SUPREME COURT COPY

In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

ENNIS REED,

Defendant and Appellant.

Case No. S082776

CAPITAL CASE

SUPREME COURT
FILED
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Deputy

Los Angeles County Superior Court, Case No. TA037369
The Honorable John Joseph Cheroske, Judge

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DEATH PENALTY

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STATEMENT OF THE CASE

In an amended information filed by the Los Angeles County District Attorney, appellant was charged with two counts of murder (counts 1, 3; Pen. Code,[1] § 187, subd. (a)), and two counts of attempted willful, deliberate, and premeditated murder (counts 2, 4; §§ 187, subd. (a), 664). The special circumstance of multiple murder was alleged (§ 190.2, subd. (a)(3)). As to counts 1 and 2, it was alleged that in the commission of the offenses, appellant personally used an assault rifle (§ 12022.5, subd. (b)(2)). As to counts 3 and 4, it was alleged that in the commission of the offenses, appellant personally used a firearm (§§ 1203.06, subd. (a)(1), 12022.5, subd. (a)). As to count 4, it was further alleged that in the commission of the offense, appellant personally inflicted great bodily injury (§ 12022.7, subd. (a)). As to all counts, it was further alleged that appellant had one prior conviction for a serious or violent felony (§§ 667, (a)(1), (b)-(i), 1170.12, subds. (a)-(d)), and one prior conviction for which a prison term was served (§ 667.5, subd. (b)). (2CT 450-454.) Appellant pleaded not guilty and denied the allegations. (2RT 122, 138-139.)

Appellant was tried by jury. (2CT 456-457.) The jury found appellant guilty as charged and found the special allegations to be true. (2CT 478-482.)

The same jury was unable to reach a verdict during the first penalty phase, and the trial court declared a mistrial. (2CT 595.) A second jury was impaneled. (10CT 2823.) After the penalty phase retrial, the jury reached a verdict of death. (10CT 2888.)

Appellant's motions for a new trial and to modify the death verdict were denied. (20CT 5643-5653, 5657.) On counts 1 and 3, appellant was

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

sentenced to death. On count 2, appellant was sentenced to life in prison with the possibility of parole plus six years, which was stayed. On count 4, appellant was sentenced to life in prison with the possibility of parole plus seven years, which was also stayed. (20CT 5654-5656.)

This appeal from the judgment of death is automatic. (§ 1239, subd. (b).)

STATEMENT OF FACTS

I. GUILT PHASE

A. Prosecution

1. Murder of Amarilis Vasquez and Attempted Murder of Carlos Mendez

On September 24, 1996, Carlos Mendez and his wife, Amarilis Vasquez, were working together at Kirk Plastics. They worked in the same shift from 3:00 p.m. to 12:00 a.m. (3RT 461.) At approximately 8:00 p.m., Mendez and Vasquez took their usual lunch break and went to a Mexican fast-food restaurant called Tacos El Unico located at 1521 South Long Beach Boulevard near the intersection with Glencoe Street in Compton. (3RT 450-451, 462.) They drove to the restaurant in their brand new Toyota Tacoma pickup truck. (3RT 462.) After parking the truck in a stall, Mendez and Vasquez walked to the taco stand window, ordered some food to go, and returned to their truck. (3RT 462-463.)

Mendez entered the truck first and reached over to open the door for his wife. (3RT 463.) Vasquez entered the truck and Mendez was about to start the engine when Vasquez saw a man he later identified as appellant. Vasquez said in Spanish, "Look, that guy, . . . he has a . . . pistol[,] a big pistol." (3RT 464.) When Mendez looked up, he saw appellant with a pistol in his hand walking from the corner toward the truck. (3RT 464-465, 468.) Mendez had never seen appellant before. (3RT 479, 490.) He

described the gunman at trial as an African-American man, having a shaved bald head and a "5 o'clock shadow" or light beard, and wearing a black t-shirt.[2] (3RT 490-491, 495-497.) Appellant had a finger on the trigger and the gun was pointed down toward the ground. Mendez described the weapon as a pistol approximately 12 inches long and that it was a handgun instead of a rifle. (3RT 469, 488-489.)

Mendez tried to calm his wife by saying, "Don't worry. We'll just leave." (3RT 470.) As Mendez started the truck, appellant pointed his gun toward Mendez and Vasquez, stood still "for seconds," and then began shooting. (3RT 470-471.) Appellant was standing approximately 22 feet away from the truck. (3RT 476-477.) Mendez held up his hand and tried to say, "Don't shoot." (3RT 471.) Vasquez was shot first and Mendez was shot in the right cheek. (3RT 473.) The shot to the face broke Mendez's jaw and knocked out several teeth. (3RT 492.) After getting shot in the face, Mendez opened the door of the truck. (3RT 473-474.) As he was getting outside, Mendez was shot in his left thigh. (3RT 474.) Mendez believed he was "close to death" so he forgot about his wife and tried to run away to get some help. (3RT 474-475.) He was screaming for help but everyone was hiding. Mendez remembered that his wife was still in the truck so he returned to the passenger side. (3RT 475.) By this time, the shooting had stopped and appellant appeared to have run away. Mendez saw his wife bleeding from her head and he believed she was dead. (3RT 476.)

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[2] During the preliminary hearing, Mendez testified that appellant was wearing a white shirt at the time of the shooting. (3RT 491.) At trial, Mendez explained that he was not paying attention to appellant's clothing because he was afraid but that he did see appellant's face and the gun. (3RT 492, 497.) Officer James Lewis of the Compton Police Department testified that shortly after the shooting before the paramedics arrived, Mendez told him that the shooter was wearing a black jacket. (3RT 501.)

Officer Robert Childs responded to Tacos El Unico. (3RT 450-451.) Officer Childs arrived at the parking lot and found a new tan-colored Toyota pickup truck. He observed a Hispanic man, later identified as Mendez, with blood on his face and who appeared to be hysterical. (3RT 451.) Mendez had been shot in the right cheek and thigh. (3RT 452, 458.) A woman on the passenger seat, later determined to be Mendez's wife, had been shot twice in the head. (3RT 451.) The passenger window, which was rolled up, was shattered and had a hole in the middle. (3RT 451-453.)

Officer Childs found shell casings on the ground near the front right side of the truck.[3] Although it was nighttime, the street lights were on and the parking lot was "reasonably well lit." (3RT 452.) Officer Childs estimated that the distance from the truck's location to the corner of the parking lot was approximately 22 feet. (3RT 456.) The distance from the truck to the far north side of the parking lot near the Zodiac Motorcycle Club was approximately 50 to 60 feet. (3RT 458.)

Detective Paiz went to the scene to conduct the homicide investigation. (3RT 506.) By the time he arrived, Officer Childs had already cordoned off the scene and the shell casings had been identified with evidence cards. (3RT 505-506.) Later in the evening, Detective Paiz went to the hospital to interview Mendez who had received some treatment for his injuries but was still upset and crying. (3RT 503.) During the interview, Mendez described the shooter as being approximately five feet eight inches to five feet eleven inches tall, 20 to 25 years of age, clean

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[3] Detective Michael Paiz testified that as a general rule, semiautomatic firearms expel the expended cartridges up towards the right and slightly backwards. (3RT 532.)

shaven with short black hair, and wearing black jacket and pants.[4] (3RT 494, 505.)

Between September 1996 and January 1997, Detective Paiz obtained appellant's name as a possible suspect. (3RT 506.) On January 30, 1997, Detective Paiz met with Mendez at the police station and conducted a photographic lineup which included appellant's photograph.[5] (3RT 479, 483, 506.) After being admonished and "within seconds," Mendez selected appellant's picture as that of the shooter. (3RT 480-481, 507.) On July 14, 1998, Detective Paiz again met with Mendez and conducted a live lineup at the county jail. (3RT 481, 484.) Mendez selected appellant "really fast" as the shooter. (3RT 481-482, 484.)

Dr. Ogbonna Chinwah, a deputy medical examiner for the Los Angeles County, reviewed the autopsy report of Vasquez, which was prepared by another deputy medical examiner. Based on the autopsy report, Dr. Chinwah opined that Vasquez's cause of death was a gunshot wound to the head. (3RT 544.)

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[4] While at the hospital, Mendez spoke with another police officer and described the shooter as "a male Black adult, 25 years old, wearing black pants and a black jacket, clean shaven, with short hair, 5'11", 150 to 180 pounds, medium complexion." (3RT 581-582.) During cross-examination, Mendez gave an additional description of the shooter, describing him as being five feet eleven inches tall, weighing between 150 to 180 pounds, and having a bald head. Mendez explained that by "bald," he meant the shooter had a head "like . . . when somebody is shaving . . . ." (3RT 494.) During re-direct, Mendez further explained that the shooter was "bald shaved," not naturally bald. (3RT 497.)

[5] The photographic lineup was introduced at trial as People's Exhibit No. 8. (3RT 479-480.)

2. Murder of Paul Moreland and Attempted Murder of Roy Fradiue

On November 22, 1996, at approximately 5:00 p.m., Roy Fradiue[6] and Paul Moreland met at Fradiue's uncle's house located at 2527 Pearl Street in Compton. (3RT 372-373.) Fradiue and Moreland had "a few" drinks before leaving to go to a store on Long Beach Boulevard.[7] (3RT 373-374.)

At approximately 11:00 p.m. to 11:30 p.m., Fradiue and Moreland briefly stopped by a friend's house on Pearl Street regarding some plumbing work. (3RT 374.) After leaving the friend's house, Fradiue and Moreland were walking on Glencoe Street when Fradiue saw a man he later identified as appellant standing in a fenced front yard of a duplex with several other people.[8] (3RT 375, 390.) Appellant was holding a rifle on his shoulder and he was the only person in the group holding a gun or rifle. (3RT 376-377, 384, 391.) Fradiue had never seen appellant before that day and did not recognize any of the other men. (3RT 375, 391.) Fradiue described appellant as a Black man with a "real short" hair. (3RT 393-394.) Although it was dark outside, there was a light standard one house away from the duplex where appellant was standing and another light standard across the street. (3RT 394-396.)

Appellant said something to Moreland to which he responded, "That's all right." (3RT 377.) As Fradiue and Moreland continued to walk,

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[6] On cross-examination, Fradiue admitted that he had one prior conviction for assault with a firearm and another conviction for theft. (3RT 400-401.)

[7] On cross-examination, Fradiue stated that he "somewhat" felt the effects of the alcohol and that he had smoked "a little" weed that evening. (3RT 399.)

[8] Fradiue initially stated that he could not be specific about how many people were standing in the yard with appellant but later testified that there were approximately 10 men. (3RT 375, 390.)

appellant first fired a shot into the air and then began shooting at Moreland and Fradiue. (3RT 377-378.) When the first shot was fired, Fradiue and Moreland were approximately one house down from the duplex where appellant had been standing. (3RT 379.)

Fradiue ran across the street diagonally toward the corner, heading down Temple Street toward Greenleaf. Moreland ran the other way. (3RT 378-380.) Fradiue did not turn around to see what had happened to Moreland.[9] As Fradiue turned the corner, a bullet hit a pole. Approximately three to four minutes later, Fradiue heard additional three to four shots. (3RT 381.) Fradiue ran all the way to Long Beach and Artesia where a friend gave him a ride back to his uncle's house. (3RT 378, 399.)

Fradiue did not return to the shooting scene that evening. He never again saw Moreland alive after the shooting incident. (3RT 382.) Fradiue did not contact the police about the shooting because he did not know whether Moreland had been killed. (3RT 400.)

Ronald Darby was watching television with his family in his house located near the intersection of Glencoe and Temple when he heard approximately three to four shots. (3RT 522-523.) After a brief silence, Darby heard another round of three to four shots.[10] Darby eventually went outside and saw a commotion about someone laid out on a driveway. (3RT 523.)

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[9] During cross-examination, Fradiue stated that he did not see appellant shoot Moreland but that he only saw appellant holding a gun. (3RT 392.)

[10] Darby testified at trial that the second round of shots occurred approximately five to ten seconds after the initial shots. (3RT 523.) However, Darby admitted that after the shooting, he told one of the officers that the interval between the shots was approximately two to three minutes. (3RT 526.)

At approximately 11:00 p.m., Officer George Betor received a call to respond to the 1500 block of South Temple Street, located near the intersection of Temple and Glencoe. (3RT 348.) When Officer Betor arrived at the scene, he saw a body lying on the driveway on the southwest corner of Glencoe and Temple Street. (3RT 349.) Officer Betor also found blood, bodily tissue and three expended 7.62 by 39 millimeter shell casings near the body. (3RT 352-353, 362.)

Detective Marvin Branscomb responded to 1324 Glencoe for a possible homicide investigation. (3RT 404.) Detective Branscomb took pictures of the scene, collected the three expended shell casings, and booked them as evidence at the police station. (3RT 405-406.) The shell casings were 7.62 by 37 millimeter in caliber, which was a type of round used in assault rifles. (3RT 407.) Detective Branscomb took photographs of blood splatter on the garage door and a trail of blood coming down from the victim's body. (3RT 591.) No other blood or bodily fluid evidence was found. (3RT 592.)

Both Officer Betor and Detective Branscomb observed that there was a light standard on the east side of Temple Street, just south of the location where the body was found. (3RT 362-363, 408.) The body was located directly below a "well lit" security light on the driveway above the garage. (3RT 363-364, 408.) Detective Branscomb also noted that there was a full moon and clear skies that evening. (3RT 408.)

On November 23, 1996, at approximately 10:00 p.m. to 10:30 p.m., Officer Marvin Pollard stopped appellant and another man named "I. Mc Laine" near 1315 East Glencoe which was across the street from where Moreland was shot. (3RT 358, 412-413, 416, 418.) Officer Pollard filled out a field interview ("F.I.") card for appellant by using a California identification card. Officer Pollard also noted on the F.I. card a description of a tattoo on appellant's left forearm. (3RT 414-415.)

On the same evening, in an unrelated incident, Lieutenant Reginald Wright, Officer Betor and another officer chased a suspect named Chico Mc Laine into a house on Glencoe Street, just northwest of the homicide location. (3RT 355-357, 365.) After detaining Mc Laine and another man inside the house, Officer Betor found an S.K.S. type of rifle with a loaded 30-round magazine located inside a hallway closet. (3RT 357-358, 367.) He also found another loaded magazine with 12 live rounds inside. (3RT 361, 368-369.) Officer Betor noticed that the rifle used the same type of casings found at the homicide scene across the street on the previous evening. (3RT 358.)

In April 1997, Detective Paiz contacted Fradiue at his grandmother's house in Bellflower. (3RT 392, 513-514.) Fradiue could not give a description of the shooter because his "mind was [] blurry" at the time. (3RT 392.)

On April 18, 1997, Fradiue met with Detective Paiz at the Compton Police Station for a photographic lineup.[11] (3RT 383-385, 509, 511.) After studying the pictures "for a little while," Fradiue selected appellant's picture as depicting the man who had shot at him and Moreland.[12] (3RT 385-386, 510.) Appellant's photograph was the only one that depicted a person with short hair while the remaining pictures depicted men with longer hair. (3RT 393.) Appellant was arrested on April 25, 1997. (3RT 513.)

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[11] The photographic lineup shown to Fradiue was the same one shown to Mendez, which was marked at trial as People's Exhibit No. 8. (3RT 385-386.)

[12] At trial, Fradiue testified that it took him approximately 10 minutes to pick the shooter's picture. (3RT 386.) However, Detective Paiz testified that it took Fradiue approximately 10 seconds to make his selection and stated that the entire interview lasted less than 10 minutes. (3RT 510.)

Approximately one year later, Fradiue participated in a live lineup conducted at the county jail. (3RT 387, 511.) It took Fradiue "[n]ot even two seconds" to select appellant as the shooter. (3RT 388-389.)

Dale Higashi, a senior criminalist with the Los Angeles County Sheriff's Department ("LASD"), examined the rifle and the magazine recovered by Officer Betor. (3RT 439.) The serial number on the rifle appeared to have been "attacked" or ground off. After chemically restoring the area, Higashi determined that the rifle's serial number was 03882. (3RT 439-440.) Higashi test-fired the weapon and found it to be functional. The magazine held 30 rounds. Higashi opined that the rifle was considered to be an assault weapon because of the detachable magazine. (3RT 440.)

Higashi also examined the three expended shell casings recovered from the scene and compared them with the test-fired rounds from the rifle. (3RT 440-441.) He opined that two of the shell casings were positively identified as having been fired from the rifle while the third shell casing had marks consistent with having been manually inserted into the chamber and then extracted. (3RT 441.) After examining the bullet fragments received from the Coroner's Office and comparing them to the casings recovered at the scene, Higashi opined that the test results were inconclusive because the fragments did not have sufficient individual characteristics to positively identify them as having been fired from the rifle. (3RT 441-442.) However, Higashi added that the bullet fragments could have been fired from the rifle. (3RT 442.)

Fred Roberts, an LASD forensic identifications specialist, examined the rifle and its magazine for fingerprints. (3RT 445.) No prints were recovered. (3RT 445-446.) Roberts stated that on average, the fingerprint evidence is found on a firearm only in approximately six to eight percent of the cases. (3RT 446, 448-449.)

During trial, Detective Paiz returned to the shooting scene and located a bullet hole on a no parking sign on the west side of Temple, south of Glencoe. (3RT 532-533.) Based on the metal shape of the sign post, Detective Paiz opined that the bullet was traveling in a southwesterly direction. (3RT 533.)

