In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Respondent,** **v.** **RICHARD NATHAN SIMON,** **Appellant.**	**CAPITAL CASE** Case No. S102166

SUPREME COURT
FILED
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Deputy

Riverside County Superior Court Case No. CR68928
The Honorable Gordon R. Burkhart, Judge

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STATEMENT OF THE CASE

On July 19, 1996, the District Attorney of Riverside County filed an amended criminal complaint charging appellant, Richard Nathan Simon with two murders committed on December 3, 1995, an additional murder committed on May 25, 1996, and other offenses. (1 CT 8-11.) Simon was apprehended and placed under arrest for the murder of Michael Sterling on May 26, 1996. He was again arrested for the murders of Vincent Anes and Sherry Magpali on July 3, 1996. (1 CT 2; 16 RT 2468-2470.)

On October 16, 1997, the District Attorney of Riverside County filed an amended information charging Simon in Count 1 with the murder of Vincent Anes. (Pen. Code[1], § 187, subd. (a).) The information further alleged a special circumstance: the murder was committed in the course of a robbery. (§190.2, subd. (a)(17)(i)[2].) Additionally, the information charged Simon in Count 2 with the murder of Sherry Magpali (§ 187, subd. (a)), and further alleged the special circumstance that the murder was committed in the course of robbery (§ 190.2, subd. (a)(17)(i)), kidnapping (§ 190.2 (a)(17)(ii)), and rape (§ 190.2 (a)(17)(iii))[3]. In Count 6, the information charged Simon with the murder of Michael Sterling. (§ 187, subd. (a).) The information also alleged that Simon had committed multiple murders. (§ 190.2, subd. (a)(3).) (1 CT 191-195.)

Simon was additionally charged: in Count 3 with the rape of Ms. Magpali (§ 261, subd. (a)(2)); in Count 4 with kidnapping Ms. Magpali (§ 207, subd. (a)); and in Counts 5 and 7 with unlawfully possessing a firearm (§ 12021.1). The information also alleged as to counts 1, 2, 4, and 6 that

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[1] Unless otherwise indicated, all future statutory references will be to the California Penal Code.

[2] Since renumbered to section 190.2 subdivision (a)(17)(A).

[3] Since renumbered to section 190.2, subdivisions (a)(17)(A), (a)(17)(B), and (a)(17)(C).

Simon had personally used a firearm within the meaning of sections 12022.5, subdivision (a), and 1192.7, subdivision (c)(8). The information further alleged as to count 3 that Simon had used a deadly weapon within the meaning of sections 12022.3, subdivision (a) and 1192.7, subdivision (c)(23), and that he had kidnapped the victim for purposes of committing rape within the meaning of section 667.8, subdivision (a). (1 CT 191-195.)

On November 3, 1997, Simon entered a plea of "not guilty" and denied the allegations in the information. (1 CT 202.)

Jury selection began on September 13, 1999. (2 CT 433; 2 RT 139.) On October 19, 1999, the jury was sworn, and the guilt-phase presentation began on the same day. (13 CT 3494-3495; 12 RT 1713-1714.) On November 3, 1999, Simon waived a jury trial and admitted as true his prior conviction on February 2, 1993, for the offense of attempted robbery (§§ 664/211). (13 CT 3512; 20 RT 2894-2897.) Jury deliberations began on November 16, 1999. (13 CT 3554; 23 RT 3469-3474.)

On November 23, 1999, the court declared a mistrial as to the weapons-use enhancements alleged in connection with counts 1 through 4, after the jury was unable to reach a verdict on those allegations.[4] The jury then found Simon guilty of second degree murder in count 6, and returned guilty verdicts and true findings as to all of the remaining counts and allegations. (14 CT 3701-3714, 3738-3739; 24 RT 3532-3536, 3540-3548.)

Simon's first penalty phase trial began on December 1, 1999. (14 CT 3827; 25 RT 3603.) His jury began deliberations on December 15, 1999. (15 CT 3965; 32 RT 4724-4726.) On December 22, 1999, after the jury was unable to reach a decision, the court declared a mistrial for the penalty phase. (15 CT 3970; 33 RT 4769-4773.)

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[4] On July 19, 2001, the prosecution dismissed the firearm allegations in connection with counts 1 through 4. (23 CT 6307; 36 RT 5201-5203.)

On January 24, 2000, the prosecution gave Simon notice of its intention to retry the penalty phase. (15 CT 4066.) Jury selection for the penalty phase retrial began on July 16, 2001. (21 CT 5872; 35 RT 4874.) The jury was sworn on August 13, 2001, and the penalty phase retrial began on the same day. (23 CT 6311; 39 RT 5561.) On September 4, 2001, the jury began its deliberations. (23 CT 6341; 46 RT 6653-6658.) On September 6, 2001, Simon's jurors returned a verdict fixing the penalty as death for the murders he committed. (23 CT 6405, 6413; 46 RT 6663-6665.)

On November 2, 2001, the trial court conducted an automatic review of the verdict pursuant to section 190.4, subdivision (e), and declined to modify it. The court then imposed the death sentence with respect to counts 1 and 2. For the non-capital offenses, the trial court imposed an aggregate term of 36 years to life.[5] (23 CT 6438-6450; 47 RT 6701-6706.)

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[5] The court below imposed a term of 15 years to life for Simon's violation of count 6, and a consecutive term of four years for his personal use of a firearm in connection with that count; a consecutive term of eight years for his violation of count 3, and a consecutive term of nine years for the kidnapping enhancement alleged in connection with that count; a concurrent term of five years for his violation of count 4; and concurrent terms of two years each for his violations of counts 5 and 7. The abstract of judgment indicates that Simon was sentenced to an indeterminate term of death plus 21 years. (23 CT 6447-6448.) It fails to reflect the additional term of 15 years to life the trial court imposed for the murder of Michael Sterling.

STATEMENT OF FACTS

A. Guilt Phase

1. Prosecution's Case-in-Chief

a. Counts Related to Vincent Anes and Sherry Magpali

Around 4:30 p.m. on December 2, 1995, Vincent Anes drove Jose Menor, Jose's brother Eugene, and his girlfriend, Sherry Magpali to a birthday party in Moreno Valley. (14 RT 2088-2090.) They left about two hours later, and then went bowling. After purchasing drinks at a nearby Taco Bell, and dining at a Claim Jumper restaurant in Corona, Mr. Anes drove his companions home between midnight and one o'clock the next morning. (14 RT 2091-2093.) Mr. Anes first dropped off Ms. Magpali, but when he did so he let her out a few houses down the street from where she lived. Next, he took the Menor brothers to their home. Before he walked inside, Jose Menor saw that Mr. Anes had executed a U-turn, and that he was traveling back in the direction of Ms. Magpali's residence instead of continuing on to his own home. (14 RT 2093-2095.)

Between 1:00 and 2:00 a.m. the following morning, Kenneth Riomales, Jason and John Marianas, and Noah Maling drove past Pederorena Park in Moreno Valley. They noticed Mr. Anes's black Nissan in the parking lot, but did not stop, as they assumed Mr. Anes was sitting inside the car with Ms. Magpali. (12 RT 1748-1750, 1769-1771.) The four men returned to the park no more than half an hour later, and determined they would check on Mr. Anes and Ms. Magpali, initially with the idea of pulling a prank or surprising the couple. (12 RT 1751-1753, 1780, 1782-1783.)

Riomales was the first to approach the vehicle. When he peered into its rear window, Riomales saw a single naked body in the back of the car; at

that point, he immediately alerted his companions. (12 RT 1754-1756, 1787-1788.) John Marianas peered through the window next, and said, "They've been hit. They've been hit." (12 RT 1756, 1810-1811.) Though the body's face was covered, they suspected it was Mr. Anes. The four men noticed the body was riddled with bullet wounds, and that its back was covered in blood. Jason and John Marianas were also able to make out the faint outline of two handprints in the condensation that had formed on the inside of the car's rear window. (12 RT 1788, 1811-1813.)

The four men panicked, but they did not call 911 immediately; instead, they drove to Mr. Anes's house, which was located a short distance away. Mr. Anes's mother answered when they knocked on the door, and they asked her if her son was home. She reappeared at the door after having looked inside Mr. Anes's bedroom, and told them he was not. At that point, Riomales reported what he had seen to the 911 operator, and the four men returned to the park along with Mr. Anes's mother and grandfather. They met responding Riverside County Sheriff's deputies at its front entrance about ten minutes later.[6] (12 RT 1758-1759, 1789-1791.)

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[6] Riomales did not recall seeing any other vehicle or any other person in the area of Mr. Anes's car at any point during the evening. Marianas testified that he did not notice another vehicle the first time they drove past the park, but he recalled seeing an African American male and a "heavy set" Hispanic female standing near a gazebo that was situated about 50 or 60 yards from Mr. Anes's Nissan at that point. Marianas also testified that when they turned into the park no more than 30 minutes later, he spied what looked like a red Nissan pickup with a red camper shell sitting near the park's restroom. The door of the camper shell was open. Marianas added that in the short time it took them to drive down to the end of Via Del Lago, execute a U-turn, and return to the place where Mr. Anes's vehicle was parked, the pickup had disappeared. The two figures he thought he had spotted near the gazebo were also nowhere to be seen. (12 RT 1760, 1762-1763, 1765, 1771-1772, 1777-1779, 1783-1787, 1791-1798, 1804, 1807-1808, 1810.)

Forensic Technician James Potts arrived at the scene at 4:26 a.m. He found Mr. Anes's nude body in a prone position on the back seat of his car. Mr. Anes had been stripped of his ring and his necklace. A large speaker system was missing from the rear trunk area of the automobile. (12 RT 1818-1819; 16 RT 2430-2431, 2481-2482.) Inside Mr. Anes's vehicle, Potts collected eight .9 millimeter shell casings and three .9 millimeter projectiles. (13 CT 3549; 13 RT 1843, 1846, 1850-1851, 1860-1870.)

On the roof of a nearby restroom, Potts located torn pieces from a pair of Ms. Magpali's panties, as well as Mr. Anes's pants, his belt, and one of his socks. (13 RT 1853-1855.) On the ground beneath that portion of the roof, Potts discovered Ms. Magpali's bra. Potts also found Mr. Anes's underwear and T-shirt in the basketball court situated adjacent to the park's restroom and not far from Mr. Anes's vehicle. (13 RT 1856-1859.) The underwear had been cut along the edges of the waist and the legs, and the crotch had been cut or ripped out. (14 RT 2083-2084.) Inside Mr. Anes's vehicle, Potts located a black nylon jacket. One of its pockets contained Ms. Magpali's wallet, her makeup, and some candy packages. Inside the other pocket detectives located a disposable camera. When the camera's film was developed, it yielded photographs of Ms. Magpali and Mr. Anes at the birthday party they attended the night of their murders. (19 RT 2773-2775.)

