's questions for the purpose of clarification were authorized by Evidence Code section 775[30], and did not constitute advocacy].) Both judicial interventions furthered the trial court's duty to elicit the truth and constituted fair comment on the evidence.

Even assuming error, Abel was not prejudiced by the trial court's interventions. Redondo was not able to identify Abel in court. Further, Heuvelman did not change her testimony after the court's comment that it was not a "military" coat. Heuvelman continued to maintain that she told the police in 1991 that she thought she observed a military-type trench coat. (5 RT 737-738.)

D. The Trial Judge Did Not Err When, Outside The Presence Of The Jury, He Commented That Defense Counsel Was Engaged In "Silliness" By Pursuing A Particular Line Of Questioning

Heuvelman did not testify on direct examination about how her son was behaving at the bank, nor was she questioned on such subject by the prosecutor. (5 RT 687-713.) During cross-examination, Abel's counsel read from a transcript of Heuvelman's April 19, 1995, interview with Detective Tarpley, which included a statement that her two-year-old son was acting like a wild man at the bank. (5 RT 731-734.) When Abel's counsel followed-up on this

---

30. Evidence Code section 775 provides, in pertinent part: "The court . . . may call witnesses and interrogate them the same as if they had been produced by a party to the action. . . ."

statement, Heuvelman clarified that, "When we were behind the teller line, he ran away, and so I had to scoop him up before I left to catch him [*sic*]. And at the time we were talking [to the victim inside the bank], he was standing next to me holding onto my hand." (5 RT 734.) At this point, the trial court called both counsel to the bench and the following ensued:

> The Court: Mr. Freeman, if you've got some prior inconsistent statements or something that you want to impeach her with, get to it, don't be reading the entire transcript into the record. I don't care about the kid and how he was running around the place or any of that kind of silliness.
>
> Mr. Freeman: That was the first inconsistent statement, she didn't remember about the kid.
>
> The Court: I don't care about the kid, it's superfluous and it's not improper impeaching. The Court's objection is sustained.

(5 RT 734-735.)

Abel's counsel was then allowed to proceed with the questioning of Heuvelman where it was elicited that she was distraught in a "busy way" when she left the bank and chased after her son who was walking ahead of her quickly. It was at this time that she almost bumped into Abel. (5 RT 735-736.)

The trial court's curtailment of Abel's counsel's recitation of a witness' prior statements, where the witness had not made any inconsistent statement at trial, was proper; the prior statements consisted of inadmissible hearsay. Neither the trial judge's comments about what he thought of the two-year-old's actions, nor the child's actions inside the bank were pertinent. What was pertinent and relevant, and what the trial court allowed into evidence, was the witness's state of mind once she was outside of the bank, and the conduct of her son outside of the bank which supported such state of mind. This is the location where she almost bumped into Abel. The trial court's classification of "silliness," outside the presence of the jury, simply reflected the trial court effectively controlling the proceeding. (*People v. Carpenter, supra*, 15 Cal.4th

at p. 353 [trial judge has the duty to control the trial; trial court's irritation with counsel's voir dire was not improper and did nothing to prejudice the defendant's case]; Pen. Code, § 1044.)

In any event, the "silliness" remark did not prejudice Abel because it was made outside the presence of the jury. (*People v. Burnett, supra*, 12 Cal.App.4th at p. 475.) Further, Abel was not prejudiced because he was allowed to elicit relevant testimony about the child's behavior outside of the bank.

E. The Trial Court Properly Curtailed Abel's Questioning Of Officer Solis As To Witness Responses At An In-Field Show-Up On The Day Of The Murder

Detective Nasario Solis of the Tustin Police Department testified that on the morning of the shooting, Ken Moorehead (Moorehead) was stopped near the scene of the crime and three to four witnesses were taken to his location for an in-field show-up. (5 RT 787-788, 800-802.) A broadcast had gone out regarding the description of the possible suspect. (5 RT 800.) Each of the witnesses, in turn, excluded Moorehead as being responsible for the crime; no one selected him. (5 RT 788-789, 801.) During Abel's cross-examination, Detective Solis testified that he did not recall witness Jenkins saying at the in-field show-up that Moorehead fit the profile. (5 RT 802.) The trial court then had a bench conference where Abel stated that the defense was not offering the testimony about what the witness said at the show-up for the truth of the matter, but rather to impeach Detective Solis' testimony on direct examination that the witnesses did not make any identifications. The trial court sustained its own objection.[31/] (5RT802-804.)

---

31. The following exchange occurred at the bench conference:

Court: Witnesses that were transported to a scene of a show-up that did not make an identification, whatever they said

is all hearsay. Do you want to be heard, Mr. Freeman?

Mr. Freeman: We're not offering it for the truth of the matter.

The Court: What are you offering it for?

Mr. Freeman: We're offering it to impeach his testimony that none of the witnesses that he told the district attorney on direct examination - - that all the witnesses that were taken out there didn't make any identification.

The Court: That's true. They did not. Now, what's your point?

Mr. Freeman: The point is that witnesses have made various types of identification. This one says he fits the profile.

The Court: That's argumentative. The objection's sustained.

Mr. Rosenblum: The only thing identifying - -

The Court: Mr. Peters, you're biting your lips, do you want to be heard? Come on.

Mr. Peters: Just, the report does indicate some of the in-field show-up witnesses did make various types of identification, different from what he testified to. He said that none of them made identifications, some of them did, some of them didn't.

The Court: Was this person arrested?

Mr. Peters: No, but it goes - - it also goes to - - number one, it goes to his credibility or recollection.

It also shows various people made the identifications, and then some agreed and some couldn't agree.

Mr. Rosenblum: Are you saying somebody said that this was the man at the bank, or are you saying that - - is that what you're saying? I mean, I'm just asking.

A trial judge retains wide latitude to place reasonable limitations on cross-examination when it would result in harassment, prejudice, confusion of the issues, repetition, or is only marginally relevant. (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 679 [106 S.Ct. 1431, 89 L.Ed.2d 674].) Here, the witnesses' responses to the Moorehead in-field show-up were a collateral matter, and only marginally relevant, if at all, to impeach Detective Solis. There is no evidence on the record that any of the three or four witnesses positively identified Moorehead as the shooter. Abel did not present evidence, or argue that Moorehead was the shooter. Abel's implied proffer for impeachment was that witness Jenkins stated that Moorehead fit the profile. (5 RT 802-803.)[32/] Further, without specifying in any detail, Abel's trial counsel asserted that the witnesses made various types of identification. (5 RT 803.) This did not constitute a sufficient proffer to allow the questioning of Detective Solis for impeachment purposes; no one identified Moorehead as being the person responsible. Further, the show-up occurred in January 1991. Detective Solis testified in June 1997 and had not reviewed any reports of the in-field show-up on the morning of the trial. (5 RT 802.) Consequently, this extremely attenuated, collateral matter had absolutely no bearing on any relevant or material issue as to Detective Solis' testimony and was properly excluded. (See *People v. Sapp* (2003) 31 Cal.4th 240, 289-290.) It was well within the trial court's discretion to exclude the inquiry as part of its duty to effectively control

---

The Court: You're tilting at wind mills.

The Court's objection's sustained. Go back to work.

(5 R 802-804.)

32. In his opening statement, Abel acknowledged that Kenneth Moorehead was the subject of an in-field show-up line-up on January 4, 1991, and that none of a number of the witnesses from the bank "could give any good, positive identification." (4 RT 449.)

the proceedings. (*People v. Carpenter, supra*, 15 Cal.4th at p. 353; Pen. Code, § 1044.) Additionally, no possible prejudice occurred by the trial court's accurate comment, "You're tilting at wind mills" (5 RT 804) because the comment was made outside the presence of the jury. (*People v. Burnett, supra*, 12 Cal.App.4th at p. 475.)

F. The Trial Court's Comments Concerning The Arrest Of Defense Investigator Portratz Were A Fair Response To Witness Redondo's Testimony

Redondo, an eyewitness to the shooting, testified that defense investigator Douglas Portratz (Portraz), on January 31, 1997, showed her a photograph of a person wearing glasses, which he said was Abel. (4 RT 588-589.) The person Redondo witnessed shooting the victim was not wearing glasses. (4 RT 589.) Portratz showed Redondo another photo of a person he identified as Craig Elz (Elz) (Exh. 32), and told her that he was the one who had committed the crime. (4 RT 589-590.) Redondo further testified that Portratz, on his own initiative, told her that Elz was involved in another robbery with James Gano (Gano). (4 RT 590.) Redondo testified that she felt Portratz was trying to convince her that Elz committed the robbery (at hand) and dissuade her from her belief that Abel was involved in the commission. (4 RT 591.) Portratz also showed her a copy of the police composite drawing, which had been prepared from Redondo's description, and tried to convince Redondo that the composite looked more like Elz than Abel. (4 RT 591.)

Later, during the cross-examination of Redondo, Abel played the audiotape of Portratz' June 31, 1997, interview of Redondo for the jury. (5 RT 642-643.) The audiotape and the transcript of the audiotape were marked, respectively, as Exhibits F and F-1, and were introduced into evidence. (5 RT 642-643; 9 RT 1494.) The transcript (Exh. F-1) is part of the record on appeal. (3 CT 1164-1174.) The transcript of the interview confirmed that Investigator

Portratz showed Redondo a photograph of Elz, whom Portratz described as "the brother-in-law of the informant, Gano, who was arrested with Gano in a bank robbery in 1995, that started this whole thing." (3 CT 1165-1166.) Portratz further explained in the interview that Elz was the person who went into the bank in the 1995 robbery, while Gano was the getaway driver. (3 CT 1171.) Portratz further stated that the robbery in 1995 was similar to the 1991 robbery. (3 CT 1170.) Portratz also show Redondo a copy of the 1991 composite drawing of the perpetrator and asked her repeatedly, leading questions about the similarities between the composite and Elz as compared to his 1995 bank robbery booking photograph. (3 CT 1166, 1170.) Portratz also showed Redondo a 1991 photograph of Abel, wearing glasses, and asked Redondo to examine the eyes, moustache, and "stuff" in the photo as to the issue of similarity. (3 CT 1166-1167.) Redondo pointed out in the interview that the perpetrator did not have a full, thick moustache like that Elz displayed in his photo. (3 CT 1167-1169.) In response, Portratz said, "Well, moustaches can be shaven or unshaven." (3 CT 1169.) Portratz summarized the interview by stating, "You think that this [Mr. Elz' photograph] looks closer to . . . the drawing than Abel does . . . Right?" (3 CT 1172.) Portratz reiterated, "You think that this [Elz' photograph] looks similar to the drawing." (*Ibid.*)

After the tape was played, Redondo indicated that she stood by what she said in direct examination, that Portratz suggested to her in the interview that Elz committed the crime. (5 RT 646.) Soon after Portratz finished the interview, Redondo called Detective Tarpley and told him that a gentlemen (Portratz) showed her different photographs and was trying to confuse her about what had happened – she felt that he was implying that Elz was responsible for the murder. (5 RT 665.)

Detective Tarpley testified that Elz was smaller than Abel, about 5'8"-5'9". (9 RT 1407.) Further, that Elz was about 8 years younger than Abel, he

would have been 38 years old in 1991. (9 RT 1408.) Abel was 46 years old at the time of the murder. (9 RT 1408.)

After Redondo testified that Portratz tried to convince her that Elz committed the crime, and not Abel, the trial court called both counsel to the bench and the following ensued:

> The Court: Have you caused Mr. Portratz to be arrested for attempting to dissuade a witness?
>
> Mr. Rosenblum: No.
>
> The Court: Why not? I mean, I haven't seen a better case for it than this.
>
> Mr. Rosenblum: Maybe that's something - -
>
> The Court: Is it in the scheme of things, I hope?
>
> Mr. Rosenblum: It's something I'll look at, your honor.

(4 RT 592.)

The trial judge's comment about arresting Portratz for attempting to dissuade a witness was a fair comment based on Redondo's testimony. (Pen. Code, § 136.1, subd. (a)(1); see also *People v. Clark* (1992) 3 Cal.4th 41, 145-146 [trial court's conduct characterizing several of the defendants' answers as "wisecracks" or "smart-allecky" were appropriate]; *People v. Snow, supra*, 30 Cal.4th at p. 78 [well within a judge's discretion to rebuke an attorney, sometimes harshly, when the attorney asks inappropriate questions or otherwise engages in improper conduct]; *People v. Young* (2005) 34 Cal.4th 1149, 1188-1189 [prosecutor's comment in closing argument a fair response to defense argument].)

The trial court's comment was made outside the presence of the jury and caused Abel no possible prejudice. (*People v. Burnett, supra*, 12 Cal.App.4th at p. 475.)

Abel argues that the trial court's comment "cast a chilling effect on Abel's defense." (AOB 30.) Abel does not support this conclusionary argument with any citations to the record. Abel has not demonstrated how the court's comment had a chilling effect. Further, at the time of the trial court's comment, Abel's counsel did not object or otherwise state that the comment had any adverse effect on the defense, or even come to the defense of Portratz. (4 RT 592.) Additionally, it was apparent from the record that the prosecutor was not going to cause the arrest of Portratz. (*Ibid.*)

G. Refusals Of Defense Requests For Sidebar Discussions Were Proper

Abel contends that the denial of two of his counsel's sidebar requests, and the granting of one such request by the prosecutor "sent a clear message to jurors: he favored the prosecution and considered the defense efforts a waste of time." (AOB 31.) The refusal of two defense sidebar requests, and the granting of one prosecutor request, in a half-day trial, would not send a message that the trial court favored the prosecution over the defense. It certainly did not send a message over the course of a long trial such as the case at hand.

During the prosecutor's questioning of Redondo about investigator Portratz trying to "sell" her on the idea that Mr. Elz was involved in the crime, Abel's counsel objected and asked the court, "You want us at sidebar?" (5 RT 654.) The trial court overruled the objection and stated, "Request for sidebar is denied." (*Ibid.*) Here, counsel did not even request a sidebar; he only made an inquiry as to whether the trial judge wanted a sidebar.

Abel's next example occurred during the redirect examination of Lorraine Ripple, when the prosecutor queried her as to Abel's counsel's questions concerning bank robberies. Immediately after the objection, the prosecutor stated he would rephrase the question and Abel's counsel then

tentatively asked for a sidebar, which was denied.[33/] Then, after one other question, the prosecutor asked to approach, which was granted:

> Mr. Rosenblum: Your Honor, there's, I think, about two more areas that I want to cover, but I think I better approach before I ask.
>
> The Court: Okay, come. With the reporter.

(6 RT 937.)

When a trial counsel asks to approach the bench about subject areas he wants to cover, it is a strong signal to a trial judge that the subject areas are sensitive, and a conference, outside the hearing of the jury, is appropriate. At the sidebar conference, counsel and the court discussed Abel's drug use. (6 RT 937-938.) Neither the prosecutor nor Abel's counsel asked Ripple any further questions about bank robberies. (6 RT 937-958.)

Accordingly, the trial court's decisions about the three inquiries or requests for sidebar conferences were entirely proper and did not display any favoritism towards the prosecutor or send a message that defense efforts were a waste of time. (See *People v. Fudge, supra*, 7 Cal.4th at p. 1108 [trial court's

---

33. The just-summarized exchange was as follows:

> Q Do you remember being asked by Mr. Freeman about any bank robberies you did in the Los Angeles area?
>
> Mr. Freeman: No. I object. I didn't - -
>
> Mr. Rosenblum: I'll rephrase it.
>
> Mr. Freeman: I didn't ask her about any robberies. Maybe we ought to have a - - see where he's going, let's go to the bench.
>
> The Court: Request denied.

(6 RT 936-937, emphasis added.)

refusal on several occasions to allow defense counsel to have a sidebar conference was not misconduct; trial court exercised its power to control the proceedings; there is no right to approach the bench and defense counsel was not treated unfairly]; *People v. Alfaro, supra*, 61 Cal.App.3d at p. 425 [no error when trial court refused defense request to approach sidebar on several occasions].)

H. Abel Mischaracterized The Trial Court's Comment, "She's Probably In Custody Now," As Relating To Abel's Wife, Vicki Ross, When It Actually Related To Witness Lorraine Ripple

Vicki Ross (Ross) and Abel were married for a period of time. (9 RT 1305.) Ripple was paroled from prison on March 18, 1991. (6 RT 850.) Abel's counsel was questioning Ripple about whether she had attended the wedding of Abel and Ross when the trial court commented, "She's probably in custody now":

Q: . . . Did you go to the wedding?

A. No.

Q: You recall about when he got married?

The Court: That's hearsay, counsel. Sustained. She's probably in custody now.

Mr. Freeman: No.

The Witness: No, I believe it happened right after I got out.

The Court: All right.

The Witness: But I am not too sure.

By Mr. Freeman: Q. Would May '91 refresh your recollection?

A: Somewhere in there.

(6 RT 870-871.)

It is clear from the context of the entire dialogue just cited, and the record to that point, that the trial court is referring to Lorraine Ripple as probably being in custody at the time of the wedding, not Vicki Ross.[34/]

Accordingly, the trial court's comment was proper and did not prejudice Abel in any way.

I. The Trial Court's Questions And Comments During Voir Dire Neither Displayed A Bias Towards Abel Nor A Preference For The Death Penalty As Opposed To Life Without The Possibility Of Parole

Abel contends that the trial court judge, by asking the jurors if they had the inner strength to pronounce a death verdict, where he purportedly did not ask the same question as to the verdict of life without the possibility of parole, displayed his preference for the death penalty. (AOB 33.) Abel further argues that the trial court's comments, which appeared to qualify the definition of life without the possibility of parole, lent judicial weight to the death penalty. (AOB 34-35.) Abel's contentions are meritless.

The trial court made it clear to the prospective jurors that there were two equally serious choices if the jurors reached the penalty phase, and that the court did not have a preference. (2 RT 115-116, 121, 123, 132-137; 3 RT 217-218.) Contrary to Abel's contentions, the trial judge was scrupulously fair and even-handed as he discussed with the prospective jurors the need for intestinal

---

34. In support of Abel's argument, he only recited the following portion of the just-cited quote: "Q. You recall about when he got married? THE COURT: That's hearsay, counsel, sustained. She's probably in custody now." (AOB 32.)

fortitude, inner strength, strength of character, and courage to return either a verdict of death, or a verdict of life without possibility of parole. On four occasions during voir dire, the trial judge used the interchangeable terms of "inner strength," "strength of character," and "courage." Once it was in reference to whether the jury could impose the death penalty (2 RT 135); once it was in reference to whether the jury could impose either penalty (3 RT 218); and twice it was in reference to whether the jury could impose life without the possibility of parole (2 RT 126; 3 RT 305). There is absolutely nothing improper about using such terms in discussing the seriousness of reaching either verdict in a capital case. (See *People v. Floyd* (1970) 1 Cal.3d 694, 731 [although not at issue on appeal, trial court questioned juror as to having the courage in a proper case to vote for a verdict of death].) The trial court should be even-handed in its "death qualification" questions to prospective jurors and should inquire into their attitudes about capital punishment to determine if their views would impede their ability to serve as jurors. (*People v. Champion* (1995) 9 Cal.4th 879, 909.) Here, this is exactly what the trial court did,[35] and Abel's contention to the contrary has absolutely no basis.

At the commencement of voir dire, the trial court made it abundantly clear that there could only be two possible punishments, "Death and the second is life without the possibility of parole." (2 RT 93-94.) The trial court stressed the seriousness of the prospective jurors' possible role in imposing either the death penalty or life without the possibility of parole. (2 RT 137.) In this context, the trial court made a reference to appellate review, and informed the

---

35. The trial court informed the jury at the outset as to the need to examine the jurors' attitudes, ideas, and feelings about capital punishment. (2 RT 96.)

jurors that a verdict of life without the possibility of parole meant that Abel would ultimately die in prison, while a verdict of death meant Abel would be put to death in prison.[36/]

Later in the voir dire, the trial court reiterated the gravity of the jurors' responsibilities and that for purposes of a decision (life without possibility of parole), they would have to assume that the "man" would be locked up for his entire life and die in prison. Further, for purposes of the death verdict, it would mean that the death penalty would ultimately be carried out.[37/] (3 RT 304.)

---

36. The full text of the trial court's comments are as follows:

> The Court: For purposes of your evaluation of the entire case, when I say life without parole, you have to accept the proposition that life without parole, generally speaking, means that the man will spend his life in prison and ultimately die there.
>
> You also have to assume that if you mete out a death sentence, after an appellate review is finished, the defendant will be put to death in prison. That's how you have to approach your task. Punishment should be something that you folks think is appropriate in light of the crime the defendant's committed and the kind of human being that will be depicted to you by the defense in the case. Punishment should not be some kind of a reward because of a win. In other words, it has to be a reasoned judgment on the part of the jurors guided by the law that I give you. It has to be serious, serious stuff.
>
> Is there anyone that has a feeling that they'd just rather not get involved in this kind of a serious case?

(2 RT 137.)

37. The full text of the trial court's comments are as follows:

> . . . Previously I told you that for purposes of your decision, you have to assume that the government will keep the man locked up for his entire life and he'll die in prison. That's the assumption you have to make. We're not telling you and guaranteeing to you

The trial court made sure that the jury appreciated, if they got to the penalty phase, that "the least that can happen to him is life without parole and the ultimate, of course, is the death penalty." (2 RT 122.)

The above comments by the trial court were again scrupulously even-handed and realistically dealt with the circumstances surrounding any capital case. Contrary to Abel's contention, there is no way the trial court's comments lent judicial weight in favor of the death verdict. There was no improper conduct.

J. The Trial Court Did Not Improperly Dissuade The Jury From Asking For A Read-Back Of Trial Testimony

Abel claims that certain of the trial court's comments dissuaded the jury from asking for any read-back of testimony during deliberations. (AOB 33-34.) To the contrary, there was nothing improper about the judge's comments to the jury.[38] The trial court first had counsel stipulate to the reporter entering the jury

---

> that that's true. We're simply trying to impose upon you the gravity of your responsibility as jurors.
>
> And with regards to that very strong gravity of your responsibility, you must assume that if you impose life without parole, that means what it says; if you impose the death penalty, that means that ultimately the death penalty will be carried out. The court is not stating to you as a matter of fact that those things will happen.
>
> Okay. A very fine distinction there, I hope you can understand that.

(3 RT 304.)

38. The text of the trial court's read-back comments are as follows:

> [The Court] . . . In the event there is a necessity for the reporter to read back any testimony, ultimately, the reporter may do so informally by entering the jury room and reading from her notes.

room to read from her notes as to any read-back requests. (10 RT 1744.) The trial court then furthered explained the read-back process, and requested that the jury determine amongst themselves that it is necessary. (10 RT 1745.) The trial court made it clear that it did not intend to dissuade the jury in any way from

---

> Mr. Rosenblum: So stipulated by the People.
>
> Mr. Peters: Stipulated by the defense.
>
> The Court: Ladies and gentlemen, as a general rule, there is absolutely no reason for the jury to register to all the testimony. Your collective recollections, generally speaking, should be adequate to determine all the issues before you.
>
> When you ask for testimony, all parties must be notified of the request, then the reporter must reread all the requested testimony and excise all sustained objections, all conferences that occurred at the bench, and any hearings conducted outside the jury's presence.
>
> The time consumed in this process may be equal to the time that it took for the testimony to occur. The court would request that before you ask for a reading of the testimony, that you determine among yourselves that it's necessary and in order for you to reach a verdict.
>
> The court does not intend to dissuade you in any way from receiving the testimony that any of you deem necessary in order for you to reach a verdict.
>
> These comments are intended to be explanatory only as to the time necessary to complete the previously described process.
>
> One last thing, it's not an instruction, it's simply common sense. You may take as long or as brief a time as you need to reach a verdict. You are under absolutely no time requirements or constraints in reaching such a verdict.

(10 RT 1744-1745.)

requesting a read-back. (10 RT 1745.) The court finally admonished the jury that it could take as long as it needed to reach a verdict. (*Ibid.*)

Abel has not cited any authority to support his baseless argument that the trial court's comments "dissuaded" the jury from asking for any read-back of trial testimony. Penal Code section 1138 essentially provides that if there is any disagreement between the jurors as to testimony, the information that they request must be given to them. (See *People v. Box* (2000) 23 Cal.4th 1153, 1213.) The manner in which the trial court satisfies such jury requests are entrusted to its sound discretion, and its decision will not be overturned absent manifest abuse. (*People v. Cooks* (1983) 141 Cal.App.3d 224, 261.)

Accordingly, the trial court acted properly. The absence of a request for a read-back, and the relative short time the jury deliberated before reaching a guilty verdict, reflect the overwhelming evidence of guilt and the fact that it was a straight forward case, neither factually complicated, nor involving complex expert testimony; not that the jury was dissuaded from requesting read-backs of testimony.