On November 25, 2006, Dr. Chinwah conducted Moreland's autopsy. (3RT 537-538.) He opined that the cause of death was multiple gunshot wounds. (3RT 378.) Dr. Chinwah found nine gunshot wounds on Moreland's body. The first bullet entered from the back of the left chest and exited through the right upper neck near the right ear. (3RT 539.) The second bullet went in the back of the left arm and continued into the chest area. (3RT 539-540.) The third bullet went in the back of the left forearm. The fourth bullet went into the abdomen and its fragmented parts became lodged in the lower rib cage. The fifth bullet went in the back of the right thigh and exited near the groin area. The sixth bullet went in the front of the right thigh and exited through the back. The seventh bullet went through the right front leg and came out through the back. (3RT 540.) The eighth bullet went in the inner left leg, shattered the bone, and exited through the outer side. (3RT 540-541.) The ninth bullet went through the front side of the right hand and came out through the back. (3RT 541.) A toxicology report showed that Moreland had alcohol, cocaine and phencyclidine or "P.C.P." in his body at the time of his death. (3RT 546-547.)

B. Defense

On the day of the Mendez/Vasquez shooting, Foster Slaughter and his fellow motorcycle club members were seated on their motorcycles near the Zodiac Club located north of Tacos El Unico. (3RT 565-569.) When the gunshots rang out, Slaughter and his club members rushed to get

everyone inside. (3RT 569.) Slaughter saw a "Spanish-American" man standing outside his truck and a gunman standing behind the truck shooting at him. (3RT 569-571.) The gunman fired approximately three to four shots at the Hispanic man, ran over to the side of the truck, and shot into the truck twice. (3RT 573, 575-576, 579.) The gun appeared to be jammed at some point and the gunman escaped around the corner toward a street behind the restaurant. (3RT 573, 575-576.) The victim ran toward the phone booth and tried to dial 911 without success. He yelled toward Slaughter and his colleagues, asking them to call the police. (3RT 571.)

Slaughter was standing approximately 50 feet away from the gunman and could not recognize his face. (3RT 572.) Slaughter described the gunman as a Black male, approximately five feet nine inches to six feet tall, weighing between 190 and 200 pounds, having long hair, and wearing a black hat, beanie or cap, and a big black long coat. (3RT 573-574, 578.) Slaughter explained that the coat was a puffy jacket that fell just above the knee. He did not recall seeing a hood or any writing on the jacket. (3RT 576-577.) After observing appellant at trial, Slaughter stated, "[Appellant] don't [*sic*] look like the one [who] was there. [The gunman] was a little thicker than [appellant] in arm-wise." (3RT 574.)

C. Rebuttal

Officer Kenneth Roller interviewed Slaughter at the scene of the shooting at Tacos El Unico. Slaughter described the gunman as a male Black adult, wearing a three-quarter length black jacket and dark jean pants. (3RT 584, 586.) There was no description given regarding the gunman having long hair or being bulky like a weightlifter. (3RT 586-588.)

II. PENALTY PHASE[13]

A. Prosecution

The parties stipulated that on September 15, 1992, appellant was convicted in case number TA015119 of attempted murder as an aider and abettor in a shooting occurring in 1991. (5RT 1116.) Appellant went to prison on September 15, 1992, and was released on parole on August 3, 1996. (5RT 1098.) Appellant reported to the parole office on August 5, 1996. (5RT 1099.)

1. Murder of Vasquez and Attempted Murder of Mendez

On September 24, 1996, Mendez and Vasquez drove together to work at Kirk Plastic Company for their 3:30 p.m. shift. (5RT 1004-1005.) At approximately 8:00 p.m., Mendez and Vasquez took their lunch break and drove five minutes to a Mexican restaurant. (5RT 1005-1006.) Mendez parked his truck on the side of the restaurant's window and together with his wife, walked up to the window to order some food to go. (5RT 1006.)

After picking up the food, Mendez entered his truck through the driver's side and opened the door for Vasquez. (5RT 1007.) While they were getting ready to leave, Vasquez told Mendez that there was a man with a gun. (5RT 1007, 1011.) Mendez looked up toward the passenger side and saw appellant walking toward his wife, holding a black gun

[13] This penalty phase statement of facts summarizes the evidence presented at the penalty phase retrial. The first penalty phase jury deadlocked seven to five in favor of life without the possibility of parole. (4RT 792, 796.) The penalty phase retrial jury was presented with similar aggravating evidence previously presented during the guilt phase trial, with the addition of appellant's social history and the testimony of Joe Galindo regarding the Mendez/Vasquez shooting. (6RT 1127-1172.)

pointed to the ground. (5RT 1007-1011.) Mendez put up his hands in an attempt to stop appellant from shooting. (5RT 1012-1014.) Mendez heard several shots, one of which hit him on the right cheek. (5RT 1014-1015.) Mendez opened the door and while trying to come out of the truck, he was shot again in the left leg. (5RT 1016.)

Mendez screamed for help but nobody came. (5RT 1017.) Realizing his wife was still in the truck, Mendez returned and saw Vasquez bleeding from the right side of her face. (5RT 1017-1019.)

Officer Childs arrived at the scene at approximately 8:00 p.m. and saw Mendez running around the truck screaming hysterically. (5RT 1030.) Officer Childs recovered nine shell casings outside of the truck near the passenger side. (5RT 1031-1032.) He also recovered two expended bullets, one of which was found behind the bench seat of the truck. (5RT 1032.) Typically, a semiautomatic weapon will eject the shell casings up and to the right of the gun. (5RT 1033-1034.)

At the time of Vasquez's death, Mendez had been married to Vasquez for five months. They had been living together since 1993. (5RT 1004.) Mendez described that since Vasquez's death, his life has been "really hard" because "it's really hard to lose [the] one who[m] you love, . . . especially when she . . . is killed [] this way." (5RT 1020.) Mendez eventually remarried because he believed it would help him deal with the loss of his wife. (5RT 1020, 1028.)

Dr. James Ribe, a senior deputy medical examiner with the Los Angeles County Department of Coroner, testified about Vasquez's autopsy. (5RT 1103-1104.) Vasquez's autopsy report indicated that she died of a gunshot wound to her head. The report also stated that the wound was caused by a gunshot entering the right front side of the head and coming out through the left rear side of the head. (5RT 1106.) The victim also had

pseudo-stippling around her wound which were tiny abrasions caused by the glass fragments as the bullet struck the car window. (5RT 1106-1107.)

2. Murder of Moreland and Attempted Murder of Fradiue

On November 22, 1996, at approximately 12:00 p.m., Fradiue and Moreland met up at Fradiue's uncle's house on Pearl Street. (5RT 1044.) They had "quite a few drinks" of Olde English 800 and Fradiue also smoked some marijuana. (5RT 1046.) At approximately 11:00 p.m., Fradiue and Moreland left the house to go to a store located on Long Beach Boulevard. (5RT 1045, 1056.)

While walking eastbound on Glencoe, Fradiue and Moreland saw a group of approximately 13 to 15 men standing in front of a duplex. (5RT 1045, 1047-1048.) Appellant was in the group holding a rifle over his shoulder. (5RT 1048-1049.) After appellant and Moreland exchanged some words, Fradiue heard a gunshot in the air. (5RT 1049-1050.) When Fradiue turned around, he saw appellant bringing the rifle down and shoot toward them. (5RT 1051.) Fradiue and Moreland began running in opposite directions. (5RT 1050.) Moreland was slumping down as if he had been hit. (5RT 1052.) As Fradiue was turning the corner, he heard a gunshot hit a pole near him. (5RT 1052-1053.) Fradiue ran southbound on Temple, hopped over a gate and ran through the apartments all the way to Artesia. He found a friend at the phone booth who gave him a ride to his cousin's house. (5RT 1053.)

At approximately 11:00 p.m., Darby heard approximately four gunshots coming from the front of his house located near the intersection of Glencoe and Temple. (5RT 1037-1038.) There was a pause of approximately a minute or two before Darby heard additional three to four

gunshots. (5RT 1038, 1040.) When Darby went outside, he saw a person lying on the driveway with gunshot wounds. (5RT 1038-1039, 1041.)

Officer Betor arrived at the corner of Glencoe and Temple shortly after 11:00 p.m. He saw a male Black victim lying on the driveway, propped up against the garage door, and with several large caliber bullet wounds to his body. There was blood around the body as well as blood and flesh particles splattered on the garage door. (5RT 1079.) The victim's ankle was completely snapped and turned under his body and his feet were crossed. (5RT 1080.) Officer Betor discovered two expended shell casings of 7.62 by 39 millimeter caliber at the crime scene. (5RT 1077.) This type of bullet is compatible with the AK-47, S.K.S. rifle, and Ruger Mini-30. (5RT 1078.)

On the following day, Officer Betor assisted Lieutenant Wright with a suspect chase into a duplex on Glencoe Street. (5RT 1080.) After detaining the suspect, Officer Betor found an S.K.S. rifle with a loaded magazine inside the duplex. (5RT 1082, 1084.)

In May 1999, Detective Paiz went to the southwest corner of Glencoe and Temple and found a bullet hole in a no parking sign. (5RT 1066.) The bent metal appeared to show that the bullet was traveling in a southern direction when it struck the sign. (5RT 1067.)

Moreland's autopsy report indicated that he died of multiple gunshot wounds. (5RT 1108.) Moreland suffered nine gunshot wounds to his back, neck, ear, arm, chest, forearm, abdomen, thigh, hip, leg, and hand. (5RT 1109-1111.) The toxicology report indicated the presence of P.C.P., cocaine and alcohol in Moreland's system at the time of his death. (5RT 1112-1113.)

Floyd Moreland is Moreland's father. On the day of the shooting, Floyd Moreland went to the crime scene to identify his son's body. (5RT 1070.) Moreland was 38 years old when he was killed. At the time of his

death, Moreland was working for his father as a plumber. Since his death, Floyd Moreland has been missing his son very much and it has been difficult not having Moreland around to help him with work. (5RT 1071.) Moreland had two brothers, two sisters, and one daughter who was 16 or 17 years old when he died. (5RT 1071-1072.) The daughter used to live with Moreland when she was younger but now lives in Detroit with her mother. (5RT 1072.)

B. Defense

On the day of Vasquez's shooting, Joe Galindo was working for the California National Guard. (6RT 1127.) Between 6:00 p.m. and 7:00 p.m., Galindo went to Tacos El Unico to buy some tacos and returned to his girlfriend's house approximately five to six houses down the street on Glencoe. (6RT 1127-1128.) While outside on the front porch, Galindo heard three gunshots coming from the taco stand. (6RT 1128.) Galindo turned around and saw a Black male with his right arm up shooting into a car. (6RT 1128, 1132.) Galindo grabbed his girlfriend and took her inside the house. (6RT 1128.) When he returned outside 15 seconds later, Galindo saw the same man running past his location from a distance of approximately 53 feet away. (6RT 1128-1130.) The man fled around the side of a corner house on Glencoe and Temple. (6RT 1135-1136.)

The lighting was "pretty dark" and Galindo did not see the man's face. (6RT 1129.) Galindo described the man as being "somewhat stocky," wearing dark colored pants, a checkered shirt, and a black baseball cap. (6RT 1129-1130.) After a brief visual examination of appellant in the courtroom, Galindo opined that appellant did not appear to be the man he saw running down the street because appellant was "smaller." (6RT 1131-1132.) Galindo described himself as being six feet one inch tall and

weighing 204 pounds. (6RT 1131.) According to Galindo, the gunman was at least as tall as or a bit taller than he was. (6RT 1132.)

Slaughter was declared unavailable and his guilt phase trial testimony was read into the record. (6RT 1141-1158.)

Dolores Churchill is appellant's great-aunt. (6RT 1214-1215.) Churchill lives with appellant's mother, Beatrice Reed, in Fullerton. (6RT 1215.) Churchill is a retired social work administrator who is working as a part-time instructor at Santa Ana Community College. (6RT 1215-1216.) Appellant's mother could not come to testify in court because she was emotionally "fragile." (6RT 1228.) Churchill believed that appellant had a strained or distant relationship with his mother because "they just didn't communicate with each other well." (6RT 1219, 1228.) Churchill also believed appellant was a very considerate person who offered to help around the house. (6RT 1226-1227.) He was baptized as a Catholic and participated in his first communion. She has never witnessed appellant displaying uncontrollable anger or having problems with his temper. (6RT 1227.)

Appellant was born on October 30, 1972. (6RT 1216-1217.) Appellant's mother had a nervous breakdown while pregnant with appellant and was committed to a hospital for approximately 14 days. (6RT 1220.) Appellant's parents had a "strained relationship" and separated before appellant started kindergarten. (6RT 1217-1218.) Appellant continued to live with his mother in Compton until she became unemployed and lost the house. (6RT 1221.)

While in school, appellant showed difficulty paying attention. (6RT 1222.) He attended several different schools and teachers believed he had learning disabilities. (6RT 1222-1224.) He never received any formal testing for his learning disabilities. (6RT 1225.)

Dolores Sheen is the executive director and principal of Sheenway School and Culture Center, which is a school appellant attended 15 years ago. (6RT 1159-1160.) Appellant enrolled at Sheenway School on May 19, 1986, as a seventh grader. (6RT 1161.) At the time appellant was attending the school, Sheen opined that he was not performing to his grade level. Appellant began manifesting behavioral problems due to his difficulty in accomplishing the school work at his level. (6RT 1167.) Despite numerous attempts, Sheen received no support from appellant's mother regarding improving appellant's performance at school. (6RT 1167-1168, 1173.) Appellant failed to make it to eighth grade because he was performing at a third or fourth grade level. (6RT 1169.) He was behind in school assignments, was irregular in attendance, and regularly failed to wear the uniform. (6RT 1171, 1175.) Appellant was suspended and eventually expelled after one year. (6RT 1172.)

C. Rebuttal

Officer Lewis interviewed Mendez at the scene of the shooting. (6RT 1187-1188.) Mendez was upset, crying and bloody. Mendez told Officer Lewis that he was sitting inside his truck when a Black male wearing a black jacket approached the passenger side of the vehicle and shot at him and his wife. Mendez also stated that after the shooting, the shooter turned and ran away westbound on Glencoe. (6RT 1191.)

Officer Childs interviewed Galindo at the scene. (6RT 1205-1206.) Galindo described the shooter as a Black male wearing a black hat and a long black coat. Galindo gave no description regarding the shooter's height or weight. He also described another person who was with the shooter as an adult Black male wearing a plaid shirt. (6RT 1207.)

In January 1997, approximately three and a half to four months after the shooting, Detective Paiz contacted Mendez to conduct a photographic

lineup. (6RT 1194-1195.) After being admonished, it took Mendez approximately 15 seconds to identify appellant as the shooter out of the lineup. (6RT 1195-1196.) In July 1998, Mendez attended a live lineup at the county jail. (6RT 1198.) Again, it took Mendez between 10 to 15 seconds to identify appellant as the shooter. (6RT 1198-1199.)

Mendez reiterated that the shooter had a shaved head at the time of the shooting. (6RT 1200-1201.) He had no doubt in his mind that appellant was the shooter. (6RT 1204.)

ARGUMENT

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING APPELLANT'S MOTION TO CONTINUE THE TRIAL TO PERMIT A DEFENSE WITNESS TO TESTIFY

Appellant argues that the trial court abused its discretion when it denied his motion for a continuance to allow Joe Galindo to testify at trial. He further contends that the court's failure to grant the continuance resulted in a violation of his federal constitutional rights under the Sixth, Eighth and Fourteenth Amendments. (AOB 42-75.) Respondent disagrees.

A. Factual Background

On May 25, 1999, the first day of trial, appellant's counsel orally moved for a continuance based on the unavailability of defense witness Galindo, and the trial court denied the request as follows:

> [COUNSEL]: Your Honor, I want to raise one problem so the court is aware. [The prosecutor] and I discussed this yesterday. It is about a witness by the name of Joe Galindo.
>
> Mr. Galindo apparently has been transferred within his National Guard Unit perhaps to Yugoslavia. He is a percipient witness in regards to one of the crimes. And on the basis of his transfer, I would be requesting this matter be continued.

THE COURT: People, anything?

[PROSECUTOR]: I'd object to the continuance.

I believe in being a percipient witness, he's referring to the shooting first in time, victim Vasquez. And Mr. Galindo was present at a location where he couldn't actually see the shooting, but he saw a person running away from the area of the shooting and going to a particular location on Glencoe Street. And he indicated at the time to the police that he could not identify that person if seen again; he could just give a description, which I believe would be somewhat . . . inconsistent with the way the defendant looks.

[COUNSEL]: That's a fair and accurate statement of the facts, Your Honor.

THE COURT: Well, the request for a continuance is denied. Mr. Galindo being transferred to Yugoslavia – there's no way of knowing if he'll ever come back or when he might come back. So for that reason, the continuance is denied.

(2RT 75-76.)

Galindo subsequently returned from his military duty and testified at the penalty phase retrial on August 2, 1999. (6RT 1127-1132.) Galindo stated that he was standing approximately 53 feet away when the shooter ran past him. (6RT 1128-1130.) Despite being "pretty dark" outside, Galindo described the shooter as being "stocky," wearing dark pants, a checkered shirt, and a black baseball cap. (6RT 1129-1130.) After a brief visual examination of appellant in the courtroom, Galindo opined that appellant did not appear to be the man he saw running down the street because appellant was "smaller." (6RT 1131-1132.)

After the penalty phase retrial jury returned a judgment of death, appellant filed a motion for new trial alleging that he was deprived of his right to a fair trial when the trial court denied his request for a continuance to allow Galindo to testify during the guilt phase. (20CT 5643-5650.) The motion was denied. (6RT 1335-1336.)