Potts recovered 29 latent fingerprints from Mr. Anes's Nissan, but the only matches to known identifications that examiners could obtain were from fingerprints and palm prints belonging to Jose and Eugene Menor. (13 RT 1886-1892; 16 RT 2443-2458.) The park's restroom door yielded six latent prints, but none that had matches within the CAL-ID system. (16 RT 2458-2461.)

After Potts had finished gathering evidence at Pedrorena Park, he was summoned to the northbound shoulder of the 215 freeway, near the McCall

exit in Sun City. There, Potts found Ms. Magpali's body, dressed only in her jeans and satin blouse. She was lying on her stomach, with her left arm under her head, and her right arm curled up under her chin. Her pockets were empty; a gold necklace and some rings she had been wearing that evening were missing. (13 RT 1873-1874, 1972-1973; 16 RT 2426-2427; 19 RT 2775.) Potts retrieved two .9 millimeter shell casings that were lying near Ms. Magpali's body, and two .9 millimeter projectiles that were buried in the dirt beneath her head. (13 RT 1875-1877, 1879-1880, 1975-1976, 1978.) At the scene, Potts applied "tape lifts" to collect any trace evidence that may have been adhering to Ms. Magpali's body and clothing. (13 RT 1878-1879.)

Marianne Stam, a senior criminalist with the Department of Justice, collected additional trace evidence from both victims after their bodies were taken to the Riverside County Coroner's Office, on December 4, 1995. (14 RT 1989, 1992.) Stam collected fibers, fingernail clippings, swabs, and brushings from Ms. Magpali's hands, the inside of her jeans near the right pocket, the hair on her head, her vagina, and her pubic hair. Stam also collected some plant-type material from Mr. Anes's penis and left thigh. Finally, Stam collected samples from the floorboard carpeting of Mr. Anes's Nissan for fiber comparisons. (13 RT 1981-1985; 14 RT 2006-2013.) Stam saw no indications that Mr. Anes had been sexually assaulted. (14 RT 2051-2052, 2055, 2082-2084; 16 RT 2368-2369.)

The brushings from Ms. Magpali's pubic hairs, as well as her vaginal swab, betrayed the presence of sperm. (14 RT 1999-2005.) Stam later examined Ms. Magpali's clothing, which she had received on December 8, 1995. Stam found some plant material inside the legs of Ms. Magpali's pants. (14 RT 2069-2070, 2082.) She detected a possible semen stain in the crotch area and inside left knee of Ms. Magpali's jeans, and a possible semen stain on Ms. Magpali's shirt. (14 RT 2013-2018.) Stam also

detected blood stains on the exterior back left hip area, the seat and back pocket area, and the upper front exterior of Ms. Magpali's jeans. (14 RT 2040-2043.)

The semen stains did not contain a sufficient number of spermatozoa to subject them to serological testing. When Stam analyzed the blood stains, she was unable to determine the donor's type through conventional ABO or PGM blood-typing analysis. Consequently, Stam had the semen and blood samples she obtained, along with those retrieved by James Potts and Dr. Garber, sent to the San Bernardino County Sheriff's Crime Lab for DNA analysis on February 8, 1996. (14 RT 2018-2035, 2039-2040.)

On May 30, 1996, Stam received saliva, hair, and blood samples that had been obtained from Simon. She attempted to analyze his blood using the ABO and PGM typing systems without success. During testing, Simon's blood exhibited a "Rouleaux Formation," a property that creates "pseudo clumping" instead of "real clumping," and therefore yields inconclusive results. For that reason, Stam also sent Simon's biological samples to the San Bernardino County Sheriff's Crime Lab for DNA analysis on June 6, 1996. (14 RT 2035-2040, 2085-2086.)

The red fibers that Stam collected from Ms. Magpali's body and clothing, as well as from the crime scene itself, revealed a common source. Mr. Anes's vehicle, the clothing found inside of it, Simon's Buick LeSabre, and Simon's residence were all excluded. (14 RT 2043-2046, 2048-2051, 2055-2058.) However, based on information she later received, Stam collected red fibers from the interior of a 1981 Dodge Colt that was found parked outside of a mechanic's shop in Rubidoux. (14 RT 2058-2061, 2063; 17 RT 2543-2544, 2563-2564.) The fibers from the vehicle bore a close similarity, though Stam could not say they were a conclusive match because they were not unique to the 1981 model year. (14 RT 2061-2062.)

Based upon that evidence, and a subsequent contact investigators had with him, Curtis Williams was arrested on October 6, 1999[7]. (17 RT 2564.)

During her inspection of the Dodge Colt, Stam found two holes, one on the front edge of the glove box and one behind it, which tested weakly positive for the presence of lead. Stam opined it was possible that the two holes could have been created by a single bullet, but no projectile was ever located inside the car, and there was no evidence that a bullet had passed through the vehicle's firewall. (14 RT 2062-2068, 2078-2079; 15 RT 2139-2145.)

Riverside County Forensic Pathologist Darryl Garber conducted Ms. Magpali's autopsy on December 7, 1995. (13 RT 1884-1885; 16 RT 2332-2334.) Garber noted that Ms. Magpali had received two gunshot wounds to the head. One bullet had entered the back of her head slightly behind her right ear, and had exited through the left side of her chin. The second bullet entered through Ms. Magpali's right temple, coursed through her right maxillary bone, and exited through her right upper lip without passing through the brain. Both bullet holes were consistent with a medium-sized caliber weapon, and both projectiles would have been fired from a distance of at least 18 to 24 inches. (16 RT 2344-2349.) Though he had not noted it in his autopsy report, Garber allowed there was some evidence that Ms. Magpali sustained a grazing wound along the right side of her face that may have been caused by a third projectile; however, the nature of her injuries

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[7] The information linking the car, and ultimately the murders of Ms. Magpali and Mr. Anes to Williams, was initially provided by Thomas Crompton, a defense investigator, to Lodric Clark, a senior investigator with the Riverside County District Attorney's Office. Clark passed it along to Detective Gary Thompson, who directed Stam to retrieve the evidence. The jury was told only that the information had been obtained from an investigator, and never learned the defense team was its source. (17 RT 2546-2547, 2559.)

ruled out a conclusive determination. (16 RT 2350-2351, 2372-2374.) Ms. Magpali's toxicology screening came back negative for the presence of alcohol and drugs. (16 RT 2354.)

During the autopsy, Garber prepared a sexual assault kit that contained swabs and combings from Ms. Magpali's vagina. (13 RT 1986-1987.) Though he noted no signs of vaginal trauma, Garber did detect what appeared to be fingertip bruising and scratches on Ms. Magpali's legs that were consistent with their being held forcefully. He also observed a possible defensive wound on her right hand, between the thumb and index finger; and plant material on her buttocks. (16 RT 2339-2343, 2369.)

Garber conducted Mr. Anes's autopsy on December 8, 1995. (13 RT 1880-1881; 16 RT 2355.) Mr. Anes sustained a total of eight gunshot wounds. Two bullets entered his upper left arm and passed through his shoulder. A third bullet traveled the same path but continued through his brain. A fourth bullet also passed through his upper left arm, but lodged in his left shoulder. A fifth bullet entered his upper left arm, coursed through the wall of Mr. Anes's chest, and then lodged in his neck. The sixth bullet entered his left posterior arm, exited the arm, and then re-entered Mr. Anes's chest, perforating his left lung, his aorta, and the second thoracic vertebra of his spine. The seventh bullet entered his left chest, traveled through his back, and lodged in the back of his head. The eighth bullet entered the left side of his chest, and perforated his left lung as it exited his back. All eight bullets were fired within the space of a minute or two, and possibly in a matter of seconds. Based upon the nature of Mr. Anes's wounds, the mouth of the gun was between three and eighteen inches from his body when all eight rounds were discharged. (16 RT 2358-2367.)

Garber removed five .9 millimeter projectiles from Mr. Anes's body – one from the right side of his neck; one from his right shoulder; one from the area between his left neck and left shoulder; and two from his brain.

(13 RT 1881-1883; 16 RT 2367.) Mr. Anes's toxicology screening also came back negative for the presence of alcohol and drugs. (16 RT 2367-2368.)

Paul Sham, a criminalist with the Department of Justice Crime Lab in Riverside, received the recovered projectiles and shell casings on December 20, 1995. (13 RT 1905, 1909-1911.) Based on his preliminary examination, he could only determine the projectiles were "probably" all fired from the same gun. Sham noticed that the cartridge cases all carried a distinctive impression that had been left by the weapon's firing pin, and so on January 12, 1996, he entered an exemplar into the "Drug Fire" system operated by the Department of Justice. (13 RT 1912, 1918.)

On January 18, 1996, Redlands Police Officer John Moore conducted a routine traffic stop of the 1986 Isuzu Impulse that Simon was driving. (13 RT 1830-1833.) Following the encounter, Officer Moore arrested all three occupants of the vehicle and impounded the car. When he conducted an inventory search of the automobile, Moore located a .9 millimeter handgun, containing 17 rounds, under the front passenger's seat. (13 RT 1834-1837.) Simon's front passenger, Mamie Weeks, testified that earlier in the same day Simon had picked her up and driven her to a home a couple of blocks from where she lived. Simon explained to Weeks that he was going to pick up a gun at the residence, because he needed protection from "some of the gang bangers or something in San Bernardino he didn't get along with." (13 RT 1937-1939.) Weeks further testified that when Simon realized he was being pulled over by the police, he handed the gun to her and asked her to place it under her seat. (13 RT 1940.) The following day, Simon called Weeks and asked her to claim ownership of the gun. When she refused, Simon became angry, said that she was a "bitch," and told her that he was going to "fuck her up." Weeks was so afraid of Simon that she moved to Nevada for several months after the incident occurred. (13 RT 1944-1946.)

By May 7, 1996, Roger Massaro, a technician at the San Bernardino County Sheriff's Crime Lab, notified Sham that cartridges which had been test-fired from that gun matched the impression Sham had entered into the Drug-Fire system. Officer Moore test-fired the gun again the next day, and determined that all ten of the cartridges recovered from the locations where Mr. Anes and Ms. Magpali were shot had been fired from that same weapon. (13 RT 1918-1922.)

b. Counts Related to Michael Sterling

Around 8:50 p.m. on May 25, 1996, Riverside County Sheriff's Deputies Dean Baer and Timothy Morin were dispatched to an apartment complex at 13902 Elsworth Street in Moreno Valley. (15 RT 2101-2102, 2106; 17 RT 2520-2522.) When they arrived, Deputies Baer and Morin proceeded to a field across from the complex's parking lot, where they found Vernice Haynes kneeling next to Michael Sterling, who had been shot. Mr. Sterling was still conscious, but he had difficulty speaking on account of the pain. (15 RT 2102-2103, 2105.) Mr. Sterling died soon after paramedics transported him to Riverside Hospital.