K. Abel Was Not Prejudiced By Any Judicial Misconduct

Abel claims that "judicial unfairness" constituted structural error. (AOB 39.) Where it is demonstrated that a trial judge is partial (actual judicial bias), which usually arises in the context of judicial interest in the proceeding, it is deemed structural error and the case is automatically reversed. (See *Arizona v. Fulminante* (1991) 499 U.S. 279, 309-310 [111 S.Ct. 1246, 113 L.Ed.2d 302; *People v. Brown, supra*, 6 Cal.4th at pp. 332-333.) It is abundantly clear that the record does not demonstrate that the trial court lost its impartiality, or was actually biased in this case. (*People v. Jenkins, supra*, 22 Cal.4th at p. 1050 [looking at the entirety of the record as to the penalty phase, it does show that the trial court expressed some frustrations with defense counsel, but nothing demonstrated that the trial court lost its impartiality]; *People v. Seaton, supra*,

26 Cal.4th at p. 698 [after carefully reviewing the record, this court rejected defendant's claim of judicial bias, that the trial court's hostility towards defendant permeated the entire trial; finding no evidence that the judge was bias against the defendant].)

Further, Abel neither demonstrated that the trial court's acts constituted judicial misconduct nor that any error, singularly or collectively, prejudiced Abel. (See *People v. Clark, supra*, 3 Cal.4th at p. 148 [defendant's burden to show error and prejudice]; *People v. Monterroso, supra*, 34 Cal.4th at p. 784 [judge's comments, singularly or collectively, did not constitute misconduct].) Abel has not demonstrated that the record reveals that the trial court persistently made disparaging remarks so as to discredit the defense or create the impression that the court was allying itself with the prosecution. (See *People v. Carpenter, supra*, 15 Cal.4th at p. 353.) Some friction between the trial court and counsel is virtually inevitable in a long trial, and any friction or pointed comments equally applied to both Abel's counsel and the prosecutor.[39] (See *People v. Snow, supra*, 30 Cal.4th at pp. 78-79.) Also, any possible error as to the trial court's statement in closing argument was cured by both the prosecutor's and the trial court's admonitions, as well as the trial court's 17.30 jury instruction. (See subsection (A), *infra*.)

The proper standard to assess harmless error is whether it is reasonably probable that the judicial misconduct had a prejudicial effect on the verdict. (*People v. Sturm, supra*, 37 Cal.4th at p. 1244 [prejudicial effect on death penalty phase]; see also *People v. Watson* (1956) 46 Cal.2d 818, 836.) However, even under the more stringent *Chapman*[40] standard of harmless error,

---

39. See recital of trial court's comments to the prosecutor set forth herein.

40. *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705]; see also *People v. Sturm, supra*, 37 Cal.4th at p. 1244.

the overwhelming evidence of guilt demonstrates that Abel was not prejudiced by any singular or collective error.

Here, Redondo selected Abel as the shooter out of a photographic line-up, stating off the record that she was 100 % sure and stating she was 80 % sure on the record ; Heuvelman was 100 % sure that Abel was the person she almost bumped into outside the bank (identifying Abel both in a photographic line-up and in court); the 1991 photograph of Abel (Exh. 47), and the police composite drawing (Exh. 29), are a close match; Abel was seen by the victim's mother, America Miller, in the family market six weeks before the murder; Abel was a long-time prison friend and then-business associate of James Gano, who knew about the cash withdrawal banking practices of the Miller family; Abel had a financial motive to steal to support his gambling habit; the murder weapon was Abel's gun-of-choice; and Abel told Ripple that he robbed and killed a man at a Tustin bank. Ripple also recounted that Abel told her that the victim "had a business, a little mini-store, or whatever, and he cashed checks for a lot of 'wetbacks' that were up here . . ." (6 RT 855.) The Miller family store cashed checks for a mainly Mexican clientele. This is a detail that could have only come from Abel. Abel even acknowledged that he was at the Millers' store on one occasion.

Accordingly, Abel's claim must fail. The record does not reveal that Abel was deprived of a fair trial because of the trial judge's conduct. (*People v. Snow, supra*, 30 Cal.4th at p. 78 [a defendant is entitled to a fair trial, not a perfect one].)

II.

THE TRIAL COURT DID NOT ERR IN ADMITTING EVIDENCE OF ABEL'S PAST GANG MEMBERSHIP AND WITNESS RIPPLE'S FEAR OF HARM

Abel contends that witness Lorraine Ripple's testimony, that her son was affiliated with a gang of which Abel was a former member, violated due

process, and that the trial court abused its discretion when it denied his motion for a mistrial based on the admission of such evidence. (AOB 41-47.) Abel further contends that the prosecutor engaged in misconduct by eliciting the testimony and arguing, in closing argument, that Ripple testified "at great risk to herself and great risk to her family." (AOB 47-50.) Abel forfeited these issues on appeal by failing to make timely objections or request appropriate admonitions. Abel's claims also fail on the merits because the benign reference to Abel's past gang membership, and Ripple's concern for her safety and her son's safety, were highly probative to her credibility as a witness. Further, the prosecutor's comment in final argument as to Ripple's safety concerns were proper, being based on evidence at trial that had not been stricken by the trial court. Lastly, even assuming any error, Abel was not prejudiced by the admission of the evidence and the prosecutor's argument.

A. Abel's Claims Have Been Forfeited And Cannot Be Heard On Appeal

Abel contends that the trial court abused its discretion in denying his motion for a mistrial on the grounds that admission of gang evidence constituted improper character evidence within the meaning Evidence Code section 1101 and was irrelevant in violation of his constitutional right to due process. (AOB 45-47.) A timely objection at trial on a specific ground alerts the trial court to the basis on which the exclusion is sought and gives the prosecution the opportunity to establish the admissibility of the evidence. (*People v. Hayes* (1999) 21 Cal.4th 1211, 1261.) Abel did not object to the testimony when it was received into evidence. He also failed to move to strike the gang evidence, or request a limiting instruction or curative admonition.[41/]

---

41. Even in his new trial motion, Abel failed to raise his claim that the testimony denied him due process. Instead, the only ground asserted in his motion for a new trial was the tardy objection to purported improper character

(6 RT 940-941.) Accordingly, Abel's contentions of irrelevance, improper character evidence, and constitutional violation are forfeited for purposes of this appeal by his failure to timely object to the admission of the evidence and his failure to request an admonition. (Evid. Code, § 353; *People v. Burgener* (2003) 29 Cal.4th 833, 869 [constitutional claims forfeited]; *People v. Sanders* (1995) 11 Cal.4th 475, 567, fn. 12 [constitutional issues raised for the first time on appeal are forfeited]; *People v. Ashmus* (1991) 54 Cal.3d 932, 972-973, fn. 10.)

Abel also asserts that the prosecutor committed misconduct by eliciting prejudicial, inadmissible evidence from Ripple, and by improperly commenting on excluded evidence in closing argument. (AOB 47-50.) Again, Abel has forfeited this issue, as the only defense objection concerning Ripple's pertinent testimony on redirect examination was on hearsay grounds to the question by the prosecutor as to Deborah Lankford telling Ripple not to testify in this case. (6 RT 941.) Further, Abel did not object to the prosecutor's comment in closing argument that "Lorraine Ripple was here at great risk to herself and great risk to her family." (10 RT 1542.) For failure to timely object on the specific ground raised on appeal and failure to request an admonition, Abel has forfeited the prosecutorial misconduct issue for purpose of this appeal. (*People v. Berryman* (1993) 6 Cal.4th 1048, 1072-1073; *People v. Silva* (2001) 25 Cal.4th 345, 372; *People v. Cunningham* (2001) 25 Cal.4th 926, 1019.) Abel contends that he did not waive his objection to the just-cited comment by the prosecutor in closing argument because any objection would have served to draw further attention to a matter that had already been litigated. (AOB 49, fn. 24; citing *People v. Hill, supra*, 17 Cal.4th 800, 820; *People v. Zambrano* (2004) 124 Cal.4th 228, 236-237.) The two cases Abel relies upon do not stand

---

evidence, only made after further examination of Ripple by both parties, and after Ripple had been excused as a witness that day. (6 RT 941-970.)

for the proposition being cited; instead, both cases stand for the proposition that a defendant can be excused from the requirement of a timely objection and request for an admonition where it would be futile. (*People v. Hill, supra,* 17 Cal.4th at p. 821; *People v. Zambrano, supra*, 124 Cal.App.4th at pp. 236-237.) In any event, even if the prosecutor's comment can be construed as prosecutorial error, it would have been cured by an objection and admonition that would not have drawn further improper attention to a matter already litigated. (See *People v. Silva, supra*, 25 Cal.4th at pp. 372-373 [admonition would have cured any improper comment by the prosecutor].) Here, the prosecutor did not make any reference to Abel's past gang affiliation and an objection and simple admonition would have cured any possible prejudice. Accordingly, Abel's claim of prosecutorial misconduct has been forfeited.

B. The Trial Court Did Not Err in Admitting Ripple's Testimony On Abel's Past Gang Membership

The trial court properly admitted the testimony of Ripple and did not abuse its discretion in denying Abel's motion for mistrial. Lorraine Ripple made only one benign reference to Abel's past gang membership, which neither identified the gang, nor related any information about "gang culture" to the jury: "My son is also affiliated with a gang that John was once a member of - - " (6 RT 940.)

"A trial court should grant a mistrial only when a party's chances of receiving a fair trial have been irreparably damaged and we use the deferential abuse of discretion standard to review a trial court ruling denying a mistrial." (*People v. Silva, supra*; 25 Cal.4th at p. 372.)

After Ripple finished her testimony on June 4, 1997, and the jury was excused until the next morning, Abel requested a mistrial based on the

admission of purported improper evidence of Abel's character, including the gang reference, the safety of Ripple's sons, the Lankford letters, and Ripple's testimony about Columbian cartels.[42/] (6 RT 959-963, 967.)

The trial court found that Ripple's "gang" reference was blurted out and was not "really responsive" and denied the motion for a mistrial. (6 RT 960, 970.) The trail court's denial of Abel's motion is fully supported by the record.

Evidence of a defendant's gang membership "creates a risk the jury will improperly infer the defendant has a criminal disposition and is therefore guilty of the offense charged." (*People v. Williams, supra,* 16 Cal.4th at p. 193.) "Evidence of a defendant's criminal disposition is inadmissible to prove he committed a specific criminal act." (*Ibid.*; Evid. Code, § 1101, subd. (a).) However, evidence that a defendant is a member of a gang is properly admissible on the issue of witness credibility. (*People v. Sanchez* (1997) 58 Cal.App.4th 1435, 1449-1450 [defendant's membership in SSL gang and SSL member's threats to Abel were admissible].) Gang evidence has been admitted when it has had "significant probative value on the issue of [ ] witnesses' credibility to assist the jury in determining whether they were in fact telling the truth." (*Id.* at p. 1450.)

Evidence that a witness is either afraid to testify or fears retaliation is relevant to witness credibility. (*People v. Burgener, supra*, 29 Cal.4th at p. 869.) "A witness who testifies despite fear of recrimination of *any* kind by *anyone* is more credible because of his or her personal stake in the testimony." (*People v. Olguin* (1994) 31 Cal.App.4th 1355, 1368, emphasis in original.) Evidence that a witness felt fear just from the nature and gravity of their

---

42. As the prosecutor pointed out that Ripple's testimony about Columbian cartels did not involve Abel. (6 RT 970.) Ripple testified at the end of redirect examination that she provided information to Detective Proctor about other murders, and the Columbian cartel, but did not talk to the detective about this case or about John Abel. (6 RT 942-943.)

testimony, the fear not being caused by threats or intimidation, was relevant to the jury's assessment of the witness's credibility. (*People v. Avalos* (1984) 37 Cal.3d 216, 232.) The underlying explanation of the basis for a witness's fear is relevant to the witness's credibility and the admissibility of such evidence is well within the sound discretion of the trial court. (*People v. Burgener, supra*, 29 Cal.4th at p. 869; *People v. Feagin* (1995) 34 Cal.App.4th 1427, 1433.)

Abel cites *People v. Brooks* (1979) 88 Cal.App.3d 180, 187, for the proposition that the jury was not entitled to hear why Ripple was in fear. (AOB 49.) *Brooks* is easily distinguished from this case because the only apparent reason for the witness in *Brooks* to be called was to testify about threats she received from the defendant's girlfriend. (*Id.* at pp. 185-187.) The Court of Appeal found that there was no issue as to witness credibility and that the threatened witness did not testify to anything factually relevant. (*Ibid.*) Here, to the contrary, Ripple's credibility was a material issue, and she testified about several highly probative substantive matters.

Here, Lorraine Ripple's testimony concerning Abel's past gang membership and her son's gang affiliation was not admitted for the truth of the matter, but was admitted on the material issue of Ripple's credibility.

In his opening statement, Abel's counsel told the jury that Abel had been paroled from prison in February 1990, that James Gano and Abel had been friends in the federal prison system back in the 1980s, and that they met in Lompoc (federal prison) in 1978. (4 RT 434, 437-438.) Counsel further referenced Abel's robberies in Los Angeles and Orange counties that he committed with Ripple and for which he was convicted in 1982. (4 RT 463.)

During cross-examination, Abel's counsel elicited from Ripple that Abel had told her about a number of murders that he had committed, and she had told him about murders that she had been involved with. (6 RT 907-909.) Ripple, in the context of testifying about a possible transfer to the California Institute

for Women ("CIW") for one year, added:

> And it's like right now, I've got my son, all my friends, I have got two letters in the past week, one from Arizona prison, one from Levenworth (*sic*) that are flat out: Don't' take the stand, don't say a word. And I'm - - you know, I've got a lot of problems even with my sons over this.

(6 RT 912-913.)

On redirect examination, the prosecutor followed-up on Ripple's concern expressed during her cross-examination. In response to the prosecutor's query as to what she was talking about, Ripple testified, "Okay. My son is also affiliated with a gang that John [Abel] was once a member of - - ." The prosecutor cut off Ripple's response and focused on her concern for her son's safety. (6 RT 940.) Ripple testified that she had concern for sons' safety; she had one son in state prison and one in federal prison. (*Ibid.*) Ripple further testified that more than one person had sent her letters telling her not to take the witness stand.[43/] (6 RT 941.) Abel neither objected to nor requested an

---

43. The complete text of the above-summarized testimony is as follows:

> Q [prosecutor] . . . You had said something on cross-examination about why it is so difficult for you to be here. I think you indicated something about having sons in Arizona, things of that nature, that caused you some concern as you sit here today. Could you please explain what you were talking about to the jury?
>
> A Okay. My son is also affiliated with a gang that John was once a member of - -
>
> Q Before we talk about that, I just - -
>
> A Is that what you wanted?
>
> Q I just want to ask do you have any concerns over your own son's safety?
>
> A Yes, I do.

admonition as to the just-summarized testimony.

The prosecutor further elicited from Ripple that Deborah Lankford (Lankford) talked to her about her testimony. Abel's objection on hearsay grounds was overruled. Ripple then testified:

> She didn't want me to testify, but she even went further with writing other inmates in the S.H.U. unit. And I was attacked a year ago May 7th on the S.H.U. yard by six other inmates.

(6 RT 941.)

Without objection, the prosecutor further elicited that Deborah Lankford is a close friend of Abel and that Ripple was testifying "at risk to yourself and your children." (6 RT 942.)

On recross-examination, Abel explored various correspondence between Ripple and Detective Tarpley in 1995. (6 RT 953-957.) After Abel brought up a purported offer to Ripple of one year at C.I.W., Ripple added:

> And while we're putting all this in the record, let's go one better. John's had Debbie Langford (*sic*) sending all this paperwork to every god damn prison in the fuckin' state laying on my sons to keep me off the stand.

Q Do you have any children that are in state prison?

A I have two sons: one in state, one in federal.

Q You indicated something about people sending you letters, telling you not to take the witness stand - -

A Yes.

Q - - in this particular case. You had letters sent to you?

A Yes.

Q By more than one person?

A Yes.

(6 RT 940-941.)

Now, put that in your record if one of my kids gets hurt.

(6 RT 957-958.)

The prosecutor, in rebuttal argument, made it clear that Abel's character was not at issue in the guilt phase of the trial. (10 RT 1677-1680.) Further, in response to Abel's attacks on Ripple's credibility, the prosecutor in rebuttal closing argument argued that she put herself at risk by testifying. (10 RT 1691-1692.) In final argument, the prosecutor commented in reference to Lorraine Ripple, "She's not a confidential informant. She's known to everyone. Lorraine Ripple was here at great risk to herself and great risk to her family. "I want you to think about that." (10 RT 1542.) At no point did the prosecutor argue Abel's purported past gang membership.

The gang testimony, along with Ripple's testimony about being assaulted by six inmates while in prison, and her and Lankford's testimony about circulating information in the prison system that Ripple was a snitch, explains Ripple's fear for her safety and the safety of her sons (who were also incarcerated.) The fear of being tagged with a "snitch jacket" in prison also explains why Ripple did not disclose key evidence, such as Abel giving her the .22 caliber handgun after the murder, in her first May 17, 1995, interview with Detective Tarpley. Abel cross-examined Ripple extensively concerning her May 17, 1995, interview and her failure to tell Detective Tarpley about the .22 caliber handgun at that time. (6 RT 876, 881-886, 890-893.)

The credibility of Ripple was a material issue in the case. (See *People v. Tuilaepa* (1992) 4 Cal.4th 569, 588 [nothing bars evidence of gang affiliation where it is directly relevant to a material issue].) In opening statement, in Abel's examination of Ripple, and in closing argument, Abel attacked the credibility of Ripple. (4 RT 465-468; 6 RT 894-896, 907-908, 911-912, 914, 951-958; 10 RT 1615, 1622-1641.) Abel argued in closing that "Lorraine Ripple is the case. These eyewitnesses, you know, are worthless in terms of

beyond a reasonable doubt." (10 RT 1615.) Abel further argued in regards to Ripple:

> The question of validating what an informant is telling you is extraordinarily important and I don't see a large amount of validation of Lorraine Ripple's statements that she had given to the police in 1995, that is, as to murders she's committed, other murders he's committed, the co-defendants he killed back in the sixties. Whether or not Ripple even knew Abel back in the sixties. (10 RT 1633.)

Abel even attacked the credibility of Ripple through the testimony of her one-time friend, Lankford. Lankford has known Abel for 20 years. He wrote letters to her and sometimes he would begin the letters with "Hello Sexy Lady[44]." (7 RT 1014, 1067-1068.)

Lankford testified that Ripple acted like Abel was "a piece of property", was jealous, telling outrageous stories, and told other people that she thought Lankford was sleeping with Abel. (7 RT 1047-1049.)

When Abel was charged in this case,[45] he told Lankford that Ripple was bringing evidence against him.[46] Lankford told other people in the state prison system that Ripple was informing on Abel. (7 RT 1096-1097, 1108-1109; 8 RT 1138.) Defense witness Lankford further testified that in May 1997, she received, from the defense copies of five or six letters that Ripple had written to the Tustin Police Department and two transcripts of her police interviews. (7 RT 1096, 1108, 1115; 8 RT 1129-1130, 1132-1133.) Lankford sent copies of the materials to her parents and a mutual friend of Ripple and herself. (8 RT

---

44. Abel testified that he has been friends with Lankford for a long time and was fond of her, but had never had sexual intercourse with her; he just fondled her. (9 RT 1463-1464.)

45. Evidence was presented to the jury that Abel was charged in June 1995. (9 RT 1397, 1404.)

46. In 1995, Lankford wrote Abel in prison and told him that she knew Ripple was informing on him. (9 RT 1484-1485.)

1132-1133, 1136-1137.) The materials showed that Ripple was informing on Abel. (8 RT 1133.) Lankford was not told by the defense to distribute the materials; she did it on her own. (8 RT 1133-1134.) Lankford further testified that she knew Ripple had two sons who were incarcerated. (7 RT 1101.) Lankford knows that getting a "snitch jacket" could cost a person their life. (7 RT 1097.)

Ripple's fear was not only highly probative to her mental state as a witness, but it also explained her demeanor on the witness stand – her unresponsive, profanity-laced outburst as to her and her sons' safety. (6 RT 940, 957-958.) (See *People v. Feagin, supra*, 34 Cal.App.4th at p. 1433 [evidence of witness's fear relevant to witness's state of mind and demeanor in court].)

Here, defense witness Lankford acknowledged, since 1995, she had disseminated within the prison system that Ripple was a "snitch" in Abel's case and that getting a "snitch jacket" while incarcerated could cost one his or her life. The totality of circumstances in this case required that the jury have an explanation for Ripple's legitimate fears for her and her sons' safety, including allowing a benign reference to Abel's past gang membership, in order for the jury to accurately assess Ripple's credibility. (See *People v. Burgener, supra*, 29 Cal.4th at p. 869 [not necessary to show witness's fear of retaliation is "directly linked" to defendant for threats to be admissible]; *People v. Gutierrez* (1994) 23 Cal.App.4th 1576, 1588, 1590 [although not necessary to show that the fear of retaliation is directly linked to the defendant for the evidence to be admissible, there was circumstantial evidence which tended to connect the defendant to the efforts to tamper with the witnesses].) Moreover, even while no direct link to the defendant is required to admit evidence of retaliation; here, there was substantial evidence to link Abel to Deborah Lankford's efforts to intimidate Ripple. Lankford testified that Abel told her, after he was charged

in June 1995, that Ripple would bring evidence against him. (7 RT 1108-1109.) Lankford received letters and transcripts concerning Ripple in May 1997, but it was Lankford's decision to send the materials to other persons. (7 RT 1096, 1108, 1115; 8 RT 1129-1130, 1132-1134.)

Accordingly, there was no error in admitting the gang evidence and the Lankford threat evidence, and Abel's motion for a mistrial was properly denied.

On appeal, a judgment is presumed correct and the Abel must demonstrate prejudicial error amounting to a miscarriage of justice. (*People v. Garza* (2005) 35 Cal.4th 866, 881.) On its face, the brief, non-specific reference to Abel's past gang membership was not prejudicial. No gang was named, the testimony indicated only prior membership, and nothing about gang culture was introduced. Further, from Abel's own testimony, the jury knew that he had been in prison for almost the entirety of the 1960's, and for the 17 years leading up to his parole in February 1990.[47/] (9 RT 1430, 1435, 1467.) Under these circumstances, past gang membership would not surprise or prejudice the jury.

Further, the trial court's admonition cured any possible prejudice caused by the gang reference. Before any testimony occurred on the morning after Ripple's testimony (i.e. June 5, 1997), the prosecutor presented to the court and Abel a choice of two limiting instructions concerning Ripple's redirect examination. (7 RT 975-976.) One instruction admonished the jury to totally disregard the testimony at issue, and the other proposed instruction was to limit the testimony for purposes of Ripple's state of mind, not for the truth of the

---

47. Abel testified on direct examination that he was currently serving a 44-year, eight-month state prison term, and also had a federal prison term of 53 years, eight months. (9 RT 1429-1430.) Further, Abel testified on direct examination that he had two-dozen felony convictions, almost all for robberies; he had served over 17 years in prison when he was paroled in February 1990; and he had been in prison for all of the 1960's, except for a few months. (9 RT 1430-1435, 1467.)

matter. (*Ibid.*) Abel's counsel let it be known that his requested remedy was mistrial or dismissal, but under the circumstances chose the "total disregard" instruction. (7 RT 976, 989, 997.) Prior to any witness testifying on June 5, 1997, the trial court gave the following curative instruction:

> During redirect examination, the defense objected to a portion of witness Lorraine Ripple's testimony regarding possible retaliation against herself or family members. Upon further reflection, the court believes that the objection to be a proper. You are therefore instructed that the answer of the witness dealing with that limited portion of her testimony is stricken. You are hereby instructed not to consider or discuss that portion of her testimony in any fashion in deciding this case. Treat it as though you never heard it.

(7 RT 997.)

Any possible prejudice arising from Ripple's gang reference to Abel's past gang membership was cured by the trial court's admonition to strike and disregard her redirect testimony concerning possible retaliation against herself or family members. (7 RT 997.) (*People v. Burgener, supra*, 29 Cal.4th at p. 870 [any error as to the admission of evidence was harmless because the trial court ultimately instructed the jury to disregard the threats]; *People v. Silva, supra,* 25 Cal.4th at p. 374 [admonition would have cured any harm from the prosecutor's question]; *People v. Hines, supra,* 15 Cal.4th at p. 1038 [admonition would have prevented jury from speculating about an identification of defendant; there was no abuse of discretion in the denial of the motion for mistrial].) A jury is presumed to follow a trial court's instruction. (*People v. Burgener, supra*, 29 Cal.4th at p. 870; *People v. Olguin, supra*, 31 Cal.App.4th at p. 1368.)