B. The Trial Court Properly Denied The Request For Continuance

Section 1050, subdivision (e), provides, "Continuances shall be granted only upon a showing of good cause." A particularized showing is required when a continuance is requested to secure the attendance of witnesses. (*Owens v. Superior Court* (1980) 28 Cal.3d 238, 250.) Specifically, "defendant had the burden of showing he had exercised due diligence to secure the witness's attendance, that the witness's expected testimony was material and not cumulative, that the testimony could be obtained within a reasonable time, and that the facts to which the witness would testify could not otherwise be proven." (*People v. Howard* (1992) 1 Cal.4th 1132, 1171; see *People v. Jenkins* (2000) 22 Cal.4th 900, 1037.) In determining whether there was error, "the appellate court looks to the circumstances of each case and to the reasons presented for the request." (*People v. Frye* (1998) 18 Cal.4th 894, 1013, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

"'The determination of whether a continuance should be granted rests within the sound discretion of the trial court, although that discretion may not be exercised so as to deprive the defendant or his attorney of a reasonable opportunity to prepare.' [Citation.]" (*People v. Jackson* (2009) 45 Cal.4th 662, 677-678; see also *People v. Lewis* (2009) 46 Cal.4th 1255, 1310 ["'whether to grant a continuance of a hearing to permit counsel to secure the presence of a witness rests in the sound discretion of the trial court'"].) "The party challenging a ruling on a continuance bears the burden of establishing an abuse of discretion, and an order denying a continuance is seldom successfully attacked. [Citation.]" (*People v. Beames* (2007) 40 Cal.4th 907, 920; see *People v. Beeler* (1995) 9 Cal.4th 953, 1003.) A trial court abuses its discretion "only when the court exceeds

the bounds of reason, all circumstances being considered. [Citations.]" (*People v. Beames, supra*, 40 Cal.4th at p. 920.)

Here, there was no abuse of discretion. There was no written motion for a continuance, just an oral one made on the first day of trial. The only facts presented to the trial court in support of the motion for a continuance was that Galindo, whose National Guard Unit had been transferred to Yugoslavia, was present but did not actually see the Mendez/Vasquez shooting and that he saw a person running away from the area of the shooting. The court was also told that Galindo had indicated to the police that he could not identify the person he saw running away from the scene and that he gave a description which was "somewhat . . . inconsistent" with appellant. (2RT 75-76.) Appellant's counsel made no effort to inform the court of the nature or extent of any attempts made by his investigator to locate Galindo or properly serve a subpoena.[14]

More importantly, based on the facts presented to the court, "there[] [was] no way of knowing if [Galindo would] ever come back or when he might come back." (2RT 76.) Contrary to appellant's argument, it was not the court's or the prosecution's burden to "determine how long Galindo would be gone." (AOB 60.) Instead, appellant had the burden of demonstrating at the time the continuance was requested, that Galindo's "testimony could be obtained within a reasonable time . . . ." (*People v.*

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[14] Appellant recites in length the efforts expended by his investigator in attempting to serve Galindo with a subpoena prior to trial in support of his position that he diligently sought to locate the witness and obtain his presence in court. (AOB 62-63.) However, none of these facts were presented to the trial court at the time of the continuance request but instead, were argued for the first time in the motion for a new trial filed after appellant's conviction and judgment of death. (2RT 75-76; 20CT 5643-5650.) This Court's review is limited to the circumstances and the reasons presented for the continuance request. (*People v. Frye, supra*, 18 Cal.4th at p. 1013.)

Howard, *supra*, 1 Cal.4th at p. 1171.) Since the only information presented to the court was that Galindo had been transferred to Yugoslavia, there was no showing his attendance could have been secured within a reasonable time – or at any time. Consequently, the court acted well within its discretion when it declined to continue the trial based on Galindo's unavailability.

For the same reasons, appellant's argument that the denial of a continuance violated his federal constitutional rights must fail. (AOB 42, 58-59, 72.) "[T]he denial of a continuance may be so arbitrary as to deny due process." (*People v. Beames*, *supra*, 40 Cal.4th at p. 921.) "However, not every denial of a request for more time can be said to violate due process, even if the party seeking the continuance thereby fails to offer evidence." (*Ibid.*)

> Although "a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality[,] . . . [t]here are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process." [Citation.] Instead, "[t]he answer must be found in the circumstances present in every case, *particularly in the reasons presented to the trial judge at the time the request is denied*." [Citations.]

(*Ibid.*, italics added.)

In this case, as stated previously, the facts presented to the trial court were insufficient to support the grant of a continuance. Both sides agreed that Galindo did not see the shooting and could not identify the man running away from the scene. (2RT 75-76.) There were no facts presented to the court regarding the efforts made by appellant to secure Galindo's presence and no information about when he would be available to testify. (See § 1050, subd. (i) ["continuance shall be granted only for that period time shown to be necessary by the evidence considered at the hearing on

the motion"].) Thus, the denial of a continuance to secure Galindo's testimony was not so arbitrary as to deny appellant's due process rights.

C. Any Error Was Harmless

Even assuming the trial court erred in denying appellant's request for a continuance, any error was harmless under any standard of review. (*Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705]; *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*); see *People v. Hawkins* (1995) 10 Cal.4th 920, 945 [applying *Watson* standard to determine whether denial of request for continuance prejudiced defendant], disapproved on another ground in *People v. Blakeley* (2000) 23 Cal.4th 82, 89.)

The evidence of appellant's identity as to the Mendez/Vasquez shooting was established by Mendez who testified that he saw appellant approach his truck and, while standing approximately 22 feet away, fire multiple shots into the truck toward Mendez and Vasquez. (3RT 464-465, 468, 470-471, 476-477.) Shortly after the shooting, despite having been shot multiple times, Mendez told Officer Lewis that the shooter was a Black man wearing a black jacket. (3RT 501.) Later in the hospital, Mendez gave a more detailed description of the shooter to Detective Paiz, adding that he was between five feet eight inches to five feet eleven inches tall, 20 to 25 years old, clean shaven with short hair, and wearing black pants and jacket. (3RT 494, 505, 582.) Mendez repeated the same description of the shooter to another police officer at the hospital, this time adding that the shooter was of "medium complexion." (3RT 581-582.) Mendez's descriptions of the shooter were mostly consistent with appellant's photograph and information found in his DMV identification

card issued on August 6, 1996, less than two months before the shooting.[15] (See People's Exh. 13a.)

Furthermore, Mendez positively and unequivocally identified appellant as the shooter in three different occasions. In January 1997, Mendez selected appellant's picture out of a photographic lineup "within seconds." (3RT 480-481, 507.) In July 1998, this time in a live lineup, Mendez selected appellant as the shooter "really fast." (3RT 481-482, 484.) Finally, Mendez also identified appellant as the shooter without hesitation during his trial testimony. (3RT 464-465.)

In contrast, had Galindo returned in time to testify at the guilt phase, his testimony would have had little impact in countering Mendez's identification of appellant as the shooter, even if considered together with Slaughter's testimony. Slaughter testified that he saw the shooter while standing approximately 50 feet away but could not recognize his face. (3RT 572.) Galindo also observed the shooter while standing over 50 feet away, twice the distance between the shooter and Mendez, and admitted that he was unable to see the shooter's face because it was "pretty dark" outside. (6RT 1129-1130.) Unlike Mendez, Galindo and Slaughter never had an opportunity to face the shooter and Galindo only observed the shooter running past him. (3RT 573, 575-576; 6RT 1128-1130.) Although Galindo and Slaughter both opined that appellant was not the shooter because the gunman was bigger or "thicker" than appellant (3RT 574; 6RT 1131-1132), this could be explained by Slaughter's own observation that the shooter was wearing a black "puffy jacket" (3RT 576-577), which could

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[15] The DMV identification card showed that appellant was 23 years old at the time of the Mendez/Vasquez shooting. The document also indicated that appellant was five feet nine inches tall and weighed 122 pounds. The picture depicted a clean shaven Black male with a shaved bald head. (See People's Exh. 13a-13b.)

have given them the wrong impression that the shooter was bulkier than he really was. Based on this evidence, any error in denying a continuance was harmless under any standard.

II. THERE WAS SUBSTANTIAL EVIDENCE TO SUPPORT APPELLANT'S CONVICTIONS FOR THE MURDER OF VASQUEZ AND THE ATTEMPTED MURDER OF MENDEZ

Appellant contends there was insufficient evidence that he was the shooter in the murder of Vasquez and the attempted murder of Mendez. (AOB 76-109.) Respondent disagrees.

A. Standard Of Review

In reviewing an insufficiency of evidence claim, the court asks "whether after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. [Citation.]" (*People v. Maury* (2003) 30 Cal.4th 342, 403, original italics, internal quotations omitted.) The evidence upon which the judgment relies must be "reasonable, credible, and of solid value." (*People v. Jones* (1990) 51 Cal.3d 294, 314.) The reviewing court cannot reweigh the evidence or evaluate the credibility of the witnesses. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) Rather, the reviewing court "presume[s] '"in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence." [Citation.] This standard applies whether direct or circumstantial evidence is involved.'" (*People v. Prince* (2007) 40 Cal.4th 1179, 1251.) When a verdict is supported by substantial evidence, the appellate court must defer to the lower court's findings. (*People v. Smith* (2005) 37 Cal.4th 733, 739.)

Even where an eyewitness has been subjected to undue suggestion, the fact finder must be allowed to hear and evaluate the identification testimony, unless the totality of circumstances suggests """"a very substantial likelihood of irreparable misidentification."""" (*People v. Arias* (1996) 13 Cal.4th 92, 168.)

B. Sufficient Evidence Supports The Jury's Finding That Appellant Was The Shooter of Mendez and Vasquez

Here, there was sufficient evidence that appellant was the shooter in the murder of Vasquez and attempted murder of Mendez. Mendez testified that on the day of the shooting, he saw appellant approaching his truck from approximately 22 feet away while holding a 12-inch long pistol in his hand. (3RT 464-465, 468-469, 476-477, 488-489.) Ignoring Mendez's plea not to shoot, appellant fired multiple shots into the truck, striking Vasquez in the head and Mendez in the right cheek. (3RT 471, 473.) Mendez was also shot in his leg as he tried to get out of his truck. (3RT 474.) At the time of the shooting, the parking lot was illuminated by street lights and was reasonably well lit. (3RT 452.) Mendez had ample opportunity to observe appellant prior to being shot, not only when appellant was slowly approaching the truck but also as appellant stood still "for seconds" before firing multiple shots into the truck. (3RT 470-471.)

Furthermore, after the shooting, Mendez gave consistent descriptions of the shooter on three separate occasions. Immediately following the shooting, while Mendez was still "very, very upset [and] crying," he described the shooter to Officer Lewis as a Black male wearing a black jacket. (3RT 500-501.) Later in the evening, during an interview with Detective Paiz at the hospital, Mendez described the shooter as being approximately five feet eight inches to five feet eleven inches tall, 20 to 25 years of age, clean shaven with short black hair, and wearing a black jacket

and black pants. (3RT 494, 505.) The same description, with the addition of the shooter's skin tone, was given to another police officer at the hospital. (3RT 581-582.) Mendez's descriptions of the shooter's physique mostly matched the information and photograph contained in appellant's California identification card from DMV, which had been issued on August 6, 1996, less than two months before the shooting. (See People's Exhibit Nos. 13a-13b.)

In addition to the verbal descriptions, Mendez positively identified appellant as the shooter in two separate lineups. First, during a photographic lineup conducted at the police station, Mendez selected appellant's picture as that of the shooter "within seconds." (3RT 480-481, 507.) Second, in a live lineup conducted at the county jail, Mendez again identified appellant as the shooter "really fast." (3RT 481-482, 484.) Combined with Mendez's in-court positive identifications of appellant at both the preliminary hearing and trial, and viewing all evidence in light most favorable to the prosecution, this was sufficient evidence to support the jury's finding that appellant was guilty of murder of Vasquez and attempted murder of Mendez. (*People v. Maury*, *supra*, 30 Cal.4th at p. 403.)

Citing federal appellate opinions from other jurisdictions as well as a 2006 report by the California Commission on the Fair Administration of Justice, appellant argues that Mendez's identification of him as the shooter is not substantial or credible evidence. (AOB 82-108.) However, the testimony of a single eyewitness is sufficient to support a conviction. (See *People v. Boyer* (2006) 38 Cal.4th 412, 480 [identification by single eyewitness and out-of-court identification both provided sufficient evidence to prove defendant's identity]; *People v. Cuevas* (1995) 12 Cal.4th 252, 275 [out-of-court identifications repudiated at trial may provide substantial evidence]; see also *People v. Allen* (1985) 165 Cal.App.3d 616, 623 ["It is

well settled that, absent physical impossibility or inherent improbability, the testimony of a single eyewitness is sufficient to support a criminal conviction."].) Appellant's arguments are nothing more than an attack on the credibility of Mendez and an improper attempt to reweigh the evidence on appeal. (*People v. Lewis* (2001) 26 Cal.4th 334, 361; *People v. Diaz* (1992) 3 Cal.4th 495, 541; *People v. Barnes* (1986) 42 Cal.3d 284, 303.) Since appellant cannot demonstrate that Mendez's testimony was inherently improbable or physically impossible, his contention must fail. (*People v. Young* (2005) 34 Cal.4th 1149, 1181; see *People v. Champion* (1995) 9 Cal.4th 879, 927 [although there was inconsistencies in eyewitness testimony, jury could reasonably conclude that testimony was credible].)

Appellant also claims that the photographic and live lineup results are unreliable due to suggestive identification procedures. (AOB 82.) No such arguments were made at trial to challenge Mendez's identification. In any event, neither the photographic lineup nor the live lineup was unduly suggestive. Appellant claims that he was the only bald individual in the photographic lineup wearing a white T-shirt. (AOB 82.) However, shortly after the shooting, Mendez described the shooter to Detective Paiz as having short black hair and wearing a black jacket. (3RT 494, 505.) Thus, the fact that Mendez selected appellant's picture which depicted him with a shaved bald head and a white T-shirt, instead of the pictures of two other men with short black hair and dark clothing (Picture Nos. 3 and 4), further increases the reliability of Mendez's positive identification. (See People's Exh. 8.) Since there was nothing in appellant's picture that caused him to stand out in a way that suggested Mendez should select him, the photographic lineup was not unduly suggestive. (*People v. Gonzalez* (2006) 38 Cal.4th 932, 943, citing *People v. Carpenter* (1997) 15 Cal.4th 312, 367 ["'Because human beings do not look exactly alike, differences are inevitable. The question is whether anything caused defendant to

"stand out" from the others in a way that would suggest the witness should select him.'"].)

As to the live lineup, appellant claims that it was suggestive because Mendez testified that he picked the man he had previously seen in the photographic lineup. (AOB 82.) However, Mendez also testified that the man he picked was "the person who did the shooting" and that he picked appellant out of the lineup "as fast as" he had identified appellant in court. (3RT 481.) Under the totality of circumstances, Mendez's identification of appellant out of both lineups were reliable. (See *People v. Cook* (2007) 40 Cal.4th 1334, 1354 [pretrial identification held reliable under the totality of the circumstances after considering such factors as the witness's opportunity to view the suspect at the time of the offense, the witness's degree of attention at that time, the accuracy of the witness's prior description, the level of certainty the witness expressed when making the identification, and the lapse of time between the offense and the identification].)

Finally, appellant's attempt to attack Mendez's identification of appellant by characterizing Mendez's descriptions of the shooter as "evolving" is groundless. Shortly after being shot twice and before receiving any medical treatment, Mendez gave Officer Lewis a brief description of the shooter as being a Black male wearing a black jacket. (3RT 501.) After being transported to the hospital and finally receiving some treatment for his wounds, Mendez was able to give a more detailed description of the shooter to Detective Paiz, describing him as five feet eight inches to five feet eleven inches tall, 20 to 25 years of age, clean shaven with short black hair, and wearing black jacket and pants. (3RT 494, 505.) Virtually the same description was given to another officer while Mendez was still in the hospital. (3RT 581-582.) The fact that Mendez provided a more detailed description of the shooter at the hospital

does not demonstrate that he was making up facts about the shooter. Instead, the more likely explanation is that Mendez simply had more time to reflect and gather his thoughts about the shooting incident after his wounds had been treated at the hospital.

Mendez's preliminary hearing description of the shooter as having a bald head and wearing a white T-shirt also does not demonstrate that his descriptions were "evolving." The description of the shooter as having a bald head was entirely consistent with his trial testimony that appellant had a shaved bald head. (3RT 491, 497.) As to his testimony that the shooter was wearing a white T-shirt, Mendez later explained that he was not paying attention to the shooter's clothing but that he could clearly see the shooter's face and gun. (3RT 492, 497.) Again, when all evidence is viewed in light most favorable to the prosecution, Mendez's descriptions of the shooter consistently supported the conclusion that appellant was indeed the man who shot at Vasquez and Mendez. (*People v. Maury*, *supra*, 30 Cal.4th at p. 403.) Therefore, this argument should be rejected.

III. THERE WAS SUBSTANTIAL EVIDENCE TO SUPPORT APPELLANT'S CONVICTIONS FOR THE MURDER OF MORELAND AND THE ATTEMPTED MURDER OF FRADIUE

Appellant also contends that there was insufficient evidence to support his conviction for the murder of Moreland and the attempted murder of Fradiue. (AOB 110-132.) Respondent disagrees.

A. Standard Of Review

The applicable law on review was previously discussed in Argument II. (See Arg. II.A, *ante*.)

B. Sufficient Evidence Supports The Jury's Finding That Appellant Was The Shooter Of Moreland And Fradiue

As was the case with the shooting of Mendez and Vasquez, there was ample evidence to support the jury's guilty findings that appellant was the shooter in the murder of Moreland and the attempted murder of Fradiue.