Vernice Haynes was Mr. Sterling's fiancée. (15 RT 2261.) She testified that on the evening of the shooting, she and Mr. Sterling were visiting an apartment where Davinna Gentry, Sterling's cousin, lived with her boyfriend, Curtis Williams. She knew Gentry as "Shay," and Williams as "Droopy." Gentry knew Simon through Williams, and they referred to Simon as "Nate Dog" from "7-4 Hoover." (15 RT 2261-2262, 2284.) Shortly after 7:00 p.m., Simon walked into the apartment with Jamal Brown (Brown), and Brown's brother, Raheen. Simon was "talking crazy" and "cussing out" Williams. (15 RT 2152-2155, 2265-2266; 16 RT 2385-2386, 20 RT 2820-2822.)

Williams introduced Mr. Sterling to Simon. As he reached out his hand, Simon asked Mr. Sterling, "Where are you from," or, "What set were

you from?" Mr. Sterling chuckled and said, "I'm from I.E., Inland Empire, 'cause I was raised here. But I don't gang anymore." Simon then pulled back his hand and went into a rage. He said to Williams, "Droopy, why do you have this motherfuckin' I.E. in your house." Simon told Brown to go get his (Simon's) gun from the car, and said that he wanted to shoot Mr. Sterling. Brown said, "No, man," and tried to get Simon to calm down. (15 RT 2265-2269, 2308-2309; 16 RT 2386-2387, 2396-2397.) Mr. Sterling never raised his voice, and his expression was quizzical -- he seemed more shocked than upset at Simon's behavior. (15 RT 2308.) At that point Simon went into the apartment's bathroom. Haynes testified that she was "nervous," because she feared Simon would shoot them when he emerged. She said to Mr. Sterling, "Please. Let's go. Let's just leave." Mr. Sterling replied, "It's all right. Just wait. Let's just hold on," and he appeared concerned for Williams. (15 RT 2269-2270.)

When Simon walked out of the bathroom, his mood seemed to have changed, and he offered an apology as he reached out his hand to shake Mr. Sterling's. When Mr. Sterling took Simon's hand, Simon pulled Mr. Sterling towards him in order to give him a hug. (15 RT 2269-2270, 2285, 2309-2310.) Simon then walked over to Williams, struck him in the mouth with his elbow, and again berated Williams for bringing Mr. Sterling into his apartment.[8] At that point Gentry spoke up, and told Simon that she would not allow him to "disrespect her" in her own residence. Simon

[8] At one point in her testimony, Haynes recalled the sequence of events differently. She testified that Simon had struck Williams before he went inside the bathroom, and that when he came out, Simon apologized to both Mr. Sterling and Williams. After that episode, Simon said he was leaving, and there were no further incidents of violence inside the apartment. (16 RT 2397-2398.)

looked at Gentry, and said to her, "Shut up, bitch, before I shoot you too."[9] Mr. Sterling lifted up his shirt to show Simon that he was unarmed. (15 RT 2270, 2279, 2285; 16 RT 2396-2397, 2418-2419.)

Williams did not attempt to return Simon's blow; instead, he stepped back and said, "What are you doing, man." To Haynes, Williams seemed afraid of Simon, as did everyone else. Williams complained, however, that Simon was "disrespecting" his home and his girlfriend, and the two men went outside to discuss the matter. When Mr. Sterling told Haynes he was going outside to "watch Droopy's back," Haynes begged Mr. Sterling not to leave, because she was afraid he would be shot. She said to Mr. Sterling, "No. Don't go out. You don't know . . . what the guy is going to do." Mr. Sterling responded by telling her to stay inside. Haynes complied, and Gentry closed and locked the door behind her. (15 RT 2271-2273, 2310-2314; 16 RT 2395-2398, 2400-2403.)

At that point, Haynes wanted to run out the back of the apartment and find Mr. Sterling's brothers, who lived in a different area of the apartment complex. Gentry told her no one was leaving. As she argued with Gentry, Haynes heard three shots in rapid succession.[10] (15 RT 2274, 2315-2319.) Haynes began jumping up and down while screaming. Shortly afterwards, Williams knocked on the door. When Haynes opened it, Williams looked to her as though he had been "wrestling in the dirt." Williams was "slumped over" and leaning on either the door or the adjacent railway for support. Williams said to Haynes, "Go get Mike." When she asked where

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[9] Haynes insisted she had always told investigators that Simon had threatened to shoot Gentry, but she told the officers who interviewed her at the scene only that Simon had said, "shut up, bitch." (16 RT 2409-2410, 2413-2416.)

[10] Deputy Morin believed Haynes had reported hearing four shots, but Haynes was certain she had never told anyone that she had heard more than three. (15 RT 2317-2318; 16 RT 2403; 17 RT 2532-2533.)

he was, Williams said to Haynes, "Over there." Haynes looked around Williams and saw Mr. Sterling staggering in the field. As Haynes ran to that location, her path crossed that of Simon and his companions, who were running towards Simon's waiting car. (15 RT 2274-2276, 2282, 2319-2320, 2323.)

When Haynes reached the place where Mr. Sterling lay dying, he said to her, "You know I'm going to jail."[11] Haynes responded, "For what? You didn't do anything." They both started laughing. Haynes told Mr. Sterling to get up so that she could take him home, but he said nothing more, as blood was coming out of his mouth. (15 RT 2280, 2321-2322.) Haynes testified that neither Mr. Sterling nor Williams had a gun, mentioned a gun, nor threatened Simon in any manner that evening. (15 RT 2281, 2283, 2286-2287, 2296-2297; 16 RT 2405.)

When Deputy Morin interviewed Haynes at the scene (17 RT 2520, 2526-2527), she related that when Simon started to abuse Mr. Sterling, Williams came to his defense and said, "What's up? He's a friend of mine." Simon then delivered a glancing blow to Williams's back with his fist. Simon continued to berate Mr. Sterling, and told one of his companions, "Go get my gun." Gentry then took Simon to task and said, "Why you dissin' me in my apartment like this?" When Williams again came to Mr. Sterling's defense, Simon struck Williams in the face with his fist. (17 RT 2528-2530.) Gentry demanded that Simon and his two companions leave, which they did. Williams followed them out, and was soon followed in turn by Mr. Sterling. Haynes and Gentry positioned themselves at the apartment's entrance. From that vantage point they could see Mr. Sterling and Simon hug each other, which led both women to

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[11] Haynes testified that Mr. Sterling had been in and out of prison, most recently for beating a man. (15 RT 2285-2286, 2288, 2290.)

believe the two men had worked out their differences. Soon after that, however, Simon and Mr. Sterling were engaged in a heated exchange. Mr. Sterling ordered Haynes to go back into the apartment. Gentry joined her, and closed the door after them. Within a minute, Haynes heard four gunshots. (17 RT 2530-2533.) Haynes went back outside and encountered Williams, who was walking towards her. Williams said that they needed to leave the area immediately.[12] (17 RT 2539-2540.)

Gentry's account of the evening's events paralleled that of Haynes in many respects, but varied in others. Gentry testified that she answered the door, and Simon asked for "Droopy." (15 RT 2152, 2154.) He walked in with Brown, who had asked to use the bathroom. Raheen remained outside, by the door. (15 RT 2155, 2162.) Simon shook hands with Williams, and then shook Mr. Sterling's hand when he was introduced to him. Simon asked Mr. Sterling where he was "from." When Mr. Sterling replied, "I.E.," Simon grew angry and said he "didn't like niggers from I.E." (15 RT 2155-2157.)

Simon turned to Brown and said, "Man, go to the car and get my gun." Brown replied, "No, you're tripping." (15 RT 2159.) Simon then turned back to Williams and asked him why he was "hanging" with Mr. Sterling. Williams explained that he was part of Gentry's family. Simon responded, "What's up?" At that point Gentry told Simon that "it wasn't going to happen" in her house, because she had kids there. Simon retorted, "So what, bitch. I'll shoot you, too." (15 RT 2160.) Mr. Sterling stood up, lifted his shirt to show Simon he was not armed, and protested he was "trying to be cool" and stay out of jail, because he had only been out for a

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[12] At trial, Haynes did not recall telling the investigating officers about anything she had seen from the doorway of Gentry's apartment, or Williams's remark about needing to leave the area. (15 RT 2323-2324; 16 RT 2402-2403, 2420.)

week or two. (15 RT 2156.) Mr. Sterling did not seem to be angry, and never threatened Simon. (15 RT 2188.)

As Williams walked over to where Mr. Sterling was sitting, Simon took a swing at Williams, landing a glancing blow on his back. Williams asked Simon why he had hit him, and tried to persuade Simon to stop what he was doing and to talk it over with him outside. Simon refused, and again asked Williams why he was "hanging around with these I.E. niggers." (15 RT 2160-2165.) As Brown tried to escort him out of the apartment, Simon entered the bathroom. Everyone in the apartment was afraid that Simon might be retrieving a gun while he was inside. Gentry asked Williams to make Simon leave. Meanwhile, Brown went back to the front door of the apartment, while Raheen, who had remained outside, walked away from the door towards Simon's vehicle. (15 RT 2167-2169.) Simon came out of the bathroom and immediately apologized to Mr. Sterling. Simon said "he knew he was wrong," and "it wasn't him." Mr. Sterling replied, "Okay, you know, all right, man." Simon then shook Mr. Sterling's hand and hugged him; Mr. Sterling hugged Simon back. Simon walked out the door, followed by Williams. (15 RT 2169, 2171.) Gentry could hear Williams outside, asking Simon, "Why you trip like that?" After a short while Mr. Sterling said he was "going outside to check on his dog." (15 RT 2172.) Haynes and Gentry both begged Mr. Sterling to stay inside. Gentry said to Mr. Sterling, "You know, if he does anything to Curtis, he won't kill him, you know." Mr. Sterling pushed Gentry aside, and walked out the door. (15 RT 2170.) At that point, Haynes became distraught; she screamed and ran into the bathroom. (15 RT 2176.)