Additionally, in closing rebuttal argument, the prosecutor made it clear that Abel's character was not at issue in the guilt phase of the trial. (10 RT 1677-1680.)

Further, the overwhelming evidence of Abel's guilt, as argued above in Argument I, demonstrates that it is not reasonably probable that the jury would have reached a different verdict absent the gang membership reference. (*People v. Watson, supra*, 46 Cal.2d at pp. 836-837; *People v. Sakarias* (2000) 22 Cal.4th 596, 630; *People v. Brooks, supra*, 88 Cal.App.3d at p. 188.)

C. There Was No Prosecutorial Misconduct

Abel makes the unsupported and untenable claim that the prosecutor "cleverly calculated" the inquiry regarding Ripple's concern for her sons, "knowing that it would undoubtedly lead to a disclosure about Abel's gang affiliations." (AOB 48.) On redirect examination, the prosecutor asked an appropriate follow-up question about the concerns Ripple had expressed about her sons during cross-examination. (6 RT 912, 913, 940-941.) There is nothing in the record to support Abel's view that the prosecutor knew his question would elicit a response that revealed Abel was a past gang member. The prosecutor had never met Ripple before she walked into court to testify and had never talked to her. (6 RT 847-848.) In fact, the prosecutor's effort to cut off Ripple's response by interjecting another question shows that this was not the prosecutor's intention. (6 RT 940.)

In any event, for the reasons detailed above, testimony as to Abel's past gang membership and the intimidation of Ripple by Lankford was properly admitted.

Abel also contends that the prosecutor acted improperly by arguing that Ripple testified at great risk to herself and her family, ignoring the trial court's admonition for the jury to disregard a portion of Ripple's testimony on redirect examination. (AOB 48-49.)

The prosecutor's comment that, "Lorraine Ripple was here at great risk to herself and great risk to her family," was made in the context of his argument that "She's not a confidential informant. She's known to everyone." (10 RT 1542.) The prosecutor's comment was proper and did not contravene the trial court's admonition. The trial court's admonition instructed the jury that the defense's objection to Lorraine Ripple's testimony of possible retaliation against herself and her sons on the redirect examination was proper, that such testimony would be stricken, and that the jury was not to consider it. (7 RT 997.) Abel's only objection during redirect examination regarding possible retaliation was the hearsay objection as to what Lankford told Ripple about her upcoming testimony. (6 RT 941.) Ripple was allowed to answer and stated that Lankford did not want her to testify, that Lankford wrote to other inmates in the S.H.U., and that Ripple had been attacked the year before by inmates in the S.H.U. yard. (6 RT 941.) It was not until later in the redirect examination that Ripple, without objection, responded "yes" to the question about "testifying at risk to herself and her children." (6 RT 942.) However, based on later discussions by counsel and the trial court concerning Ripple's fleeting gang reference, the trial court's admonition could properly be construed to encompass her testimony about Abel's past gang membership and her concern about her son's safety in prison. (6 RT 940-942.)

Even if all of Ripple's references in redirect examination to safety concerns, possible retaliation, and gang membership, were excluded, there remains ample evidence in the record to support the prosecutor's comment that Ripple was testifying at great risk to herself and her family. (*People v. Silva, supra*, 25 Cal.4th at pp. 374-375 [prosecutor has wide latitude in argument to suggest inferences that can be drawn from the evidence].) During cross-examination, Ripple testified that two letters, one from an Arizona prison and

one from Leavenworth,[48] told her not to take the stand; and she had a lot of problems with her sons over testifying against Abel. (6 RT 912-913.) On recross-examination, Ripple testified that Lankford was sending paperwork to every prison in the state, "laying on my sons to keep me off the stand," and to "put that in your record if one of my kids gets hurt." (6 RT 957-958.) Lankford testified that when Abel was charged in the case, he told her that Ripple would bring evidence against him. She further testified that she told other people in prison that Ripple was informing on Abel, that she received letters and transcripts of Ripple's interviews from the defense in May 1997, that she knew Ripple had two sons in prison, and that she knew getting a "snitch jacket" in prison could cost one their life. (7 RT 1014, 1067-1068, 1096-1097, 1108-1109, 1111, 1115; 8 RT 1132-1134, 1136-1138.) Abel testified that in 1995, Lankford wrote him a letter in prison telling him that she knew Ripple was informing on him. (9 RT 1484-1485.) Accordingly, the prosecutor's comment in final argument was a proper inference based on evidence not stricken by the trial court.

Hence, the prosecutor did not commit error and there was no prosecutorial misconduct. "A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct 'so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.'" (*People v. Gray* (2005) 37 Cal.4th 168, 215.)

> Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves 'the use of deceptive or reprehensible methods to persuade either the court or the jury.' (Citation.)

(*Id.* at pp. 215-216.)

---

48. It was established in redirect examination that one son was in state prison and one was in federal prison. (6 RT 940.)

Here, there was neither prosecutorial misconduct, nor improper or "intemperate" prosecutor behavior. However, if the trial court were to find prosecutorial misconduct, such misconduct was harmless because of the overwhelming evidence of Abel's guilt. There is no reasonable possibility that the prosecutor's conduct affected the jury's verdict. (*Chapman v. California, supra*, 386 U.S. at p. 24; *People v. Cunningham, supra*, 25 Cal.4th at p. 1019.)

For the above reasons, Abel's claims should fail.

III.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING ABEL'S MOTION FOR A PRETRIAL LINE-UP

Abel contends that the trial court's denial of his request for a pretrial physical line-up violated his due process rights. (AOB 54-63.) Abel's claim must fail. The trial court's denial of the motion was proper because the motion was untimely, there was no reasonable likelihood of mistaken identification, and that the proposed line-up would not have tended to resolve any issue of mistaken identification. Further, even if this Court were to find error, Abel was not prejudiced because of the overwhelming evidence of Abel's guilt, the quality of initial suspect descriptions by key witnesses, the certainty of Heuvelman's eyewitness identification, and the fact that Redondo could not identify Abel at trial.

On December 30, 1996, Abel filed a motion for a pretrial line-up to be heard at a January 24th pretrial hearing. (1 CT 349-354.) On January 21, 1997, the prosecution filed an opposition to Abel's motion for a pretrial line-up which emphasized the language in *Evans v. Superior Court* (1974) 11 Cal.3d 617, 625, that a defendant has a right to a pretrial line-up only when eyewitness identification is a material issue and there is a reasonable likelihood of mistaken identification. (2 CT 395-396.) At the January 24, 1997, hearing, Abel argued

that the trial court should grant his motion for a line-up because the primary eyewitness (Redondo) had made an identification, with 90 % certainty, that another person was the perpetrator. (2 RT 63, 65-66.) The prosecutor argued that two factors required the denial of Abel's motion: (1) a pretrial line-up would not resolve any possible question of mistaken identification, and (2) the lack of timeliness in bringing the motion. (2 RT 68-69.)

A trial court or magistrate has broad discretion in deciding whether to grant a defendant's request for a pretrial line-up. (*Evans v. Superior Court, supra*, 11 Cal.3d at p. 625.) In an appropriate case, due process requires that a defendant, upon timely request, be afforded a pretrial line-up. (*Ibid.*)

> The right to a line-up arises, however, only when eyewitness identification is shown to be a material issue and there exists a reasonable likelihood of a mistaken identification which a line-up would tend to resolve.

(*Ibid.*)

The trial judge or magistrate has the right to deny a motion for a pretrial line-up where it is not timely made. (*Id.* at p. 626.) "Such motion should normally be made as soon after arrest or arraignment as practical." (*Ibid.*) "Motions which are not made until shortly before trial should, unless good cause is clearly demonstrated, be denied in most instances by reason of such delay." (*Ibid.*) Here, Abel made his first appearance in this case in municipal court on July 28, 1995. (MCR CT 7.) It was not until 17 months later, on December 30, 1996, that Abel filed his motion for a pretrial line-up, at a time when the trial was set for February 24, 1997. (1 CT 252, 349-354.) On January 24, 1997, the trial court continued the trial to April 28, 1997, and denied Abel's motion for a pretrial line-up. (2 CT 497; 2 RT 59-60, 69.)

In response to the trial court's question as to why the motion had not been filed earlier, Abel's counsel stated that there had been a Proposition 115 preliminary hearing where the officer just "read" the identification. Further,

counsel said they were surprised to discover that Abel had been sent back to Folsom Prison (located in the Sacramento area) after the preliminary hearing, and both counsel had to travel to Folsom in August 1996 to interview Abel about conducting a line-up. (2 RT 63-64.) Abel's counsel Peters (co-counsel with attorney Freeman), also indicated that he was engaged in other matters in Judge Fitzgerald's courtroom. (2 RT 64.)

On January 24, 1997, the trial court denied the motion for a pretrial line-up without expressing any specific grounds, or making any express findings of fact.[49/] (2 RT 69.)

Abel's attorneys explanations for the delay in bringing the motion were totally inadequate and did not demonstrate any cause for the 17-month delay. Abel's attorneys did not explain why the motion was not brought in front of the magistrate, which was the appropriate time for the motion. The murder occurred on January 4, 1991. A complaint was filed on June 23, 1995, charging Abel with murder. (Municipal Court Record "MCR" CT 7, 18-21.) Abel appeared in court on the charge on July 28, 1995. (MCR CT 7, 23.) On August 28, 1995, there was an order filed to permit jail visitation and interview of Abel by defense investigators. (1 CT 1.) On September 15, 1995, Abel was arraigned on the felony complaint. (MCR CT 10, 25.). As of November 14, 1995, a month before the preliminary hearing, Abel's investigator had reviewed in excess of 1,100 pages of discovery, visited Abel at the jail, interviewed eyewitness Redondo, and prepared attorney binders for trial. (1 CT 7-9.) It was clear from Abel's attorney Freeman's cross-examination at the preliminary hearing that he was well-versed in the witness identification issues.

---

49. On April 8, 1997, the trial was continued until May 12, 1997, and then continued again to May 27, 1997, at which time the trial commenced. (2 CT 517, 535, 589.)

Over a year before Abel filed his motion for a pre-trial line-up, Abel was bound over on the murder charge after a two-day preliminary hearing, which was held on December 14 and 15, 1995. (MCR CT 14-16; 1 CT 11, 86.) During the preliminary hearing, attorney Freeman examined Detective Tarpley on witness Colleen Heuvelman's description of the perpetrator and her prior identifications, as well as witness Redondo's prior identifications. (1 CT 68, 76, 78, 80-81.) Neither Heuvelman nor Redondo testified at the preliminary hearing.

The Information was filed on December 26, 1995, and Abel was arraigned on January 16, 1996; the case was assigned to Judge Fitzgerald. (1 CT 224; 2 RT 27-28.) On January 19, 1996, Judge Fitzgerald set a September 3, 1996, trial date. (1 CT 225.) On September 3, 1996, the trial was continued to February 24, 1997, with a new pretrial date of January 24, 1997. (1 CT 252; 2 RT 55.)

Abel's motion should have been brought prior to the preliminary hearing in case the prosecutor elected to have the eyewitnesses (Heuvelman and Redondo) testify at the preliminary hearing. (See *People v. Baines* (1981) 30 Cal.3d 143, 148 [value of pretrial line-up is substantially diminished once the preliminary hearing has been conducted and there is a confrontation between the defendant and the eyewitness[es]].) Moreover, Abel's counsels' excuses that they were surprised to discover that Abel was transferred to Folsom at some unspecified time after the preliminary hearing, that they had visited Abel in Folsom in August 1996, and that one of the counsel was engaged in other matters in Judge Fitzgerald's courtroom, did not constitute cause for the lengthy delay in bringing the motion for pre-trial line-up, as the delay extended through and beyond the superior court arraignment.

The circumstances in this case are similar to those in *People v. Baines, supra*, 30 Cal.3d at p. 147. In *Baines*, counsel was appointed to represent a

defendant on a robbery charge on January 4, 1979. The preliminary hearing was conducted on January 30, 1979, *Baines* moved for a pretrial line-up on March 15, 1979. The motion was denied on March 21, and the trial was commenced to start on March 31, 1979. (*Ibid.*) In *Baines*, the defendant's excuse for the delay was that he had complied with the local court rule which required all pretrial motions to be heard on the pretrial conference date. (*Id.* at p. 148.) This Court found that no justification was offered for defendant's failure to seek a prompt line-up in the municipal court, and held that the trial court did not abuse its discretion in denying defendant's motion on the grounds of being untimely.[50/] (*Id.* at pp. 148-149.)

Accordingly, the trial court's denial of Abel's motion was proper because the motion was untimely.

For a defendant to have a right to a pretrial line-up, eyewitness identification must be shown to be: (1) a "material issue"; (2) "a reasonable likelihood of a mistaken identification" exists; and (3) "a line-up would tend to resolve" the mistaken identification. (*People v. Farnam* (2002) 28 Cal.4th 107, 184.) Although the first prong has been shown in this case, the last two prongs have not. Accordingly, the trial court also acted within its broad discretion in denying Abel's motion because there was no reasonable likelihood of mistaken identification, and a line-up would not tend to resolve an issue of mistaken identity.

---

50. The fact that the defendant was represented by three different counsel by the time of the motion, did not have any bearing on this Court's holding in *Baines*. For this reason, Abel's motion can not be deemed timely simply because Abel was represented by three different attorneys before his motion was filed. A public defender was appointed on July 28, 1995, and one month later attorney Ed Hall was appointed to represent Abel. (MCR CT 7, 9, 23.) On November 19, 1995, i.e., nearly two months before Abel was arraigned in superior court, Attorney Freeman was appointed to represent Abel. (MCR CT 11-12, 26-27; 1 CT 224; 2 RT 27-28.)

The "*possibility* of a mistaken identification exists in any case; however, . . . 'reasonable *likelihood* of mistaken identification'" is necessary. (*People v. Abdel-Malak* (1986) 186 Cal.App.3d 359, 369, emphasis in original.) Here, there was no reasonable likelihood of mistaken identification. As described in more detail in respondent's Statement of Facts, *infra*, Redondo's physical description of the perpetrator, which was the basis for the composite drawing, along with Heuvelman's description of the person she almost bumped into outside the bank, and the composite drawing itself, all closely matched Abel's June 14, 1991, photograph. (4 RT 566, 569-570, 572-574, 589; 5 RT 696-701, 705, 737, 752; Exhs. 29, 47.) Further, Heuvelman was absolutely sure when she picked Abel from a photographic line-up on April 19, 2005, and positively identified Abel at trial pursuant to Abel's counsel's inquiries. (5 RT 711-715; 9 RT 1367-1368; Exh. 30.) Further, Redondo was 80 % sure on the record, and 100 % sure off the record when she picked Abel out of a photographic line-up on March 6, 1995. (4 RT 583-586; 9 RT 1358, 1363; Exh. 30.)

Redondo was shown several photographic line-ups within days of the murder, and viewed over a thousand photographs at the police station. (4 RT 574-578.) As to all the photographs and photographic line-ups, Redondo stated to the police at the time that photo number 10 in one of the line-ups "showed a similar facial feature to the suspect today, but this was not the suspect either." (4 RT 576.) With regards to photograph number 6 (Jones) in another photo line-up, Redondo stated that she was 90% sure he was the suspect, but the moustache was not as heavy. (4 RT 577-578.) Redondo's January 1991 identification of the two photographs in two separate line-ups can be explained because the groups of photographs were chosen by the police based on the general description of the subject (Abel). (8 RT 1213-1214, 1220-1222, 1242-1244.) Abel's photograph was not included in the January 1991 line-ups.

At the March 13, 1991, live line-up in San Diego, Redondo selected an individual, but right after the selection she told police that she was sure the person was not the perpetrator. (4 RT 578-580; 8 RT 1235-1236, 1249-1250.) Mr. Jones was in the live line-up and was not selected by Redondo. (4 RT 578-580; 8 RT 1247-1250.)

Abel argues that witnesses described the perpetrator as Hispanic and cites to the record. (AOB 63.)[51] The citations are all to a Tustin Police Department continuation report. (ACT [4/21/03] 37, 39, 43.) The continuation report summarized that Barron-Jenkins (who was not called to testify at trial), was standing approximately 20 feet from the window when she heard a pop and saw a Hispanic male running through an opening in the bushes. (ACT [4/21/03] 37.) The report summarized Redondo's statement where she described the perpetrator as a "male white, with possibly some mixture or Hispanic in him." (ACT [4/21/03] 39.) The report summarized Heuvelman's statement, where she described the person she almost bumped into as a "male white, with Hispanic-looking dark eyes . . ." (ACT [4/21/03] 43.) Based on all the circumstances, including key witnesses Redondo's and Heuvelman's identifications that the perpetrator was "white," and bank assistant Vice-President Dejong's identification of the person as a white male (ACT [4/21/03]

---

51. Abel also asserts that "one of the two witnesses who identified Abel as the assailant, previously identified two other men, one of whom had an altercation previously with the victim." (AOB 63.) From Abel's citations to the record for such assertion (4 RT 577-579; 6 RT 823; 8 RT 1231-1234), Abel appears to be referring to Redondo's 90% identification of Larry Jones in a January 1991 photographic line-up. The citations to the record do not show that Mr. Jones, or anyone else, had a prior confrontation with the victim. One of Abel's citations to the record reveals that Detective Solis was present at the family business (Alameda Market) when a photograph of Mr. Jones was shown to America Miller and she stated that he looked similar to a man who had been in the market. (6 RT 823-824.) During Mrs. Miller's testimony, she stated that the person (Larry Jones) depicted in the photograph looked familiar, but she did not remember if he had been around the market. (5 RT 782-783.)

34), the references cited by Abel do not raise a reasonable likelihood of mistaken identity based on the perpetrator being Hispanic and not "white."

In the context of the reliability of an in-court identification, this Court set forth certain factors which are useful in assessing whether there is a reasonable likelihood of mistaken identity. *(People v. Gordon* (1990) 50 Cal.3d 1223, 1242.) Three of the factors are relevant to the case-at-hand: "The opportunity of the witness to view the criminal at the time of the crime, the witness's degree of attention, [and] the accuracy of his prior description of the criminal . . ." (*Ibid.*) Here, as detailed in respondent's statement of facts, Redondo and Heuvelman had excellent opportunities to view the perpetrator, both were very attentive to the perpetrator, and both of their descriptions were an extremely close match to Abel's physical description and the clothing he possessed.

Accordingly, for the above reasons, the trial court did not abuse its discretion in denying the motion for a pretrial line-up as there was no reasonable likelihood of mistaken identity. (See *People v. Rivera* (1981) 127 Cal.App.3d 136, 149 [the accuracy of the witnesses' description and the cumulative effect of the weaker description by another witness, as well as the identification by the officer who observed defendant fleeing the crime scene, supported the magistrate's conclusion that there did not exist a reasonable likelihood of mistaken identity].)

Additionally, it was not shown that a pretrial line-up would have tended to resolve the likelihood of any mistaken identification. Here, prior to the January 4, 1997, hearing, both Heuvelman's and Redondo's descriptions of the perpetrator, as well as their previous identifications in line-ups, were well documented. Redondo's track record as to identifications in prior line-ups made it unlikely that she would be definite in a court-ordered physical line-up post-January 24, 1997. In fact, this lack of absolute certainty was borne out by

her failure to positively identify or eliminate Abel during her June 2, 1997, trial testimony. (4 RT 629-630; 5 RT 648-649.) Witness Heuvelman manifested absolute certainty in selecting Abel in an April 19, 1995, photo line-up, and expressed the same certainty in positively identifying Abel at trial. (5 RT 711-715.) Accordingly, the quality of the two witnesses' identifications would not have been expected to change by a post-January 24, 1997, line-up.

Further, the mere passage of time from the date of the murder (over six years), and the change in Abel's appearance, made it highly unlikely that a physical line-up would have resolved any mistaken identity. Redondo testified at trial that the person in the photo line-up (Exh. 30), in position number 2 (Abel), looked somewhat different than how Abel appeared in court, with his long hair, suit, and tie. (5 RT 648-649.) Further, as the prosecutor argued at the motion hearing, in regards to resolving any issues of mistaken identity, Abel, from a facial hair standpoint, looked quite different from his physical description at the time of the crime. (2 RT 68-69.)

The above reasons, including that fact that both Heuvelman and Redondo accurately described Abel at the time of the crime, demonstrate that the trial court did not abuse its discretion in denying Abel's motion on the basis that a physical line-up would not tend to resolve any issue of mistaken identity.

Even if this Court were to find that the trial court abused its discretion, any error was harmless under any standard because of the overwhelming evidence of Abel's guilt as detailed in Argument I, and Redondo's and Heuvelman's physical descriptions of Abel at the time of the crime. (*Chapman v. California, supra*, 386 U.S. at p. 24.) Further, as to Redondo, there is no possible prejudice because she failed to identify Abel at trial. Additionally, Heuvelman's accurate description at the time of the crime, and her absolute certainty in her identifications of Abel in the April 1995 photographic line-up and at trial in June 1997, demonstrate that there is no reasonable possibility that

a physical line-up would have impacted her identification evidence. The claim that a physical line-up would have benefitted Abel is purely speculative. (See *People v. Fernandez* (1990) 219 Cal.App.3d 1379, 1385.)

For all the foregoing reasons, Abel's argument should be denied.

IV.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING DETECTIVE RUBINO'S TESTIMONY CONCERNING THE .22 CALIBER HANDGUN AND THE MAC-11 SEMI-AUTOMATIC PISTOL SEIZED BY POLICE ON OCTOBER 5, 1991

Abel contends that the trial court erred by admitting into evidence guns seized from Abel's car some nine months after the murder because the guns were not involved in the murder, and therefore were irrelevant. (AOB 64-72.) Abel also asserts that "the circumstances of the arrest were, like the weapons, irrelevant to the present offense and served only as further improper attacks on Abel's character." (AOB 69.) Abel's claims are meritless. First, Abel made a timely objection only on relevancy grounds, thus forfeiting any other basis for claiming error on appeal. In any event, the guns, and the circumstances of the October 5, 1991, contact with Abel were highly probative to Lorraine Ripple's credibility, corroborating her testimony on cross-examination and redirect examination. The admission into evidence of the .22 caliber handgun was also relevant for illustrative purposes. Lastly, even assuming error, Abel cannot demonstrate prejudice by the admission of this evidence.

In response to Abel's counsel's question on cross-examination, that the police told her, "Abel gave you up," Ripple spoke of a pill vial with her name on it that she had given Abel that was in his car when he was arrested. (6 RT 876-877.)

Abel's counsel exhaustively cross-examined Ripple about the .22 caliber handgun (murder weapon), and established that Abel gave it to her as a "hot

gun." She described the gun and testified that she did not tell the police about it in her initial interview on May 17, 1995. She further testified that she later traded the gun to a drug connection in exchange for drugs, and that she robbed the drug connection and his runners on several occasions. (6 RT 881-883, 887-893, 896-897, 899-903, 905-906.)

Ripple further testified on cross-examination that Abel gave her the .22 caliber handgun (murder weapon), a MAC-11 that shoots 9 millimeter bullets, and later got another gun from Abel. (6 RT 889.) Ripple further testified that "guns are something that go back and forth, you know, quite a bit and passed around." (6 RT 889-890.) Abel did not move to strike or otherwise object to this testimony. (*Ibid.*)

The prosecutor, on redirect examination, followed-up on the other guns Abel gave Ripple. (6 RT 928-933.) Ripple testified that guns are handed back and forth, and if someone needs a gun you give him the gun, and when the person is done with the gun, he gives it back. (6 RT 928-929.) Ripple further testified that Abel had a MAC-11 and that Exhibit 48 appeared to be such a gun. (6 RT 928-931.) She also testified that Exhibit 49, a .22 caliber handgun, was similar to the .22 caliber handgun (murder weapon) that Abel had given her, and that she had seen Abel in possession of such a gun. (Exh. 49; 6 RT 931-932.) Further, after Ripple got rid of the .22 caliber handgun (murder weapon), Abel possessed another .22 caliber handgun because he liked to use that type of gun. (6 RT 932-933.)

Abel's counsel did not object to any of the above testimony and failed to request any admonition. (6 RT 928-933.)