Fradiue testified that he saw appellant among a group of men standing in front of a duplex as Fradiue and Moreland walked on Glencoe Street. (3RT 375, 390.) Fradiue described appellant as a Black man with a "real short" hair, and stated that he was the only man in the group holding a rifle over his shoulder. (3RT 393-394, 376-377, 384, 391.) Although it was dark outside, there were multiple street lights illuminating the location. (3RT 363-364, 374-396, 408.) Fradiue stated that appellant first fired a shot into the air and then began shooting toward him and Moreland. (3RT 377-378.) Fradiue was able to run away without being struck but Moreland was shot multiple times and killed. (3RT 349, 378, 399.) Fradiue later positively identified appellant as the shooter in two separate occasions, first in a photographic lineup at the police station and subsequently in a live lineup at the jail. (3RT 383-389, 509-511.) He also identified appellant as the shooter during the preliminary hearing and at trial. (1CT 141; 3RT 374-375.)

Furthermore, in addition to Fradiue's positive identification of appellant as the shooter, the evidence also established that appellant returned to the scene of the shooting the very next day as documented in the F.I. card filled out by Officer Pollard. (3RT 412-416, 418.) On the same date, the police also recovered the murder weapon inside a house near where Fradiue had seen appellant standing with the rifle over his shoulder just before the shooting. (3RT 355-358, 365, 367, 440-441.) Thus, Fradiue's identification of appellant was corroborated because he identified a person who was connected to the area where the shooting occurred and

the murder weapon was found in a house with appellant's companion at the time the F.I. card was completed.

This evidence, when viewed in light most favorable to the prosecution, was sufficient to support appellant's convictions for the murder of Moreland and the attempted murder of Fradiue. As stated previously (see Arg. II.B, *ante*), appellant's arguments attacking Fradiue's credibility based on minor inconsistencies in his testimony as well as challenging the reliability of the identification procedures constitute nothing more than improper attempts to reweigh the evidence on appeal and should be rejected. (*People v. Lewis*, *supra*, 26 Cal.4th at p. 361; *People v. Diaz*, *supra*, 3 Cal.4th at p. 495, 541.)

IV. THE TRIAL COURT PROPERLY DENIED APPELLANT'S *WHEELER/BATSON* MOTION DURING THE GUILT PHASE JURY SELECTION BECAUSE HE FAILED TO ESTABLISH A PRIMA FACIE CASE OF GROUP BIAS

Appellant, who is African-American, contends the trial court erred in overruling the defense *Batson/Wheeler*[16] objection to the prosecutor's peremptory challenges against five African-American prospective jurors, in violation of the federal and state constitutions. (AOB 133-161.) Respondent disagrees.

A. Factual Background

The guilt phase jury selection began with an initial panel of 250 jurors. (2RT 80-81.) After the jurors claiming hardships were excused, the

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[16] *Batson v. Kentucky* (1986) 476 U.S. 79 [106 S.Ct. 1712, 90 L.Ed.2d 69] (*Batson*) and *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*). For the first time on appeal, appellant asserts a claim under *Batson*. (2RT 296-297.) This Court has held that consideration of a *Batson* claim is not forfeited on appeal if *Wheeler* was the only case cited in the trial court. (*People v. Yeoman* (2003) 31 Cal.4th 93, 117-118.)

jury selection proceeded with a panel of 123 jurors who were requested to fill out a jury questionnaire.[17] (2RT 85-127, 150; 2CT 458-461.) Based on the jury questionnaire responses, 41 additional jurors were excused either by stipulation or for cause and the general voir dire portion of the jury selection began with 82 prospective jurors.[18] (2RT 150, 155-156, 162-271, 274-276, 292.)

The first 18 jurors to fill the jury box were Jurors Gladys Beard, No. 5645, No. 1450, Corinne Tate, No. 2801, No. 6761, Janice Clark, Jacqueline Wilson, Kevin Wees, Bert Abron, No. 1923, Billie Lawrence, Nickey Wright, Mary Cole, Betzaida Campizta, No. 0744, David Wilcox, and No. 9937. (2RT 275-277.) The court conducted the initial voir dire to the entire panel before the attorneys were allowed to ask additional questions. (2RT 277-287.)

After a brief voir dire session, the prosecutor exercised his first five peremptories to excuse Jurors Tate, Abron, Lawrence, Campizta and Janice Clark. (2RT 287-292.) The prosecutor later used three additional peremptories to excuse Jurors Bruno Blanco, Wright and Cole. (2RT 296.)

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[17] Although the trial court stated that there were 124 jurors who filled out the questionnaire, the final juror list generated by the court clerk after the jurors claiming hardships had been excused contained only 123 names. (2RT 150, 157-159; 2CT 458-461.)

[18] After reviewing the jury questionnaire responses, the parties jointly stipulated to excuse 31 jurors. (2RT 150, 155-156, 162-165.) The trial court and the attorneys then questioned some jurors regarding their responses in the questionnaires before excusing additional seven jurors for cause. (2RT 165-271.) Before the general voir dire began, the court excused Juror Frank Hayes for cause. (2RT 274.) While filling the jury box with the first 18 prospective jurors, it was agreed that Juror Jose Espinosa had already been excused for cause. (2RT 275-276.) During voir dire, the clerk advised the court that Juror Pamela Bryson had been previously excused. (2RT 292.)

Following the prosecutor's eighth peremptory challenge, appellant's counsel requested to approach the bench and made a *Wheeler* motion as follows:

> [COUNSEL]: Yes, your Honor. I would note that – at least it would appear from my count that the People have excused by way of peremptory challenges six – pardon me – five African-Americans out of the eight challenges.
>
> THE COURT: All right. Is there anything further?
>
> [COUNSEL]: Well, it doesn't look like, in regards to the last one, there was any – that it was justifiable, and I think it was done on the basis of race.
>
> THE COURT: So this is a motion pursuant to *Wheeler*?
>
> [COUNSEL]: Yes.
>
> THE COURT: Is there anything else?
>
> [COUNSEL]: No.
>
> THE COURT: All right. The court is going to find that there has not been a showing of a strong likelihood and that the burden has not been met at this point in time, so accordingly the *Wheeler* motion is denied. Thank you.
>
> [COUNSEL]: Thank you, your Honor.

(2RT 296-297.)

After the denial of *Wheeler* motion, the prosecutor exercised five additional peremptories. (2RT 298, 300-301, 307.) Each party exercised three peremptories during the selection of four alternate jurors. (2RT 308-318.)

B. Applicable Law

Both the state and federal constitutions prohibit the use of peremptory challenges to exclude prospective jurors based on bias against members of a protected cognizable group, such as one identified by race,

ethnicity, or gender. (*J.E.B. v. Alabama ex rel. T.B.* (1994) 511 U.S. 127, 129 [114 S.Ct. 1419, 128 L.Ed.2d 89]; *People v. Bell* (2007) 40 Cal.4th 582, 596.) The improper use of peremptory challenges violates a criminal defendant's federal constitutional right to equal protection and state constitutional right to be tried by a jury drawn from a representative cross-section of the community, and is subject to challenge by a *Wheeler/Batson* motion at trial. (See *People v. Jenkins, supra*, 22 Cal.4th at p. 992; see also *People v. Griffin* (2004) 33 Cal.4th 536, 553; *People v. Willis* (2002) 27 Cal.4th 811, 816-817.)

A trial court's evaluation of a *Batson/Wheeler* motion involves three steps. (*Johnson v. California* (2005) 545 U.S. 162, 168 [125 S.Ct. 2410; 162 L.Ed.2d 129]; *Miller-El v. Cockrell* (2003) 537 U.S. 322, 328-329 [123 S.Ct. 1029; 154 L.Ed.2d 931]; *People v. Bell, supra*, 40 Cal.4th at p. 596.) "First, the defendant must make out a prima facie case 'by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose.'" (*People v. Taylor* (2010) 48 Cal.4th 574, 611, quoting *Johnson v. California, supra*, 545 U.S. at p. 168.) Second, if a prima facie case is shown, the burden shifts to the prosecution to provide a race-neutral explanation for the strike. Finally, if the prosecution meets this burden, then the defendant must show the prosecutor's reasons were pretextual and the true reason for the strike was purposeful discrimination. (*Ibid.*)

At the time of the guilt phase jury selection in 1999, the relevant California standard for establishing the first-step prima facie case in *Wheeler/Batson* challenges was whether the defendant had shown a "strong likelihood" or "reasonable inference" – terms meaning it was "more likely than not" and treated as synonymous – that purposeful discrimination had occurred. (See *People v. Johnson* (2003) 30 Cal.4th 1302, 1313-1314 [citing the use of both terms in *Wheeler* and confirming they articulated the same standard].) In 2005, the United States Supreme Court disapproved

this standard for federal constitutional purposes, stating that a prima facie burden simply means the production of evidence that permits the trial court to draw an inference of discrimination. (*Johnson v. California*, *supra*, 545 U.S. at p. 170; see also *People v. Carasi* (2008) 44 Cal.4th 1263, 1292-1293 [discussing *Johnson v. California*].)

Because the trial court in this case denied the *Wheeler/Batson* motion for appellant's failure to establish a prima facie case, this Court should independently determine "whether the record permits an inference that the prosecutor excused jurors on prohibited discriminatory grounds." (See *People v. Carasi*, *supra*, 44 Cal.4th at p. 1293; see also *People v. Taylor*, *supra*, 48 Cal.4th at p. 614 [when a motion is denied without finding a prima facie showing of discrimination, reviewing court independently reviews the record to decide if it supports an inference that the prosecutor improperly exercised a peremptory challenge].) To prevail, appellant "must make a 'showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose.' [Citations.]" (*People v. Howard* (2008) 42 Cal.4th 1000, 1016-1017, internal quotations omitted.)

C. The Record Supports The Trial Court's Determination That Appellant Failed To Establish A Prima Facie Showing Of Discriminatory Purpose

An independent review of the record supports the trial court's finding that appellant failed to make a prima facie showing that the prosecutor based his challenges on improper racial discrimination as alleged. Indeed, the trial court's ruling should be upheld because the record does not permit an inference that the five challenged jurors were excused for constitutionally impermissible reasons.

Here, the 12 jurors who were sworn to try the case included three African-Americans. (9CT 2583 [Juror No. 8060]; 10CT 2619 [Juror No. 6761], 2691 [Juror No. 3257].) While not dispositive, the presence of three

African-Americans on the jury is an indication that the prosecutor's peremptory challenges were not based on race discrimination. (See *People v. Lewis* (2008) 43 Cal.4th 415, 480; *People v. Huggins* (2006) 38 Cal.4th 175, 236; *People v. Avila* (2006) 38 Cal.4th 491, 556.)

The racial composition of the 12 sworn jurors confirms the indications that there was no improper race or gender discrimination by the prosecutor when he exercised his peremptory challenges: there were four Caucasians (Juror Nos. 0744, 5645, 2801, and 9937), two Asians (Juror Nos. 1450 and 9716), three African-Americans (Juror Nos. 8060, 6761, and 3257), one "Middle[-]East[ern]" (Juror No. 5209), one Hispanic (Juror No. 1923), and one "European" (Juror No. 7697). (9CT 2528, 2546, 2565, 2583; 10CT 2601, 2619, 2637, 2655, 2673, 2691, 2709, 2727.)

Moreover, the actual responses given by each of the five challenged jurors in their questionnaires or during the oral voir dire showed an obvious permissible reason for the prosecutor's challenge.

Juror Abron wrote in his questionnaire that his brother had a "bad or negative experience[] with law enforcement" when he was convicted of a robbery in 1984 and was sent to prison. (7CT 1854, 1866.) Although Juror Abron stated that his brother's experience would not affect his ability to evaluate the credibility of law enforcement witnesses, the prosecutor may have reasonably concluded that the fact that someone so close to the juror spent time in prison could affect his decision-making process in determining appellant's punishment. (See *People v. Lancaster* (2007) 41 Cal.4th 50, 78 [no inference of group bias found from the prosecutor's decision to challenge a prospective juror whose family members had served prison terms]; *People v. Ledesma* (2006) 39 Cal.4th 641, 678 [the fact that a prospective juror had a brother confined in prison was an "adequate" reason to strike the juror].)

Additionally, Juror Abron indicated in the questionnaire that he had previously been on a criminal jury involving a murder charge in 1992 which resulted in a "hung" jury. (7CT 1867.) Although there is no explanation as to what role Juror Abron played in the previous jury's failure to reach a verdict, the prosecutor may have had legitimate concerns about a juror who could have caused a "hung" jury in the past, particularly in a murder trial. (See *People v. Turner* (1994) 8 Cal.4th 137, 170, overruled on another ground in *People v. Griffin*, *supra*, 33 Cal.4th at p. 555, fn. 5 [a prospective juror's "experience of sitting on a hung jury constitutes a legitimate concern for the prosecution"]; *People v. Rodriguez* (1999) 76 Cal.App.4th 1093, 1108-1109.) Thus, this record does not support an inference that Juror Abron was excused for prohibited discriminatory reasons.

Juror Lawrence stated in her questionnaire that she was "[s]trongly against" the death penalty and that her view on the issue had not changed in the past ten years. She also indicated that in her opinion, the death penalty is imposed too often. (4CT 1028.) During the oral voir dire, Juror Lawrence reiterated her opposition to death penalty as follows:

> [PROSECUTOR]: All right. How do you feel about having a death penalty? Do you think we should have one or we should not.
>
> PROSPECTIVE JUROR LAWRENCE: Well, you know, I look at it – so many people are being sent, you know, to a – given the death penalty and they are not – you know, five years, ten years later, they have found that they really didn't commit the crime. [¶] . . . [¶] So, you know, I mean, if we are going to have justice, I believe that maybe we should just not have a death penalty. You know, 'cause you can send somebody to death and they could be innocent.

(2RT 209-210.) Later on, despite her words of assurance that she would follow the law and apply the death penalty based on the evidence, Juror

Lawrence again mentioned her concern for the possibility of imposing the death penalty on an innocent person as follows:

> [PROSECUTOR]: In your heart, given the way that you feel, can you [impose the death penalty]?
>
> PROSPECTIVE JUROR LAWRENCE: Oh, yes. I mean, . . . there's two different things that we have. We have to look at the law, and we have to go according to the evidence that's put before us as jurors. And under the law, . . . you have to do what the law says.
>
> [PROSECUTOR]: All right.
>
> PROSPECTIVE JUROR LAWRENCE: Although we could send somebody – give them death and they could be sent – you know. But you have to go under the law. Really, you have to look at all the evidence.
>
> *But like I said, there is always a possibility that a person could be sent to death and be innocent.* But I would look at the law.

(2RT 210-211, italics added.)

The totality of Juror Lawrence's questionnaire and oral responses plainly raised questions about her ability and willingness to impose the death penalty, legitimate concerns that supported the prosecutor's peremptory challenge. This record does not support an inference that the juror was excused for prohibited discriminatory reasons. (See *People v. Cash* (2002) 28 Cal.4th 703, 725 [willingness to impose death penalty is proper consideration for exercising peremptory challenge]; *People v. Pride* (1992) 3 Cal.4th 195, 230 [a prospective juror's concerns about an innocent person being executed found to be a legitimate race-neutral reason to exercise peremptory challenge].)

Juror Clark, similar to Juror Abron, also had a close relative who had been previously convicted of a crime. In her questionnaire, Juror Clark stated that her spouse was convicted of a drug offense in 1977. (7CT

1813.) Although she also indicated that her husband had received a fair outcome from the incident, the prosecutor may have reasonably concluded that Juror Clark's experience with her husband's criminal conviction could affect her ability to be a fair juror in this case. (See *People v. Lancaster*, *supra*, 41 Cal.4th at p. 78; *People v. Ledesma*, *supra*, 39 Cal.4th at p. 678.)

Juror Wright disclosed in his questionnaire that he was familiar with Tacos El Unico, the scene of the Mendez/Vasquez shooting. In *People v. Vines* (2011) 51 Cal.4th 830, a capital murder trial stemming from a robbery of a fast food restaurant, this Court found that the prosecutor reasonably took into account the fact that a prospective juror's daughter had previously worked at a fast food restaurant in exercising his peremptory challenge. (*Id.* at p. 852.) In this case, Juror Wright was personally familiar with the actual restaurant where one of appellant's murders occurred. Similar to the prosecutor in *Vines*, the prosecutor here could have reasonably concluded that a juror personally familiar with the crime scene may be biased in evaluating the evidence of the shooting location.

Additionally, Juror Wright indicated in his questionnaire that a defendant in a criminal trial had to prove his innocence. (7CT 1781.) The fact that Juror Wright had a fundamental disagreement as to the burden of proof in a criminal trial was an obvious point of concern for the prosecutor. (See *People v. McGhee* (1987) 193 Cal.App.3d 1333, 1352 [juror's ability to follow the law found to be a legitimate concern in exercising a peremptory challenge].) Based on this record, it cannot be inferred that Juror Wright was excused for prohibited discriminatory reasons.

Juror Cole also had a husband who had been arrested or charged with a crime. As was the case with Jurors Clark and Abron, the prosecutor had legitimate reasons to be concerned about a juror who had a close relative with a criminal history. (See *People v. Lancaster*, *supra*, 41 Cal.4th at p. 78; *People v. Ledesma*, *supra*, 39 Cal.4th at p. 678.) Further,

Juror Cole disclosed in her questionnaire that she owned a firearm which originally belonged to her father. (3CT 694.) The fact that appellant's case involved two separate shootings with firearms gave the prosecutor reasonable basis to be concerned about a juror's familiarity with firearms. (See *People v. Lomax* (2010) 49 Cal.4th 530, 577-578 [the fact that a juror owned guns and had fired a gun or been present when guns were fired were legitimate reasons for excusing the juror].) As to this juror, the record did not raise an inference that the prosecutor improperly exercised a peremptory challenge of her based on prohibited race discrimination.