When Mr. Sterling walked outside, Gentry turned the lights off and tried, unsuccessfully, to see what was happening through her front window. Gentry did not trust Simon, and so after she told her niece to put the younger children in a back room, she exited her apartment through the rear

sliding door in order to check on Williams and Mr. Sterling.[13] (15 RT 2235-2236.) Gentry went into her neighbor's backyard and climbed up on her fence, in order to acquire a better vantage point. Gentry was only able to see "shadows on the ground" from that location, but she did believe Mr. Sterling was leaning against Simon's car – she recognized his shadow because of the two men, Mr. Sterling was the larger individual. (15 RT 2170, 2173-2178, 2215-2216.) Gentry heard Simon telling Mr. Sterling to "get off my car." About a minute after Mr. Sterling had lifted his body off the car, Gentry heard two gunshots. Gentry saw the shadows moving after the shots were fired. She then jumped off the fence and ran to her neighbor's backyard, which she believed would afford her a clearer view of the scene. At that point, she heard a third gunshot. (15 RT 2179, 2227-2229, 2231-2232.)

Gentry knocked on the sliding glass door belonging to her neighbor, who allowed Gentry to come inside. Peering out her neighbor's front window, Gentry watched as Simon and his two companions drove away from the scene in Simon's white Buick LeSabre. She also saw that Williams was outside her own front door, speaking with Haynes. (15 RT 2179-2182, 2238.) She stepped out and the three of them went to the field together. (15 RT 2224.) Mr. Sterling was still alive when they encountered him; Gentry told him to remain still and applied hand pressure to his wounds. (15 RT 2170-2171.) Gentry then asked Williams for his car keys

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[13] Haynes testified that Gentry was inside the apartment with her when gunshots rang out. (15 RT 2324.) Detective Gary Thompson interviewed Gentry both at the scene of the shooting and during a subsequent recorded interview at the station. Thompson's recollection was that Gentry told him she was inside the apartment when she heard three shots. Thompson did not recall Gentry telling him that she had gone outside, climbed a fence, or that she had been able to observe or overhear events as they transpired before the shooting. (16 RT 2473-2474.)

and drove to the unit occupied by Mr. Sterling's brothers.[14] (15 RT 2182-2183, 2224.) Gentry testified that neither Mr. Sterling nor Williams was armed that evening. (15 RT 2169, 2186.)

On May 26, 1996, Forensic Technician Robert Riedman located a loaded .22 caliber Intratec semiautomatic pistol under the mattress in the master bedroom of Simon's residence. It had a live round in the chamber with an expended round jammed in the ejection port. The attached ammunition clip contained another 19 live rounds. (15 RT 2128, 2130-2135.) On top of the dresser in the same room, Riedman discovered a box of ammunition and a second ammunition clip, both of which contained live .22 caliber rounds. (15 RT 2136-2138.)

Criminalist Paul Sham test-fired the firearm in July 1996. Sham determined conclusively that the cartridge recovered from the scene of Mr. Sterling's shooting was discharged from the gun recovered in Simon's bedroom. Sham also determined that the projectile recovered from Mr. Sterling's body was consistent with a bullet fired from that gun or any other .22 caliber semiautomatic firearm "with the same rifling class characteristics." (13 RT 1905; 15 RT 2250-2251, 2256-2259.)

Brown, who was the stepbrother of Simon's wife, Keisia Simon, testified at trial. He recounted that he and his brother Raheen accompanied Simon to Gentry's apartment on the evening of May 25, 1996. (20 RT 2821-2822; 43 RT 6194-6195.) While there, Brown asked to use the

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[14] Gentry was driving Williams's 1981 Dodge Colt. When she returned with it, she had to park on the street because the parking lot had already been taped off. Later, deputies gave her the opportunity to move the Colt back to its original position in the parking lot. (15 RT 2183-2186.) Deputies apparently did not search the Colt that evening. (15 RT 2108, 2119-2120.) The prosecutor asked Gentry about the hole in the glove compartment. Gentry testified that she was aware of it, and did not recall having seen it before the middle of December 1995. (15 RT 2188-2189.)

bathroom. (20 RT 2824.) Brown's recollection of the evening's events was limited, but he did remember that after he used the bathroom there was a lot of "commotion," and he heard the people inside the apartment arguing. (20 RT 2831, 2849-2851.) Brown walked outside to join Raheen.[15] At that point, Brown struck up a conversation with a girl who was sitting on the stairway. Brown recalled that Simon got into an argument with "a black guy" outside of the apartment. While Brown was trying to obtain the girl's phone number, he heard gunshots, but he did not remember how many. (20 RT 2825-2827, 2829.) At that point Raheen was standing a few feet away from him. Brown was frightened; he and his female companion began to run up the stairs, but Raheen convinced Brown to turn around, come back down the stairs, and get into the car. At that point, Brown observed a black male running into the field across from the parking lot. (20 RT 2828, 2833, 2840, 2843, 2852-2856, 2875-2876.) Brown insisted that he never saw who fired the gun, or any of the events leading up to the shooting. He testified that neither he nor his brother had a gun that evening. Brown also denied that Simon had ever told him to go get a gun. (20 RT 2832-2833, 2835-2836, 2857-2858, 2864.) Simon drove them home from the scene in silence. (20 RT 2838.)

Riverside County Sheriff's Detective Phil Ricciardi conducted a recorded interview of Brown on May 31, 1996.[16] (20 RT 2881-2882.) Brown recalled that when he walked out of the restroom at Gentry's apartment, everyone was engaged in a heated argument. He asked Raheen what was going on, but Raheen replied he did not know. At some point, Brown said he grabbed Simon and told him to "chill out." Brown walked

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[15] Brown was unsure whether he left the apartment with his brother, or whether his brother had remained outside while he used the bathroom. (20 RT 2824-2825, 2851, 2866.)

[16] The tape of the interview was played for the jury. (20 RT 2884.)

out with his brother " 'cause [Simon] was trippin', he was tellin' 'em some, you know, you know IE guilty and some other stuff." (13 CT 3518, 3521-3522, 3529.) Once outside, he spoke with a girl who was sitting in the stairwell. They agreed to exchange telephone numbers, and as she passed him a pen, Brown heard two gunshots. Brown turned around and Mr. Sterling was "running." Next he noticed Simon sprinting towards his vehicle, and then "movin' around in the car and stuff." (13 CT 3515, 3518-3521, 3523, 3530.)

Earlier that day, Brown's parents had a barbeque, where Simon was a guest. He and Simon were in the garage, preparing to go to a store, when Simon showed him a gun that looked like "a Tech or something" and had a clip. (13 CT 3526-3528.) In his interview, Brown proclaimed he did not see the shooting, or witness the encounter leading up to it. Brown said, "I didn't know [Simon] was gonna do what he did," and then added, "Fuckin' idiot shot him." Brown knew Simon had the gun with him, because Simon had told him that "he had it stashed." Brown observed, "He had it stashed somewhere, that's when he's fumbling." (13 CT 3520.)

Brown recalled that Simon and Mr. Sterling were arguing when they came outside. Brown added, "And I figured, shit, [Simon] shot him. He had to." Brown added:

> But I didn't see the gun. When I went to the car I turned around, [inaudible], none of my business, I was talkin' to homegirl. So anyway, when I turned around they, everything was just already like in motion, like he plotted [inaudible].

Brown then offered, "[Simon] shot him[,] what for I don't know." Brown noted that Simon was the only one who had a gun. (13 CT 3531.)

At one point, Detective Ricciardi asked Brown to clarify why he had said that Simon had shot Mr. Sterling. Brown replied, " 'cause [Simon] had a gun on him earlier and he's the only one trippin' around there." (13 CT

3524.) Ricciardi then asked Brown, "What'd that guy do to deserve it?" The following exchange then ensued:

> [Brown]: I don't know. He was, they were trippin' over IE or something.
>
> [Ricciardi]: Was that guy doin' anything?
>
> [Brown]: No, he was cool to me. I had, when I first walked in I had to ask if I can go to the bathroom and he say yeah.
>
> [Ricciardi]: So he was, he was bein' cool outside?
>
> [Brown]: Uh yeah. He totally shot him cold blooded, man.

(13 CT 3524.)

After the shots rang out, Brown was going to follow the girl he had been speaking with upstairs, but his brother told him they had to leave with Simon. Brown did not know where exactly Simon had stashed the gun inside of the car, but based on the movements he saw him make, Brown surmised that Simon had placed it in the vehicle's glove compartment. Brown got inside the car and the three men drove home in silence. (13 CT 3524-3526, 3529.) Brown said he was "shocked" by "the way it had happened," and he interjected, "The wrong place at the wrong time." (13 CT 3524.)

Dr. Joseph Choi, a forensic pathologist with the Riverside County Coroner's Office, performed Mr. Sterling's autopsy on May 29, 1996. (16 RT 2432-2433; 17 RT 2567-2569.) Choi recovered a .22 caliber bullet from a single gunshot wound to Mr. Sterling's right armpit. (17 RT 2570-2571.) The bullet had perforated Mr. Sterling's chest cavity, passed through both lungs as well as his heart, and had lodged in his left pectoralis muscle. (17 RT 2574-2575.) The bullet had traveled from right to left, in a slightly downward direction, and then slightly forward. Choi estimated the

gun had been fired approximately two feet away from Mr. Sterling's body. (17 RT 2575-2576.) Toxicology results revealed that Mr. Sterling's blood alcohol level at the time of his death had been .10 percent, and tested positive for the presence of cannabinoids. (17 RT 2577-2578.)

One .22 caliber shell casing was found in the parking lot of the apartment complex, near a stairwell leading from the first to the second floor. (15 RT 2109-2110, 2117-2118, 2120, 2125.) Riverside County Sheriff's Detective Gary Thompson assisted in the investigation of the murders of Sherry Magpali and Vincent Anes. He was also assigned to investigate the murder of Michael Sterling. Detective Thompson went to Simon's Dana Lane residence and arrested him there around 3:30 or 4:00 a.m. on May 26, 1996. (16 RT 2468-2470.) Thompson arranged to have blood, hair, and saliva samples collected from Simon later that same day. (16 RT 2471-2472; 20 RT 2924.) Thompson acknowledged that Simon did not display any signs of alcohol or drug intoxication at that time. (16 RT 2470-2471.)