After Ripple completed her testimony, Abel's counsel told the trial court ". . . we've got guns out here . . . that have no relevancy." (6 RT 958-959, 962.) The next morning, Abel's counsel argued against allowing Detective Rubino to testify about the guns seized from Abel's car as being cumulative to

Ripple's testimony and on the grounds they were not the guns used in the homicide. (7 RT 982-983.) Abel did not object on character evidence grounds, only stating, "Bringing this detective in, who says he has contact with the defendant, again, we're pushing up cleverly against the edges of 1101A evidence again." (7 RT 983.) Further, Abel did not object on constitutional grounds. (6 RT 962; 7 RT 982-997.) Abel's counsel stated that the guns were "pretty superfluous." (7 RT 984.) Abel's counsel acknowledged that there was no contrary evidence that Abel did not have the guns and would be willing to stipulate if he was able to confirm that Abel had those guns. (7 RT 984-985.) It was agreed between counsel that the prosecutor would establish through the detective that the guns were not connected with the murder. (7 RT 989.)

As the prosecutor argued below, it was Abel who bought out the evidence of the MAC-11 and the guns being handed back and forth. (7 RT 985.) Further, Abel attempted to discredit Ripple by saying that she was lying about everything. Accordingly, the gun evidence properly corroborated Ripple's testimony. (7 RT 986.)

The trial court indicated that the gun evidence was probative as to Ripple's testimony about the gun she received from Abel. (7 RT 984.) The trial court ruled that the prosecutor could not refer to Detective Rubino's stop of Abel as an arrest, but to call it "a contact in a search of a car . . ." (7 RT 986-987.)

Based on the trial court's ruling, Detective Steve Rubino, of the Los Angeles County Sheriff's Department, testified that he was part of a multi-jurisdictional criminal apprehension detail that contacted Abel on October 5, 1991, in a 1991 Toyota Tercel, registered in Abel's name. (7 RT 998-999, 1002-1104.) Deputy Rubino searched the Toyota and found a MAC-11 semi-automatic pistol (Exh. 48), a .22 caliber pistol (Exh. 49), and a couple of 9 millimeter magazines. (7 RT 1004-1006.) Detective Rubino also found a pill vial, with the name of Lorraine Ripple on it, in Abel's vehicle. (7 RT 1007.)

Detective Rubino further testified that the .22 caliber handgun he found in Abel's vehicle was not related to the murder. (7 RT 1009.) The People offered Exhibits 48 and 49 into evidence and they were admitted without objection. (7 RT 1010.) Abel did not object to Detective Rubino's testimony at the time it was given. (7 RT 998-1007.) After Detective Rubino's testimony, Abel moved for a mistrial on the basis of improper character evidence, and the motion was denied. (7 RT 1011.)

While Abel made a proper objection to Detective Rubino's testimony and admission of the guns (Exhs. 48 and 49) on relevancy grounds, he forfeited a challenge on appeal on any other grounds by failing to make a timely objection, or to request an admonition. (Evid. Code, § 353; *People v. Kennedy* (2005) 36 Cal.4th 595, 612; *People v. Burgener, supra*, 29 Cal.4th at p. 869 [constitutional claims forfeited]; *People v. Hayes, supra*, 21 Cal.4th at p. 1261.)

Abel contends that a defendant is excused from the necessity of making a timely objection or requesting an admonition if either would be futile. (AOB 65, fn. 32.) Here, as argued in Argument I, the totality of the record shows that an appropriate objection or request for an admonition would not have been futile. Further, as to the specific testimony of Lorraine Ripple, the trial court overruled the prosecutor's objections to certain of Abel's counsels' questions. (6 RT 888-889.) Further, the trial court instructed the prosecutor to refer to Abel's October 5, 1991, arrest as a "contact," and encouraged a stipulation between counsel. (7 RT 984-987.)

A trial court's ruling on the receipt of evidence will not be disturbed on appeal absent a finding that the trial court abused its discretion. (*People v. Robinson* (2005) 37 Cal.4th 592, 626; *People v. Lenart* (2004) 32 Cal.4th 1107, 1123 [determination of relevancy reviewed on an abuse-of-discretion standard]; *People v. Price* (1991) 1 Cal.4th 324, 433.) "Evidence is relevant if it has any tendency in reason to prove or disprove any disputed fact of consequence,

including evidence relevant to the credibility of a witness." (*People v. Kennedy, supra*, 36 Cal.4th at p. 615; see also Evid. Code, §§ 210, 351.) In determining the credibility of a witness, the jury may consider "the existence or non-existence of any fact testified by him." (Evid. Code, § 780, subd. (i).)

Here, the evidence pertaining to the two guns seized by Detective Rubino on October 5, 1991, was highly probative to Lorraine Ripple's credibility – it corroborated her testimony that Abel had in his possession MAC-11 and .22 caliber handguns, in addition to the handgun he told Ripple that he had used in the murder. Ripple was a key prosecution witness and Abel pursued a strategy of an "all out" attack on her credibility. The attack commenced with Abel's counsel's remark made in opening statement – in 1992, Abel was convicted for robberies which he and Lorraine Ripple had committed in Orange County and Los Angeles County. (4 RT 463.) During cross-examination of Ripple, Abel attacked her credibility for not disclosing that Abel gave her the purported murder weapon during her initial interview with Detective Tarpley on May 17, 1995 (6 RT 881-883, 893); for trading guns for drugs on dozens of occasions (6 RT 896-897); for needing the "hot gun" because she intended to kill someone with it (6 RT 901-903); for telling Abel about the murders that she was involved in (6 RT 908); for having a drug connection who supplied her with heroin and cocaine (6 RT 890); for being hospitalized for drug addiction (6 RT 913); for having received treatment for mental health problems (6 RT 913-914); and for robbing her drug connection and his runner on several occasions (6 RT 891-893).

Abel continued his attacks on Ripple's credibility by eliciting testimony from his witness, Deborah Lankford, about Ripple's bizarre behavior. (7 RT 1047-1049.) Further, in Ripple's cross-examination, Abel attempted to establish that Ripple's testimony concerning murders committed by Abel were fabricated. Abel questioned Detective Tarpley about his ability to confirm the

murders. (6 RT 907; 9 RT 1378, 1392.)[52] In final argument, Abel characterized Ripple's statement to Detective Tarpley, that Abel had murdered his co-defendants in the sixties, as "quite bizarre" and that "it's fair to question the credibility of the witness in the bizarre nature of such statement, and the validation of that statement." (10 RT 1622-1623.)

Abel's counsel furthered argued that Lorraine Ripple was the prosecutor's case. (10 RT 1615.) It was Abel that made Ripple's credibility a key issue in the case and who elicited the testimony that Abel was in possession of a MAC-11 semi-automatic handgun and another handgun besides the murder weapon. Thus, corroboration of Ripple's testimony concerning the existence of the guns was highly probative and the trial court did not abuse its discretion in allowing the evidence. (*People v. Kennedy, supra*, 36 Cal.4th at p. 615 [testimony relevant to establishing witness credibility – tended to show prior statement was false and her trial testimony was true]; *People v. Riser* (1956) 47 Cal.2d 566, 578, overruled on other grounds, *People v. Chapman* (1959) 52 Cal.2d 95, 98 [the P38 gun not used in the murder was admissible to corroborate the bartender's testimony[53]]; *People v. Lepolo* (1997) 55 Cal.App.4th 85, 88-92 [the evidence of defendant's prior conduct of waving a

---

52. During Detective Tarpley's examination, Abel's counsel repeatedly asked if the detective had verified the various statements made by Lorraine Ripple. (9 RT 1379-1383, 1389.)

53. This Court found that another gun admitted into evidence (a Colt .38), was not admissible because the weapon was not involved in the crime and tended to show that defendant was the sort of person who carried deadly weapons. (*People v. Chapman, supra*, 52 Cal.2d at p. 577.) Another case cited by Abel, *People v. Henderson* (1976) 58 Cal.App.3d 349, 360 (AOB 67), stands for the same proposition that a gun, not connected to the crime, cannot be admitted into evidence where there is no proper, relevant purpose for its admission. Here, there were proper, relevant purposes for admitting the evidence, as argued herein.

machete in the air and threatening the police with it was admissible as impeachment evidence as to his credibility].)

Additionally, Detective Rubino's testimony as to the circumstances of the October 5, 1991, contact was clearly necessary and relevant to show that it was Abel who possessed the guns in question, as well as the pill vial in Ripple's name.

In addition to the .22 caliber handgun being properly admitted to corroborate Ripple's testimony, it also illustrated what a .22 caliber handgun looked like. Abel tested Ripple's credibility concerning her claim that Abel gave her the "murder" weapon. (6 RT 881-883, 888-893, 896-903, 906.) Ripple described the .22 caliber handgun. (6 RT 899-900.) On redirect, Ripple was shown the gun seized from Abel's car by Detective Rubino (Exh. 49), and Ripple said that it was similar to the gun (murder weapon) she had received from Abel, but such gun was "nickel-plated or chrome-colored, it was silver". (6 RT 932.)

Accordingly, under the circumstances, it was proper to admit the .22 caliber handgun seized by Detective Rubino (Exh. 49), to illustrate and validate Lorraine Ripple's testimony about the existence and appearance of the two .22 caliber handguns. (*People v. Ham* (1970) 7 Cal.App.3d 768, 779-780 [.22 was properly admitted to illustrate the similarities to the appearance of the gun used in the robberies]; *People v. Trout* (1960) 54 Cal.2d 576, 586 [gun admissible as type of weapon used in the crimes]; *People v. Aguirre* (1958) 158 Cal.App.2d 304, 306-307 [gun properly admitted for purposes of illustration].) In addition to the reasons stated above, Ripple's testimony, about the different guns she and Abel were exposed to, tested her recollection as to the exact nature and description of the gun given to her by Abel (murder weapon).

Lorraine Ripple's testimony about the other guns Abel possessed, or Abel gave her, or were passed back and forth, including the MAC-11 gun and

the .22 caliber handgun, was proper and not objected to. Even assuming that the .22 caliber and the MAC-11 handguns were admitted in error, it was cumulative to other properly admitted gun evidence, and was not prejudicial. (*People v. Cox* (2003) 30 Cal.4th 916, 958; *People v. Medina* (1995) 11 Cal.4th 694, 750.)

Further, Detective Rubino's testimony and the guns being admitted into evidence could not have prejudiced Abel in light of Lorraine Ripple's testimony and statements, elicited by Abel's counsel, about other murders committed by Abel, Ripple's and Abel's exposure to and penchant for guns, and the extensive evidence concerning Abel's criminal history. (See *People v. Price, supra*, 1 Cal.4th at pp. 433-434 [given other properly received evidence, the bandolier was not inflammatory]; *People v. Ramos* (1982) 30 Cal.3d 553, 564 [evidence of a disassembled gun, apparently not used in the robbery, not prejudicial in view of uncontradicted evidence that defendant used a gun in the commission of the offense]; *People v. Lenart, supra*, 32 Cal.4th at p. 1125.)

The applicable standard for harmless error is whether, absent the evidence, it is reasonably probable that the jury would have reached a different verdict. (*People v. Watson, supra*, 46 Cal.2d at p. 836; *People v. Cox, supra*, 30 Cal.4th at p. 958.) Here, based on the arguments above, and the overwhelming evidence of Abel's guilt, any error was harmless under *People v. Watson*, as well as under the more exacting standard of *Chapman v. California, supra*, 386 U.S. at p. 24. (*People v. Lenart, supra*, 32 Cal.4th at p. 1125 [harmless error under either standard].)[54/]

---

54. The prosecutor's reference in closing argument to the seized guns (10 RT 1538-1539) cited by Abel (AOB 70-71), did not change the prejudice analysis. First, prosecutor's comments were not objected to, and Abel failed to request an admonition; thus, the issue is forfeited for purposes of the appeal. (*People v. Silva, supra*, 25 Cal.4th at p. 372; *People v. Berryman, supra*, 6 Cal.4th at pp. 1072-1073.) Additionally, based on the evidence in the record discussed above concerning Abel and Lorraine Ripple, a reference to these

For the above reasons, Abel's claim should fail.

V.

VICTIM IMPACT EVIDENCE AS TO THE EFFECT OF THE MURDER UPON MEMBERS OF THE MILLER FAMILY WAS PROPERLY ADMITTED

Abel contends that the testimony of the victim's mother concerning the impact of the murder on the victim's brother violated his constitutional rights. (AOB 73-79.) First, Abel failed to timely object to the testimony about the victim's brother and ask for a curative admonition; thus he has forfeited the issue for appeal purposes. In any event; the victim's mother's testimony taken in the context of her full statement of the impact of the murder on the victim's brother, was proper. Moreover, Abel was not prejudiced by the testimony.

Abel's counsel failed to object to Mrs. Miller's testimony at the time she testified. (11 RT 1955-1959.) After Mrs. Miller was excused, counsel still did not object; he only made an observation about the testimony (". . . I wasn't going to object, but . . .") (11 RT 1961.) The tried court responded, "I guess that's a motion to strike," and denied the anticipated motion, indicating that the testimony was all part of the family's hardship. (*Ibid.*) Abel did not ask for an admonition or any particular remedy. (*Ibid.*) Abel at no time offered a specific ground for his concern or observation. (11 RT 1958-1961.)

Under the circumstances, even if this Court construes Abel's and the trial court's verbal exchange as a general objection, Abel has nevertheless forfeited this issue on appeal by his failure to make a timely objection on a specific ground or a request for an admonition to Mrs. Miller's testimony. (Evid. Code, § 353; *People v. Pollock* (2004) 32 Cal.4th 1153, 1181; *People v.*

---

people having "loaded guns that shoot people . . . these are dangerous people," could not possibly prejudice Abel. Further, the jury was instructed that an attorney's statements are not evidence. (10 RT 1711.)

Roldan (2005) 35 Cal.4th 646, 732 [did not object on grounds of unduly inflammatory]; *People v. Montiel* (1993) 5 Cal.4th 877, 934; *People v. Sanders*, *supra*, 11 Cal.4th at p. 549 [defendant's general objections, which did not assert specific grounds, forfeited the issue for appeal].)

In a capital case trial, evidence showing the impact of a murder on the victim's family and friends does not violate the Eighth or Fourteenth Amendment of the United States Constitution. (*People v. Pollock, supra*, 32 Cal.4th at p. 1180.) The due process clause only provides relief where the victim impact evidence is so unduly prejudicial as to render the trial fundamentally unfair. (*Payne v. Tennessee* (1991) 501 U.S. 808, 825 [111 S.Ct. 2597, 115 L.Ed.2d 720].) "Victim impact evidence is simply another form or method of informing the sentencing authority about the specific harm caused by the crime in question." (*Ibid.*) States can properly conclude that victim impact evidence should be before a jury to assess a defendant's moral culpability and blame-worthiness. (*Ibid.*)

> Under California law, victim impact evidence is admissible at the penalty phase under section 190.3, factor (a),[55] as a circumstance of the crime, provided the evidence is not so inflammatory as to elicit from the jury an irrational or emotional response untethered to the facts of the case.

(*People v. Pollock, supra*, 32 Cal.4th at p. 1180.)

A family member or friend can testify about the impact of the crime on another family member of the victim. (*People v. Jurado* (2006) 38 Cal.4th 72, 132.) America Miller, the victim's mother, was one of two witnesses who gave victim impact evidence during the penalty phase of the trial. The testimony of Mrs. Miller and her husband only encompassed 12 pages of the

---

55. Penal Code section 190.3, factor (a) provides, in pertinent part: "The circumstances of the crime of which the defendant was convicted in the present proceeding . . ."

reporter's transcript. (11 RT 1948-1959.) The great majority of the prosecution's penalty phase evidence consisted of other crime evidence (robberies). (11 RT 1775-1947.)

Mrs. Miller testified about the impact of the murder on the victim's brother and other siblings:

> Q [Prosecutor] Has it been difficult living with this?
>
> A Yes, very difficult because we just not lost one son, we lost another one, Bobby. He got real hurt because he love Armando and both of them have things to do, you know, they're all excited. Oh, yeah, we gonna do this, we gonna do that. They want to work, they want to do some good things and all arranged.
>
> So Bobby got hurt in his heart. He got so much hate, you know, that he can't trust, who could do this to his brother, so this make him sick for his heart. It come more because they say, you have healthy mind, healthy heart.
>
> So, you know, he don't just kill me one son he kill me two sons.
>
> Q So your son, Bobby, eventually died of heart problems?
>
> A Yes, uh-huh.
>
> Q Now, as far as the other children, the remaining children in the family, do they all miss Armando a great deal?
>
> A Yes, very much, very much.

(11 RT 1958.)

Here, Mrs. Miller testified about the substantial emotional impact of the victim's death on the victim's brother; how much the brother loved him and how angry and hurt he felt. (11 RT 1956.) In this context, Mrs. Miller testified that the brother "got hurt in his heart," it "make [*sic*] him sick for his heart," and "you have healthy mind, healthy heart." She further added, "He don't just kill me one son he kill me two sons." (*Ibid.*)

The prosecutor then elicited that the victim's brother died of heart trouble (*Ibid.*) Mrs. Miller's testimony poignantly expressed the emotional impact of the murder on the victim's brother and the belief of a grieving mother that the murder had some connection to the brother's death. This is an understandable reaction by a victim's mother and it was clearly understood by the jury that the brother died from heart disease and was not "murdered" by Abel, as Abel portrays. (AOB 77.) (See *People v. Brown* (2004) 33 Cal.4th 382, 398 [brother saluting victim's grave and father not going on any more fishing trips were simple manifestations of the psychological impact experienced by the victims and were understandable human reactions].)

Mrs. Miller's testimony was certainly not so inflammatory, if inflammatory at all, as to render the penalty phase fundamentally unfair. (See *People v. Boyette, supra*, 29 Cal.4th at pp. 440-444 [proper testimony included victim's eight-year-old son wanting to die so that he could be with his mother, six-year-old son repeatedly calling his grandfather wanting to know where his mother was, victim's sister waking up in the middle of the night crying, and older brother so distraught that he moved from the area]; *People v. Jurado, supra*, 38 Cal.4th at p. 136 [evidence that the victim was pregnant at the time was emotional, but not inflammatory as to be improper].) The fact that victim impact evidence has a strong emotional impact does not mean that it is overly inflammatory. (*People v. Roldan, supra*, 35 Cal.4th at pp. 732-733.) Here, Mrs. Miller's testimony was highly relevant to show how the murder affected her and the victim's brother. (See *People v. Boyette, supra*, 29 Cal.4th at p. 443.)

Mrs. Miller's testimony was less emotionally-laden than other victim impact evidence that has been deemed admissible. (See *People v. Jurado, supra*, 38 Cal.4th at pp. 133-134, and cases cited therein; *People v. Boyette, supra*, 29 Cal.4th at pp. 441-445.) Further, there is nothing in the record to

indicate that Mrs. Miller's testimony had a particular emotional impact on the jury. (11 RT 1955-1961 [no showing that any juror was crying or otherwise emotionally distraught].) The fact that Mrs. Miller's testimony was brief and it appeared that she did not show any undue emotion, evidences that the testimony was not inflammatory. (*People v. Roldan, supra*, 35 Cal.4th at p. 732.)

Abel also contends that the evidence was improper because the victim's brother was not present at the crime and Abel could not have known that the murder would have led to his premature death. (AOB 76.) This Court has rejected any such requirement of presence or knowledge. (*People v. Pollock, supra*, 32 Cal.4th at p. 1183 [victim impact testimony proper about persons not present at the murder scene, and about matters unknown to a defendant].)

Abel also appears to be arguing that victim impact evidence is limited to injurious harm *immediately* incurred by family members as a result of the murder. (AOB 76, emphasis added.) Victim impact evidence is not limited to the "injuries" suffered by friends and family immediately after the crime. (*People v. Brown, supra*, 33 Cal.4th at pp. 397-398 [testimony by witnesses 20 years after the crime about how they were still suffering was proper].) "It is only logical that the effects, both psychological and physical, of a violent and murderous assault . . . would be enduring." (*Id.* at p. 397.)

Finally, Abel argues that if Penal Code section 190.3, factor (a) is construed to include Mrs. Miller's impact testimony, that such subsection is unconstitutionally vague. (AOB 77.) This contention has also been rejected by this Court. (*People v. Jurado, supra*, 38 Cal.4th at p. 132; *People v. Pollock, supra*, 32 Cal.4th at p. 1183; *People v. Boyette, supra*, 29 Cal.4th at p. 445, fn.12.)

For the foregoing reasons, Mrs. Miller's testimony was properly admitted. Further, even assuming error, Abel was not prejudiced.

The prosecutor ensured that Mrs. Miller's testimony would not be construed improperly by the jury by telling the jurors in closing argument:

> Lastly, number seven, victim impact. I presented to you two witnesses very briefly, just so they could talk to you a little bit about Armando Miller.
>
> Now, there's couple of things that I do want to say in considering their testimony. Two things. The first is this: I know Miller said something about her son Bob, Bob having heart problems. Ladies and gentlemen, please do not we're not suggesting in no way, shape, or form, that John Abel is responsible for the death of her other son. I mean, this is a mother, obviously, in her mind she feels that this somehow impacted her son's heart. But we're not asking you to hold Mr. Abel responsible for the heart problems of Bob, Bobby Miller, who eventually died.
>
> But in her own mind - - this is, again, the impact of this crime on this victim and the victim's family. In her mind, the way she's dealing with this is she feels the killing of Armando Miller is such a heartbroken event to her other son, who he was close to, that this is what caused his illness.
>
> There's no evidence of that, there's no proof of that. So I ask you not to consider that the death of Bobby Miller had anything to do with this incident. That is just her impression and it's part of her victim impact, but there's no proof of that.

(12 RT 2011-2012.)

In closing argument, the prosecutor emphasized that the jury should not consider that the death of the victim's brother "had anything to do with the incident."[56] (12 RT 2012.) The prosecutor's statements to the jury cured any possible prejudice. Further, even if there was error, Abel was not

---

56. Abel contends that the just-referenced argument by the prosecutor was a disingenuous statement which "exasperated (*sic*)the impact of this prejudicial evidence." (AOB 78.) Beyond there being no basis for such a contention, any issue as to prosecutorial error was forfeited by Abel's failure to object. (*People v. Montiel, supra*, 5 Cal.4th at p. 934.)

prejudiced; Mrs. Miller testified briefly and without undue emotion. (*People v. Boyette, supra*, 29 Cal.4th at p. 445.)

For these reasons, as well as the overwhelming evidence of Abel's guilt, any error was harmless as there was no reasonable possibility that the penalty verdict would have been different absent Mrs. Miller's testimony. (See *People v. Jackson* (1996) 13 Cal.4th 1164, 1232-1233; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1070.)

For the foregoing reasons, Abel's claims should fail.

VI.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING ABEL'S MOTION TO DISMISS FOR PRE-CHARGING DELAY

Abel contends that his due process rights were violated by an unjustified pre-charging delay which seriously prejudiced his ability to prepare a defense. (AOB 80-89.) Abel has not demonstrated that he was actually prejudiced by the delay. Further, any delay was justified; law enforcement neither purposefully caused the delay to gain an advantage, nor was it caused by their negligence. Moreover, even if this Court deems a delay prejudiced Abel, the justification for the delay and public interest in bringing a murderer to justice greatly outweighs any prejudice. Despite any delay, Abel received a fair trial.

Under both state and federal law, a delay between the time of an offense and the filing of an accusatory pleading (i.e., a pre-indictment delay) can result in a violation of due process of law. (*United States v. Lovasco* (1977) 431 U.S. 783, 795 [97 S.Ct. 2044, 52 L.Ed.2d 752, 762-763]; *People v. Catlin* (2001) 26 Cal.4th 81, 107.) Under the California Constitution, the defendant must first establish prejudice occurred as a result of pre-charging prosecutorial delay. (*People v. Catlin, supra*, 26 Cal.4th at p. 107; *People v. Dunn-Gonzalez* (1996) 47 Cal.App.4th 899, 911.)

> A three-step analysis is employed to determine whether the defendant's rights have been violated. First, the defendant must show he has been prejudiced by the delay. Second, the burden then shifts to the prosecution to justify the delay. Third, the court balances the harm against the justification.

(*People v. Dunn-Gonzalez, supra*, 47 Cal.App.4th at p. 911; *People v. Catlin, supra*, 26 Cal.4th at p. 107.)

Likewise, a Fifth and Fourteenth Amendment due process violation based on pre-indictment delay requires that defendant demonstrate prejudice. (*United States v. Marion* (1971) 404 U.S. 307, 324 [92 S.Ct. 455, 30 L.Ed.2d 468, 478].) For a due process violation under the federal Constitution, it must be shown that the delay caused substantial prejudice to a defendant's right to a fair trial and the delay was purposefully undertaken to gain a tactical advantage over the defendant. (*United States v. Marion, supra*, 404 U.S. at p. 324; *People v. Catlin, supra*, 26 Cal.4th at p. 107.) Under the California Constitution, the delay can be caused by negligence; the prejudice suffered under those circumstances may be sufficient, when balanced against the reasons for the delay, to violate due process. (*Scherling v. Superior Court* (1978) 22 Cal.3d 493, 507.)