As just demonstrated, the record completely supported the trial court's finding of no prima facie case and therefore, it should be affirmed. (See *People v. Garceau* (1993) 6 Cal.4th 140, 172-173, overruled on another ground in *People v. Yeoman*, *supra*, 31 Cal.4th at pp. 117-118 [denial of *Wheeler*/*Batson* motion affirmed where record showed trial court relied on individual juror's responses and supported court's finding that defendant failed to establish prima facie case of discrimination].) The record does not raise an inference of discrimination as to any of the five challenged jurors, much less any pattern of discrimination, and as previously discussed, the composition of the jury that was sworn to try the case demonstrates there was no design to exclude African-Americans.

Appellant argues that the prosecutor's failure to orally question any of the five challenged panel members on voir dire suggests that he was exercising his peremptory challenges based on a group bias. (AOB 154.) This is factually incorrect. The prosecutor spent a significant amount of time questioning Juror Lawrence regarding her concern for innocent people being sentenced to death penalty. (2RT 209-211.) More importantly, under the applicable law at the time of appellant's trial, the trial court properly assumed the primary role in questioning the jurors which limited the time it allotted to counsel for questioning. (See *People v. Taylor*, *supra*, 48

Cal.4th at pp. 615-616 [prosecutor's failure to ask questions is not significant where, consistent with the law at the time, court assumed primary responsibility for questioning and prosecutor reviewed extensive questionnaire].) Plainly, the limited nature of attorney voir dire explains the lack of questioning as to the four other jurors, and also justified the prosecutor's heavy reliance on the jurors' responses to written questionnaires.

As for appellant's attempt to compare the responses of the challenged jurors with each other and those of other jurors (see AOB 142-154), such comparative analysis has been held to be of little value and not required at the first stage of a *Wheeler/Batson* analysis in determining whether a defendant established a prima facie case of discrimination. (*People v. Taylor*, *supra*, 48 Cal.4th at pp. 616-617 [declining to engage in comparative analysis at first-stage of *Wheeler/Batson* analysis]; see also *People v. Williams* (2006) 40 Cal.4th 287, 312-313 [noting diminished value of comparative analysis where there is an objectively plausible basis for dismissing prospective juror and no pattern of discrimination appears; court should be hesitant to infer *Wheeler/Batson* violation under such circumstances given the legitimate role of subjective factors in a prosecutor's decision of whether to exercise a peremptory challenge].)

For all of these reasons, appellant's *Wheeler/Batson* argument should be rejected.

V. THE JURY WAS PROPERLY INSTRUCTED WITH A MODIFIED VERSION OF CALJIC NO. 2.92

Appellant argues that his constitutional rights were violated when the trial court instructed the jury with CALJIC No. 2.92 without two of the eyewitness identification factors requested by defense. (AOB 156-161.) Respondent disagrees.

A. Factual Background

While discussing the jury instructions, appellant's counsel raised an objection to the revisions made by the trial court to CALJIC No. 2.92 regarding the factors to be considered by the jury in determining the proof of identity by an eyewitness testimony as follows:

> THE COURT: . . . Then the defense wanted to discuss [CALJIC No.] 2.92, factors in proving identity by eyewitness testimony.
>
> [COUNSEL]: Yes, your Honor. I think there was . . . a couple of stricken items there.
>
> THE COURT: Yes.
>
> [COUNSEL]: . . . One of them is on the second page . . . .
>
> THE COURT: The one on the second page that has been stricken is whether the witness had prior contacts with the alleged perpetrator.
>
> There's no evidence in either case that any of the witnesses have ever had any contact with Mr. Reed.
>
> [COUNSEL]: That's correct.
>
> As I understand that . . . factor, the suggestion is . . . that if he had prior contacts, then it is more likely that the identification is a good identification; and if he didn't have prior contacts, then it is less likely. And that's why I would request that one to be left in.
>
> THE COURT: Did you have any response to that?
>
> [PROSECUTOR]: No.
>
> THE COURT: I'm going to leave it out.
>
> The other stricken area was . . . the witness' capacity to make an identification.

I don't think that we have that as an issue in this case. There is no someone who is of minor age or anything else to indicate –

[COUNSEL]: I agree.

The problem . . . has to do with the issue of intoxication. Mr. Fradiue had told us that he was drinking all day. And I agree I don't think it is really a capacity argument, but . . . there must be another place in that instruction that allows me to argue that.

THE COURT: I think there is. That's the concluding line, which says "and any other evidence relating to the witness' ability to make an identification."

[COUNSEL]: We'll use that then.

THE COURT: All right.

(3RT 559-560.)

The jury was later instructed with the revised version of CALJIC No. 2.92, as follows:

Eyewitness testimony has been received in this trial for the purpose of identifying the defendant as the perpetrator of the crime[s] charged. In determining the weight to be given eyewitness identification testimony, you should consider the believability of the eyewitness as well as other factors which bear upon the accuracy of the witness' identification of the defendant, including but not limited to, any of the following:

[The opportunity of the witness to observe the alleged criminal act and the perpetrator of the act;]

[The stress, if any, to which the witness was subjected at the time of the observation;]

[The witness' ability, following the observation, to provide a description of the perpetrator of the act;]

[The extent to which the defendant either fits or does not fit the description of the perpetrator previously given by the witness;]

[The cross-racial [or ethnic] nature of the identification;]

[Whether the witness was able to identify the alleged perpetrator in a photographic or physical lineup;]

[The period of time between the alleged criminal act and the witness' identification;]

[The extent to which the witness is either certain or uncertain of the identification;]

[Whether the witness' identification is in fact the product of [his] own recollection;]

[______________;] and

Any other evidence relating to the witness' ability to make an identification.

(2CT 526-527; 3RT 613-614.)

B. The Trial Court Properly Modified CALJIC No. 2.92 According To The Evidence At Trial; In Any Event, Any Error Was Harmless

The trial court is required to instruct the jury only on the relevant and/or raised theories of defense. Further, the court may "'properly refuse an instruction offered by the defendant if it . . . is not supported by substantial evidence [citation].'" (*People v. Burney* (2009) 47 Cal.4th 203, 246, quoting *People v. Moon* (2005) 37 Cal.4th 1, 30.)

Here, as the trial court correctly noted and counsel so acknowledged, there was no evidence that any of the eyewitnesses were previously acquainted with appellant. (3RT 559-560.) In fact, both Mendez and Fradiue testified that they had never seen appellant prior to their respective shootings. (3RT 375, 391, 479, 490.) In the absence of any evidence, let alone substantial evidence, of prior contact with appellant, the trial court did not err in striking the "prior contacts" factor from CALJIC No. 2.92

before instructing the jury with it. (See *People v. Burney*, *supra*, 47 Cal.4th at p. 246.)

Similarly, there was no evidence presented at trial that Fradiue lacked capacity to make an eyewitness identification.[19] Although counsel tried to argue that Fradiue's intoxication might have affected his capacity to make an identification, he readily agreed with the court that "it is really [not] a capacity argument." (3RT 560.) Aside from Fradiue's own testimony that he had been drinking prior to the shooting, there was no other evidence presented to support an argument that Fradiue lacked any legal capacity to identify the shooter. To the contrary, Fradiue was fully capable of careful observations and well-aware of his surroundings as evidenced by his detailed description of the shooting incident. (3RT 372-399.) Since there was no substantial evidence of lack of capacity by any witness, this factor was also appropriately left out by the trial court.[20]

Appellant appears to rely on *People v. Wright* (1988) 45 Cal.3d 1126, to argue that the entirety of CALJIC No. 2.92, including the two omitted factors, "'should be given . . . in a case in which identification is a

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[19] Appellant's counsel objected to the "capacity" factor at trial based on Fradiue's intoxication issue only. (3RT 560.) To the extent that appellant is now attempting to claim that the trial court should have also instructed with the "capacity" factor because Mendez's identification was allegedly affected by the state of his injuries (AOB 156, fn. 54), this argument has been forfeited on appeal for failure to timely object at trial. (See *People v. Lee* (2011) 51 Cal.4th 620, 638.) Although section 1259 permits review of issues affecting appellant's substantial rights without an objection being asserted, it is inapplicable here since the remainder of the instruction allowed consideration of the omitted factors and appellant's substantial rights were not affected.

[20] Similarly, appellant's argument that the alleged instructional error resulted in a violation of his federal constitutional rights should be rejected as the "[r]ejection of a claim on its merits necessarily disposes of the additional constitutional 'gloss.'" (*People v. Hartsch* (2010) 49 Cal.4th 472, 493, fn. 19.)

crucial issue . . . .'" (AOB 158-159.) However, this Court in *Wright* also stated that a court instructing the jury with CALJIC No. 2.92 "*should list only factors applicable to the evidence at trial*, and should refrain from being unduly long or argumentative." (*Id.* at p. 1143, italics added.) Additionally, this Court specifically instructed that "[t]his model instruction, *with appropriate modifications to take into account the evidence presented at trial*, will usually provide sufficient guidance on eyewitness identification factors." (*Id.* at p. 1141, italics added.) As previously stated, since there was no evidence to support either of the two omitted factors, the trial court's modifications to the jury instruction were appropriate.

In any event, even assuming the trial court should have instructed the jury with the two omitted factors, any error was harmless because it is not reasonably probable that appellant would have obtained a more favorable result absent the alleged error. (See *People v. Wright*, *supra*, 45 Cal.3d at p. 1144 [applying the *Watson* standard of harmless error in alleged CALJIC No. 2.92 instructional error].) In addition to the specific factors listed under CALJIC No. 2.92, the jury was also instructed with a "catch-all" provision at the very end of the instruction, which instructed the jury to consider "[a]ny other evidence relating to the witness' ability to make an identification." (2CT 526-527; 3RT 613-614.) Under this provision, the jury was free to consider appellant's lack of prior contacts with the eyewitnesses and the witnesses' intoxication even without a pinpoint instruction.

Furthermore, counsel argued extensively during his closing arguments that Fradiue's identification of appellant should be discarded because he had been drinking all day, was under the influence of drugs and had not observed the actual firing of the rifle. (4RT 672-674.) In contrast, there was strong evidence presented that heighted the credibility of the

eyewitness testimony. For example, both Mendez and Fradiue provided multiple descriptions of the shooter from their own recollection which matched appellant's appearance at the time, identified appellant out of both photographic and live lineups, and were highly confident of their identifications. (3RT 383-389, 393-394, 376-377, 384, 391, 464-465, 480-482, 484, 494, 501, 505, 507, 509-511, 582.) The jury's guilty verdicts clearly demonstrate that it believed the eyewitness identifications and rejected counsel's arguments to the contrary. In light of this record, any error in omitting two factors out of CALJIC No. 2.92 was harmless.

VI. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING MENDEZ'S USE OF THE TERM "DEVIL" DURING TESTIMONY

Appellant claims that the trial court erred in failing to control Mendez's outbursts on 13 occasions during his guilt phase testimony and three occasions during his penalty phase retrial testimony when he referred to appellant as the "devil." (AOB 162-169.) Respondent disagrees.

A. Factual Background

During Mendez's guilt phase testimony, he obviously became emotional discussing the shooting death of his wife and referred to appellant as the "devil" on several occasions as follows:

> [PROSECUTOR]: Once you were inside your truck, what's the next thing that happened?
>
> [MENDEZ]: Uh, we were talking for a minute, for some – you know, some – "Let's go, we are hungry," something. And then I was ready to start on the truck when my wife saw that *devil* over there.
>
> . . .
>
> [PROSECUTOR]: And what did you see?

. . .

[MENDEZ]: This *devil* (indicating) with the pistol in his hand.

[PROSECUTOR] All right. You pointed – sorry to stop you, but you pointed at somebody in the courtroom. Point again so the judge can see you and tell the judge what is the man wearing right now.

[MENDEZ]: This *devil* right there (indicating).

I saw this *devil* coming with pistol, you know, against us.

THE COURT: Excuse me. Would you describe what he's wearing now or his race, the man that you're pointing to here.

You see there are four men at this table.

[MENDEZ]: Yeah, that *devil* (indicating). You know, he has that shirt. That *devil* (indicating).

[PROSECUTOR]: What color is the shirt?

[MENDEZ]: Like a blue with a white inside.

THE COURT: All right. That's the defendant, Mr. Reed. Thank you, sir.

(3RT 464-465, italics added.) Mendez intermittently referred to appellant as the "devil" as he continued to describe the shooting as follows:

[PROSECUTOR]: You said you – okay. You then began to start the truck?

[MENDEZ]: Yeah, when my wife – because she was afraid already. You know, she was – she was afraid. And then I tried not to worry my wife. And then I said, "Don't worry. We'll just leave." And then I start on the truck.

When I start on the truck –

[PROSECUTOR]: Okay.

[MENDEZ]: – and then this – this *devil* right there start [shooting] at us.

. . .

[PROSECUTOR]: Sorry.

From your position in the truck, did you continue to watch him as he walked closer, or did you turn your attention to the key and the truck?

[MENDEZ]: No, when . . . this *devil* – . . . at that time, he was . . . standing right there, and he point us, you know, the pistol, the arm . . . .

. . .

[PROSECUTOR]: Did you hold your hand up like that?

. . .

[MENDEZ]: Facing to the windshield. Because he was really straight to . . . my wife. She was right here. And this *devil* was right there. And I tried to stop . . . him to not to, you know, sho[o]t us, you know.

. . .

[PROSECUTOR]: Where did you go?

[MENDEZ]: Tried to run, you know, tried to run to somebody help me from the *devil* that was there . . . .

. . .

[PROSECUTOR]: . . . But are you able to tell whether or not your wife was hit by the first shot or whether you were hit by the first shot, or were you not able to tell?

[MENDEZ]: I'm able to say that she got the first shot. She got the first shot. But I don't know. She didn't talk to me. When I tried to – she didn't have any reaction. When I tried to stop this *devil*. She didn't have any reaction . . . .

. . .

[PROSECUTOR]: He stopped shooting?

[MENDEZ]: Yeah. Yeah.

And then when I – when – well, I didn't think about if he was there or not. I just came back for my wife. And then – but this *devil*, he wasn't there. And I think he runs away. And then I came back for my wife.

(3RT 470-473, 476, italics added.) Later, while discussing the photographic identification, Mendez referred to appellant as the "devil" once again as follows:

[PROSECUTOR]: In January of the next year, 1997, did you contact this man right in front of me, Detective Paiz, or did he contact you?

[MENDEZ]: Yes, he did.

[PROSECUTOR]: And then did he show you some photographs?

[MENDEZ]: Yes, he did.

[PROSECUTOR]: And did you do that at your house or at the police station, or where did you do that?

[MENDEZ]: He call[ed] me to . . . his office, and then he showed me; and then I recognize this *devil* right away.

(3RT 479, italics added.) Mendez referred to appellant as the "devil" a total of 13 times during his guilt phase testimony but no objections were ever asserted.

During the penalty phase retrial testimony, Mendez again referred to appellant as the "devil" as follows:

[PROSECUTOR]: Okay. After you got in and when you opened the door for her, what's the next thing that happened?

[MENDEZ]: I was, uh, ready to . . . go, and, uh, we were talking for a – pretty – couple of words, and then she saw that *devil* right there (indicating).

(5RT 1007, italics added.) Later, when Mendez again referred to appellant as the "devil," defense counsel objected for the first time as follows:

[PROSECUTOR]: . . . When you looked to your right, what did you see?

[MENDEZ]: I saw that *devil* with the –

[COUNSEL]: Your Honor, I object, and I'd ask the witness not to describe him in such a way. It's not appropriate.

THE COURT: Yes, sir. If you see somebody in the courtroom that is the person that you saw that day, would you simply point him out where he's seated and tell us what he's wearing for today, please.

Do you see somebody here?

[MENDEZ]: Yeah. A red shirt.

THE COURT: Where is he seated?

[MENDEZ]: Right in the – first place.

THE COURT: You pointed to the defendant. That's Mr. Reed.

If you'll refer to him as either "the defendant" or "Mr. Reed," please.

[MENDEZ]: Oh.

THE COURT: Okay?

[MENDEZ]: (Witness nods his head up and down.)

(5RT 1008, italics added.) Closer to the end of his direct testimony, Mendez used the term "devil" once again for the last time as follows:

[PROSECUTOR]: All right. When you got it in your mind that your wife was still there, was the shooter still shooting or had he left –

[MENDEZ]: No, no. No, this *devil* already left.

[PROSECUTOR]: All right. You mean the defendant?

[MENDEZ]: Yeah.

(5RT 1017, italics added.)

B. Appellant's Guilt Phase Claim Has Been Forfeited For Failure To Timely Object

Generally, objections to evidence on the specific grounds asserted must be made or the objection is forfeited. (*People v. Pollock* (2004) 32 Cal.4th 1153, 1181.) Here, there were no objections asserted during the 13 times Mendez used the term "devil" to refer to appellant during the guilt phase of the trial. (3RT 464-465, 470-473, 476, 479.) Therefore, appellant's claim of error as it relates to the use of the term "devil" during Mendez's guilt phase testimony has been forfeited on appeal.

Furthermore, appellant also forfeited any federal constitutional claims stemming from Mendez's use of the term "devil." Constitutional objections must be interposed in the trial court in order to preserve them for appeal. (See *People v. Partida* (2005) 37 Cal.4th 428, 433-434; *People v. Williams* (1997) 16 Cal.4th 153, 250.) Here, there was no objection asserted on federal constitutional grounds in either of Mendez's guilt or penalty phase testimony. Therefore, the federal claim has been forfeited as well.