Daniel Gregonis, a criminalist with the Scientific Investigations Division of the San Bernardino Sheriff's Department, found that the DNA profile he obtained from Simon's blood sample matched the DNA profile exhibited in the sperm fraction present in the vaginal swabs taken from Ms. Magpali's body and the stains from the crotch area of her jeans. (18 RT 2612-2636.) In the seven markers he examined using the Polymerase Chain Reaction (PCR) technique, Gregonis determined that the DNA profile he obtained would be expected to occur in 1 of 4.8 billion Caucasians, 1 of 120 million Hispanics, and 1 of 52 million African Americans. In the four markers Gregonis analyzed under the Restriction Fragment Length Polymorphism (RFLP) system, the DNA profile he obtained would be expected to occur in 1 of 74 million Caucasians, 1 of 120 million Hispanics, and 1 of 47 million African Americans. Multiplying

those two frequency statistics together, one would expect to encounter the same DNA profile in less than one person among the world's entire population. In short, unless he had an identical twin, Simon was the only possible contributor of the DNA samples obtained from those sperm fractions. (18 RT 2602, 2607, 2638-2644.) Williams and Mr. Anes were excluded as possible contributors. (18 RT 2637, 2644-2647.)

2. Defense Case

Recalled as a witness for the defense, Mamie Meeks testified that on January 18, 1996, Simon drove her to a residence at 24663 Fay Avenue. They parked in front of the garage, and Simon went around its right side. The home's entrance was on the left. From her position, Meeks could not see whether Simon had gone inside. (22 RT 3166-3169, 3187-3188, 3192-3193.)

Sandy Ferguson testified that her family owned the home at 24663 Fay Avenue, and that she was living there on January 18, 1996. At that time there was a gate on the right side of the garage that afforded access to the backyard. Kevin Reed, whom she also knew as "Zoe," was her boyfriend, and he spent a lot of time at her house. Reed was a friend of Simon and Williams, and both men were regular visitors there. (22 RT 3205-3211.) Ferguson testified Williams had been to her house on four or five different occasions before January 23, 1996, when Reed was sent to jail. Ferguson told the jury she had never seen either Williams or Simon with a gun. Ferguson added that she had never known Reed to have a gun, either. (22 RT 3216-3218.)

B. Penalty Phase

Simon's second penalty phase jury heard substantially the same evidence as was presented to his guilt phase jury.

1. Prosecution's Case-in-Aggravation

Kenneth Riomales testified that he had known Mr. Anes since they were both in Junior High School. (39 RT 5648.) Riomales considered Mr. Anes a good friend, and the two of them enjoyed playing basketball together. Riomales remembered Mr. Anes as someone who used to "laugh and joke around." (39 RT 5662.)

Priscilla Severson told the jury that Mr. Anes was her oldest child. She testified that Mr. Anes was a good student who wanted to join the Navy. After completing his military service, Mr. Anes planned to go to college and then dental school. (39 RT 5664-5665.) Severson moved Mr. Anes with her from the Philippines to the United States when Mr. Anes was 13 years old. His biological father lived and worked in Saudi Arabia; Mr. Anes only saw him one month out of the year. Notwithstanding those circumstances, Mr. Anes was a good boy who never got in trouble. Though he had come into Mr. Anes's life only three years before the murder, Mr. Anes was close to his stepfather, and Severson described the family's home life as happy. (39 RT 5666-5670.)

When she arrived at the scene of her son's murder, Severson was not told right away that he was dead. She thought her son may have been in some kind of traffic accident. She could not understand why, if her son was hurt, nobody was attending to him as he lay inside his car. (39 RT 5676-5678.) She was too distraught to call her husband with the news of Mr. Anes's death. Since the day she discovered her son had been murdered, Severson has had no happy moments in her life. (39 RT 5679.) Mr. Anes's murder left her fearful that the same thing might happen to her younger son, Dino. For a time she turned off the telephone in her house on the weekends so that Dino's friends would be unable to invite him to join them for social activities. Severson noticed that after the murder, Dino became a loner, kept all of his feelings inside, and was never happy. (39 RT 5680.)

Severson remembered Mr. Anes as a sweet boy and an obedient son. He was thoughtful, playful at home, and always made sure his homework was finished before he went out with his friends. (39 RT 5681.) Mr. Anes had never been in any fights, and he never carried any weapons. Severson still has nightmares when she thinks about how her son was robbed, stripped of his clothes, and murdered in such a brutal fashion. (39 RT 5682-5683.) Severson and her family no longer celebrate the holidays. (39 RT 5680.)

Mr. Anes's stepfather, Timothy Severson, testified that he and Mr. Anes had become very close in the time that they knew each other. They enjoyed playing basketball, video games, and cards. Severson also used to help Mr. Anes work on his stepson's black Nissan. (39 RT 5685-5687.) Mr. Anes was always agreeable, and often volunteered to help around the house without being asked. Mr. Anes had many friends, and no bad qualities. Severson told the jury that he most missed the way Mr. Anes would joke with his friends and family. (39 RT 5688, 5694.)

Mr. Severson was stationed at a military base in Nevada when Mr. Anes was murdered, and he received the news from his brother-in-law. It took Mr. Severson an entire day to get permission to leave the base. The reality of what had occurred did not sink in until Mr. Severson arrived in San Diego, at which point he became angry and fearful for his wife and for Dino. (39 RT 5689-5692.) Mr. Severson had to make all of the funeral arrangements, and he had to return to base in three weeks' time. He was not able to go back to San Diego again for another two-and-a-half months after that. Mr. Severson blames himself for Mr. Anes's death, because he moved the family to Moreno Valley and then left them there while he finished his military training in Nevada. Mr. Anes's murder has made his wife less happy, and less inclined to go out during the holidays, go on

vacations, or visit friends. As the result of his brother's murder, Dino always seems sad. (39 RT 5692-5694.)

Mr. Anes's younger brother Dino described Mr. Anes as playful. He recollected fondly those times when they had played video games together, or basketball at Pedrorena Park. Mr. Anes always helped Dino with his math homework, and Mr. Anes was an obedient son. Dino drives Mr. Anes's car on occasion. It makes him think of his brother and the good times they had when Mr. Anes would drop him off at school, or when they would go to the mall. (42 RT 6020, 6023.) Dino and Mr. Anes also shared a bedroom. Late at night, when Dino cannot sleep, his thoughts turn to Mr. Anes, and he wonders what things would be like if his brother were still alive. (42 RT 6022.) Dino regrets the fact that he never had the opportunity to say goodbye to Mr. Anes. He also feels cheated because Mr. Anes is no longer there to give him advice, help him out, and to tell him "what to expect in life." Dino has become a loner as the result of his brother's death. (42 RT 6024.)

While he was at the scene of the murder, Dino saw police cars and an ambulance arriving, but he noticed they did not seem in a hurry to help Mr. Anes, who was in his Nissan. That is when he realized his brother was dead. (42 RT 6022.) As they were heading over to the park, Dino was praying that Mr. Anes would still be alive when he arrived. Since "God didn't answer," Dino now believes it is "useless . . . to pray." He does not have the same faith, and he cannot accept the fact that his brother was "brutally murdered and robbed of all of his belongings, and humiliated like that." Since Mr. Anes's murder, the family no longer celebrates his brother's birthday, or the holidays; instead, they visit the cemetery. (42 RT 6022-6024.)

Jasmine Magpali is Ms. Magpali's younger sister. She recalled that Ms. Magpali had a fun personality and a lot of friends. Jasmine has very

many happy memories of her sister, and misses her jokes, smiles, and creativity. (39 RT 5695-5696.) Jasmine believed Ms. Magpali's best quality was her ability to make anyone feel comfortable around her. Ms. Magpali liked to draw, write, compose poetry, and sing. Ms. Magpali had never been in trouble, and the two of them were close. Ms. Magpali was a very friendly person, spontaneous and outgoing, and she wanted to "go out and see the world." She was also environmentally conscious. Ms. Magpali graduated magna cum laude from high school and received its Outstanding Academic Achievement Award for 1995. Ms. Magpali was attending Riverside Community College when she was murdered, and planned to make her living as a graphic artist. (39 RT 5699-5702, 5707-5708.)

Jasmine was at a church retreat when Ms. Magpali was murdered. She knew Ms. Magpali was gone, but no one wanted to tell her, even after she had arrived home. Jasmine only found out that her sister was murdered when she read a newspaper account. Jasmine did not learn other details, such as the fact that Ms. Magpali was also raped, until she heard the opening statements in the penalty phase trial. (39 RT 5709-5710.) As a result of Simon's crimes, Jasmine became a "very closed-up person" and found it difficult to trust others. Her brother Jeffrey also became "closed-up" and untrusting – he always tried to hide his feelings. After Ms. Magpali's murder, "the house became silent for a while." Family members stopped communicating with each other, and they seemed afraid to get close to one another. Jasmine hears her mother crying at night, and she has also noticed that her mother becomes "very emotional" whenever Ms. Magpali's name is mentioned. Now the holidays are "just not the same. Sort of empty." (39 RT 5708-5711.)

Jeffrey Magpali, Ms. Magpali's younger brother, testified that Ms. Magpali was a "free spirit" who helped him avoid boredom by encouraging him to play games, sing a song, or draw. Ms. Magpali was interested in

music and Japanese animation, and she loved animals. (42 RT 6015-6016.) Ms. Magpali often asked her brother to take pictures of her and her friends as they dressed up and pretended to model, or as they posed to music. That always made Jeffrey laugh. (42 RT 6016-6017.) Jeffrey was attending the same church retreat when one of their uncles came to retrieve him and his other sister Jasmine. He took them into a room and said they needed to go home. Jeffrey's uncle did not say anything during the drive, but Jeffrey knew all along what must have happened. (42 RT 6017.)

A part of Jeffrey could not accept the fact that Ms. Magpali had been murdered, "because she [was] so strong, and I thought she could fight anybody off." (42 RT 6017.) Jeffrey testified that it was painful knowing how she had died, and knowing that Ms. Magpali had been raped. He feels Ms. Magpali's loss; she was the oldest sibling, and so he had always looked to her for advice and guidance. Ms. Magpali's death did not become real to him until he saw her face as she lay in the coffin at the mortuary – at that point he felt the pain of not having been able to say goodbye. (42 RT 6018.) Ms. Magpali was the one who added excitement to the family, by encouraging them to do things together. Since her murder they rarely go out as a family. Things are "sad all the time," and Jeffrey feels as though he has to watch out for their mother. The holidays are no longer the way they used to be, as they involve visiting the cemetery or offering food to Ms. Magpali on the family altar. Jeffrey hoped that some of the sadness would go away as the result of having accepted Ms. Magpali's death, but he believed the pain never would. (42 RT 6019.)

Vernice Haynes, Mr. Sterling's fiancée, testified that at the time of the shooting she had known Mr. Sterling for about eight years, and had been engaged to him for a month-and-a-half. (40 RT 5783.) Since Mr. Sterling's murder, she has trouble getting along with people, does not trust them, and is very angry. Though she drank before Mr. Sterling's murder,

her drinking intensified afterwards, and she is now a recovering alcoholic. Her family does not like to have her around, and she has been unsuccessful in her attempts to hold down a job. After Mr. Sterling was murdered, Haynes quit school, and fell into homelessness on three different occasions. Before Simon murdered Mr. Sterling, she was "on track," she enjoyed spending time with her grandchildren, and she found satisfaction helping her church with its food program. Now, "everything is so senseless." (40 RT 5809.) Mr. Sterling's brothers are all very angry about what happened. (40 RT 5810.)