"The ultimate inquiry in determining a claim based on due process is whether the defendant will be denied a fair trial." (*Ibid.*; see also *People v. Dunn-Gonzalez, supra*, 47 Cal.App.4th at p. 914 [". . . task of the reviewing court is to determine whether pre-charging delay violates the fundamental conceptions of justice."]; *United States v. Lovasco, supra*, 431 U.S. at p. 790 [task of reviewing court is to determine only whether the delayed government indictment violated "'fundamental conceptions of justice'"].) "The statute of limitations is usually considered the primary guarantee against bringing overly stale criminal charges." (*People v. Archerd* (1970) 3 Cal.3d 615, 639.)

A pre-charging delay is analyzed under the due process clause; the Sixth Amendment right to a speedy trial does not attach until a defendant has been arrested or charged. (*Scherling v. Superior Court, supra*, 22 Cal.3d at p. 504; *United States v. Marion, supra*, 404 U.S. at p. 323.)

Whether a pre-arrest delay is unreasonable and whether the defendant is prejudiced by the delay are questions of fact. (*People v. Dunn-Gonzalez, supra*, 47 Cal.4th at pp. 911-912; *People v. Wright* (1969) 2 Cal.App.3d 732, 736.) Prejudice is a factual question determined by the trial court; factual conflicts are won or lost at the trial level. (*People v. Hill* (1984) 37 Cal.3d 491, 499.) A trial court's ruling will be upheld on appeal if supported by substantial evidence. (*People v. Dunn-Gonzalez, supra*, 47 Cal.App.4th at p. 912; see also *Scherling v. Superior Court, supra*, 22 Cal.3d at p. 506 [". . . cannot say as a matter of law that the trial court erred in concluding defendant was not prejudiced by the delay."].)

Abel has the burden to show actual prejudice by reason of the delay. (*People v. Belton* (1992) 6 Cal.App.4th 1425, 1433; *People v. Allen* (1979) 96 Cal.App.3d 268, 278-279.) The actual prejudice must be shown by particular facts, not by bare conclusions. (*Serna v. Superior Court* (1985) 40 Cal.3d 239, 250; see also *Shleffar v. Superior Court* (1986) 178 Cal.App.3d 937, 947 [in a speedy trial motion, defendant failed to establish prejudice by competent evidence as opposed to speculation, surmise, and conjecture].) The length of the period of time between the commission of the offense and the filing of charges is not a critical issue in determining prejudice. (*People v. Hartman* (1985) 170 Cal.App.3d 572, 579.) Prejudice may be shown by the loss of a material witness, missing evidence, fading memories, or loss of a crucial defense. (*People v. Archerd, supra*, 3 Cal.3d at pp. 640-641.) Where a defendant has failed to demonstrate actual prejudice, the court need not inquire

into whether the delay was justified. (*Scherling v. Superior Court, supra*, 22 Cal.3d at p. 506; *People v. Lawson* (1979) 94 Cal.App.3d 194, 198.)

The murder occurred on January 4, 1991. (4 RT 548, 554-558.) A complaint charging murder was filed against Abel on June 23, 1995. (1 MCT [Municipal Court Record] 7, 18-21.) On October 22, 1996, Abel filed a motion to dismiss for a due process violation based on pre-charging delay. (1 CT 286-300.) On January 24, 1997, the trial court conducted a hearing on Abel's motion and denied the motion. (2 CT 497; 2 RT 56-58, 69,71.) On June 24, 1997, the day before the jury rendered its death verdict, the trial court denied Abel's renewed motion to dismiss based on pre-charging delay. (3 CT 800; 12 RT 1967-1976.) The trial court did not make any findings. (*Ibid.*)

Abel again raised the issue of a due process violation as part of his motion for a new trial filed on September 8, 1997. (3 CT 1054, 1072-1076.) On September 26, 1997, Abel filed a declaration from defense investigator Kristin Smith which addressed the pre-charging delay claim in support of his motion to dismiss. (3 CT 1117-1121; 12 RT 2148-2149.) The trial court denied Abel's motion for a new trial. (3 CT 1146; 12 RT 2146-2170.)

Here, neither at trial, nor by declaration, did Abel demonstrate actual prejudice. In Abel's moving papers to dismiss this case, he argued that for 21 months after the anonymous call, practically nothing was done in the case; it was two years after the call that the complaint was filed. (1 CT 290.) In Abel's Opening Brief, he stated his moving papers at trial argued an inexcusable delay of 15 months after receiving the anonymous tip[57], and a 21-month delay from the tip to filing charges. (AOB 80.) From the record, it appears that nothing was done on the case from approximately December 1993

---

57. On August 1, 1993, Detective Solis of the Tustin Police Department received an anonymous phone call from a female who said Abel committed the murder. (1 CT 72; 2 CT 442-447.)

(several months after the anonymous call), to when Detective Tarpley began working on the case on January 4, 1995, a total of 13 months during which the case laid idle.

On the day of the murder, January 4, 1991, Tustin Police Department officers interviewed witnesses at the Sunwest Bank crime scene and had a field "show-up" line-up. (4/21/03 Supp. CT 34-43; 5 RT 784, 805.) Tustin police prepared photographic line-ups and showed the line-ups to witnesses, including Redondo and Heuvelman. (4 RT 574-578, 580-581, 611-613, 615; 5 RT 706-709, 771, 760-762; 8 RT 1193-1200, 1204-1205, 1213-1214, 1219-1225, 1247-1249.)

In 1991, Tustin police investigated Larry "Turtle" Jones and Melvin Herrera as possible suspects; neither were arrested. (8 RT 1219, 1242, 1247-1248.) A live line-up was conducted in San Diego on March 13, 1991, and Redondo did not select Jones as the shooter. (8 RT 1247-1249.) The Tustin Police Department worked the case through July 1991, showing another photo line-up to Redondo on July 18, 1991, where she eliminated as suspects all of the persons depicted in the line-up. (4 RT 580.) Law enforcement generated approximately 1,100 pages during the investigation in 1991. (1 CT 7-8; 9 RT 1346.)

As of August 1993, the homicide investigation had been suspended by the Tustin Police Department because they had exhausted all leads. (5 RT 798.)

On August 3, 1993, Tustin Police Department Detective Solis received an anonymous telephone call from a female who said Abel committed the murder. Detective Solis questioned the caller at length and had the audiotape of the conversation transcribed. (1 CT 72; 2 CT 422-447.)

The anonymous caller told Detective Solis that she obtained information about the murder from "John," an owner or employee at an Italian restaurant on

Tustin Avenue, who was a long-time friend of Abel.[58] (2 CT 423, 425, 430-435, 438-440.) Detective Solis attempted to corroborate what the caller told him. (5 RT 791.) Over several months, Detective Solis attempted to locate the Italian restaurant and contacted other police departments in an effort to locate "John." (2 CT 407; 12 RT 1972.) During the anonymous call, the caller said she would call back, but never did. (2 CT 441-442, 446-447, 455-459; 12 RT 1971.) Detective Solis conducted a records check of Abel and secured a June 15, 1992, photo of Abel for the file. (1 CT 77; 5 RT 791.) Detective Solis learned that Abel was incarcerated in state prison for a lengthy commitment. (2 CT 407.)

Detective Solis was the sole investigator assigned to the Tustin Police Department homicide unit between 1991 and 1994. It was extremely difficult to handle all of the cases. (5 RT 789-790, 793.) The current, most immediate homicide cases were the priority because those cases had the best chance of resolution. (5 RT 790, 793.)

Detective Tarpley was assigned to the homicide unit in 1995 and inherited six or seven "suspended" or unsolved homicides. (5 RT 795-797; 9 RT 1339.) Prior to Detective Solis being transferred from the homicide unit, he reviewed all of his cases with Detective Tarpley. (5 RT 795.) Detective Tarpley had two "fresh" homicides that he was able to resolve. (9 RT 1361-1362.)

Detective Tarpley started working on the Armando Miller homicide on January 4, 1995. (9 RT 1339.) He read about 98 % of the file. (9 RT 1340.) Detective Tarpley checked on Abel's then-current confinement status at Folsom

---

58. It appears that "John" and the restaurant were made up by the caller to protect her husband, James Gano. (2 CT 455-459.) In a December 20, 1995, interview, Joanne Gano told the Tustin Police Department that she was the anonymous caller and had heard about the murder from her husband. (1 CT 88-189; 2 CT 455-459.)

Prison and sent Abel's photo to Abel's parole officer. (9 RT 1346-1349, 1362.) Detective Tarpley placed Abel's photo in a "six-pack" photographic line-up and showed the line-up and the composite sketch of Armando Miller's murderer to Redondo on March 6, 1995. (1 CT 55-57.) Prior to meeting with Redondo, Detective Tarpley contacted Detective Mike Proctor of the Westminster Police Department concerning Lorraine Ripple. (9 RT 1355-1356, 1362.) Detective Tarpley showed the photographic line-up to other witnesses, including Heuvelman, on April 19, 1995. (5 RT 775; 9 RT 1353, 1367-1369.) Detective Tarpley interviewed Lorraine Ripple in state prison on May 17, 1995. (9 RT 1370-1375.)

The murder complaint was signed by Detective Tarpley on June 19, 1995, and filed on June 23, 1995. (1 MCT 7, 18-21.)

Abel contends that his alibi defense was irrevocably prejudiced by the delay because of his faded memory, the faded memory of Money Funders Mortgage owner, James Gano (Gano), the faded memory of defense witness Elaine Tribble, and the destruction or loss of telephone records which would have corroborated his alibi. (AOB 80-85.)

Abel's trial testimony in support of his alibi defense recounted, in detail, his activities of January 4, 1991. (9 RT 1451-1459, 1462-1463.) He testified that on that day, as an employee of Gano's mortgage company, he first went to Elaine Tribble's rose-colored residence on Conquista Street (Long Beach) to return loan documents. (9 RT 1452-1456.) Then he tried to track down a loan applicant by going to his residence in Willmington, and to the person's place of business in San Pedro. (9 RT 1456-1458.) Abel then made a collect call from a pay phone to the mortgage company, where he told Gano's partner about the status of the San Pedro loan applicant. (9 RT 1458.) Just as it started getting dark, Abel went to Deborah Lankford's residence in Huntington Beach. (7 RT 1028, 1058, 1083; 9 RT 1462.) Abel then went to Gano's residence in

Anaheim Hills to explain what happened with the San Pedro loan applicant. (9 RT 1462-1466.)

Accordingly, it is clear from Abel's trial testimony, that his memory about the events of January 4, 1991, did not "fade" over time. Accordingly, Abel was not prejudiced by any delay.

Neither party called Gano as a witness at trial, although his whereabouts were known; he was incarcerated in a federal prison in White Deer, Pennsylvania. (3 CT 1091.) Gano testified extensively at the December 14, 1995, preliminary hearing. (1 CT 88-189.) At the preliminary hearing, Gano had an excellent memory of Abel coming to his residence on the evening of January 4, 1991, and telling him he had shot the kid (Armando Miller). (1 CT 95-96, 108-109, 120-122, 126-130, 132.) Gano had taken Abel to Alameda Market a half-dozen times and had introduced him to the Miller family. (1 CT 90-91.) Abel told Gano that he had checked it out ahead of time and had trailed the victim for a day. (1 CT 98.) Abel asked Gano to hold the .22 caliber black handgun that he had used to shoot the victim, and Gano put the gun in his Coke machine. (1 CT 96-98.) Gano then hid the gun in some bushes away from his property. (1 CT 99-100, 136.)

On January 5, 1991, Abel returned to Gano's residence to retrieve the gun and Gano gave the gun back to him. (*Ibid.*) Abel then took Gano to Sunwest Bank, the scene of the murder. (1 CT 100-101.) Gano had an excellent recollection of what he did with Abel on January 5, 1991. (1 CT 134-145, 147-148.)

Approximately one and a half years after the shooting, Gano told his wife about Abel's involvement in the murder. (1 CT 153-155.) Joanne Gano, James Gano's wife, made an anonymous telephone call to the police. (1 CT 162.) The substance of Mrs. Gano's December 20, 1995, interview supported her husband's preliminary hearing testimony. On the day of the murder, Gano

was upset that "Mando" (Armando) had been killed. (2 CT 456.) Abel came to their house the day after the murder. (2 CT 456.) A few years after the murder, her husband told her that Abel "went to rob 'Mando' at the bank and that 'Mando' put up a fight and John [Abel] shot him in the head." (2 CT 456-457.)

Gano did not have a "faded" memory of the relevant events. If he had, it would only benefit Abel because Gano's testimony was extremely incriminating as to Abel's guilt. Accordingly, Abel was not conceivably prejudiced by Gano's possible faded memory. (See *People v. Catlin, supra*, 26 Cal.4th at p. 109 [no evidence that the two dead witnesses would have testified favorably for the defense].)

Elaine Tribble's testimony at trial supported Abel's alibi defense. Although Tribble was unable to testify whether Abel came to her residence on Conquista Street in Long Beach on January 4, 1991, she did testify that she had five or more personal contacts with Abel between Christmas 1990 and March 1991, concerning her loan application. (8 RT 1142-1146, 1150.) Tribble testified that she requested the return of her loan documents from Abel when she obtained a loan from a different source. (8 RT 1145-1146.) Tribble did not recall whether the loan documents were returned, but she would have probably destroyed them in any event; there was no reason for her to keep them. (8 RT 1146, 1155-1156.)

Abel did not demonstrate that there were any entries on the loan documents to show that they had been returned to Tribble on January 4, 1991. Further, Abel has not demonstrated that Tribble's memory would have been any better had Detective Solis chosen the same investigative technique as Detective Tarpley (using photographic line-ups) after he received the anonymous telephone call on August 3, 1993. Tribble would still not have been able to recall the exact date(s) Abel came to her residence, and any

returned loan documents would have likely been destroyed. (See *People v. Morris* (1988) 46 Cal.3d 1, 38, disapproved on other grounds, *In re Sassounian* (1995) 9 Cal.4th 535, 543-544, fn. 5 [a defendant's girlfriend testified that her memory was no better in February 1979, when she first spoke to police, than it was four years later].) Accordingly, Abel has not met his burden to establish actual prejudice.

Abel's contention that he was prejudiced by the purported destruction or misplacement of telephone records due to pre-indictment delay is equally unavailing.

Abel testified that he was advised that all of the telephone records for Money Funders Mortgage were contained in eight boxes of business records except for the telephone records between January 3 [1991] and February 4 [1991]. (9 RT 1459.) The parties stipulated at sentencing and motion for a new trial hearing on September 26, 1997, that Tustin Police Department had asked Joanne Gano about the location of the Money Funders Mortgage records in 1996. Mrs. Gano discovered the company's records in a storage locker approximately one month before she turned the boxes over to the Tustin Police Department on May 28, 1997. (12 RT 2146-2148.)

The January 23, 1997, declaration of defense investigator Douglas Portratz averred that on August 12, 1996, he served a subpoena duces tecum for Money Funders Mortgage records on a representative of the Orange County District Attorney's Office, who was accepting service on behalf of Joanne Gano; on September 12, 1996, he faxed a subpoena duces tecum for telephone records to Pacific Bell, located in Oakland, California; and in September and October 1996, he personally served subpoenas duces tecum for telephone records purportedly held by other companies. (2 CT 490-491.)

A September 26, 1997, declaration of defense investigator Kristin Smith averred that on May 29, 1997, she looked through the eight boxes of Money

Funders Mortgage records and did not locate any records for a loan transaction involving Conquista Street or any telephone records encompassing January 4, 1991. (3 CT 1117-1119.) Subsequently, Smith was advised that Elaine Tribble was the person who lived on Conquista Street and on June 26, 1997, she was able to locate Tribble's file in the records. (3 CT 1119-1120.) Smith further alleged that on August 22, 1997, she faxed an application for a subpoena duces tecum for Money Funders Mortgage telephone records to Pacific Bell, and was advised by the custodian of records that they only held records for transactions from August 1991 to the present. (3 CT 1120-1121.)

If a telephone record showing a collect call from San Pedro to Money Funders Mortgage on January 4, 1991, existed, Abel has not demonstrated that the delay from the time of the anonymous call (August 1993) to early January 1995, when Detective Tarpley took over the case, caused the inability of the defense to secure the January 4, 1991, telephone records. From Smith's declaration, one can reasonably conclude that Pacific Bell had a protocol of retaining records for six years.[59/] Had Pacific Bell been subpoenaed in a prompt fashion after the filing of the June 1995 charges, or if the defense had followed-up on its September 12, 1996, subpoena to Pacific Bell, it appears that the telephone records for the January 1991 time period would have still been available, based on their apparent protocol. There was absolutely no showing that the destruction or misplacement of the January 1991 Money Funders Mortgage telephone records was connected to the delay.

Further, even from Abel's own testimony, it appears that the alleged collect call from a phone booth in San Pedro was fabricated. Abel testified that he went to Gano's residence in Anaheim Hills on the evening of January 4, 1991, to tell him about his attempt to locate a loan applicant in San Pedro. (9

---

59. As of late August/early September 1997, Pacific Bell had records from August 1991 to the present.

RT 1465.) This raises the question of why Abel would need to report this insignificant event to Gano if he had already informed Gano's partner of the situation? Additionally, Abel testified that he visited Deborah Lankford in Huntington Beach earlier that same evening. Accordingly, why didn't Abel call Gano from Lankford's house instead of driving all the way to Anaheim Hills for a ten-minute visit? (9 RT 1462-1465.)

Lastly, because San Pedro, Willington, and Long Beach are all located within 45 minutes of the crime scene, Abel could have easily committed the murder at approximately 10:30 a.m. and still have time to make various stops for Money Funders Mortgage. Further, Abel' own time line shows that the purported phone call to Money Funders Mortgage would not have occurred until late afternoon. His testimony appeared to indicate that after the phone call, he went to Lankford's Huntington beach house, arriving at dark. Thus documentation of the purported phone call would not have established an alibi for the murder of Armando Miller.

Accordingly, Abel has failed to demonstrate actual prejudice. Abel was able to set forth his alibi defense by his own detailed testimony, Elaine Tribble's testimony, and Deborah Lankford's testimony.[60/] There was no showing by Abel that he lost a crucial defense or testimony from a material witness by reason of a delay. (See *People v. Archerd, supra*, 3 Cal.3d at p. 641.)

Although the justification for any delay need not be analyzed because Abel has failed to demonstrate prejudice, any delay was nevertheless reasonable.

The Tustin Police Department expended a great deal of resources in an attempt to locate Armando Miller's murderer. The 1991 file consisted of

---

60. Deborah Lankford testified that Abel came to her residence on January 4, 1991. (7 RT 1028, 1058, 1083.)

approximately 1,100 pages. The case was then suspended because there were no further leads.

After the August 3, 1993, anonymous call, Detective Solis spent a significant amount of time after trying to corroborate the information he received. Detective Solis was never able to locate "Italian restaurant John," who had purportedly heard Abel talk about the murder, because "John" was fabricated by the anonymous caller (later discovered to be Mrs. Gano). From 1991 through 1994, the Tustin Police Department had scarce resources to allocate to the homicide unit; only Detective Solis was assigned. The Tustin Police Department reasonably prioritized their resources to investigate current or more immediate homicide cases because they had a higher likelihood of being resolved, as opposed to the murder of Armando Miller, which was two-and-a- half years old at the time they received the anonymous call implicating Abel.

When Detective Tarpley took over the case in early January 1995, he chose a different investigative tact than Detective Solis. Instead of trying to verify the anonymous call by locating "Italian restaurant John," he prepared a photographic line-up, which included Abel's photo and showed it to key witnesses. In the 1995 stage of the investigation, Detective Tarpley located another important witness, Lorraine Ripple, and caused a murder complaint to be filed on June 23, 1995.

The above circumstances do not show an attempt by law enforcement to weaken Abel's case because of the passage of time. (See *Scherling v. Superior Court, supra*, 22 Cal.3d at pp. 806-807 [no evidence that the delay was for the purpose of weakening the defense]; *People v. Archerd, supra*, 3 Cal.3d at p. 643 [no grounds for reversal – delay was not unreasonable, arbitrary, or vexatious, and was not caused to intentionally harass defendant].) The circumstances show that the Tustin Police Department acted in a reasonable, not

negligent manner, in light of their limited resources. (*Shleffar v. Superior Court, supra*, 178 Cal.App.3d at p. 948 [in view of law enforcement's limited resources, the police efforts to locate defendant were reasonable]; *People v. Dunn-Gonzalez, supra*, 47 Cal.App.4th at pp. 912-916 [upheld the trial court's finding that the 12-month pre-charging delay was justified – district attorney's office was not negligent due to having one deputy assigned to fraud cases and the difficulty in allocating scarce resources].)

It was not negligence that Detective Solis chose one investigative path, because, unbeknownst to him, the anonymous caller lied about "Italian restaurant John." Detective Tarpley chose another path that led to Armando Miller's murderer being brought to justice. It was excellent police work.

Accordingly, any delay was reasonable and justified under the circumstances. Moreover, the justification for any delay far outweighed any possible, nominal showing of prejudice.

In balancing the justification against any prejudice caused by the delay, a public interest factor must be considered. (*People v. Wright, supra*, 2 Cal.App.3d at p. 736 [case is resolved by balancing the public interest and the rights of the defendant].) The seriousness of the crime, murder, must be taken into consideration – society has placed importance on bringing a murderer to justice as evidenced by legislation that does not subject murder to a statute of limitations. (*Penney v. Superior Court* (1972) 28 Cal.App.3d 951, 954. Additionally, the probability that Abel fabricated the collect telephone call made from San Pedro to Money Funders Mortgage on January 4, 1991, can be taken into consideration. (*Ibid.*)

For the following reasons, the justification for any delay far outweighed any possible showing of prejudice: Abel has demonstrated, at best, nominal prejudice; compared to Tustin Police Department acting reasonably in conducting the investigation; the seriousness of the crime; and the probability

that Abel did not make the collect telephone call from San Pedro. (*People v. Catlin, supra*, 26 Cal.4th at pp. 106, 108-110 [nine-year delay between the commission of the crime and the charges]; *People v. Morris, supra*, 46 Cal.3d at pp. 37-38 [no due process violation notwithstanding three-year delay caused by loss of the file; defendant's claim of key witness loss of memory speculative].)[61/]

The ultimate test is whether, under the circumstances, Abel has been denied a fair trial within the meaning of the due process clause. (*Scherling v. Superior Court, supra*, 21 Cal.3d at p. 507.) Clearly, Abel received a fair trial, irrespective of any investigative, pre-charging delay.

For all the foregoing reasons, Abel's claim should be denied.

VII.

ABEL WAS PROPERLY CHARGED IN THE AMENDED INFORMATION WITH FIRST DEGREE MURDER PURSUANT TO PENAL CODE SECTION 187, SUBDIVISION (A)

Abel contends that his constitutional rights were violated because the trial court lacked jurisdiction to try Abel for first degree murder as a result of the Amended Information which only charged Abel with second degree "malice" murder under Penal Code, section 187, subdivision (a). (AOB 90-97.)

---

61. Abel implies that because the trial court did not expressly balance any prejudice with justification for the delay, the court did not properly perform its duties. (AOB 88.) Where the record is silent, as it is here, it is presumed that the court was aware of and followed the applicable law. (*In re Jacob J.* (2005) 130 Cal.App.4th 429, 437; *People v. Mack* (1986) 178 Cal.App.3d 1026, 1032; Evid. Code, § 664; see also *Steinback v. Crone* (1868) 36 Cal. 303, 306; *Minton v. Cavaney* (1961) 56 Cal.2d 576, 579, fn. 1.)

Here, the trial court was aware of the applicable law that it must balance the justification for the delay against any prejudice. The standard was set forth in Abel's moving papers which the trial court reviewed. (1 CT 294; 2 RT 58.)

Abel further contends that the United States Constitution requires more specific pleading than the accusation in the case-at-hand. (AOB 95-97.) As Abel acknowledges, this Court has repeatedly rejected his argument concerning purported lack of subject matter jurisdiction. (AOB 92-95.) This Court has also rejected his argument that the language of the pleading in this case violated the United States Constitution. Abel's arguments lack merit based upon established law.