C. There Was No Abuse Of Discretion And In Any Event, Any Error Was Harmless

Even assuming there was no forfeiture, the trial court did not abuse its discretion in allegedly failing to control Mendez's use of the term "devil." The trial court has the broad discretion to control the proceedings during trial "with a view to the expeditious and effective ascertainment of the truth regarding the matters involved." (§ 1044 .) "Where . . . a discretionary power is inherently . . . vested in the trial judge, his or her exercise of that wide discretion must not be disturbed on appeal except on a showing that the court exercised its discretion in an arbitrary, capricious or

patently absurd manner that resulted in a manifest miscarriage of justice." (*People v. Jordan* (1986) 42 Cal.3d 308, 316; see also *People v. Frye*, *supra*, 18 Cal.4th at p. 948.)

The outbursts here were limited to the use of the term "devil" in referring to appellant by a single victim who had personally and at close-range witnessed his wife being shot in the head by appellant and was himself shot multiple times. Due to the understandably emotional nature of the crime, and especially in light of counsel's continued lack of objection to the use of the term "devil," the court could have properly determined that an intervention was unnecessary during the guilt phase testimony. Indeed, as soon as appellant's counsel finally decided to intervene and object to the use of the term "devil" during the penalty phase, the court immediately admonished Mendez to refer to appellant as "defendant." (5RT 1008.) Nothing in the record demonstrates that the trial court's lack of early intervention to Mendez's use of the term "devil" constituted an arbitrary or capricious exercise of discretion resulting in manifest miscarriage of justice. (See *People v. Lewis* (2006) 39 Cal.4th 970, 1029 [trial court did not err in denying motion for mistrial based on witness's comment that the defendant was a "dirty black dog" as she was leaving the witness stand, because the jury was aware that the witness scorned the defendant for gunning down her daughter in church].)

Furthermore, "[a]t the penalty phase, the prosecution may introduce evidence of the emotional effect of defendant's prior violent criminal acts on the victims of those acts." (*People v. Price* (1991) 1 Cal.4th 324, 479.) Thus, Mendez's use of the term "devil" to describe his wife's murderer is not grounds for reversal of the penalty phase.[21]

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[21] Similarly, appellant's argument that Mendez's use of the term "devil" also resulted in a violation of his federal constitutional rights should (continued...)

In any event, any error in failing to control Mendez's emotional outbursts was harmless. A witness's blurting out of inadmissible evidence does not require reversal unless the trial court abused its discretion in concluding the statement was not incurably prejudicial. (See *People v. Bradford* (1997) 15 Cal.4th 1229, 1336.) "Whether a particular incident is incurably prejudicial requires a nuanced, fact-based analysis." (*People v. Chatman* (2006) 38 Cal.4th 344, 369-370.)

In the instant case, Mendez's use of the term "devil" did not tell the jurors anything that they could not easily surmise for themselves. In the context of the heinous facts surrounding the shooting of Mendez and his wife, the trial was understandably an emotional one for him, and Mendez's frustration and animosity towards appellant would come as little surprise to the jury. Once counsel asserted an objection, the court promptly ordered Mendez to refrain from using the term.

The court also instructed the jury with CALJIC No. 1.00 which stated that the jury "must base [its] decision on the facts and the law" and that it "must not be influenced by sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling." (2CT 502-503.) The jury is presumed to have followed these instructions. (*People v. Osband* (1996) 13 Cal.4th 622, 714.) Therefore, any error in failing to control Mendez's use of the term "devil" was harmless.

(...continued)
be rejected since the trial court did not abuse its discretion in controlling the witness testimony. (See *People v. Hartsch*, *supra*, 49 Cal.4th at p. 493, fn. 19.)

VII. THE TRIAL COURT PROPERLY DENIED APPELLANT'S REQUEST FOR LINGERING DOUBT INSTRUCTIONS, ADEQUATELY RESPONDED TO JURY'S WRITTEN INQUIRY, DID NOT DIRECT A VERDICT OF DEATH, AND WAS NOT REQUIRED TO INFORM THE JURY ABOUT THE FIRST PENALTY PHASE MISTRIAL AND A DEFENSE WITNESS'S ABSENCE IN GUILT PHASE TRIAL

Appellant contends that the trial court improperly refused to give the penalty phase retrial jury lingering doubt special instructions requested by appellant and failed to adequately respond to the jury's written inquiry asking whether a death verdict could be returned "[i]f the jury agrees that one of the cases presented warrants the death penalty, however, one of the cases contains some doubt . . . ." Appellant also contends that the court's instruction that appellant's guilt was "conclusively presumed" or "conclusively proven" directed a verdict of death and that the court was required to inform the jury about the first penalty phase jury's deadlock and Galindo's unavailability during the guilt phase trial.[22] (AOB 170-214.) Respondent disagrees.

A. Factual Background

During the penalty phase retrial jury selection, the court gave the following instruction to the jury:

> All right. Ladies and gentlemen, this is a criminal case. It is what is referred to as a penalty phase trial.
>
> There has already been a guilt phase jury trial. In that trial, the defendant was convicted of two counts of murder in the first

---

[22] Appellant also adds a federal constitutional claim to each allegation. (AOB 182-183, 189-191, 201-203, 207-208.) As will be shown below, since there was no error under the applicable state law, appellant's federal claims must be rejected as well. (See *People v. Hartsch*, *supra*, 49 Cal.4th at p. 493, fn. 19.)

> degree and two counts of willful, deliberate, and premeditated attempted murder. It was also found to be true that the defendant personally used a firearm in each of those four felonies and, further, that he inflicted great bodily injury in one of the attempted murders.
>
> The jury in the guilt phase trial also found to be true the allegation of what is called a special circumstance, that is, that the defendant was convicted of two first degree murders in that proceeding.
>
> Having been found guilty of those offenses and the special circumstance having been found to be true, there is a second trial, the penalty phase trial. *In this penalty phase trial, the defendant's guilt is to be conclusively presumed as a matter of law.*
>
> In the penalty phase trial you will be asked to decide what penalty will be imposed. You'll be given only two alternatives: life without the possibility of parole or death.
>
> Life in prison without the possibility of parole means just that. The defendant will spend the rest of his life in prison, and he will never be released on parole.
>
> Death means exactly that. The defendant will be sentenced to death and will be executed in the San Quentin prison.
>
> The jury must listen to the information about the defendant's background, both the good and the bad, and take that into consideration, along with the evidence that you will hear about the circumstances of the crimes he has been convicted of, and then decide between the two punishments which are allowed by law.

(5RT 963-964, italics added.)

Later on in the voir dire, when three additional potential jurors joined the jury pool, the court reiterated the above instructions and once again reminded the jurors that "[i]n this . . . penalty phase trial, the defendant's guilt is to be conclusively presumed as a matter of law. You are not here to determine his guilt or innocence." (5RT 969-970.)

At the close of evidence presentation, the court instructed the jury as follows:

> Well, ladies and gentlemen, we've reached that part of the trial where you have now all the evidence that you are ever going to have in this trial to decide the issue which is before you, which, as you are aware, is simply what punishment should be imposed.
>
> Remember when we started off, I advised you of the fact that the defendant has been convicted of the two counts of attempted murder, two counts of murder in the first degree, that the use of a firearm was found to have been true already by another jury, and that the infliction of great bodily injury was found to be true. *As a matter of law, you are to treat those convictions as conclusively proven.*

(6RT 1232, italics added.)

While discussing the jury instructions, defense counsel requested the court to instruct the jury with two special instructions regarding lingering doubt. (6RT 1241-1244.) Defense special instruction "A", which was based on *People v. Morris* (1991) 53 Cal.3d 152, 218-219, disapproved on another ground in *People v. Stansbury* (1995) 9 Cal.4th 824, 830, fn. 1, stated as follows:

> The adjudication of guilt is not infallible and any lingering doubts you entertain on the question of guilt may be considered by you in determining the appropriate penalty, including the possibility that some time in the future, facts may come to light that have not yet been discovered.

(10CT 2881.) Defense special instruction "C", based on *People v. Thompson* (1988) 45 Cal.3d 86, 134, stated as follows:

> Each of you may consider as a mitigating factor any lingering or residual doubt that you may have as to the guilt of the defendant. Lingering or residual doubt is defined as doubt concerning proof that remains after you have been convinced beyond a reasonable doubt.

(10CT 2883.)

The prosecutor objected to the lingering doubt special instructions, and the following discussion ensued:

> THE COURT: . . . And the People object to [special instruction "A"]?
>
> [PROSECUTOR]: Yes.
>
> THE COURT: And the basis of the objection is?
>
> [PROSECUTOR]: In a number of cases since then, the court has found that the defense is not entitled to a specific instruction concerning lingering doubt.
>
> And I'd cite two just as examples.
>
> People v. Ochoa, at 19 Cal.4th 353 at page 478. That's a 1998 case.
>
> And People v. Mayfield, 14 Cal.4th 448, at page 807. And that's a 1997 case.
>
> . . .
>
> THE COURT: I think, yeah, what Mayfield stands for is the proposition that since we have 8.85 of the jury instructions which gives the broad definition of factor (k), that there isn't any need to give pinpoint instructions on the definition of lingering doubt.
>
> I'll hear from whoever is going to address this.
>
> [COUNSEL]: You Honor, I found 174 cases talking about lingering doubt, and they were all over the place. As [the prosecutor] has pointed out, there are cases that go both ways.
>
> It struck me that because this is a second jury, I would think that an understanding of that lingering doubt would be more clear to a guilt phase – to a jury that had considered the guilt of the defendant; and that when we have the second jury, I think it might be more important to give such an instruction there.
>
> There is a case called People v. Arias –

> THE COURT: I'm familiar with it. I'm looking right at it.
>
> [COUNSEL]: And my thought is – the only language I was looking at there is where it was talking about, as I understood it, in some circumstances they thought that a lingering doubt instruction should be given. And it struck me that perhaps this is that kind of case.

(6RT 1241-1242.) After considering the arguments from both sides, the court declined to give the proposed defense special instructions "A" and "C". (6RT 1243-1244.)

During the closing arguments, appellant's counsel emphasized that appellant had been found guilty of the two murders beyond a reasonable doubt and explained to the jury that any lingering doubt it might have regarding appellant's guilt could be used as a mitigating factor in deciding whether to impose the death penalty. (6RT 1284-1285.) Counsel went on to highlight in detail the apparent inconsistencies in the prosecution evidence in an attempt to undermine the victims' eyewitness identifications. (6RT 1285-1292.) In his concluding remarks, counsel again returned to the issue of residual doubt as follows:

> There is possible doubt.
>
> Mr. Reed stands before you convicted of these two homicides. The jury at the trial in the guilt phase found him guilty of them beyond a reasonable doubt. Ladies and gentlemen, I submit to you that there is a residual, possible doubt; and I believe it should form the basis of your vote against death in this case.

(6RT 1292-1293.)

On the second day of deliberation, the jury submitted the following question to the court:

> If the jury agrees that one of the cases presented warrants the death penalty, however, one of the cases contains some doubt, according to the instructions, is this sufficient for awarding death?

(6RT 1316.) Counsel and the prosecutor presented their positions as follows:

> [COUNSEL]: Your Honor, I'd ask the court to consider answering this question in the following way: that I believe that the answer is "no."
>
> The jury, I think, has expressed a question that suggests that they have a lingering doubt in regards to one of the special circumstances. And since the reason that we are here is because of a finding of the special circumstances, I think what they are expressing is a lingering doubt as to that special circumstance; and therefore I think they should be advised that the answer is "no," and that they should consider lingering doubt as a . . . circumstance in mitigation.
>
> . . .
>
> [PROSECUTOR]: I think that we should tell them that they can consider all the evidence that they have and that they have had, in light of the law; and on balance, if they think the death penalty is warranted, they can return a verdict of death. But more specifically than that, I don't think we can answer.
>
> . . .
>
> [COUNSEL]: That sounds like a reasonable response to their question, also.
>
> I just don't think we can tell them just a short "yes." I think that's – I think we would be making a mistake in doing that. This is really their decision, and I think on balance they have to weigh this mitigation.

(6RT 1317.) After considering the arguments from both sides, the court reasoned as follows:

> THE COURT: Well, I think we have to start from the position that the guilt phase jury has already found the special circumstance to be true; that the second jury, in this case, the penalty phase jury, is not charged with the duty of re-determining the issue as to whether or not the special circumstance is true or not. In other words, they don't re-decide the special circumstance.

> And it would appear to me that since this jury, the penalty phase jury, then doesn't re-decide the special circumstance allegation, which was previously found to be true by the [guilt] phase jury, that even though this jury may have some lingering or residual doubt as to perhaps one of the two murders, it would appear from their note that . . . they feel that the circumstances of at least one of the two murders, the factor (a) circumstances, would substantially outweigh the mitigating factors and in their opinion the death penalty would be appropriate in this case.

The court concluded by stating that it believed the correct answer to the jury's question was "yes," but that it was willing to reword the answer to make it less "abrupt." (6RT 1318.)

The prosecutor agreed with the court that the legally correct answer was "yes," but expressed concern that doing so "will be telling [the jury] how they should vote." The prosecutor suggested the following answer instead: "'All things considered, including whatever doubt you may have on one of the murders, all things considered, you can choose one or the other.'" Appellant's counsel agreed that the suggested answer was appropriate. (6RT 1319.) The jury was reconvened and instructed as follows:

> THE COURT: . . .
>
> That all things considered in this case, in the context of your question, the jury still may choose which of the two penalties is appropriate in this case.
>
> The answer is yes.
>
> Does that answer your question?
>
> THE FOREPERSON: I believe so.

(6RT 1320.)

The jury resumed deliberations at 10:28 a.m. and at 10:45 a.m., it returned a verdict of death. (6RT 1320-1321.) While polling the jury, Juror No. 1 indicated that death was not her verdict. The court noted that

there was no unanimous verdict, returned the verdict forms to the jury and asked the jurors to go back to deliberations. (6RT 1322.)

At 1:50 p.m., the jury requested the read back of Slaughter's testimony. As the court was getting ready for the read back, the jury submitted another note stating that the testimony was no longer needed. (6RT 1324.) The parties and the court agreed that from the jury's latest note, it appeared that the jury had resolved whatever concern it might have had regarding Slaughter's testimony, and that the jury should resume deliberations. (6RT 1324-1325.) At 2:08 p.m., the jury returned a verdict of death. (6RT 1325-1326.)

B. The Trial Court Properly Refused To Give Lingering Doubt Instructions

Appellant argues the trial court erred when it refused to instruct the penalty phase jury on the issue of lingering doubt, especially after the jury's written inquiry on the second day of deliberations. (AOB 170-214.) This Court has "repeatedly [] rejected claims that, under either state or federal law, a trial court must instruct concerning lingering doubt, whether on the court's own motion or in response to a specific request." (*People v. Robinson* (2005) 37 Cal.4th 592, 635.) In *Robinson*, this Court could "perceive no reason to reconsider those determinations here," and observed that "consistent with defense counsel's closing arguments, the jury was allowed under the factor (k) instruction to consider in mitigation any lingering doubt it may have had." (*Ibid.*)

Here, the evidence presented at the penalty phase retrial by appellant regarding the Mendez/Vasquez shooting exceeded the evidence he presented at the guilt phase. Appellant was able to present even more evidence of lingering doubt through Galindo's testimony, which was unavailable at the time of the guilt phase trial. At the conclusion of the

penalty phase retrial, the jury was instructed with factor (k) under CALJIC No. 8.85, which stated that it should consider "[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime . . . as a basis for a sentence less than death . . . ." (10CT 2865-2866.) Counsel argued extensively during closing arguments that any lingering doubt the jury might have regarding appellant's guilt could be used as a mitigating factor in deciding whether to impose the death penalty. (6RT 1284-1293.) Since the jury was allowed to consider lingering doubt regarding the Mendez/Vasquez shooting as a mitigating factor based on counsel's closing arguments and capital sentencing factor (k), the trial court did not err in refusing to give special lingering doubt instructions. (See *People v. Robinson, supra*, 37 Cal.4th at p. 635.)

Appellant suggests that a lingering doubt instruction was required because the jury's question showed it "did not understand that residual doubt could be weighed in mitigation." (AOB 181.) To the contrary, the jury's question demonstrated that it was well aware of the mitigating value of lingering doubt because the inquiry was whether the existence of lingering doubt on the Mendez/Vasquez shooting would automatically preclude a verdict of death.

Appellant relies on *People v. Cox* (1991) 53 Cal.3d 618, disapproved on another ground in *People v. Doolin, supra*, 45 Cal.4th at p. 421, fn. 22, for the proposition that the evidence in this case required the court to instruct on lingering doubt. (AOB 187-179, 181-182.) However, "[t]he *Cox* dictum that a lingering doubt instruction *may* be required as a matter of statutory law, which itself was based on dictum from [*People v.*] *Thompson*[, *supra*, 45 Cal.3d 86], has been put to rest. [This Court] ha[s] repeatedly held that instruction on lingering doubt is not required by state law, and that the standard instructions on capital sentencing factors, together with counsel's closing argument, are sufficient to convey the

lingering doubt concept to the jury." (*People v. Hartsch*, *supra*, 49 Cal.4th at pp. 512-513, original italics.)