Mr. Sterling's sister-in-law, Dyanne Sterling, testified that Mr. Sterling's four brothers David, Leroy, Cecil and Goldy, "went out of control for a little bit." Her husband, David, "took it hard and tried to hold it in." Cecil also "took it hard," while Goldy "never talked about it." She recalled that before Mr. Sterling was murdered, they all liked to have barbeques together, and that Mr. Sterling never allowed his own troubles to spoil the fun. Whenever Mr. Sterling was around, "there was laughter. We played games." (42 RT 6010-6013.) Mr. Sterling was very close to her own son, David Junior, who used to laugh and play with him. David Junior misses Mr. Sterling; he now stays in his room, crying and watching television. (42 RT 6013-6014.)

On March 17, 1997, Andre O'Harra, a sergeant with the Riverside County Sheriff's Department, intercepted a letter written by Simon from jail.[17] (42 RT 5989-5991.) The letter read as follows:

> Hey, Stretch:
>
> What's up with you? Me, these mother fuckin', [ ], got me wanting to blast they bitch ass. These fools keep saying Nig, [ ],

[17] The letter, which was dated March 7, 1996, was addressed to "Stretch," who was Simon's cousin, Terri Richardson. (42 RT 5992; 45 RT 6489.)

and laughing. I'll hurt one of these fools, [ ]. I'm tired of these punk ass fools in here, [ ]. I ain't never seen a bunch of hooks in one area like this in my life. I know you don't really care about this kind of shit, but I'm writing you about this so that I can refrain from taking one of these hooks away from himself. You see, everybody is in one-man cells, [ ].

I'll fuck around and hurt somebody in here for talking shit. Fools talk shit and don't even know who they are talking to. I was making some of their homies hide behind and under cars when I was on the street. Knockin' them out in the club and shit.

But when a mother fucka can't get to them, they all of a sudden become big shit. I'll tell you about punk ass people. In jail these, [ ], are some of the scariest people. Anybody that has to get a group of people so they can fight a head-up fight, is a bitch.

Stretch, I'm not going to take this shit too much longer. They keep using that word about my people. I'm going to lay one of they ass out. I'll beat the shit out of one of these fools, [ ]. I never have been a light weight, and I don't want to do the shit all my life either. One thing I'll always be is a heavy weight contender, [ ].

Still you cuz, Nate.

(42 RT 5992-5993.)

On April 13, 1997, Correctional Officer Shawn Gilmore found a black plastic comb under Simon's mattress. Its teeth had been removed, and it had been sharpened to a point at one end, a process that converted the comb into a "shank." Simon was the cell's only occupant. (42 RT 5976-5980.)

On September 12, 1998, Senior Correctional Deputy Robert Moore searched a cell that Simon shared with another inmate. Underneath the cell's television cage, Moore found two toothbrushes that had been sharpened to a point. A cleaning towel had been taped around their opposite ends to form a handle. (42 RT 6001-6006.)

2. Defense Case-in-Mitigation

Not long after Simon was born, his parents, Richard Aldrich and Evelyn Malachi, divorced. Aldrich and Malachi had a stormy relationship, and they were both physically and verbally abusive to each other. Malachi moved in with her mother out of concern for Simon's welfare. (45 RT 6418-6421.) Soon afterwards, Aldrich went to prison for one or two years. He was briefly released, and then returned to prison for another five years. When Aldrich was imprisoned the first time, Malachi moved to Compton and obtained a job as a records clerk and then a dispatcher with that city's police department, in March 1969. Simon was under two years old at the time. (45 RT 6422-6426.) Between then and the year that Simon reached the age of 18, witnesses could not remember more than eight or nine occasions when he had contact with Aldrich. On one of those occasions, Malachi had called Aldrich to come over to her house and administer a 15 or 20 minute beating. The rest of the time that Aldrich had contact with Simon, he would belittle his son. Twice, Aldrich promised Simon that he would come to see him, but then did not show up. (43 RT 6084, 6130, 6176-6179.)

During that period Malachi struck up a relationship with a man named Fred Iiams, who also worked at the Compton Police Department. They dated for two years until they married, in 1971 or 1972. (43 RT 6081-6082, 6092; 45 RT 6426-6427.) Iiams could tell that Simon was pained by his father's absence in his life, and so Iiams tried to be a father-figure to him. (43 RT 6084-6085.) Though he thought Simon was spoiled at first, Iiams saw Simon develop into a "very disciplined young person" who did whatever he and Malachi asked him to do. Iiams concluded that Simon was a "good kid." (43 RT 6085-6086.)

Iiams and Malachi separated when Simon was eight years old. Following the divorce, Iiams observed that Simon "seemed less happy."

Before, Simon liked to laugh and make other people laugh, but afterwards, his demeanor seemed to change.[18] (43 RT 6110-6111.)

A year after she split with Iiams, Malachi began a live-in relationship with a Compton police officer, John Davis. In the intervening period of time, Malachi had entered and graduated from the Police Academy herself. Malachi and Davis were physically and verbally abusive to each other, and they separated after a year-and-a-half. (43 RT 6086; 45 RT 6429-6431.) One night following their break-up, Malachi awoke at 3:00 a.m. to find Davis standing over her bed, holding an automotive jack. Davis was screaming that he was going to beat Malachi to death because, "if he couldn't have [her], no one else would." (45 RT 6432-6433.) Davis then pulled Malachi out of bed; as he did, Malachi grabbed a gun that she kept under her pillow. They began to fight, and the struggle took them into a hallway bathroom. As Davis grabbed Malachi by the hair and began banging her head against the wall, the gun went off and Davis sustained a grazing wound to his stomach. Davis then ran from the house. Simon was home at the time that incident occurred. (45 RT 6433-6435.)

Three years later, Malachi developed a relationship with her patrol sergeant, Ron Malachi. While they were dating, Ron and Simon seemed to be "best buddies," but after they married it seemed as though Ron had developed a deep aversion to Simon. (45 RT 6442-6443.) Ron became physically abusive to both Simon and Malachi. (43 RT 6133-6134; 44 RT 6206-6207, 6209, 6228-6229, 6383-6385; 45 RT 6445-6446.) After three

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[18] Iiams attributed Simon's change in attitude to the emotional abuse he suffered at the hands of Ron Malachi, the man who later became his stepfather. Iiams testified he never saw any signs that Simon had been physically abused by Ron. Though Iiams acknowledged that he had spanked Simon, or swatted him on the calf or the hand with a ruler, after about four months had passed it was no longer necessary to discipline Simon. (43 RT 6085, 6098-6099, 6113.)

years, their marriage soured – Malachi concluded that "one of us was going to kill the other one," and so she told Ron to move out in 1980. (45 RT 6446-6447.)

Simon attended a private Catholic school during his middle school years and his first year in high school. After his freshman year, Simon had to transfer to a public high school for financial reasons; he dropped out soon afterwards. (45 RT 6477-6480.) The record's account of Simon's activities from the age of 15 until 18 is rather sparse. During that time, he had a daughter named Angel. (45 RT 6453-6454.) In 1985, his mother and Ron reconciled. Malachi told Simon that she was putting the Compton house up for sale, and that if it sold after he turned 18 and he was not back in school or "doing anything with [his] life" he would be unwelcome to join them at their new home in Moreno Valley. Malachi testified this was because, "I did not want to take any negatives with me." (45 RT 6481.) Simon determined he would move into his father's home. (43 RT 6136.)

Around that time Simon's grandmother, Yvonne Gilmore, received a telephone call informing her that Simon had been knocked unconscious following a beating he sustained at a park in Compton. Gilmore picked up Simon, brought him back to her house, and allowed him to sleep through the night. (43 RT 6161-6162.) The next morning she called Simon's mother and told her she should have Simon checked out at a medical facility. The two or three young men who were with Simon never told her what had happened. Nor did Simon. (43 RT 6137-6141.) Several months after that, Simon moved to Michigan and stayed with family there. (43 RT 6141-6142, 6161-6163.)

In August 1989, when Simon was 22 or 23 years old, Gilmore received a telephone call advising her that her grandson had been shot. Simon lost the sight in his left eye as a result of his wound, and he returned to California to recuperate at Gilmore's house. (43 RT 6142-6145; 44 RT

6210-6211, 6236-6237.) Dawn Malachi later learned the incident was gang-related. Gilmore offered that Simon was taught the difference between right and wrong. She was never made aware that Simon had been in any trouble, or that he had been arrested, or that he had any drug problems. (43 RT 6154, 6159-6160.)

Though Gilmore believed Simon's personality remained unchanged as a result of the shooting (43 RT 6145-6146), his cousin Terri Richardson observed that he looked "old," and not "himself" when she saw him again. Simon appeared "slower," and Richardson could see a visible indentation in his head. After Simon returned from Michigan, he seemed "distant," whereas before he had been lively, had a good sense of humor, and was fun to be around. (43 RT 6184-6185, 6187-6188.) Nevertheless, while Richardson was pregnant with her own daughter, Simon was very supportive and helpful. He drove her to her doctor's appointments and picked her up from the hospital after she gave birth. (43 RT 6186-6187.)

Simon still has a close relationship with Richardson and her daughter. Richardson looks to him for advice, and she believes he is still a good role model. (43 RT 6188-6190, 6197.) Richardson said she would be "devastated" if Simon were executed (43 RT 6198-6199), although she acknowledged that she was unaware he was living in Michigan during the four-year period that he resided there, and never asked him why he had relocated. (43 RT 6183, 6196.)

In October 1992, Simon's uncle was murdered during a carjacking. His death left Simon despondent, and Simon cashed out an insurance policy that had been taken out by his grandmother in his name in order to pay for the funeral expenses. (43 RT 6152-6153, 6156-6157; 45 RT 6460-6462.) A few months after that, Simon moved in with a woman at an unidentified location. Shortly thereafter, Simon was convicted of attempted robbery. In May 1993, Richard Aldrich died. (20 RT 2897; 43 RT 6154-6156.) In

September 1993, Simon's mother split up with Ron Malachi for the last time. At that point Simon moved to Moreno Valley and lived for a while with his mother and his half-sister, Dawn Malachi. (45 RT 6456-6458.) During that time, Simon met and married a woman named Keisia. Eventually he and Keisia rented their own place on Dana Lane. Simon stayed at times with Keisia and at other times with his mother and Dawn. Simon and Keisia had a daughter, Tabernay, who was born on January 31, 1996. (43 RT 6194-6195; 44 RT 6212-6213, 6221-6222; 45 RT 6459-6460.)