Additionally, to the extent Abel is claiming a denial of due process because of a purported lack of notice that the prosecutor would pursue the theory that the murder occurred during the commission of a robbery, Abel has forfeited the issue for purposes of appeal by failing to object to the felony-murder instructions, and by failing to move to reopen his case when he learned of the applicable felony-murder instructions. The jury was instructed on the felony-murder theory of first degree murder under Penal Code section 187, subdivision (a), and Penal Code section 189, via CALJIC Nos. 8.10 and 8.21, respectively. (2 CT 683-685; 10 RT 1730-1731.) Abel neither objected to the instructions nor moved to reopen his case upon learning of the trial court's instructions. Accordingly, he has forfeited any due process claim based on lack of notice. (*People v. Kipp* (2001) 26 Cal.4th 1100, 1131-1132; *People v. Memro* (1995) 11 Cal.4th 786, 869; *People v. Diaz* (1992) 3 Cal.4th 495, 556.)

This Court has long acknowledged that the definition of murder in Penal Code section 187, subdivision (a), includes first degree murder, felony murder, and second degree murder. (*People v. Witt* (1915) 170 Cal. 104, 107-108; see also *People v. Hughes* (2002) 27 Cal.4th 287, 368-369.) A general allegation of murder under Penal Code section 187, subdivision (a) in an accusation, as occurred in the Amended Information in this case, is sufficient to put a defendant on notice of a possible conviction of first degree murder under a felony-murder theory. (*People v. Witt, supra*, 170 Cal. at pp. 107-108; *People*

v. Kipp, supra, 26 Cal.4th at p. 1131; 2 CT 495 [First Amended Information].) In *Hughes,* this Court rejected the argument that Penal Code section 189 had to be invoked in the information to charge felony murder when the information charged malice murder under Penal Code section 187. (*People v. Hughes*, *supra*, 27 Cal.4th at pp. 368-370.) This Court also rejected defendant's four-part attack which included: (1) the trial court lacked jurisdiction to try him for the crime of felony murder; and (2) the information failed to put him on notice that the prosecution planned to proceed under a theory of first degree felony murder. (*Id.* at pp. 369-370.)

Abel makes essentially the same arguments made and rejected in *Hughes,* but also complains that Penal Code section 187 does not include first degree murder. (AOB 92.) Abel bases his argument on this Court's decision in *People v. Dillon* (1983) 34 Cal.3d 441, arguing *Dillon* undermined *People v. Witt*, *supra*, 170 Cal. at p. 104. (AOB 93.) This Court, in *Hughes*, rejected arguments that *Dillon* overruled *Witt*. (*People v. Hughes*, *supra*, 27 Cal.4th at p. 371.) Nonetheless, Abel complains this Court "has never explained how the reasoning of *Witt* can be squared with the holding of *Dillon*." (AOB 93.) Not so. This Court explained an accused receives adequate notice of the prosecution's theory of the case from the evidence at the preliminary hearing or at post-indictment proceedings. (*People v. Hughes*, *supra*, 27 Cal.4th at pp. 369-370.) In *Kipp*, this Court explained that the language in *Dillon,* to the extent that felony murder and murder with malice "are not the same crimes,"[62] means that murder with malice and felony murder had different elements but were still "a single statutory offense of murder." (*People v. Kipp, supra*, 26 Cal.4th at p. 1131, accord, *People v. Nakahara* (2003) 30 Cal.4th 705, 712 ["Although the two forms of murder have different elements, only a single offense of murder exists."]; *People v. Carpenter* (1997) 15 Cal.4th 312, 394.)

---

62. *People v. Dillon, supra*, 34 Cal.3d at p. 476, fn. 23.

Abel also claims that if there is a single statutory offense of first degree murder, it comes under Penal Code section 189, not Penal Code section 187. (AOB 94.) Clearly, this Court has rejected this argument in repeatedly holding that Penal Code section 187 is the applicable statute for first degree murder. (See *People v. Witt, supra*, 170 Cal. at pp. 107-108; *People v. Hughes, supra*, 27 Cal.4th at pp. 369-370; *People v. Kipp, supra*, 26 Cal.4th at p. 1131; *People v. Nakahara, supra*, 30 Cal.4th at p. 712.)

Here, Abel received adequate notice of the prosecution's theory of the case, commencing with the preliminary hearing on December 14 and December 15, 1995. At the preliminary hearing, the prosecution established probable cause that the murder occurred during the commission of a robbery. (1 CT 14-191.) The Information, filed on December 26, 1995, in addition to setting out the murder charge under Penal Code section 187, subdivision (a), alleged the special circumstance that Abel committed the murder while engaged in a robbery in violation of Penal Code section 190.2, subdivision (a)(17)(i).[63] (1 CT 216.) All parties knew as of that time that the prosecution was seeking the death penalty based on a first degree felony-murder theory. Additionally, a May 15, 1996, order directed payment to Abel's attorney for fees on a capital case, which would not occur absent a special circumstance allegation of a murder committed during the course of a robbery. (1 CT 234-235.) Further, the prosecutor concluded his opening statement by saying "I am confident you will have no trouble in returning a guilty verdict against John Abel for the killing of Armando Miller during the course of the robbery." (4 RT 432.)

Accordingly, it is clear from the record that Abel was placed on notice almost from the beginning of the case that the prosecution was proceeding

---

63. The First Amended Information, filed January 24, 1997, had the same special circumstance allegation. (2 CT 495.)

under a felony-murder theory and seeking the death penalty. (See *People v. Kipp, supra*, 26 Cal.4th at p. 1131; *People v. Hughes, supra*, 27 Cal.4th at pp. 369-370.)

Abel also argues that the United States Supreme Court's decision in *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435], required the prosecutor to charge facts necessary to bring the case within the felony-murder rule. (AOB 96.) Indeed, *Apprendi* does require that "any fact (other than a prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury and proved beyond a reasonable doubt." (*Apprendi v. New Jersey, supra*, 530 U.S. at p. 476.) This Court has rejected defense arguments based on *Apprendi* that require a unanimous jury verdict as to a particular theory to justify a finding of first degree murder. (*People v. Nakahara, supra*, 30 Cal.4th at p. 712-713.) However, as noted above, Abel was on notice of the first degree murder charges in the Amended Information, as well as the special circumstance that the murder occurred during the course of a robbery. The facts were submitted to the jury and the jury was fully instructed regarding first degree felony murder. As argued above, Abel's claim that the jury convicted him "of uncharged crimes" has no basis in law or the facts. (AOB 96.) Abel's claim that he was deprived of his Sixth and Fourteenth Amendment rights should be rejected.

For the foregoing reasons, Abel's claims should fail.

VIII.

THE TRIAL COURT PROPERLY DENIED ABEL'S AUTOMATIC MOTION FOR MODIFICATION OF THE PENALTY VERDICT

Abel contends that the trial court erred because it employed the wrong standard for addressing circumstances in mitigation, and heard victim impact statements not presented to the jury prior to ruling on the motion for

modification. (AOB 98-106.) Abel's claims are forfeited for purposes of appeal by his failure to object at the trial level. Additionally, the trial court used the proper standard for the motion to modify by independently reweighing the evidence of aggravating factors and mitigating factors to determine whether the evidence presented to the jury supported the death verdict. Further, the trial court did not err because the record does not show that it considered the statements of the victim's family members at sentencing for purposes of its ruling. Moreover, even assuming error, Abel was not prejudiced.[64/]

Abel's claims pertaining to the trial court listening to victim statements of America Miller and Holly Davis before ruling on the automatic motion for modification of the death penalty verdict are forfeited by his failure to object to the statements at the time of the motion. (*People v. Rogers* (2006) 39 Cal.4th 826, 906-907 [failure to object to victim's father's statement and consideration of the probation report by the trial court forfeited the issues for purposes of appellate review]; *People v. Ramos* (1997) 15 Cal.4th 1133, 1183 [issue forfeited by failure to object to the trial court's consideration of the victim's brother's statement]; *People v. Samayoa* (1997) 15 Cal.4th 795, 858-859 [issue forfeited by failing to object to statement made on behalf of victim's family members].)

Additionally, Abel's claim that the trial court used the wrong standard under Penal Code section 190.4, subdivision (e), is also forfeited by his failure

---

64. Abel also asserts that the trial court's purported errors violated various federal constitutional rights. (AOB 105.) Abel's constitutional claims are asserted perfunctorily and without argument in support, and need not be considered by this Court. (*People v. Mayfield* (1993) 5 Cal.4th 142, 196.) In any event, Abel forfeited any federal constitutional claims by failing to object on such basis at the trial level. (*People v. Simon, supra*, 25 Cal.4th at p. 1103; *People v. Sanders, supra*, 11 Cal.4th at p. 510, fn. 3.) Further any constitutional claims would fail for the same reasons set forth in this argument discussing Abel's discrete contentions.

to object. (*People v. Kennedy, supra,* 36 Cal.4th 595 at p. 638 [improper use of lack of remorse as an aggravating factor].)

A. The Trial Court Used The Proper Standard For Independently Determining Whether The Evidence Supported The Jury's Death Verdict

Penal Code section 190.4, subdivision (e) provides for an automatic motion for a modification of the death verdict. (*People v. Steele* (2002) 27 Cal.4th 1230, 1267.)

> In ruling on the motion, the trial court must independently reweigh the evidence of aggravating and mitigating factors presented at trial and determine whether, in its independent judgment, the evidence supports the death verdict.

(*Ibid.*; Pen. Code, § 190.4, subd. (e) ["The judge shall . . . take into account, and be guided by the aggravating and mitigating circumstances referred to in section 190.3 . . ."].)[65/]

The trial court shall specify the reasons for its findings on the record. (*People v. Kaurish* (1990) 52 Cal.3d 648, 716; Pen. Code, § 190.4, subd. (e).)

Here, at the commencement of the hearing on the modification motion, the trial court set forth the correct standard for its independent review of the jury's death verdict. (12 RT 2170-2171.) The trial court found that Abel executed the victim in cold blood; the murder was an enormously aggravating factor. (12 RT 2179.) Further, there were additional aggravating circumstances beyond a reasonable doubt consisting of approximately 20 separate robbery victims who described violent crimes, and documents proving numerous prior convictions. (12 RT 2179.) The trial court found that there were no circumstances in mitigation as set forth in Penal Code section 190.3,

---

65. Penal Code section 190.3, subdivision (a) through (k) set forth the various circumstances in aggravation and mitigation for the trier of fact to take into account in rendering a penalty verdict in a capital case.

subdivisions (d) through (i), and (k). (12 RT 2180-2181.) The trial court did not make a specific finding as to section 190.3, subdivision (j), a circumstance in mitigation as to whether Abel was an accomplice to the offense and his participation in the offense was relatively minor. (*Ibid.*) However, there was no evidence presented to the jury that Abel was merely an accomplice or that his participation was relatively minor. Abel presented an alibi defense which the trial court expressly rejected in ruling on the motion. (12 RT 2179.) During the motion hearing, the trial court indicated that it was satisfied beyond a reasonable doubt that Abel was guilty of first degree murder and that the special circumstance was true. (12 RT 2178.)

Just prior to denying Abel's motion to modify the death verdict, the trial court reiterated that the factors in aggravation "overwhelmingly outweigh those in mitigation." (12 RT 2181.)

It is clear from the record as a whole (3 CT 1147-1153; 12 RT 2170-2172, 2178-2182, 2187-2188) that the trial court understood its duty and applied the correct standard of independent review. (See *People v. Smith* (2003) 30 Cal.4th 581, 640.)

The fact that the trial court misspoke as to burden of proof on one occasion during the lengthy modification motion hearing, stating "there was no factors in mitigation proven beyond a reasonable doubt . . ."[66] (12 RT 2180), does not constitute error under the circumstances. (*People v. Mayfield, supra*, 5 Cal.4th at pp. 195-196 [although the trial court in some of its comments

---

66. There is no penalty phase burden of persuasion. (*People v. Smith, supra*, 30 Cal.4th at p. 640.) Except for proof of other crimes, the trial court should not instruct on the burden of proving aggravating or mitigating circumstances. The sentencing function in a capital case is moral and normative, not factual. (*People v. Carpenter, supra*, 15 Cal.4th at pp. 417-418.)

misstated the applicable legal standard under Penal Code section 190.4, subdivision (e), it was not error because the record shows it correctly applied the law]; *People v. Davenport* (1995) 11 Cal.4th 1171, 1233.)

Here, a minor slip of the tongue concerning the proof requirements for a circumstance in mitigation does not constitute error when the entirety of the record clearly shows that the trial court applied the correct standard. An independent determination by the trial court upon the reweighing of the aggravating and mitigating factors showed that the evidence supported the death verdict. (See *People v. Smith, supra*, 30 Cal.4th at p. 640 ["The court's discussion as a whole made clear it did apply the correct test."].)[67]

B. Listening To Victim's Family Members' Statements Prior To The Trial Court's Ruling On Abel's Motion For Modification Did Not Constitute Error

In its independent determination of evidence to support the death penalty, the trial court is limited to considering the evidence of aggravating and mitigating circumstances presented to the jury. (*People v. Edwards* (1991) 54 Cal.3d 787, 847.) Absent evidence in the record to the contrary, it must be assumed that the trial court was not improperly influenced by material not presented to the jury. (*People v. Berryman, supra,* 6 Cal.4th at p. 1106 [probation report]; *People v. Samayoa, supra*, 15 Cal.4th at p. 859 [statement made on behalf of family members].)

The jury returned the verdict of death on June 25, 1997. (3 CT 1038; 12 RT 2139-2140.) On September 26, 1997, the trial court heard Abel's motion

---

67. In addition to the trial court's repeated statements setting forth the appropriate standard under Penal Code section 190.4, subdivision (e), it instructed the jury during the penalty phase on CALJIC Nos. 8.85 and 8.88, which also set forth the appropriate legal standard for weighing mitigating and aggravating circumstances. (3 CT 862-865, 947-947a; 12 RT 2087-2091, 2134-2135.)

for a new trial and an automatic motion for modification of the death verdict. (12 RT 2146-2191.) After denying Abel's motion for a new trial, the trial court made certain findings as to the automatic motion for modification before hearing statements from the victim's mother, America Miller, and the mother of the victim's child, Holly Daniels.[68] (12 RT 2170-2177.) Abel did not object to the statements. (12 RT 2170-2191.) After the statements, the trial court made additional findings pertaining to the motion for modification before denying the motion. (12 RT 2178-2182.) The trial court then sentenced Abel to death. (12 RT 2182-2189.)

This Court recognizes that it is the better practice to rule on the motion prior to hearing any statements from a family member. (*People v. Rogers, supra*, 39 Cal.4th at p. 907 [probation report and victim's brother's statement].) However, in this case there is no indication that the trial court relied on the two family members' statements in ruling on the motion to modify the death verdict. (12 RT 2170-2182.) After the statements by family members, the record shows that the trial court only considered the evidence at trial and the penalty phase in making its ruling. (12 RT 2178-2182.) In its analysis, the trial court mentioned the victim impact evidence received during the penalty phase, but said nothing about the statements it had just heard. (12 RT 2179.) Under these circumstances, the trial court did not err by listening to the statements prior to its ruling. (*People v. Rial* (2000) 22 Cal.4th 1153, 1221-1222 [reading the probation report prior to the ruling was not error absent evidence in the record that the trial court was influenced by the report]; *People v. Rogers, supra*, 39 Cal.4th at p. 907 [failure to make the ruling before hearing a victim impact statement or reading the probation report is not error "where nothing in the

---

68. The sentencing of Abel was also part of the September 26, 1997, hearing. The victim's family members were entitled to make statements at sentencing pursuant to Penal Code section 1191.1. (*People v. Rogers, supra*, 39 Cal.4th at p. 906, fn. 37; *People v. Green* (2004) 125 Cal.App.4th 360, 379.)

record suggests the court relied on any impermissible material"]; *People v. Samayoa, supra*, 15 Cal.4th at p. 859 [assumed trial court properly put aside the victim impact statement and the probation report in making its ruling]; *People v. Osband* (1996) 13 Cal.4th 622, 726-727.)

C. Even Assuming Error, Abel Was Not Prejudiced

Even assuming the trial court erred by either misstating the burden of proof as to mitigating circumstances, and/or by listening to family members' statements before its ruling, Abel was not prejudiced. (*People v. Padilla* (1995) 11 Cal.4th 891, 968-969 [defendant not prejudiced by any error given the strength of evidence in aggravation and absence of mitigating circumstances].) Here, as set forth above, the trial court found several aggravating circumstances, the manner in which the murder occurred being of particular weight, while finding no circumstances in mitigation. (12 RT 1280-1281.) As noted by the trial court, Abel did not present any evidence during the penalty phase. (12 RT 2180.)

Any error was harmless as there was no reasonable possibility that any error affected the trial court's ruling on the motion for modification. (*People v. Rogers, supra*, 39 Cal.4th at p. 911; *People v. Kennedy, supra*, 36 Cal.4th at pp. 638-639; *People v. Jackson, supra*, 13 Cal.4th at p. 1217 [no reasonable possibility that the trial court's mischaracterazation that defendant was found "lying in wait" affected its ruling].)

The trial court made it abundantly clear that its independent determination that the evidence supported the jury's death verdict was not a close call. Under such circumstances, any error was harmless; it had no reasonable possibility of affecting the ruling. (*People v. Padilla, supra*, 11 Cal.4th at pp. 968-969; *People v. Wader* (1993) 5 Cal.4th 610, 667; *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1239.)

Abel requests that the matter be remanded to the superior court for a new hearing on the motion for modification. (AOB 106.) Even if there was error, there is no reason for remand as any purported errors did not affect the trial court's ruling. (*People v. Champion, supra*, 9 Cal.4th at pp. 951-952; *People v. Daniels* (1991) 52 Cal.3d 815, 893.)

For all of the foregoing reasons, Abel's claims should fail.

IX.

RESPONDENT DOES NOT OBJECT TO THIS COURT'S REVIEW OF RIPPLE'S SEALED PSYCHIATRIC RECORDS

Abel request that this Court independently review Ripple's psychiatric records to insure that the trial court did not abuse its discretion as to the materials it failed to disclose. (AOB 107-112.) Respondent does not object to this Court's review of Ripple's sealed psychiatric records to determine if the trial court abused its discretion.

On June 5, 1997, Abel's attorney, Mr. Freeman, filed a motion to appoint a psychologist to examine Ripple and attached his own declaration which asserted in relevant parts, upon information and belief, that Ripple displayed bizarre behavior in state prison, slashed her throat in late 1994, has been placed on suicide "watch" and inmates report that Ripple has fantasies concerning Abel. (2 CT 614-616; 7 RT 989-991.) There was no mention in Abel's motion for appointment of a psychologist that Abel was seeking Ripples psychiatric records. (*Ibid.*)

On June 9, 1997, near the close of evidence during the guilt phase of the trial, the prosecutor indicated to the court that the defense had requested the prosecutor's assistance in obtaining psychological records of Ripple from the California Department of Corrections. (8 RT 1256.) Pursuant to the request, the prosecutor actively assisted the defense, with the understanding that the

records would be given directly to the trial court for in camera review. (8 RT 1257.) At that time Abel asserted that he wanted to obtain Ripple's file to show her mental health problems, psychiatric things that may be going on, and to document her suicide attempts (counsel represented Ripple slit her throat in 1994). (8 RT 1258-1259).

On June 10, 1997, the prosecutor further assisted the defense by informing the defense and the court that the California Department of Corrections required a court order for their records and gave the defense a fax number for a fax transmittal. (9 RT 1265.) The trial court signed a court order on the same day for release of Ripple's psychiatric records. (2 CT 631.)

On June 12, 1997, the trial judge reviewed sixty pages of California Department of Corrections psychiatric records in camera, and expressed that he had weighed Abel's constitutional rights (need for the material) against Ripple's right of privacy. (2 CT 640-641; 10 RT 580.) The trial court determined that Abel would receive a fair trial without the material and there was nothing of any particular value contained therein for the defense. (10 RT 1580.) The trial court proceeded to read into the record the most recent finding by state prison senior psychologist Eric Kunkel:

> Lorraine Ripple .
>
> Since inmate Ripple, W27065, is not suffering from a serious mental disorder, and since more than six months has elapsed since her previous self-destructive behavior, it is recommended that the 'Sharp's restriction' described in my chrono dated 5/28/96 be lifted.
>
> Although Ripple is perhaps a no greater than average risk of dangerousness to herself at this time, this does not mean that her dangerousness to others has declined.

(10 RT 1581.)

The trial court then denied defendant's motion to further examine the psychiatric records of Ripple and sealed the records, as court exhibit number 2. (2 CT 640-641; 10 RT 1581.)

This Court may review confidential psychiatric records examined by the trial court in camera to determine the appropriateness of the lower court's ruling to not release records to the defense. (*People v. Gurule* (2002) 28 Cal.4th 557, 595; *People v. Price, supra,* 1 Cal.4th at pp. 492-493 [sealed prison records concerning the Aryan Brotherhood]; *People v. Turner* (1994) 8 Cal.4th 137, 210-211, fn. 17 [police personnel records].) Appellate review of sealed records is limited to whether the lower court's ruling was correct. (*Herrera v. Superior Court* (1985) 172 Cal.App.3d 1159, 1163.)[69/]

Abel does not dispute the procedures followed by the trial court in reviewing Ripple's psychiatric records. (AOB 109-110.) The trial court did in

---

69. Abel lays a foundation for his request for this Court to review the records, inter alia, by referring to a letter Ripple reportedly wrote to Sherry Barnes (Barnes), citing to certain pages of the record. (AOB 107.) The cited pages did not mention any letter by Barnes, nor the purported subject matter of the letter. (2 CT 615-616; 7 RT 990-991, 1045-1052.) Abel also refers to "emotional outbursts" by Loraine Ripple. (AOB 107-108.) It should be noted that such "outbursts"were in the context of a concerned mother responding to the safety of her incarcerated sons under circumstances where Abel's good friend, and possible sexual intimate, Deborah Lankford, had communicated to inmates that Ripple was a "snitch" in this case. (6 RT 940-941, 957-958, 961; 7 RT 1014, 1060-1061, 1065-1067, 1097, 1099-1102; 9 RT 1464, 1467, 1489-1490.)

Abel also asserts that a psychologist Roxanne Davenport treated Ripple while Ripple was incarcerated (AOB 107, citing to 6 RT 913-914.). There is nothing in the record which indicates that psychologist Roxanne Davenport treated Ripple in prison. (6 RT 913-914.) The record does indicate that Davenport, a friend of Ripple who had known her for twenty years, had visited Ripple in prison. (6 RT 914.) Abel correctly noted that Ripple had been suffering from sensory depravation. (AOB 107, fn. 51.) This would be consistent with the fact Ripple had been housed in security (isolation), spent twenty-two and one half hours of each day locked in her cell, received 10 hours a week in the exercise yard, and got 3 showers a week. (6 RT 859-860.)

fact use the proper procedures and balancing test to review the records. The trial balanced Abel's need for the records under the Constitution (Sixth Amend.) verses Ripple's right to privacy in her psychiatric records. (10 RT 1580). (*Davis v. Alaska* (1974) 415 U.S. 308, 319 [94 S.Ct. 1105, 39 L.Ed.2d 347] [juvenile records]; *People v. Gurule, supra*, 28 Cal.4th at p. 592; *People v. Hammon* (1997) 15 Cal.4th 1117, 1127; *Nielsen v. Superior Court* (1997) 55 Cal.App.4th 1150, 1154-1155.)

Evidence Code section 1014 codified psychotherapist-patient privilege. There is a strong public policy to protect a patient's psychiatric treatment records. (*People v. Webb* (1993) 6 Cal.4th 494, 518.) Evidence code section 1014 reflects a patients constitutional rights to privacy and is broadly construed to protect the patient. (*Nielsen v. Superior Court, supra*, 55 Cal.App.4th at pp. 1153-1154.) This Court has even suggested that the defendant may not have a constitutional right to examine psychiatric records even if the records are material to the case. (*People v. Webb, supra,* 6 Cal.4th at p. 518.)

Here, it appears from the portion of Ripple's records that were disclosed by the trial court,[70] that Abel's need for the balance of the records did not outweigh Ripple's constitutional right to privacy; and thus the trial courts properly exercised its discretion in not releasing the balance of the records. (See *People v. Gurule, supra,* 28 Cal.4th at p. 595 [reviewed sealed records and nothing alters our conclusion that further disclosure was not necessary to insure defendant obtained a fair appeal].) (*People v. Menroe* (1995) 11 Cal.4th 786, 832 [trial court did not abuse its discretion in ruling on motion to discover police personnel records].)

---

70. The trial court released prison psychologist Kenkul's recent finding that Lorain Ripple was not suffering from a serious mental disorder. (10 RT 1581.)

Although Abel does not contest the trial court's review process, he disputes that the trial judge conducted a fair review because of his purported "uncensored bias" against Abel. (AOB 110.) Notwithstanding that this issue is irrelevant if this Court reviews the records, the trial court was not biased against Abel as set forth herein in Argument I. Further, the trial court's cooperation and assistance in Abel's "last minute" request to obtain Ripple's letters to Detective Tarpley for the cross-examination of Ripple and to obtain the psychiatric records in question, belie Abel's claim of bias as the trial court could have properly denied the request as untimely. (2 CT 631; 9 RT 1266-1268, 1491-1492.)