Appellants have put forward no basis in law, fact or logic which would distinguish the instant case, or suggest that the Court should revisit this issue and come to a contrary conclusion to that result repeatedly reached in every other case in which this issue has been consistently rejected. (See also *People v. Avila*, *supra*, 38 Cal.4th at p. 615; *People v. Boyer*, *supra*, 38 Cal.4th at pp. 487-488; *People v. Huggins*, *supra*, 38 Cal.4th at p. 251; *People v. Harris* (2005) 37 Cal.4th 547, 579; *People v. Gray* (2005) 37 Cal.4th 168, 231-233; *People v. Ward* (2005) 36 Cal.4th 186, 219-221; *People v. Panah* (2005) 35 Cal.4th 395, 497; *People v. Valdez* (2004) 32 Cal.4th 73, 129, fn. 28.)

C. The Trial Court's Response To Jury's Written Inquiry Was Proper

Appellant's argument that the trial court inadequately responded to the jury's written inquiry should be rejected as well. Initially, appellant waived any claim of error pertaining to the court's response to the jury's inquiry because defense counsel "both participated in the formulation of a response and affirmatively approved of the response ultimately given." (*People v. Jennings* (2010) 50 Cal.4th 616, 683; see *People v. Hamilton* (2009) 45 Cal.4th 863, 949-950 (*Hamilton*) [claim waived where counsel and defendant both agreed to the court's response]; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1193 [claim of error waived when defendant both suggested and consented to the responses given by the court to the jury's questions].) Even though the trial court in this case did not give the exact agreed-upon wording of the instruction, counsel essentially agreed to the substance of the given instruction. Therefore, any claim pertaining to the

propriety of the court's response to the jury's question has been waived. However, even if the claim has not been waived, it is without merit.

When a deliberating jury desires to be informed on any point of law arising in a case, the jury must be returned to court and the information required must be given. (§ 1138.) The court has a primary duty to help the jury understand the legal principles it is asked to apply. (*People v. Beardslee* (1991) 53 Cal.3d 68, 97.) But elaboration upon the original instructions is not necessarily required. (*Ibid.*) Where the original instructions are themselves full and complete, the court has discretion to determine what additional explanations are needed. (*Ibid.*) A trial court's decision as to what information is sufficient to satisfy the jury's request for information is reviewed for abuse of discretion. (*People v. Smithey* (1999) 20 Cal.4th 936, 985.)

There was no abuse of discretion here. The court's response to the jury's question was legally correct. This Court has repeatedly stated that "'in the penalty phase, the jury merely weighs the factors enumerated in section 190.3 and determines "whether a defendant eligible for the death penalty should in fact receive that sentence." (*Tuilaepa v. California* (1994) 512 U.S. 967, 972 [114 S.Ct. 2630, 129 L.Ed.2d 750].) No single factor therefore determines which penalty – death or life without the possibility of parole – is appropriate.'" (*People v. Virgil* (2011) 51 Cal.4th 1210, 1278-1279, citing *People v. Prieto* (2003) 30 Cal.4th 226, 263.) The jury in this case inquired as to whether it could impose the death penalty if they had "some doubt" as to one of appellant's murder convictions. (6RT 1316.) Since any lingering doubt as to the circumstances of appellant's crimes is just one of the factors the jury should consider in determining the appropriate penalty, the legally correct answer to the jury's question was and still is "yes." Taken together with the already-given instruction under CALJIC No. 8.85, which laid out the factors to be considered in

determining appellant's penalty, the court's response advised the jury of the applicable law. Therefore, no abuse of discretion occurred.

D. The Trial Court's Instructions That Appellant's Guilt Was Conclusively Proven Did Not Direct A Verdict Of Death

Appellant also complains that the trial court's instructions during voir dire and before deliberations instructing the penalty phase retrial jury that appellant's guilt was "conclusively proven," combined with the court's response to the jury's written inquiry, effectively directed a verdict of death. (AOB 194-205.) This argument is meritless.

In *People v. DeSantis* (1992) 2 Cal.4th 1198, the trial court instructed the penalty phase jury that it could consider the defendant's "claim of innocence . . . in terms of possible doubt about his complicity in the crime . . . ," but declined to give two supplemental special instructions on lingering doubt requested by defense counsel. During voir dire and while answering a question from the jury, the trial court also instructed that "'the issue of guilt is not to be reconsidered by [the jury],'" and that "the previous 'jury decided that Mr. DeSantis was in fact guilty of the crime.'" (*Id.* at pp. 1236-1237.) On appeal, this Court rejected the defendant's suggestion that the jury instructions somehow "removed the lingering doubt question from the jury" as follows:

> [T]o the extent that the court's rulings and the prosecutor's comments merely reminded the jury that it was not to redetermine guilt, those actions did not remove the question of lingering doubt from the jury, but only told it the truth: that in the penalty phase defendant's guilt was to be conclusively presumed as a matter of law because the trier of fact had so found in the guilt phase. (See *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1235 . . . .) To the extent they dwelt on the point that defendant's guilt had been established, therefore, we do not consign the court's rulings or the prosecutor's actions to the rubric of extinguishing lingering doubt, and accordingly find no

> error. Indeed, defendant conceded during closing arguments that the prior jury's determinations, including its specific findings that defendant had personally, intentionally and premeditatedly killed Edward Davies, were not subject to revisitation and that he was guilty of the crime. (See *id.* at pp. 1234-1235.)

(*Id.* at p. 1238.)

Similar to the defendant in *DeSantis*, appellant now complains that the trial court's instructions to the jury that his guilt had been conclusively proven and the court's response to the jury question precluded the jury from considering any lingering doubt and effectively directed a verdict of death. However, as this Court stated in *DeSantis*, the jury was simply told the truth, i.e., that the penalty phase jury was not there to determine guilt or innocence, but just the appropriate penalty after considering all the mitigating evidence. Furthermore, there was no directed verdict in the court's answer to the jury question because the court correctly instructed them that no juror was affirmatively precluded from returning a death verdict if he or she had a lingering doubt as to whether appellant committed one of the murders but could consider everything in the case in choosing the appropriate penalty. Finally, as in *DeSantis*, appellant's counsel repeatedly conceded during the closing arguments that appellant had already been found guilty of the murders and that he was there just to ask the jury "not to kill him." (6RT 1280-1281.) Therefore, neither the response to the jury's question nor the instruction that appellant's guilt had been conclusively proven improperly coerced the jury to return a verdict of death. (See *People v. Cain* (1995) 10 Cal.4th 1, 66 ["the penalty phase jury . . . must perforce 'accept' the guilt phase verdicts and findings"].)

E. The Trial Court Was Not Required To Instruct The Jury About The First Penalty Phase Mistrial And Galindo's Absence During Guilt Phase

Appellant also contends that the trial court committed error when it failed to instruct the penalty phase retrial jury about the first penalty phase jury's deadlock, its numerical vote, and the absence of Galindo's testimony during the guilt phase. (AOB 205-214.) None of these arguments are meritorious.

As a threshold matter, appellant has forfeited any claim of instructional error regarding the penalty phase mistrial and missing witness testimony for failure to specifically request the desired pinpoint instructions at trial. The trial court is required to instruct only on general principles of law that are necessary to the jury's understanding of the case. Instructions on specific points or special theories that may be applicable to a defendant's particular case must be requested. (*People v. Saille* (1991) 54 Cal.3d 1103, 1119-1120.) Here, appellant never requested the trial court to instruct the penalty phase retrial jury regarding the first penalty phase jury's deadlock, its numerical vote, and the fact that Galindo had not testified during the guilt phase. Therefore, this issue has been forfeited on appeal. (*People v. Jennings*, *supra*, 50 Cal.4th at p. 675 [failure to request pinpoint instruction forfeited the issue on appeal].)

Even assuming there was no forfeiture, the trial court did not err in failing to instruct the jury as appellant desired. As appellant acknowledges (AOB 208-209), this Court has repeatedly stated that "the fact of a first jury's deadlock, or its numerical vote, is irrelevant to the issues before the jury on a penalty retrial." (*People v. Hawkins*, *supra*, 10 Cal.4th at p. 968; see *People v. Anderson* (1990) 52 Cal.3d 453, 467; *People v. Thompson* (1990) 50 Cal.3d 134, 178.) Appellant fails to provide any compelling reason to deviate from this reasoning.

Moreover, although Galindo's testimony was relevant and proper mitigating evidence regarding the circumstances of the crime to be considered at the penalty phase (see *People v. Gay* (2008) 42 Cal.4th 1195, 1221-1223), the fact of his absence during the guilt phase was certainly not relevant. As the jury in this case was instructed, the proper function of a penalty phase jury is to determine the appropriate sentence of either death or life in prison without the possibility of parole after weighing the aggravating and mitigating factors as set forth in section 190.3. (10CT 2864-2866, 2870-2871.) Whether Galindo actually testified during the guilt phase was irrelevant as the penalty phase jury did not require such information for his testimony to be considered under section 190.3, subdivision (a). Indeed, had counsel believed that the fact of Galindo's non-testimony was a relevant and important mitigating factor, he could have easily elicited such information during Galindo's testimony, which he did not. Therefore, appellant's claim should be rejected.

VIII. THE TRIAL COURT DID NOT COERCE A VERDICT DURING THE PENALTY PHASE RETRIAL BY ORDERING THE JURY TO CONTINUE THE DELIBERATIONS

Appellant contends that the trial court coerced a verdict at the penalty phase retrial when it sent the jury back for further deliberations after finding out during polling that the verdict was not unanimous. (AOB 215-222.) Respondent disagrees.

A. Factual Background

On the second day of deliberations, at approximately 10:45 a.m., the court was advised that the penalty phase jury had reached a verdict. (10CT 2847-2848; 20CT 5638-5639; 6RT 1320-1321.) After the jury and the alternates were brought into the courtroom, the court read aloud a verdict of

death signed and dated by the jury foreman. (6RT 1321.) When the court inquired to the jury as a whole whether this was the correct verdict, the jury collectively answered in the affirmative. (6RT 1322.)

The court proceeded to poll each juror individually as to whether the verdict of death was indeed his or her verdict. When the court inquired Juror No. 1 whether this was her verdict, the juror responded, "No." The court repeated the question to Juror No. 1 and the juror again answered, "No." The court continued to poll Juror Nos. 2 to 6 whom all answered in the affirmative. The court stopped the individual polling after Juror No. 6, stating, "I don't need to go any further. It appears that we do not have a unanimous verdict. I'm going to return the verdict form to you and ask the jurors to go back into deliberations, please." (6RT 1322.)

At 2:08 p.m., the jury returned a verdict of death for the second time. The jury collectively and individually confirmed that the verdict was correct. (6RT 1326-1327.)

B. The Trial Court Did Not Abuse Its Discretion In Returning The Jury For Further Deliberations

Initially, appellant forfeited his claim for failure to assert an objection below. The right to request the jury be polled, to assert any defects in the manner of polling or to request corrections or clarifications in jury polling may be forfeited by the defendant's failure to object in the trial court. (*People v. Wright* (1990) 52 Cal.3d 367, 415, disapproved on another ground in *People v. Williams* (2010) 49 Cal.4th 405, 458-459; *People v. Flynn* (1963) 217 Cal.App.2d 289, 294-295.) As to polling errors, the defendant "cannot sit idly by and then claim error on appeal when the inadvertence could have readily been corrected upon his merely directing the attention of the court thereto." (*People v. Lessard* (1962) 58 Cal.2d 447, 452.) Since appellant failed to voice any objection to the

court's decision to return the jury for further deliberations, this claim has been forfeited on appeal.

Even assuming there was no forfeiture, there was no abuse of discretion. Every criminal defendant is entitled to a unanimous jury verdict. (Cal. Const., art. I, § 16; *Wheeler*, *supra*, 22 Cal.3d at p. 265.) To assure that the verdict expresses the unanimous judgment of all jurors, any juror is empowered to declare, up to the last moment, that he or she dissents from the verdict. (*Chipman v. Superior Court* (1982) 131 Cal.App.3d 263, 266.) Accordingly, after a written verdict is announced, either party may request a polling of each juror to determine whether the verdict is his or her verdict. If any juror answers "in the negative, the jury must be sent out for further deliberation." (§ 1163.) The polling procedure allows the court to determine whether the written verdict form is the "true verdict" of every juror, or the "product of mistake or unduly precipitous judgment." (*People v. Thornton* (1984) 155 Cal.App.3d 845, 858-859.) The trial court's decision to order or not order further deliberation pursuant to section 1163 is reviewed for abuse of discretion. (See *People v. Superior Court (Thomas)* (1967) 67 Cal.2d 929, 932-933; *People v. Wattier* (1996) 51 Cal.App.4th 948, 955-956.)

Here, the trial court was in the best position to determine whether the jury's verdict truly reflected Juror No. 1's individual verdict or not. "Where, as here, a juror makes equivocal or conflicting statements as to whether he has assented to the verdict freely and voluntarily, a direct question of fact within the determination of the trial judge is presented. The trial judge has the opportunity to observe the subtle factors of demeanor and tone of voice which mark the distinction between acquiescence and evasion of individual choice." (*People v. Superior Court (Thomas)*, *supra*, 67 Cal.2d at p. 932; see also *People v. Carrasco* (2008) 163 Cal.App.4th 978, 986-991.) It was obvious from Juror No. 1's

unequivocal responses to the court's inquiry that the death verdict was not her "true verdict." Therefore, the court properly returned the jury for further deliberations pursuant to section 1163. (*People v. Thornton*, *supra*, 155 Cal.App.3d at p. 859.)

Appellant also argues that the trial court coerced Juror No. 1 to change her verdict to death by instructing the jury that a unanimous verdict was needed just before sending the jury back for further deliberations. Appellant adds that the court instead should have cautioned the jury that "no juror should surrender his or her individual judgment and conscience, even if this meant no unanimous decision could be reached," and that "there was no necessity that they reach *any* verdict." (AOB 216-217, original italics.) Appellant's argument is based on a faulty assumption that Juror No. 1 was the single holdout juror against a death verdict. (AOB 215, 217.) However, since the court stopped the individual polling after Juror No. 6, it is impossible from this record to determine how many other jurors had second thoughts about their death verdict. It is equally possible that Juror No. 1 was not a hold-out juror, but simply wanted to reassure herself about the momentous life and death decision she was making by discussing the matter one more time.

In any event, the jury, including Juror No. 1, was fully aware of the unanimity rule even before they began deliberating because the court had instructed that "[i]n order to make a determination as to the penalty, all twelve jurors must agree." (10CT 2871.) More importantly, the jurors were also instructed that "[e]ach [juror] must decide the case for yourself" and that they should "not hesitate to change an opinion if [they] are convinced it is wrong." (10CT 2874.) The jury is presumed to have followed the court's instructions. (*People v. Sanchez* (2001) 26 Cal.4th 834, 852.) In light of the instructions already given, no further instructions

were needed prior to sending the jury back for further deliberations. There was no coercion and no abuse of discretion occurred.

IX. THE TRIAL COURT PROPERLY REFUSED APPELLANT'S PROPOSED PINPOINT INSTRUCTIONS

Appellant contends that the trial court erred in refusing to instruct the jury with two separate special instructions. (AOB 219-225.) Respondent disagrees.

First, appellant argues that the jury should have been instructed that the law has no preference "for the punishment of death" and that the penalty decision is the sole province of the jury. (AOB 219 [Arg. IX].) This Court has already considered and rejected this argument in *People v. Earp* (1999) 20 Cal.4th 826, in which this very same proposed instruction was found to be "misleading and argumentative." (*Id.* at p. 903.) The Court revisited this issue again in *People v. Watson* (2008) 43 Cal.4th 652 (*Watson*), and found that there was no error in refusing to give this instruction because in light of the other instructions given, "there was no room for the jury to speculate that the laws of the State of California had a preference as to penalty. Rather, the jurors certainly must have understood that the decision was left to their sole discretion." (*Id.* at p. 699.) As appellant cannot provide any compelling reason to deviate from the above decisions, this argument should be similarly rejected.

Second, appellant argues that the jury should have been instructed not to consider the deterrent value and monetary cost of death penalty. (AOB 223-225 [Arg. X].) Again, this Court has repeatedly rejected similar claims of error for failure to give such an instruction. (See *People v. Davis* (2009) 46 Cal.4th 539, 621 [instruction was unnecessary in light of other instructions setting forth proper factors for consideration]; *People v. Welch*

(1999) 20 Cal.4th 701, 765-766 [same].) Therefore, appellant's claim should also be rejected.

X. THE USE OF CALJIC NO. 17.41.1 DID NOT VIOLATE APPELLANT'S CONSTITUTIONAL RIGHTS

Appellant contends that the trial court's instruction with CALJIC No. 17.41.1 infringed upon his state and federal constitutional rights to trial by a jury that engaged in free and open deliberations in reaching a unanimous verdict. (AOB 226-229.) Respondent submits appellant's contention is foreclosed by this Court's express holding to the contrary in *People v. Engelman* (2002) 28 Cal.4th 436.

Both the guilt phase and penalty phase retrial juries were instructed with CALJIC No. 17.41.1 as follows:

> The integrity of a trial requires that jurors, at all times during their deliberations, conduct themselves as required by these instructions. Accordingly, should it occur that any juror refuses to deliberate or expresses an intention to disregard the law or to decide the case based on any improper basis, it is the obligation of the other jurors to immediately advise the Court of the situation.

No objections were asserted by defense. (2CT 556; 10CT 2876; 4RT 694; 6RT 1311.)

Initially, appellant forfeited his right to raise this claim on appeal because he failed to object at trial and the instruction did not affect his substantial rights. (See *People v. Elam* (2001) 91 Cal.App.4th 298, 311 [failure to object to CALJIC No. 17.41.1 forfeited the issue on appeal].) However, even assuming there was no forfeiture, the claim should be rejected on its merits.