Dawn Malachi agreed Simon is even-tempered, and testified that he is not the type of person who flies into fits of rage, or explodes in anger. Dawn noted that Simon was never abusive towards his own children, and despite his difficult upbringing he had turned into a parent who was always patient and restrained when disciplining them. (44 RT 6227, 6230-6231.) Dawn testified it was important to her that her children continue to have a relationship with Simon. Dawn remarked that she looks to Simon as an "advisor," and she added that he always knew the right thing to say, never steered her wrong, and always discouraged her from committing misconduct. (44 RT 6214-6216.) However, Dawn also testified that she never really knew what Simon did during the day when he was not at home, and she had never visited him in jail. Dawn also acknowledged that she did not know what Simon did for a living while he was in Michigan, she did not know the name of the girlfriend Simon had while he resided there, and she never visited Simon's apartment on the two occasions that she saw him in Battle Creek. (44 RT 6225, 6234-6236; 45 RT 6453.)

Simon's mother attempted to put the letter Simon wrote to Richardson into context by explaining that African Americans sometimes talk "stuff" that is not necessarily true "because they have to make themselves look better." Malachi surmised that Simon was angry because of the racial slurs

that had been used against him, and was talking "stuff" to make himself seem "bigger," or more intimidating. Malachi also thought her son may have just wanted to "vent." (45 RT 6489, 6494-6495.) Though Malachi believed Simon had been a good son and a good father, she conceded her awareness that he had a "good side" with her and his daughters, but that he has a "bad side" as well. (45 RT 6454-6455, 6462-6463, 6488-6489.) Malachi also had no idea what Simon did for a living while he was in Michigan. (45 RT 6483.) Malachi testified that if Simon were to be executed, "it would be like killing me. I would be the one that is being punished. I don't want to lose my son. I want him any way I can have him." (45 RT 6496.)

Defense investigator Thomas Crompton testified that he obtained fibers from Williams's car on November 29, 1998, and delivered samples to Forensic Technician Carol Hunter on December 7, 1998. (44 RT 6238-6242.) Hunter compared those fibers with those that were found at the crime scene and determined they were consistent. Crompton's and Hunter's reports were delivered to the prosecution in September 1999. (44 RT 6242-6243.)

Dr. David Fukuda, M.D., testified that he took Simon's medical history during his jail intake in May 1996. At that time Simon reported having a history of seizures, and Fukuda prescribed Dilantin as a precaution. (44 RT 6266-6269.) X-rays revealed the presence of bullet fragments extending from the right ethmoid sinus cavity to the left infraorbital region. Bullet fragments were also embedded in Simon's right nasal bone, and the floor of his left eye orbit. (44 RT 6270-6271.) The bullet's path had damaged the optic nerve to his left eye. (44 RT 6274-6275.) A craniotomoy had been performed on Simon following the gunshot wound, which left a large scar running from his right eye around his skull to the area above his left eye. Simon's skull was left with a

resulting asymmetry, and there was evidence of frontal lobe damage. (44 RT 6276-6277.)

Dr. Kenneth Nudleman, M.D., is a neurologist who examined Simon at the request of his defense team. Nudleman reviewed a CAT scan that had been performed on Simon, which revealed that between 20 and 25 percent of his right frontal lobe had been destroyed by a bullet that had passed through that area of Simon's head. (44 RT 6291, 6308-6309, 6317-6318.) Nudleman also reviewed Simon's medical records pertaining to the beating he received in 1985, the gunshot wound he sustained in 1989, and treatment he had received while incarcerated at the Riverside County Jail for a grand mal seizure that he suffered there. (44 RT 6306-6308.) Finally, Nudleman administered an EEG test and a PET scan on August 4, 1999, and August 12, 1999, respectively. Based on the available data, Nudleman opined that Simon has "some organic brain damage, primarily to his right frontal lobe, and to a much lesser extent to his left frontal lobe," which had resulted in a "significant change in [the] function of his brain." (44 RT 6329-6331.)

Nudleman testified that patients with damage to the right frontal lobe may sometimes be left with personality changes such as reduced impulse control, reduced sexual inhibition, and memory impairment. (44 RT 6319.) Nudleman added a connection or correlation between criminality and frontal lobe damage has been "reported," but he noted the topic is still the subject of debate "as to how specific some of these issues are." (44 RT 6319-6320, 6322.) When asked whether frontal lobe damage could "lead a person into criminality," Nudleman replied "Nobody knows that answer for certain," and he observed there is no causal relationship between brain injury and criminality. (44 RT 6319-6320, 6361.) Nudleman further acknowledged that he could not say what effects, if any, the injuries had upon Simon's behavior. (44 RT 6333-6334.) Nudleman acknowledged that

he had personally seen cases where individuals who have suffered those types of injuries had experienced no practical consequences as a result. (44 RT 6340-6341, 6349, 6368-6369.)

3. Prosecution's Rebuttal

The prosecutor read an undated and unaddressed letter that was enclosed in Simon's letter to Richardson. It was clearly meant for Keisia:

> If I can't get you, I'm getting the closest thing to you, bitch. You stole my cars and clothes, now I'm stealing you from you, and those kid[s]. Fuck you, hoe. You stank bitch, get my cars to my grandma, or I'm smokin you, and I'm startin with that little dirt bitch you trust so much.
>
> If you move, I will force you back to L.A. I'm going to get you, bitch. You know what I do to fools that steal from me. You ain't no different than nobody else. You got a mother fuckin nigga drivin my shit like it's yours. I wouldn't care if it was yo punk ass daddy driving my shit. I'm the only person being a man that's to be behind the wheel of my shit. You surrounded by bunch of busters. And I'm going to bust on they ass. Talking bout you scared to walk down the street in Mo Vall. I'm the one to be scared of. You disrespected me and my dead uncle. If Norman was any kind of man, he wouldn't be driving another man's car. That just proves what I always knew. I'm the mother fucka named Mike that everybody wants to be like. You sistas even want they punk ass man to be like me, but I'll never be a snitch or a backstabber.
>
> Bitch ass Mike Mike damn near cried when he thought I wasn't going to get him and his buddies out of jail. You crossed the final line. See you at the crossroads, bitch. If I don't get all my shit, I'm taking all your shit, bitch. I'm already a dead man walking, so can't shit – so can't shit you say or do hurt me. But I can do a whole lot to hurt you. Get your sister's boyfriend and husbands all together and tell them I know who it is that recently caught a case that no one knows about but me. And the way I found out is because their name popped up in some new paperwork of mine. You know who you are. Why you didn't tell nobody you went to jail, don't deny it. I got it in black and white. Stop what you're doing because if you come to the penn with me, I'm going to put lipstick on you, fuck, and make you

my bitch, and your 30 pound boxes will be mine. I'm the real rider and you know that. You have been warned, don't slip and go to the penn. Tell Mike Mike I know what happened in Mule Creek when he was there. I'll be in Centinela grooving with the race riots.

You are now considered road kill, bitch, and if you run from it, your best friend takes your place. I know more than you think I know and I'm going to prove it.

I'm a fuck yo unclean ass off just for sending me through this bull shit.

Until doomsday, yours that is;

Nate, (rides again).

Bitches tuck their tails. Me, I'm a mutt, I've seen it all.

You been visiting fool in L.A. County, and he went to jail in my car. Guess what, L.A. County is my jail. I'm going to have that fool talked to. You fucked over the wrong person. I'll have yo head spent around, bitch. Did you think I wouldn't find out you got another man playing daddy to my baby. Cuz you went out like a sucka and don't even know it. You better hope I never get out. Because if I do, they're going to bury you. They're going to slide your ass right in that wall. When you go to Club Paradise, the home boy from Shotgun is going to put hands on you for me. He has spoken to you before so has my Jamaican home from schoolyard. Ta'bernay and her – Ta'bernay and her only is your shield of safety. She's the only reason you ain't been touched. And I will be pressing charges on that fool for G.T.A., stealing my car. Then they will bring me to L.A. to go to court, and they better not put me next to him in L.A. because I'll put dick in him, and I ain't gay. That's why you didn't want to put me in contact with the little homies because you were out there tricking, and you knew or thought they would check yo stupid ass.

You ain't the only person I know out there, but I'm sure you figured that out by now. By the way, I was going to send Tabby a birthday card but the jail wouldn't let me.

(45 RT 6500-6502.)

ARGUMENT

I. SIMON'S RIGHTS WERE NOT VIOLATED BY THE TRIAL COURT'S PROCESS OR ORDER REGARDING THE USE OF THE STUN BELT DURING THE TRIAL

Simon claims the trial court committed reversible error by applying "something akin to a good cause standard" when it ordered him to wear a stun belt, rather than the showing of "manifest need" which was prescribed by this Court in *People v. Mar* (2002) 28 Cal.4th 1201 (*Mar*). (AOB 35-36, 56-66.) Simon's claim fails. The record evidence demonstrates that he behaved violently while he was incarcerated and awaiting trial. This was sufficient to show the "manifest need" required by *Mar*. Because Simon's trial was held nearly three years before this Court decided *Mar*, the court below was not required to foresee and discuss all of the factors set forth in that opinion. Even assuming the trial court's order constituted a "manifest abuse of discretion," it is properly evaluated for prejudice under *Watson*;[19] however, Simon is unable to demonstrate prejudice under any standard.

Section 688 provides that "[n]o person charged with a public offense may be subjected, before conviction, to any more restraint than is necessary for his detention to answer the charge." In addition to the statutory requirement that the use of restraints be necessary, both the state and federal constitutions foreclose a criminal defendant being subjected to physical restraints of any kind in a courtroom in the presence of a jury absent a " 'showing of a manifest need for such restraints.' " (*People v. Mar*, *supra*, 28 Cal.4th at p. 1216, quoting *People v. Duran* (1976) 16 Cal.3d 282, 290-291.)

This Court held in *Mar* that the requirements set forth in *Duran*, for determining when a defendant may be shackled in the courtroom, govern

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[19] *People v. Watson* (1956) 46 Cal.2d 818 (*Watson*).

the decision whether to compel a defendant to wear a stun belt during trial as well. Specifically, this Court found that:

> (1) there must be a showing of manifest need for the stun belt; (2) the defendant's threatening or violent conduct must be established as a matter of record; and (3) it is the function of the court to initiate whatever procedures it deems necessary to make a determination on the record that the stun belt is necessary. The court must make an independent determination based on facts, not rumor or innuendo, and must not merely rely on the judgment of jail or court security personnel.