Even if this Court were to find that the trial court erred in not releasing portion(s) of Ripple's psychiatric records, any error would be harmless either under the *People v. Watson, supra*, 46 Cal.2d at p. 836, standard or under the more stringent *Chapman v. California, supra*, 386 U.S. at p. 24 standard. *(People v. Marshall* (1999) 13 Cal.4th 799, 841-842 [no reasonable probability that the outcome of the case would have been different had the witness's correctional records been disclosed]; *People v. Gurule, supra,* 28 Cal.4th at p. 594 [any error for failing to disclose more psychiatric material was harmless beyond a reasonable doubt].) Here, any additional disclosures would have been cumulative to impeachment evidence already presented as to Ripple's mental health. (See *People v. Gurule, supra,* 28 Cal.4th at p. 94.) Ripple testified that she recently received mental health treatment because she goes for long periods without sleep as the result of isolation in prison. She suffered also from sensory depravation. (6 RT 913-914.) Ripple further testified that she had been hospitalized at Los Angeles medical center. (6 RT 619.)

Furthermore, along with the overwhelming evidence of guilt, any additional "impeachment" material contained in the sealed records would have had no impact on the trial considering the extensive, non-mental health related

impeachment evidence presented against Ripple at trial.[71] (*People v. Marshal, supra,* 13 Cal.4th at p. 842.)

For the foregoing reasons, respondent does not object to this Court's review of the sealed psychiatric records, and maintains that even if the trial court abused its discretion, any error was harmless.

X.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ITS EVIDENTIARY RULINGS

Abel contends that the trial court made erroneous evidentiary rulings in violation of his constitutional rights. (AOB 113-122.) First, Abel forfeited any constitutional claims by failing to object on that basis to the various evidentiary ruling at issue. Further, the trial court did not abuse its discretion in making the evidentiary rulings. In any event, Abel was not prejudiced by the rulings.

A. Abel Had Forfeited His Claims Of Constitutional Error Based On The Trial Court's Evidentiary Rulings

Abel contends that the trial court erred by not sustaining his leading question objection concerning Heveulmen's lack of identification of a particular person depicted in a photographic line-up as the person she saw at the rear of the bank (5 RT 711); erred by improperly restricting Detective's Solis' cross-

---

71. During his cross-examination of Ripple, Abel attacked her credibility for not disclosing that Abel gave her the purported murder weapon (.22 caliber handgun) in her initial interview with Detective Tarpley on May 17, 1995, (6 RT 881-883, 893); for trading guns for drugs on at least a dozen or 2 dozen occasions (6 RT 896-897); for Ripple needing a "hot gun" because she intended to kill someone with it (6 RT 901-903); for telling Abel about the murders she had been involved with (6 RT 908); for having drug connections that would supply her with heroin and cocaine (6 RT 890); and for robbing her drug connection and his runners on several occasions. (6 RT 891-893.) Furthermore, Ripple acknowledged that she was serving lengthy prison terms, and would be in prison the rest of her life for robberies and assault of a prison guard. (6 RT 848-849.)

examination as to an in-field line-up (5 RT 803-804); erred by denying Abel's request to treat Detective Tarpley as a hostile witness (9 RT 1363), and erred by allowing Loraine Ripple to testify, over a hearsay objection, about a statement that Deborah Lankford made. (6 RT 941.) (AOB 114-121.) Abel's constitutional claims are forfeited for purposes of appeal because Abel's trial counsel did not object on such basis at trial. (*People v. Rowland* (1992) 4 Cal.4th 238, 264, 265, fn. 4, 267, fn. 5 [relevance, hearsay, Evid. Code, § 352, and *Kelly/Frye* objections insufficient to preserve constitutional claims]; *People v. Raley* (1992) 2 Cal.4th 870, 892 [Evid. Code, § 352 objection does not preserve constitutional objections, i.e., due process confrontation].); *People v. Hart* (1999) 20 Cal.4th 546, 648, fn. 37) [admission of graphic photos].)

B. The Trial Court Did Not Abuse Its Discretion By Allowing The Prosecutor's Question About The Person Depicted In Photo Number 6 In The March 11, 1991, Photograph Line-Up

"A 'leading question' is one that suggests to the witness the answer that the examining party desires." (Evid. Code, § 764.) Leading questions are generally not permitted on direct examination. (Evid. Code, § 767(a)(1).) There are exceptions such as: (1) where asking questions on preliminary matters (*Bruce v. Western Pipe & Steel Co.* (1917) 177 Cal. 25, 27; (2) where necessary when questioning a hostile witness (*People v. Spain* (1984) 154 Cal.App.3d 845, 852-853); or (3) "under [other] special circumstances where the interests of justice otherwise require" (Evid. Code, § 767(a)).

The trial court has broad discretion in determining whether special circumstances justify leading questions. (*People v. Williams* (1997) 16 Cal.4th 635, 672; see also *People v. Maxey* (1972) 28 Cal.App.3d 190, 197) [trail court has broad discretion in allowing leading questions].) A question calling for a "yes" or "no" answer is not necessarily leading; it is a leading question where, under the circumstances, it is obvious that the examiner is suggesting that the

witness answer the question one way. (*People v. Williams, supra*, 16 Cal.4th at p. 672.) Where there is a danger of false suggestion, leading questions should be prohibited, when the danger is absent, leading questions should be allowed. (*People v. Spain, supra,* 154 Cal.App.3d at p. 854.)

The prosecutor started an inquiry about Heveulmen's viewings of various photographic line-ups, with questions concerning two January 5, 1991, line-ups. Heveulmen's indicated that she did not see the person in the line-ups whom she "bumped" into outside of the bank. (5 RT 707-709.) The prosecutor then addressed the March 11, 1991, photographic line-up and it was established that Heveulmen's received an appropriate admonishment before viewing the line-up. (5 RT 710.) Heveulmen was shown the photographic line-up information form and indicated that she circled and initialed photo number 6 as being a person having some type of facial resemblance to the person that she saw the day of the crime. (*Ibid.*) Heveulmen added that she told the police:

> . . .There was a marking on his face. And I said if this was a birth mark, that definitely was not him.

(5 RT 710-711.)

Heveulmen further indicated that there was a 20% to 40% possibility (of number 6 being the person). (5 RT 711.) Then the following questions and responses at issue ensued:

> Q. Did you ever identify this person as being the person you saw outside the bank.
>
> Mr. Peters: I will object. That is a leading question. She can indicate what she said.
>
> The Court: Overruled. You may answer.
>
> Mr. Rosenblum: Did you ever identify this person, number six, as being

the person that you saw standing outside the bank?

A. No sir.

(*Ibid.*)

Abel's counsel thoroughly cross-examined Heveulmen on the March 11, 1991, photographic line-up. (5 RT 760-762.) In asking Heveulmen questions, counsel quoted from the photo line-up information form:

Q . . . . when you looked at this on March the 11th, as reflected in the photo line-up information sheet, that: "Number 6 resembles him but his eyes are closed." Did you use words like that?

A. Yes, sir. I also stated that there was a marking on his forehead; and that I said that if that was a birthmark, it definitely was not him.

Q. And none of the others –"If I could see his eyes better I would say 40 percent." Was that what you said about number 6?

A. No, sir. I said 20 to 40 percent

(5 RT 760.)

Here, the question at issue was not leading, especially in the context of the preceding questions and answers.[72/] During the questioning about the various photographic line-ups, information was elicited from Heveulmen by numerous questions calling for "yes" or "no" answer, and in which Heveulmen in fact responded in a "yes" or "no" fashion. (5 RT 708-711.) Heveulmen clearly showed her ability to respond "yes" or "no" to numerous questions, she did not restrict herself to all "yes" responses or to all "no" responses. (*Ibid*) Under the circumstances it was not obvious that the prosecutor was suggesting that Heveulmen answer one way nor was there danger of false suggestion.

---

72. Although the issue was forfeited, the questions did not violate Abel's Sixth Amendment rights because, inter alia, he had an opportunity to cross examine Heveulmen on the subject matter, and did so. (See *United States v. Owens* (1988) 484 U.S. 554, 559-560, [108 S.CT. 838, 98 L.Ed.2d 951].)

(*People v. Williams, supra,* 16 Cal.4th at p. 672; *People v. Spain, supra,* 154 Cal.App.3d at p. 854.) Accordingly, the court did not abuse it's discretion in overruling Abel's leading question objection.

Even if the trial court erred in overruling Abel's leading question objection, Abel was not prejudiced because Heveulmen's response was cumulative to prior testimony. Moreover, the same response would have been elicited by a "proper" question. Finally, her response to the question was not in dispute.

Heveulmen's response to the question, as to whether she had ever identified the person depicted in photo number 6 as being the person outside the bank, was merely for emphasis and was cumulative to her prior testimony that the person depicted in photo number 6 had a facial resemblance, if there was a birth mark on his forehead that it was clearly not him, and there was a 20% to 40% possibility it was the person. Clearly from this testimony she never identified the person depicted in photograph number 6 as the person outside the bank. (See *People v. Williams, supra,* 16 Cal.4th at p. 673 [harmless, merely cumulative to properly admitted evidence].)

Additionally, Abel was not prejudiced because even if this question is deemed improper, the same information would have been elicited by a minor, technical word change in the question, such as adding the language "whether or not". (See *People v. Hayes* (1971) 19 Cal.App.3d 459, 470 [no prejudicial misconduct–evidence could have been elicited by questions not objectionable on their face].)

Further, the fact that Heveulmen had never identified the person depicted in photograph number 6 as the person at the rear of the bank was not in dispute. Both the prosecutor and Abel's counsel were asking questions from the photographic line-up information form and it was apparent that Heveulmen never identified the person depicted in photo number 6 as "the

person" she nearly bumped into. (See *People v. Campbell* (1965) 233 Cal.App.2d 38, 44 [leading question rule will not apply stringently in noncontroversial matters].)

In view of the entirety of the circumstances, there was no conceivable prejudice. (*People v. Hinton* (2006) 37 Cal.4th 839, 865.) Accordingly, it is not reasonably probable, absent the purported leading question, that the jury would have reached a different verdict. (*People v. Williams, supra,* 16 Cal.4th at p. 673; *People v. Watson, supra,* 46 Cal.2d at p. 836.)

C. The Trial Court Did Not Abuse Its Discretion By Limiting Detective Solis' Cross Examination As To The In-Field Line-up

The same issue has been addressed by respondent at length in Argument I, in response to Abel's similar assertion in Argument I. (AOB 27-29.) Respondent refers this Court to respondent's prior Argument, to be read in conjunction with the following argument.

As argued previously, at most, Abel wanted to inquire into a remote collateral matter, i.e. testing Detective Solis' credibility as to what witness(es) said at an in-field show-up line-up where there was no evidence that the subject of the line-up, Moorehead, was identified as the shooter or had been pursued further as a possible suspect by the police after the line-up. Additionally, there is nothing in the record that Abel had contended that Moorehead was the shooter as part of a third party culpability defense. Further, neither of the key prosecution witnesses, Redundo nor Heveulmen, participated in the in-field line-up and Detective Solis did not conduct any physical line-ups or photographic line-ups that Redundo nor Heveulmen participated in. Accordingly, allowing Detective Solis' to be cross-examined further over this matter was at most, "of attenuated significance" and likely to shift the jury's focus away from the issue of guilt. (See *People v. Hart, supra,* 20 Cal.4th at

pp. 604-607 [trial court properly prohibited cross-examination on civil suit filed by victim against the Sheriff's Department for mistreatment and lies].)

A trial court has "wide discretion" in deciding the relevancy of evidence. *(People v. Kelly* (1992) 1 Cal.4th 495, 523; *People v. Cooper* (1991) 53 Cal.3d 771, 816.) The exercise of that discretion will not be reversed absent showing of abuse. (*People v. Cooper, supra,* 53 Cal.3d at p. 817; *People v. Green* (1980) 27 Cal.3d 1,19.)

A trial court's broad discretion includes the ability to control the "scope of cross-examination designed to test the credibility or recollection of the witness." (*People v. Belmontes* (1988) 45 Cal.3d 744, 788.)

> The burden is on Abel to show a Confrontation Clause violation, and:
>
> unless the defendant can show that the prohibited cross-examination would have produced a 'significantly different impression of [the witness'] credibility' [citation], the trail court's exercise of its discretion in this regard does not violate the Sixth Amendment.

(*People v. Chatman,* (2006) 38 Cal.4th 344, 372, quoting *People v. Frye* (1998) 18 Cal.4th 894, 946, quoting *Van Arsdall, supra,* 475 U.S. at p. 680.)

Accordingly, the trial court properly exercised its discretion and did not violate any of Abel's constitutional rights.

Even if the trial court erred in limiting Detective Solis' cross-examination, it is not reasonably probable the Abel would have obtained a more favorable result absent the omission of this evidence. (*People v. Koontz* (2002) 27 Cal.4th 1041, 1077-1078; *People v. Watson, supra,* 46 Cal.2d at p. 836.) It is highly unlikely that any relevant evidence would have been elicited if Abel would have been allowed to cross-examine Detective's Solis' on the exact nature of the comments by the viewers of the in-field line-ups. Further, given the extremely strong evidence of Abel's guilt, it is not reasonablely probable that he would have received a more favorable result absent of the trial court's ruling. (See *People v. Bradford* (1977) 15 Cal.4th 1229, 1324.)

D. The Trial Court Did Not Abuse Its Discretion In Denying Abel's Request To Designate Detective Tarpley As An Adverse Witness, And In The Manner That It Ruled Upon A Leading Question Objection During Abel's Questioning Of Detective Tarpley

First, Abel contends that the trial court overruled his leading question objection when the prosecutor's leading question objection was sustained to Abel's question of the same purported leading nature. (AOB 120-121.) The trial court properly sustained the prosecutor's leading question objection during Abel's direct examination of Detective Tarpley:

> Mr. Freeman: Do you recall reading, when you were reading the file and preparing to do any work in the case, the reason no work had been done on the case because in 1993, they had determined he was in the state prison?
>
> Mr. Rosneblum: Excuse me, your honor.
>
> Mr. Freeman: In no rush.
>
> Mr. Rosenblum: Excuse me. leading and suggesting an answer to a witness.
>
> The Court: Ask a non-leading question, Mr. Freeman.
>
> Mr. Freeman: He's an adverse witness and I'm asking to take him under that section of the evidence code.
>
> The Court: No showing he is adverse.
>
> Mr. Freeman: All right.
>
> The Court: It's in the eye of the beholder.
>
> Mr. Freeman: Or the ear of the listener.

(9 RT 1362-1363.)

Abel's attorney's question was leading as it assumed only one correct answer, that "the reason no work had been done on the case because in 1993, they had determined he was in the state prison" (*Ibid.*). (Evid. Code, § 764 [suggests the answer the examining party desires]; *People v. Williams, supra,*

16 Cal.4th at p. 672 [examiner suggesting that the question be answered in one way].) Accordingly, the trial court did not abuse its broad discretion in sustaining the prosecutor's leading question objection.

Abel's second complaint is equally unavailing. The trial counsel requested that his witness, Detective Tarpley, be treated as an adverse witness under the Evidence Code. The trial court denied the request. (9 RT 1363.) Although Abel's trial counsel did not specify the applicable Evidence Code section; it is Evidence Code section 776 that provides for the examination of any party in a *civil action*, or person identified with a party to be called by the adverse party and be examined as if the witness was under cross-examination. (emphasis added.) Evidence Code 776, by its own terms, applies only to civil actions, and thus has no bearing in criminal actions. Therefore, Abel's adverse witness request was properly denied.

Even if Abel's request is construed as a request to ask leading questions because Detective Tarpley had purportedly been shown to be a "hostile" witness, such request would also have been properly denied. A trial court can permit the use of leading question on direct-examination where the examiner is faced with a hostile witness as a "special circumstance" under Evidence Code section 767. (*People v. Spain, supra*, 154 Cal.App.3d at p. 853.) "Because the assessment of the circumstances revealing the witness' hostility is uniquely within the realm of a trial court, the use of leading questions on direct examination is committed to the sound discretion of the trial court". (*Ibid.*)

Here the record reveals no special circumstances, nor has Abel articulated any, to support a finding that Detective Tarpley conducted himself in a "hostile" manner during the questioning by Abel's counsel.[73/] Detective

---

73. Further, Abel has not cited any authority for his proposition that the trial court erred by denying his request to treat Detective Tarpley as an adverse witness or implied "hostile" witness. (AOB 120-121.)

Tarpley was polite, professional, forthright, and non-evasive in his responses to Abel's question's during Abel's lengthy direct examination. (9 RT 1338-1401.)

For the forgoing reasons, the trial court did not abuse its discretion in the manner that it made its evidentiary rulings in regards to Detective Tarpley.

E. The Trial Court Properly Overruled Abel's Hearsay Objection To Ripple's Testimony Concerning Lankford Threatening Conduct

The relevant question, objection, and response are as follows:

Q. What has Deborah Langford (*sic*) said to you about if you testify?

Mr. Peters: I'll object as hearsay.

The Court: Objection overruled.

The Witness: She didn't want me to testify, but she even went further with writing other inmates in the S.H.U. unit. And I was attacked a year ago May 7th on the S.H.U. yard by six other inmates.

(6 RT 941.)

Respondent refers this Court to respondent's Argument II, where this issue was addressed within the larger context of evidence of Abel's gang membership and Ripple's fear of harm.

As evidenced by Ripple's response to the above question and the other testimony set forth by the respondent in Argument II, Ripple had a legitimate fear of retaliation and was intimidated. Ripple's answer to the question at issue was not offered for truth of the matter, but offered as being highly probative of her credibility and her demeanor as a witness. (*People v. Burgener, supra,* 29 Cal.4th at p. 869 [evidence a witness is afraid to testify, or fears retaliation, is relevant to a witness credibility]; *People v. Avalos, supra,* 37 Cal.3d at p. 232 [evidence that a witness felt fear just from the gravity and nature of her

testimony is relevant to the witness' credibility]; *People v. Feagan, supra,* 34 Cal.4th at p. 1433 [witness fear relevant to witness' state of mind and demeanor in court].)

Additionally, Abel's contention, that Ripple's testimony about Lankford's threat is wholly irrelevant because Abel had nothing to do with the threat, is without legal basis. (AOB 121.) "A witness who testifies despite fear of retaliation of *any* kind by *anyone* is more credible because of his or her stake in the testimony." (*People v. Olguin, supra*, 31 Cal.App.4th at p. 1368, [emphasis in the original]; see also *People v. Avalos, supra*, 37 Cal.3d at p. 232.)

Further, although the trial court did not admonish, or otherwise instruct the jury that the evidence was limited to the nonhearsay purposes of witness credibility and demeanor, the trial court had no duty to so instruct, absence counsel's request. (Evid. Code, § 355; *People v. Ledesma* (2006) 39 Cal.4th 641, 697; *People v. Coleman* (1989) 48 Cal.3d 112, 151.)

Even if there was any error, it was harmless because it is not reasonably probable that a more favorable result would have occurred absent the challenged evidence. (*People v. Sakarias, supra,* 22 Cal.4th at p. 630, [testimony about a threatening contact between the defendant and the victim was harmless]; *People v. Watson, supra,* 46 Cal.2d at p. 836.) As noted by Abel, Abel had nothing to do with the threat and could not be prejudiced by evidence of the same.

F. Abel Was Not Prejudiced By Cumulative Error

Abel contends that cumulative evidence errors require reversal. (AOB 113-122.) Because the trial court did not err in any of its disputed evidence rulings, there is no error from which to consider whether Abel was prejudiced cumulatively or otherwise.

When a defendant invokes the cumulative error doctrine, "the litmus test is whether defendant received due process and a fair trial." (*People v. Kronmeyer* (1987) 189 Cal.App.3d 314, 349.) Here, Abel received a fair trial. (*People v. Gordon, supra*, 50 Cal.3d at p. 1278 [defendant is not entitled to a perfect trial, just a fair one].) For the reasons stated above, and the strength of the evidence of Abel's guilt, he was not prejudiced, cumulatively or otherwise

For the foregoing reason the Abel's claims as to evidentiary error, should be denied.

XI.

CALIFORNIA'S DEATH PENALTY STATUTE AND INSTRUCTIONS DO NOT VIOLATE THE UNITED STATES CONSTITUTION IN REGARDS TO THE BURDEN OF PROOF

Abel contends that California's death penalty scheme violates the United States Constitution in various ways because of its improper instructions on the burden of proof. (AOB 123-155.) Abel's numerous challenges, based on the burden of proof, for the imposition of the death penalty have previously been rejected by this Court. Abel has not presented sufficient reasoning to revisit these issues, therefore, extended discussion is unnecessary and Abel's claims should all be rejected consistent with this Court's previous rulings.

A. The Jury Is Not Constitutionally Required To Unanimously Find Beyond A Reasonable Doubt That One Or More Aggravating Factors Existed

Abel claims that since the United States Supreme Court decided in *Apprendi v. New Jersey, supra*, 530 U.S. at p. 466; *Ring v. Arizona* (2002) 536 U.S. 584 [122 S.Ct. 2428, 153 L.Ed.2d 556], and *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403], in order to impose a death sentence, the jury is now constitutionally required under the Sixth, Eighth and Fourteenth Amendments to find aggravating factors true beyond a reasonable doubt. (AOB 124-137.) California's death penalty statute is constitutional, and

this Court has determined that the United States Supreme Court decisions in *Apprendi, Ring* and *Blakley* do not alter that conclusion.

As this Court's precedent makes clear:

> The death penalty law is not unconstitutional for failing to impose a burden of proof-whether beyond a reasonable doubt or by a preponderance of the evidence-as to the existence of aggravating circumstances, the greater weight of aggravating circumstances over mitigating circumstances, or the appropriateness of a death sentence. [Citation.] Unlike the statutory schemes in other states cited by defendant, in California 'the sentencing function is inherently moral and normative, not factual' [citation] and, hence, not susceptible to a burden-of-proof quantification. [Citations.] ¶ The jury is not constitutionally required to achieve unanimity as to aggravating circumstances. [Citation.] ¶ Recent United States Supreme Court decisions in *Apprendi v. New Jersey* (2000) 530 U.S. 466 and *Ring v. Arizona* (2002) 536 U.S. 584 have not altered our conclusions regarding burden of proof or jury unanimity.

(*People v. Brown* (2004) 33 Cal.4th 382, 401-402.)

> In California:
> once the defendant has been convicted of first degree murder and one or more special circumstances has been found true beyond a reasonable doubt, death *is* no more than the prescribed statutory maximum for the offense; the only alternative is life imprisonment without the possibility of parole."

(*People v. Ward* (2005) 36 Cal.4th 186, 221 quoting *People v. Prieto* (2003) 30 Cal.4th 226, 263, [emphasis in original].)

Thus, California's death penalty withstands constitutional scrutiny, even after re-examination in light of *Apprendi* and *Ring*. (*People v. Ward, supra*, 36 Cal.4th at p. 221; *People v. Cornwell* (2005) 37 Cal.4th 50, 103-104; *People v. Panah* (2005) 35 Cal.4th 395, 499 ["neither the federal nor state Constitution requires the jury to unanimously agree as to aggravating factors, nor have our conclusions in this respect been altered by [the] recent . . . decisions in *Apprendi* . . . and *Ring*"]; *People v. Morrison (2004)* 34 Cal.4th698, 630 ["We repeatedly have held that neither *Apprendi* . . . nor *Ring* . . . affects California's

death penalty law or otherwise justifies reconsideration of the foregoing decisions"]; *People v. Prieto, supra*, 30 Cal.4th at p. 275 ["*Ring* does not undermine our previous rulings upholding the constitutionality of California's death penalty law, and we reaffirm our rejection of defendant's contentions"].)

Additionally, the United States Supreme Court's decision in *Blakely v. Washington, supra*, 542 U.S. at p. 296, does not alter the conclusion that California's death penalty scheme is constitutional. (*People v. Ward, supra*, 36 Cal.4th at p. 221.) Further, the United States Supreme Court's recent decision in *Cunningham v. California* (January 22, 2007) 549 U.S.___, 2007 WL135687, does not alter this conclusion. *Cunningham* held that California's middle term under its determinative sentencing law was the statutory maximum under the Sixth Amendment, and thus the imposition of the upper term by the trial court, without the requisite beyond a reasonable doubt finding by the jury of aggravating circumstance(s), was unconstitutional. (*Cunningham, supra*, 2007 WL135687 at *4-6, 10, 13.) Here, the verdict of death is the constitutionally valid prescribed statutory maximum. (See *People v. Ward, supra*, 36 Cal.4th at p. 221.)