As appellant acknowledges (AOB 226), this Court already rejected the same argument in *People v. Engelman, supra*, 28 Cal.4th 436. Although this Court directed that CALJIC No. 17.41.1 should no longer be

given due to the risk that the instruction could potentially interfere with a jury's deliberative process, the Court found no error in the giving of the instruction and ruled that it "does not infringe upon [a] defendant's federal or state constitutional right to trial by jury or his state constitutional right to a unanimous verdict[.]" (*Id.* at pp. 439-440, 449; see *People v. Brady* (2010) 50 Cal.4th 547, 587 [rejecting similar claim that the instruction violates a defendant's federal constitutional rights]; *People v. Wilson* (2008) 44 Cal.4th 758, 805-806 [same].) Appellant fails to provide any compelling reason to revisit this issue. Therefore, appellant's claim should be rejected.

XI. APPELLANT'S PENALTY PHASE RETRIAL DID NOT VIOLATE HIS CONSTITUTIONAL RIGHTS

Appellant contends that his penalty phase retrial violated various constitutional rights, primarily based on an alleged violation of his Eighth Amendment right against cruel and unusual punishment, because California is one of a minority of states that permits a penalty phase retrial when a first jury cannot reach a unanimous decision. (AOB 230-234.) Appellant concedes that the Supreme Court has found that a penalty phase retrial is not a double jeopardy violation. (AOB 233-234, citing *Sattazahn v. Pennsylvania* (2003) 537 U.S. 101, 106-110 [123 S.Ct. 732, 154 L.Ed.2d 588].) This Court has also rejected similar constitutional challenges. (See *People v. Taylor, supra*, 48 Cal.4th at p. 634; *People v. Gurule* (2002) 28 Cal.4th 557, 645-646.) Indeed, the trial court had no discretion to do anything other than select a new jury for a new penalty phase. (*People v. Thompson, supra*, 50 Cal.3d at pp. 176-177, citing § 190.4, subd. (b).) These decisions appropriately resolve this issue and appellant's arguments should be rejected accordingly.

XII. THE JURY WAS PROPERLY INSTRUCTED WITH CALJIC NO. 8.85

Appellant claims that before instructing the jury with CALJIC No. 8.85, the trial court should have deleted the inapplicable factors and specified whether each was aggravating, mitigating, or could be considered as either. (AOB 235-243.) As appellant acknowledges (AOB 235), his arguments have already been rejected by this Court.

First, this Court has repeatedly held that the trial court is not required to delete the inapplicable factors before instructing with CALJIC No. 8.85 because "'the jury is capable of deciding for itself which factors are "applicable" in a particular case.'" (*People v. Thomas* (2011) 51 Cal.4th 449, 505, citing *People v. Ghent* (1987) 43 Cal.3d 739, 777; see *People v. Perry* (2006) 38 Cal.4th 302, 319; *People v. Moon*, *supra*, 37 Cal.4th at p. 42; *People v. Duncan* (1991) 53 Cal.3d 955, 979.)

Second, the trial court is under no obligation to specify which factors listed in section 190.3 are aggravating or mitigating. (See *People v. Rogers* (2009) 46 Cal.4th 1136, 1178-1179; *People v. Jones* (2003) 30 Cal.4th 1084, 1129; *People v. Earp*, *supra*, 20 Cal.4th at pp. 898-899; *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1268.) Appellant offers no persuasive reason to reconsider these decisions. Therefore, this claim should be rejected.

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

Appellant argues that the trial court's use of CALJIC No. 8.88 violated his constitutional rights. (AOB 244-254.) To the extent appellant did not request the specific modifications alleged here, he has forfeited his claim on appeal. (*People v. Daya* (1994) 29 Cal.App.4th 697, 714 ["defendant is not entitled to remain mute at trial and scream foul on appeal

for the court's failure to expand, modify, and refine standardized jury instructions"].) In any event, as appellant recognizes (AOB 245), CALJIC No. 8.88 has been found to be constitutional (*People v. Moon*, *supra*, 37 Cal.4th at pp. 41-42; *People v. Crew* (2003) 31 Cal.4th 822, 858), and this Court has rejected all of appellant's challenges to the standard instruction (*People v. Ochoa* (2003) 26 Cal.4th 398, 452, abrogated on other grounds in *People v. Coombs* (2004) 34 Cal.4th 821, 860; *People v. Johnson* (1993) 6 Cal.4th 1, 52, overruled on another ground in *People v. Rogers* (2006) 39 Cal.4th 826, 879).

Indeed, the language of CALJIC No. 8.88 is not unconstitutionally vague; it adequately conveys the weighing process and is consistent with section 190.3. (*People v. Chatman*, *supra*, 38 Cal.4th at p. 409; *People v. Smith* (2006) 35 Cal.4th 334, 370; *People v. Davenport* (1995) 11 Cal.4th 1171, 1231, overruled on another ground in *People v. Griffin*, *supra*, 33 Cal.4th at p. 555, fn. 5.) The instruction "[i]s not unconstitutional for failing to inform the jury that if it finds the circumstances in mitigation outweigh those in aggravation, it is required to impose a sentence of life without the possibility of parole [citation]." (*People v. Moon*, *supra*, 37 Cal.4th at p. 42.) The instruction informs the jury regarding the proper weighing of aggravation and mitigation to determine whether death or life without parole is warranted. (*People v. Perry*, *supra*, 38 Cal.4th at p. 320; *People v. Smith*, *supra*, 35 Cal.4th at p. 370.) The "so substantial" language does not create a presumption for death. (*People v. Salcido* (2008) 44 Cal.4th 93, 163; *People v. Maury*, *supra*, 30 Cal.4th at p. 440.) Rather, it properly admonishes the jury "to determine whether the balance of aggravation and mitigation makes death the appropriate penalty." (*People v. Arias*, *supra*, 13 Cal.4th at p. 171.) "The statutory language referring to aggravating and mitigating circumstances is not vague or ambiguous. [Citations.]" (*People v. Salcido*, *supra*, 44 Cal.4th at p. 164.)

Appellant has not provided any reason for this Court to depart from its past decisions. Accordingly, appellant's claim must be rejected.

XIV. THE SPECIAL CIRCUMSTANCE OF MULTIPLE MURDER DID NOT VIOLATE APPELLANT'S EIGHTH AMENDMENT RIGHTS

Appellant claims that the multiple murder special circumstance violates the Eighth Amendment because it fails to appropriately narrow the class of persons eligible for the death penalty. (AOB 255-259.) As appellant concedes (AOB 255), this Court has repeatedly rejected similar Eighth Amendment challenges to the multiple murder special circumstance in the past. (See *People v. Loker* (2008) 44 Cal.4th 691, 755; *People v. Stevens* (2007) 41 Cal.4th 182, 211; *People v. Rogers*, *supra*, 39 Cal.4th at p. 893.) Since appellant offers no compelling reason requiring reconsideration of this issue, the instant claim should be rejected.

XV. THE IMPOSITION OF DEATH PENALTY DOES NOT VIOLATE APPELLANT'S EIGHTH AMENDMENT RIGHTS

Appellant claims that California's criminal justice system is too unreliable to allow the imposition of death penalty. (AOB 260-275.) In essence, appellant appears to argue that under the Eighth Amendment, death sentences should be affirmed only if guilt is proven beyond all doubt. However, appellant has not cited, and respondent is unaware of, any controlling United States or California Supreme Court authority requiring proof beyond all doubt in capital cases. To the contrary, the United States Supreme Court expressly rejected such argument in *In re Winship* (1970) 397 U.S. 358, 364 [90 S.Ct. 1068, 25 L.Ed.2d 368], stating that the standard required to convict a criminal defendant is "proof beyond a reasonable doubt."

In support of his argument, appellant again cites to the eyewitness identification evidence and reiterates his position that he was misidentified as the shooter. (AOB 272-274.) As previously demonstrated, the jury was presented with substantial evidence that appellant was indeed the gunman in both shooting incidents, and there was no wrongful conviction. (See Args. I.C, II.B, III.B, *ante*.) Since appellant was sentenced to death after the jury found him guilty of his crimes beyond a reasonable doubt based on substantial evidence of guilt, and after he was permitted to present all lingering doubt evidence at his penalty phase retrial, there is no Eighth Amendment violation here. Accordingly, appellant's claim is without merit and should be rejected.

XVI. CALIFORNIA'S DEATH PENALTY LAW COMPORTS WITH THE UNITED STATES CONSTITUTION

Appellant raises several federal constitutional challenges to California's death penalty that he acknowledges have already been rejected by this Court. (AOB 276-310.) Specifically, appellant presents the following federal constitutional issues: (1) section 190.2 is impermissibly broad (AOB 278-279); (2) section 190.3, factor (a), allows for arbitrary and capricious imposition of the death penalty (AOB 280-282); (3) California's death penalty does not contain adequate safeguards because the jury does not need to unanimously find beyond a reasonable doubt that aggravating circumstances exist or outweigh mitigating factors, it does not require that the death sentence be based on written findings regarding the aggravating factors, intercase proportionality review is not permitted, jury unanimity is not required for unadjudicated criminal activity to serve as an aggravating circumstance, the use of restrictive adjectives such as "extreme" and "substantial" acted as "barriers" to the mitigating circumstances appellant could present, and it fails to require an instruction that statutory mitigating

factors are relevant solely as mitigation (AOB 282-305); (4) California's sentencing scheme violates the Equal Protection Clause of the United States Constitution because it denies procedural safeguards to capital defendants that are afforded to non-capital defendants (AOB 305-308); and (5) California's use of the death penalty violates international norms of humanity and decency, and imposition of the penalty violates the Eighth and Fourteenth Amendments (AOB 308-310). As set forth by this Court in the cases that will be cited with each argument below, all of appellant's constitutional challenges to his death sentence and/or California's death penalty generally should be rejected.

This Court has repeatedly rejected appellant's constitutional challenges to California's death penalty, finding as follows. First, California's death penalty law and the special circumstances set forth in the law adequately narrows the scope of death-eligible defendants. (*People v. Martinez* (2010) 47 Cal.4th 911, 967 (*Martinez*); *Watson, supra*, 43 Cal.4th at p. 703; *People v. Perry, supra*, 38 Cal.4th at p. 322.) Second, section 190.3, factor (a), which permits the jury to consider circumstances of the crime, does not result in the arbitrary or capricious imposition of death. (*Martinez, supra*, 47 Cal.4th at p. 967; *Hamilton, supra*, 45 Cal.4th at p. 960; *Watson, supra*, 43 Cal.4th at p. 703.)

Third, California's death penalty law contains adequate safeguards. The law "does not require that the jury achieve unanimity as to aggravating circumstances or that it be given burden of proof or standard of proof instructions for finding the existence of aggravating factors, finding that aggravating factors outweigh mitigating factors, or finding that death is the appropriate penalty." (*Martinez, supra*, 47 Cal.4th at p. 967; *Hamilton, supra*, 45 Cal.4th at p. 960; see also *People v. Welch, supra*, 20 Cal.4th at p. 767, quoting *People v. Sanchez* (1995) 12 Cal.4th 1, 81 ["Unlike the determination of guilt, 'the sentencing function is inherently moral and

normative, not factual' [citation] and thus 'not susceptible to a burden-of-proof quantification'"].) The United States Supreme Court's rulings in *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435], *Ring v. Arizona* (2002) 536 U.S. 584 [122 S.Ct. 2428, 153 L.Ed.2d 556], *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403], *United States v. Booker* (2005) 543 U.S. 220 [125 S.Ct. 738, 160 L.Ed.2d 621], or their progeny, have not affected the foregoing conclusions. (*Martinez, supra*, 47 Cal.4th at p. 967, citing *People v. Bunyard* (2009) 45 Cal.4th 836, 858.) Written findings are also not required safeguards. (*Martinez, supra*, 47 Cal.4th at p. 967; *Hamilton, supra*, 45 Cal.4th at p. 960.) Intercase proportionality review is not required to render California's death penalty constitutional. (*Ibid.*; *Watson, supra*, 43 Cal.4th at p. 704.) Under the federal Constitution, the jury "properly may consider a defendant's unadjudicated criminal activity and need not agree unanimously or beyond a reasonable doubt that the defendant committed those acts."[23] (*Martinez, supra*, 47 Cal.4th at p. 967; see *Watson, supra*, 43 Cal.4th at p. 704.) Further, "[t]he use of restrictive adjectives, such as "extreme" and "substantial," in the statute's list of potential mitigating factors does not render it unconstitutional." (*Ibid.*) Likewise, "[t]here is no constitutional obligation to instruct the jury to identify which factors are aggravating and which are mitigating, or to instruct the jury to restrict its consideration of evidence in this regard." (*Martinez, supra*, 47 Cal.4th at p. 967; see *Hamilton, supra*, 45 Cal.4th at p. 961.)

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[23] Under state law, prior unadjudicated criminal activity must be found beyond a reasonable doubt for consideration at the penalty phase. (See *People v. Williams, supra*, 49 Cal.4th at p. 459.)

Fourth, California's sentencing scheme does not violate the equal protection clause by providing different procedural rights to capital and non-capital defendants because capital and non-capital defendants are not similarly situated. (*Martinez, supra*, 47 Cal.4th at p. 967; *People v. Riggs* (2008) 44 Cal.4th 248, 330.)

Finally, California's use of the death penalty does not violate international law or norms, and such norms do not limit application of the penalty only to the most extraordinary crimes. (*Martinez, supra*, 47 Cal.4th at p. 967; *People v. Gutierrez* (2009) 45 Cal.4th 789, 834; *People v. Panah, supra*, 35 Cal.4th at pp. 500-501.)

As appellant has failed to show any compelling reasons for this Court to depart from the above decisions, and has not shown that the impact of California's scheme taken as a whole denied his constitutional rights, the instant claims should be rejected.

XVII. THE METHODS OF EXECUTION DO NOT AFFECT THE VALIDITY OF APPELLANT'S DEATH PENALTY SENTENCE

Appellant contends that the methods of execution used in California, including lethal injection, violate his federal constitutional rights. (AOB 311-321.) This Court has repeatedly ruled a challenge to the method of a future execution is not cognizable on appeal, because such a claim does not affect the validity of the judgment. (*People v. Burney, supra*, 47 Cal.4th at p. 270; *People v. Demetrulias* (2006) 39 Cal.4th 1, 45; *People v. Snow* (2003) 30 Cal.4th 43, 127-128; *People v. Holt* (1997) 15 Cal.4th 619, 702; *People v. Bradford* (1997) 14 Cal.4th 1005, 1058-1059; *People v. Samoyoa* (1997) 15 Cal.4th 795, 864.) Therefore, this claim should be rejected.

XVIII. THERE WAS NO CUMULATIVE ERROR

Appellant contends that the cumulative effect of errors during the guilt and penalty phases requires reversal of the death verdict. (AOB 322-325.) Respondent disagrees because there was no error, and, to the extent there was error, appellant has failed to demonstrate prejudice.

Moreover, whether considered individually or for their cumulative effect, the alleged errors could not have affected the outcome of the trial. (See *People v. Seaton* (2001) 26 Cal.4th 598, 675, 691-692; *People v. Ochoa*, *supra*, 26 Cal.4th at p. 458; *People v. Catlin* (2001) 26 Cal.4th 81, 180.) Even a capital defendant is entitled only to a fair trial, not a perfect one. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1009; *People v. Box* (2000) 23 Cal.4th 1153, 1214, 1219, disapproved on another ground in *Martinez*, *supra*, 47 Cal.4th at p. 948, fn. 10.) The record shows appellant received a fair trial. His claims of cumulative error should, therefore, be rejected.

CONCLUSION

For the foregoing reasons, the judgment should be affirmed in its entirety.

Dated: September 22, 2011

Respectfully submitted,

KAMALA D. HARRIS
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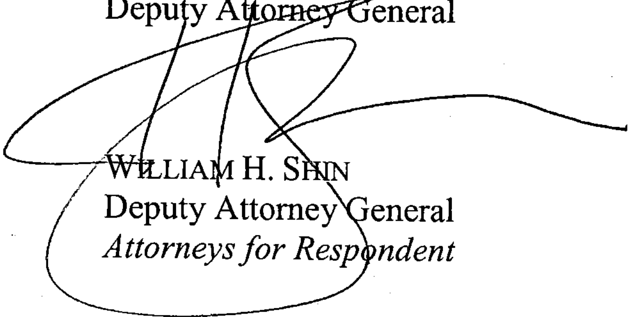

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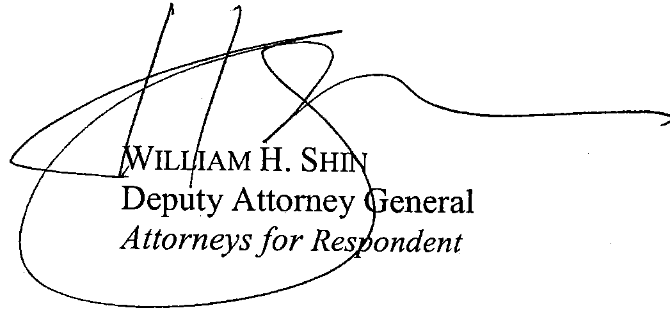
CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S BRIEF** uses a 13 point Times New Roman font and contains 24,090 words.

Dated: September 22, 2011

KAMALA D. HARRIS
Attorney General of California



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DECLARATION OF SERVICE BY U.S. MAIL
CAPITAL CASE

Case Name: **People v. Ennis Reed** No.: **S082776**

I declare: I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter.

I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On September 23, 2011, I served the attached **RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on September 23, 2011, at Los Angeles, California.

E. Obeso
Declarant

Edith Obeso
Signature

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