Accordingly, Abel's claim is without merit and should be rejected.

B. The State And Federal Constitutions Do Not Require That The Jury Be Instructed That They May Return A Verdict Of Death Only If They Find Beyond A Reasonable Doubt That The Aggravating Factors Outweigh The Mitigating Factors, And That Death Is The Appropriate Penalty

Abel contends the trial court erred by failing to instruct the jury that a verdict of death may only be returned if they are persuaded beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors, and that death is the appropriate penalty, before a verdict of death can be returned. (AOB 137-142.) This Court has repeatedly rejected this contention. (*People v. Panah, supra*, 35 Cal.4th at p. 499; *People v. Carter, supra*, 36 Cal.4th at pp.

(2005) 36 Cal.4th 686, 753; *People v. Mendoza* (2000) 24 Cal.4th 130, 191.) Neither the due process clause of the Fourteenth Amendment nor the cruel and unusual punishment clause of the Eighth Amendment require a jury to find beyond a reasonable doubt that aggravating factors outweigh mitigating factors, or that death is the appropriate penalty. (*People v. Blair, supra*, 36 Cal.4th at p. 753.) Abel provides no reason for revisiting this Court's prior holdings. Thus, Abel's contentions should be rejected.

C. The Trial Court Was Not Required To Instruct The Jury As To The Burden Of Proof At The Penalty Phase

Abel contends that the death penalty instructions given in the instant case failed to assign any burden of persuasion regarding the jury's ultimate penalty phase determination in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendment. (AOB 142-146.) This Court has specifically and repeatedly rejected Abel's argument and he has not presented to this Court any new, persuasive, or compelling reason to consider its prior decisions. Unlike the determination of guilt, the sentencing function is inherently moral and normative, not functional and thus not susceptible to any burden-of-proof qualification. (*People v. Manriquez* (2005) 37 Cal.4th 547, 589; *People v. Burgener, supra*, 29 Cal.4th at pp. 844-885; *People v. Anderson* (2001) 25 Cal.4th 543, 601; *People v. Welch* (1999) 20 Cal.4th 701, 767.) Further, there is no basis for a claim that the penalty phase jury must be instructed on the absence of a burden of proof. (*People v. Cornwell, supra*, 37 Cal.4th at p. 104.) Accordingly, Abel's claim should be rejected.

D. The United States Constitution Does Not Require Unanimous Agreement On Aggravating Factors

Abel's contends that the instructions violated the Sixth, Eighth and Fourteenth Amendments to the federal Constitution by failing to require juror unanimity on aggravating factors. (AOB 147-152.) This Court has consistently

unanimity on aggravating factors. (AOB 147-152.) This Court has consistently and repeatedly held that "neither federal nor state Constitution requires the jury to unanimously agree as to aggravating factors." (*People v. Panah, supra*, 35 Cal.4th at p. 499; *People v. Combs* (2004) 34 Cal.4th 821, 870; accord *People v. Monterroso, supra*, 34 Cal.4th at p. 730; *People v. Pollock, supra*, 32 Cal.4th at p. 1196; *People v. Yeoman* (2003) 31 Cal.4th 93, 167; *People v. Jenkins, supra*, 22 Cal.4th at p. 1053; *People v. Howard* (1992) 1 Cal.4th 1132, 1196.) Because Abel provides no persuasive reason for departing from this precedent, his claim should be rejected.

E. Although The Trial Court Need Not Instruct The Jury That There is No Unamity Requirement As To The Finding Of The Existence Of A Mitigating Factor; The Jury Was So Instructed

Abel contends that the trial court violated his Sixth, Eighth and Fourteenth Amendment Rights by failing to inform the jury that jury unamity was not needed for the finding of the existence of a mitigating factor. (AOB 152-154.) Abel forfeited the issue for purpose for this appeal by failing to object to CALJIC Nos. 8.85 and 8.88 concerning the jury's evaluation of mitigating factors. However, the jury was instructed that there was no need for the jury to unanimously agree on any matter offered in mitigation. In any event, this Court has rejected Abel's contention, and Abel provides no basis for revisiting the issue.

The trial court gave CALJIC No 8.85 concerning the factors a jury should consider in determining which penalty to impose. (3 CT 951-954;12 RT 2088-2092.) The trial court also gave the penalty phase concluding instruction, CALJIC No. 8.88, concerning aggravating and mitigating circumstances and how the jury should weigh the same in their deliberations as to the appropriate penalty. (3 CT 1036-1036A; 12 RT 2133-2135.) Abel failed to object to the giving of CALJIC Nos. 8.85 and 8.88, or any other penalty phase instructions relevant to the finding of the existence of mitigating factors. (3 CT 801; 12 RT

1968.) Nor did Abel request any clarifying instruction in this regard. (*Ibid.*) Accordingly, Abel has forfeited this issue for purposes of this appeal. (*People v. Arias* (1996) 13 Cal.4th 92, 195; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1192.) This Court, however, has consistently considered the merits of challenges to California's death penalty based on an "as applied" theory without discussing whether these challenges were raised at trial. (*People v. Hernandez* (2003) 30 Cal.4th 835, 863.) Even if this Court addresses Abel's challenge to the death penalty statute, his claim fails because it lacks merit.

As the Court has concluded, California's death penalty statute is not unconstitutional for lack of a jury instruction as to the burden of proof and standard of proof for finding mitigating circumstances. (*People v. Morrison*, *supra*, 34 Cal.4th at p. 730-731.) In *People v. Breaux* (1991) 1 Cal.4th 281, 314-315, this Court upheld the trial court's rejection of the defendant's proposed instruction as to unamity not being a prerequisite for the consideration of mitigating evidence. The trial court's reasons for rejecting the proposed instruction, were confusion, and the subject was adequately covered in other instructions, that informed the jury that they "must *individually* decide each question involved in the penalty decision" and "to consider *all* the evidence . . ." (*Ibid*, emphasis in original.) Here, the jury was instructed under CALJIC No. 8.85 in determining penalty that they "shall consider all the evidence which has been received during any part of the trial of this case . . ." (3 CT 951; 12 RT 2088.) The jury was further instructed under CALJIC No. 8.88 that "[t]o 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." (3 CT 1036A; 12 RT 2135.) Lastly, and most importantly, the jury was told in a special instruction that each juror must make his own individual assessment of the weight given to evidence in aggravation and mitigation, that "[t]here is no

requirement that all jurors unanimously agree on any matter offered in mitigation or aggravation", and "[e]ach juror should weigh and consider such matters regardless of whether or not they are accepted by other jurors". (3 CT 963; 12 RT 2098-2099.) Accordingly, the above instructions, as well as the balance of the death penalty instructions, were sufficient, and did not mislead or suggest in any way that the jury consider mitigating evidence in an improper manner. (*People v. Breaux, supra,* 1 Cal.4th at p. 315; see also *People v. Holt* (1997) 15 Cal.4th 619, 685-686 [trial court did not err in failing to instruct sua sponte, that unamity is not required for mitigating evidence].)

F. The Trial Court Was Not Obligated To Instruct The Jury On The Presumption Of Life

Abel contends that the trial court erred by failing to instruct the jury on the presumption of life, thereby violating his Eighth and Fourteenth Amendment rights. (AOB 154-155.) This Court has previously rejected this argument. (*People v. Arias, supra,* 13 Cal.4th at p. 190.) In *Arias* this Court found that so long as a:

> death penalty law properly limits death eligibility by requiring the finding of at least one aggravating circumstance beyond murder itself, the state may otherwise structure the penalty determination as it sees fit, so long as it satisfies the requirement of individualize sentencing by allowing the jury to consider all relevant mitigating evidence.

(*Ibid.*, citing *Tuilaepa v. California, supra*, 512 U.S. at p. 973; *Boyde v. California* (1990) 494 U.S. 370 [110 S.Ct.1190, 108 L.Ed.2d 316] [upholding 1978 laws provision that sentencer "shall" impose death if aggravation outweighs mitigation]; *Zant v. Stephens* (1983) 462 U.S. 862, 875 [103 S.Ct. 2733, 77 L.Ed.2d 235] [once defendant is death eligible, statute may give jury 'unbridled' discretion to apply aggravating and mitigating sentencing factors].) The penalty instructions in this case met the criteria under *Arias*. (3 CT 860-1036A; 12 RT 1087-2135.)

Thus, as Abel has given no persuasive reason for departing from this precedent, an instruction on the presumption of life was neither required nor proper.

For the foregoing reasons, Abel's claims as to the burden of proof should fail.

XII.

CALJIC NO. 8.88 IS CONSTITUTIONAL

Abel contends that CALJIC No. 8.88 violates the federal and state Constitutions in various respects. (AOB 156-167.) Abel has forfeited his claims for purposes of this appeal for failing to object to CALJIC No. 8.88 at trial. In any event, as Abel acknowledges, this Court has rejected these challenges to CALJIC No. 8.88. Abel argues that this Court's decision should be reconsidered. (AOB 157, fn. 68.) Abel had not presented any basis for this Court to revisit these issues; therefore, extended discussion is unnecessary, and his claims should be rejected consistent with this Court's previous rulings.

Abel forfeited his challenges to CALJIC No. 8.88 for purposes of this appeal by failing to object to the giving of CALJIC No. 8.88, or otherwise requesting clarifying language. (*People v. Lewis* (2002) 25 Cal.4th 610, 615; *People v. Saunders* (1993) 5 Cal.4th 580, 609.) Even if this Court were to reach Abel's claims on appeal, they lack merit.

A. The Terms "So Substantial" And "Warrants" In CALJIC No. 8.88 Do Not Violate The Eighth And Fourteenth Amendments

Abel contends that the term "so substantial" and "warrants" in CALJIC No. 8.88 violates the Eighth and Fourteenth Amendments. (AOB 157-162.) The arguments concerning the use of the terms "so substantial" and "warrants" have been considered and rejected by this Court. (*People v. Boyette, supra*, 29 Cal.4th at pp. 464-465 ["so substantial" and "warrants"]; *People v. Griffin* (2004) 33 Cal.4th 536, 593 ["so substantial and warrants"]; *People v. Coffman*

(2004) 34 Cal.4th 1, 124 ["so substantial"]; *People v. Medina, supra*, 11 Cal.4th at p. 781 ["warrants"].) Having offered no persuasive evidence why this Court should not follow its prior decisions, this Court should decline to revisit the issue, and Abel's claims should fail.

B. The Trial Court Has No Sua Sponte Duty To Inform The Jury That If They Determined That The Mitigating Factors Outweigh The Aggravating Factors, They Must Return A Sentence Of Life

Abel contends that the death penalty instructions violated his constitutional rights for failing to inform the jury that if the mitigating factors outweigh the aggravating factors, they must return a penalty verdict of a life sentence without the possibility of parole. (AOB 162-166.) This Court has repeatedly rejected this claim. (See *People v. Coffman, supra*, 34 Cal.4th at p. 124; *People v. Hughes, supra*, 27 Cal.4th at p. 405; *People v. Kipp, supra*, 18 Cal.4th at p. 381; *People v. Duncan* (1991) 53 Cal.3d 955, 988.) Having offered no persuasive reason why this Court should not follow its prior decisions, Abel's claims should fail.

C. The Trial Court Need Not Instruct The Jury That Abel Did Not Have To Persuade The Jury That The Death Penalty Was Inappropriate

Abel contends that the trial court erred because it failed to instruct the jury that Abel did not have to persuade the jury that the death penalty was inappropriate. (AOB 166-167.) This challenge to the death penalty instructions has repeatedly been rejected by this Court. As previously set forth in Argument XI C, *ante*, there is no requirement to instruct the jury on the burden of persuasion by either party in the penalty phase. (*People v. Mariquez* (2005) 37 Cal.4th 547, 589; *People v. Coffman, supra*, 34 Cal.4th at p. 125;

People v. Lenhart (2004) 32 Cal.4th 1107, 1137.) Having offered no persuasive reason why this Court should not follow its prior decision, Abel's claim must fail.

For the forgoing reasons, all of Abel's claims concerning CALJIC No. 8.88 should fail.

XIII.

INTERCASE PROPORTIONALITY REVIEW IS NOT REQUIRED

Abel argues the failure to conduct intercase proportionality review violates the Eighth and Fourteenth Amendments of the federal Constitution. (AOB 168-169.) This Court has already determined "intercase proportionality review is not constitutionally required." (*People v. Morrison* (2004) 34 Cal.4th 698, 730; accord *People v. Box, supra*, 23 Cal.4th at p. 1217.) There is no need for this Court to revisit this issue, as the contention has long been settled to the contrary: "Neither the federal nor the state Constitution requires intercase proportionality review." (*People v. Cunningham, supra,* 25 Cal.4th at p. 1042.)

As this Court summarized in *People v. Lewis* (2001) 26 Cal.4th 334:

> We also reject defendant's claim that because it does not require intercase proportional review, the California death penalty statute ensures arbitrary, discriminatory, or disproportionate impositions of death sentences. "[U]nless a defendant demonstrates that the state's capital punishment law operates in an arbitrary and capricious manner, the circumstances that he or she has been sentenced to death, while others who may be similarly situated have received a lesser sentence, does not establish disproportionality violative of the Eighth Amendment." [Citation.] Moreover, we disagree that defendant is denied equal protection and substantive due process because noncapital defendants receive some comparative review under the determinate sentencing law. [Citation.]

(*People v. Lewis, supra*, 26 Cal.4th at pp. 394-395; see also *People v. Kipp, supra,* 26 Cal.4th at p. 1139; *People v. Hillhouse* (2002) 27 Cal.4th 469, 515.)

This Court's conclusion is totally consistent with United States Supreme Court precedent. The High Court, after noting that the Eighth Amendment does not require comparative proportionality review by an appellate court in every case in which the death penalty is imposed and the defendant requests it, held that California's death penalty statute was not rendered unconstitutional by the absence of a provision for comparative proportionality review. (*Pulley v. Harris* (1984) 465 U.S. 37, 50-54 [104 S.Ct. 871, 79 L.Ed.2d 29].) Thus, as this Court concluded in *People v. Farnam, supra*, 28 Cal.4th at p. 193, there is "no reason to rule differently here."

XIV.

CALIFORNIA DEATH PENALTY LAW DOES NOT VIOLATE INTERNATIONAL LAW OR EVOLVING STANDARDS OF DECENCY

Abel contends that California's death penalty law violates international law because it is imposed arbitrarily and is cruel and inhuman under the International Covenant on Civil and Political Rights (ICCPR), and falls short of international norms and human decency. (AOB 172-177.) However, this Court has consistently rejected identical claims and should do so here.

Initially, it is observed that Abel should be precluded from claiming violations of international customary law or treaties for the first time on appeal, since he never raised any such claims in the trial court. Convicted defendants are generally precluded from raising claims on appeal if the claim was not previously raised in the trial court. (See, e.g., *People v. Jones* (1997) 15 Cal.4th 119, 181; *People v. Collie* (1981) 30 Cal.3d. 43, 64.)

Additionally, Abel lacks standing to challenge California's death penalty statute as violating international law. It is the general rule that international law does not confer standing on individuals to raise claims of international law violations in domestic courts. (See *Committee of U.S. Citizens Living in*

Nicaragua v. Reagan (D.C. Cir. 1988) 859 F.2d 929, 937; see also *People v. Brown, supra*, 33 Cal.4th at p. 403, citing *Hanoch Tel-Oren v. Libyan Arab Republic* (D.D.C. 1981) 517 F.Supp. 542, 545-547.) Accordingly, this Court should reject Abel's contention as he lacks standing to challenge California law on international law grounds.

Abel notes that all Western European countries[74], Australia, New Zealand, Canada and other countries have abolished the death penalty. (AOB 172-173.) However, as to Eighth Amendment analysis; "it is *American* conceptions of decency that are dispositive[.]" (*Stanford v. Kentucky* (1989) 492 U.S. 361, 369 fn. 1 [109 S.Ct. 2969, 106 L.Ed.2d 306] emphasis in original.) Interpretation and application of the provisions of the United States Constitution to questions presented by state or federal statutory or constitutional law is ultimately an issue for the United States Supreme Court and the lower federal courts, not customary international law. The United States Supreme Court recently reaffirmed this principle in *Roper v. Simmons* (2005) 543 U.S. 551, 575 [125 S.Ct. 1183, 161 L.Ed.2d 1], noting that, while the United States Supreme Court "has referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment's prohibition of 'cruel and unusual punishments,'" it remains the task of the High Court ultimately to interpret the Eighth Amendment. Although the United States Supreme Court has never directly addressed the issue of whether the death penalty violates international law, the lower courts that have considered the question have uniformly concluded that it does not. (See *Buell v. Mitchell* (6th Cir. 2001) 274 F.3d 337, 376.)

Furthermore, the prohibition of the death penalty is not so extensive and virtually uniform among the nations of the world that it is a customary

---

74. Abel excepts the crime of treason from Western Europe's prohibition against the death penalty. (AOB 172.)

international norm. According to Amnesty International, as of November 28, 2005, 110 countries in the world still have some sort of death penalty law in place, while 86 countries have abolished the death penalty for all crimes.[75/] (Facts and Figures on the Death Penalty: <http://web.amnesty.org/pages/death penalty-facts-eng> [as of Nov. 28, 2005].) As the Sixth Circuit Court of Appeal explained in *Buell*,

> There is no indication that the countries that have abolished the death penalty have done so out of a sense of legal obligation, rather than for moral, political, or other reasons. Moreover, since the abolition of the death penalty is not a customary norm of international law, it cannot have risen to the level that the international community as a whole recognizes it as jus cogens, or a norm from which no derogation is permitted.

(*Buell v. Mitchell*, *supra*, 274 F.3d at p. 373.) Therefore, there is no basis for this Court to conclude that the abolition of the death penalty is a customary norm of international law or that it has risen to the higher status of jus cogens.

Additionally, this Court has previously rejected the claim that California's death penalty law violates the ICCPR. (*People v. Brown*, *supra*, 33 Cal.4th at pp. 403-404; see also *People v. Wilson* (2005) 36 Cal.4th 309, 363.) As this Court noted in *Brown*,

> Although the United States is a signatory [to the ICCPR], it signed the treaty on the express condition "[t]hat the United States reserves the right, subject to its Constitutional constraints, to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment, including such punishment for crimes committed by persons below eighteen years of age." (138 Cong. Rec. S4781-01 (Apr. 2, 1992); see Comment, The Abolition of the Death Penalty: Does "Abolition" Really Mean What You Think It Means? (1999) 6 Ind. J.

---

75. Of the 110 countries which retain the death penalty, 11 reserve the death penalty only for so-called "exceptional crimes," and 25 have not carried out an execution for at least the past 10 years. (Facts and Figures on the Death Penalty, <http://web.amnesty.org/pages/deathpenalty-facts-eng> [as of Nov. 28, 2005].)

> Global Legal Studies 721, 726 & fn. 33.) Given states' sovereignty in such matters within constitutional limitations, our federal system of government effectively compelled such a reservation.

(*Ibid.*)

Finally, Abel's claim lacks merit because it has repeatedly been specifically rejected by this Court. (*People v. Harris* (2005) 37 Cal.4th 310, 376; *People v. Wilson*, *supra*, 36 Cal.4th at p. 362; *People v. Ward* (2005) 36 Cal.4th 186, 222; *People v. Brown*, *supra*, 33 Cal.4th at p. 403; *People v. Hillhouse, supra,* 27 Cal.4th at p. 511; *People v. Ghent* (1987) 43 Cal.3d 739, 783.)

Accordingly, Abel's claim should fail.

XV.

THE UNITED STATES CONSTITUTION DOES NOT REQUIRE WRITTEN FINDINGS REGARDING AGGRAVATING FACTORS

Abel claims that his Fifth, Eighth and Fourteenth Amendment rights were violated because the instructions given in this case did not require the jury to make written findings about the aggravating factors they found and considered in imposing a death sentence. (AOB 178-179.) This Court has repeatedly rejected the claim that written findings regarding aggravating factors are constitutionally required. (See *People v. Cornwell, supra*, 37 Cal.4th at p. 105; *People v. Panah, supra*, 35 Cal.4th at p. 499; *People v. Snow, supra*, 30 Cal.4th at p. 126; *People v. Maury* (2003) 30 Cal.4th 342, 445; *People v. Fauber* (1992) 2 Cal.4th 792, 859.) The above decisions are consistent with the United States Supreme Court's pronouncement that the federal Constitution "does not require that a jury specify the aggravating factors that permit the imposition of capital punishment." (*Clemons v. Mississippi* (1990) 494 U.S. 738, 746, 750 [110 S.Ct. 1441, 108 L.Ed.2d 725] citing *Hildwin v. Florida* (1989) 490 U.S. 638 [109 S.Ct. 2055, 104 L.Ed.2d 728].) Abel has provided

no new reason for this Court to reconsider its prior decisions rejecting this very claim. Therefore, his claim should be denied.

XVI.

ABEL RECEIVED A FAIR TRIAL AS THERE WAS NO CUMULATIVE PREJUDICE

Abel summarizes many of his previous claims and contends that cumulative errors require reversal of both the guilt and penalty phase verdicts. (AOB 180-183.) All of Abel's assignments of error have either been forfeited, or are meritless, or are harmless individually, and in combination.

As set forth above, many of Abel's claims were forfeited due to his failure to object below. However, even when the merits of the issues are considered, there are no multiple errors to accumulate. Whether considered individually or for their purported cumulative effect, the alleged errors could not have affected the outcome of the trial. (See *People v. Avila* (2006) 38 Cal.4th 491, 615 [rejected defendant's claims of error, or any assumed errors, not prejudicial on an individual basis; assumed errors no more compelling in the aggregate]; *People v. Guerra* (2006) 37 Cal.4th 1067, 1168; *People v. Hinton, supra*, 37 Cal.4th at p. 913; *People v. Jablonski* (2006) 37 Cal.4th 774, 838; *People v. Panah, supra*, 35 Cal.4th at p. 464; *People v. Burgener, supra*, 29 Cal.4th at p. 884; *People v. Seanton* (2001) 26 Cal.4th 598, 675, 691-692 [few errors identified were a minor in either individually or cumulatively would not alter the outcome of the trial].) Even a capital defendant is entitled to only a fair trial, not a perfect one (*People v. Box, supra*, 23 Cal.4th at pp. 1214, 1219.) The record shows that Abel received a fair trial. Nothing more is required. This Court should, therefore, reject Abel's claim of cumulative error.

CONCLUSION

For the forgoing reason, respondent respectfully request that the judgment and death sentence be affirmed.

Dated: May 14, 2007

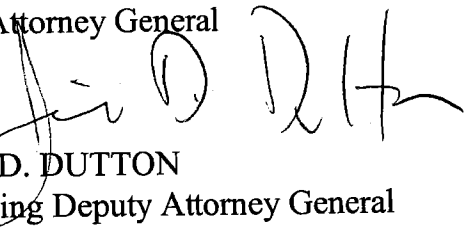
Respectfully submitted,

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

DANE R. GILLETTE
Chief Assistant Attorney General

GARY W. SCHONS
Senior Assistant Attorney General

ANDRIANNE S. DENAULT
Deputy Attorney General



JAMES D. DUTTON
Supervising Deputy Attorney General

Attorneys for Respondent

JDD:llc
SD1997XS0013
80132632.wpd

CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 46,712 words.

Dated: May 14, 2007

Respectfully submitted,

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

ANDRIANNE S. DENAULT
Deputy Attorney General

JAMES D. DUTTON
Supervising Deputy Attorney General

Attorneys for Respondent

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **PEOPLE v. JOHN CLYDE ABEL**

No.: **S064733**

I declare:

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

On **May 14, 2007**, I served the attached **RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

Kate Johnston, Deputy State Public Defender
State Public Defender's Office
Office of the Chief Counsel
801 K Street, No. 1100
Sacramento, CA 95814
Counsel for John Clyde Abel (2 copies)

Hon. Robert R. Fitzgerald, Judge
Orange County Superior Court
Central Justice Center - Dept. C-5
700 Civic Center Drive West
Santa Ana, CA 92701

Michael R. Belter, Attorney at Law
600 Playhouse Alley, Suite 402
Pasadena, CA 91101
Co-Counsel for John Clyde Abel

Michael G. Millman, Executive Director
California Appellate Project
101 Second Street, Suite 600
San Francisco, CA 94105

Hon. Tony Rackauckas, District Attorney
Orange County District Attorney's Office
401 Civic Center Drive West
Santa Ana, CA 92701

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 **May 14, 2007**, at San Diego, California.

L Chavez
Declarant

Signature

70078060.wpd