(*People v. Howard* (2010) 51 Cal.4th 15, 118 Cal.Rptr.3d. 678, 691 (*Howard*).)

In *Mar*, this Court observed that "[i]n light of the nature of the device and its effect upon the wearer when activated, requiring an unwilling defendant to wear a stun belt during trial may have significant psychological consequences that may impair a defendant's capacity to concentrate on the events of the trial, interfere with the defendant's ability to assist his or her counsel, and adversely affect his or her demeanor in the presence of the jury." Moreover, "[t]he potential for accidental activation provides a strong reason to proceed with great caution in approving the use of [a stun belt]." (*People v. Mar*, *supra*, 28 Cal.4th at p. 1205.) This Court further observed that trial courts should check on a defendant's medical status and history to ensure the defendant is free from any medical conditions that would render the use of the device unduly dangerous. (*Id.* at pp. 1205-1206.) Finally, in the context of the trial court's need to impose the least restrictive security measure to satisfy the court's legitimate security concerns, this Court held that the use of the stun belt should not be approved as an alternative to more traditional physical restraints if the features of the device "render it more onerous than necessary to satisfy the court's security needs." (*Id.* at p. 1206)

In any case where physical restraints are used, " 'those restraints should be as unobtrusive as possible, although as effective as necessary under the circumstances.' " (*People v. Mar*, *supra*, 28 Cal.4th at p. 1217, quoting *People v. Duran*, *supra*, 16 Cal.3d at pp. 290-291.) The decision to use physical restraints is made by a trial judge on " 'a case-by-case basis.' " (*People v. Mar*, *supra*, 28 Cal.4th at p. 1218, quoting *People v. Duran*, *supra*, 16 Cal.3d at p. 293.) A trial court's determination regarding restraints will not be overturned on appeal absent " 'a manifest abuse of discretion.' " (*People v. Mar*, *supra*, 28 Cal.4th at p. 1217, quoting *People v. Duran*, *supra*, 16 Cal.3d at p. 293, fn. 12.)

The showing of necessity may be satisfied by evidence that "the defendant plans to engage in violent or disruptive behavior in court, or that he plans to escape from the courtroom." (*People v. Combs* (2004) 34 Cal.4th 821, 837.) A "manifest need" for use of physical restraints may also be shown by "evidence of any nonconforming conduct or planned nonconforming conduct which disrupts or would disrupt the judicial process if unrestrained." (*People v. Duran, supra,* 16 Cal.3d at p. 293, fn. 11.) Thus, the justified use of restraints is not limited to situations involving courtroom disruption or attempted escape. (*People v. Hawkins* (1995) 10 Cal.4th 920, 944 [overruled on other grounds by *People v. Lasko* (2000) 23 Cal.4th 101, 110; *People v. Blakeley* (2000) 23 Cal.4th 82, 89-91].) While the fact that the defendant has a record of violence, or is a capital defendant, standing alone, cannot justify shackles, a defendant's fistfights while in custody pending trial, combined with an extensive criminal history, supports an order for shackling. (*Ibid.*)

A. The Trial Court Thoroughly Considered The Relevant Circumstances In Determining The Necessity Of A Stun Belt

On September 13, 1999, before the trial court began its time-qualification of the prospective jurors, defense counsel made a motion that "no chains, shackles, cuffs [or] anything of that sort be worn by the defendant during the course of the trial." (2 RT 128-129.) Simon's attorney also noted:

> And also without some showing to justify the react belt, we would be opposed to that. And just for the record, it's on his left kidney. Just above the left hip, actually. And it's, you know, probably a 4 by 4 square-shaped object that is protruding maybe a couple of inches from his – his back. And it's noticeable. I'm not sure anyone would notice what it is or – but certain jurors may be able to see it.

(2 RT 129.)

The trial court granted the motion that Simon be unshackled, but denied the motion to remove the stun belt based on the following incidents:

In June 1996, Simon had fought with another inmate; in April 1997, correctional officers found a shank in his cell; in July 1998, Simon refused to obey a deputy's order; in September 1998, correctional officers found two more shanks in his cell; that same month, Simon refused to go to his cell during a lockdown; in August 1999, correctional officers found feces stored in the same container with cleaning products inside his cell; that same month, Simon threatened a new deputy. (2 RT 129-131.) The bailiff felt that the latter incident was probably the result of "a personality conflict," but then added:

> For those reasons, I asked to have the react belt on [Simon] during the course of trial, knowing that he can't be shackled. And that's just a means of – of keeping control of him in case he has a problem. And we can take care of the problem a lot easier.

(2 RT 131.)

The trial court then noted, "It was primarily the shanks and the fights that caused some concern to me," but added it was also concerned about the mixture of feces and cleaning supplies, which, as it understood from the bailiff, "were common elements sometimes used in producing explosives." (2 RT 131.)

Defense counsel next indicated his client was complaining that he was unable to lean back in his chair due to the position of the belt. Simon's lawyer wondered whether it could be placed on the right side, which would also position it on the side opposite from the seats the jury would occupy. (2 RT 131.) When the bailiff informed the court the device had to be worn on the left side, defense counsel responded, "I guess there's another complication," and reported that Simon had "a prior injury in his left hip area," which was causing discomfort. (2 RT 132.) When the trial court inquired, "Well, what is your suggestion?," defense counsel replied:

> Well, my hope would be that he doesn't wear it at all. I would think that searches could take care of any indication of shanks. There's been no indication of him being a flight risk. Every time I've come to this court on behalf of Mr. Simon, he's been in the jury box, pretty much with all the other inmates, and there's never been an indication of any problem as far as a flight risk.
>
> And, you know, I understand the Court's concerns. But I would think simply searching him prior to court to alleviate any – and I'm sure that happens – [would] alleviate any problem as far as weapons being brought to court. And I'm not really sure if that's why we have the react belt anyway. But there doesn't appear to be any indication that he's a flight risk.
>
> I understand the court's comments about the feces and the chemicals. But there just is no history here of him threatening to escape, planning to escape, to – to justify the concern that he's a flight risk to the extent that we have to have him wear this shock device.

> And I'm concerned about his – not so much his comfort, but at his appearance of being uncomfortable in front of the jury. Because they are going to watch him. And he's obviously not able to lean back.

(2 RT 132-133.)

After learning that Simon believed the use of a cushion would not alleviate his discomfort, the trial court ruled:

> I'm going to order that he continue to wear the react belt. And it's not necessarily that he has a shank or that he is a flight risk, per se. But the fact that he has had shanks and that he has chemicals or – or elements that could be developed into – into explosives indicates to me that he is a danger to others still. And the fact that he's had confrontations with others, again, is further indication of that.
>
> When we bring 75 good citizens into the courtroom, I think we need to do everything we can to make sure that they are protected, as well as our own staff and counsel. And I think that the – some kind of restraint is appropriate.

(2 RT 133.)

Simon renewed his objections to wearing the stun belt on July 16, 2001, before his second penalty phase trial began. Defense counsel noted the absence of any incidents during the three-and-a-half month trial for the guilt phase, and during the year-and-a-half since the mistrial had been declared in Simon's first penalty phase trial. (35 RT 4862.) Simon's lawyer allowed that, "it's less obtrusive and noticeable than shackles or something of that sort," and then added:

> But the react belt has to be on the left kidney. And it is a fairly obtrusive item. Without a jacket on, it can be seen. And as the Court may recall from the last trial, it caused Mr. Simon some level of discomfort to where we had to have an extra pillow here to kind of even out his sitting so that he had something on the right side to sort of balance out what's on the left side.

> But starting out, I think there has to be some showing as to why . . . it's necessary that he wear the belt.

(35 RT 4863.)

The prosecutor reminded the trial court that sheriff's deputies had voiced their security concerns, and "wished to use the react belt on Mr. Simon to prevent violence and to prevent escape by Mr. Simon." (35 RT 4863-4864.) He asked the court to require that Simon wear the react belt, on account of his "history, the nature of these crimes, the nature of the punishment that he's facing, and the fact that he has in the past exhibited a tendency to want to engage in violent behavior while in custody . . . ." (35 RT 4864.)

The trial court then solicited additional information from Deputy Franck, who said that in addition to secreting shanks in his cell, Simon had also committed a battery against another inmate, claimed to be a member of the Crips, and had sent a letter from prison that "contained racial slurs and mentions of a possible attempt assault on a Hispanic inmate." Deputy Frank added that Simon had been "verbally aggressive with deputies on several occasions since 1998, and as late as 2001." Finally, Deputy Frank offered:

> At this point, he's been convicted. He's in a position where he doesn't have anything to lose. And we look at him as a very high security risk. He's housed in 2A, high power. And we want it on him.

(35 RT 4865.)

Defense counsel responded that the charges against Simon, and the potential sentence he might receive, did not justify the use of a stun belt. Counsel further insisted the same was true with respect to the incidents where his client had been verbally aggressive with deputies, and the fact that he was a gang member. Defense counsel maintained that the use of a stun belt is only appropriate where there is "the potential for escape or

violence in the courtroom," and that the court's inquiry "has to be more directed to [the] potential for problems within this courtroom." (35 RT 4866-4867.) Regarding the battery incident and the letter Simon had written while incarcerated, defense counsel asserted:

> And the Court had an opportunity to view Mr. Simon's behavior for a long period of time within this courtroom. And there was never the slightest problem with his behavior during the course of the trial. Maybe that's 'cause he was wearing a react belt. Maybe it's because he doesn't pose a danger or a threat of escape. I mean, I don't hear anybody saying that he's ever tried to escape or spoke of escaping.
>
> If he writes a letter out of the jail – and the letter that Deputy Franck is referring to was part of the trial record in the penalty phase that was written to his cousin, Terri Richardson. That basically was, "I'm angry at someone." It may be a little harsher words than just anger. But he was venting anger towards Hispanic inmates who were using racial slurs towards him in the jail.
>
> Did he ever act on that? No. That letter was written in 1997. So if he was going to do something towards another inmate because of his belief that they were treating him in a racially bad way, he would have done it. So he writes a letter. Nothing ever happens within the jail for a period of – I believe the letter was written in '97. He's had 4 years to act on that anger.

(35 RT 4867-4868.)

The prosecutor also reminded the court that deputies had found shanks in Simon's cell on two occasions, he had "taken the time and the effort to manufacture weapons of violence while in the jail and to conceal those in his cell," and that those acts "exhibit a tendency to violence on his part while in custody." The prosecutor told the court it needed to be concerned for the security of the staff and the courtroom generally, because of "that tendency that Mr. Simon has exhibited." (35 RT 4868-4869.)

The prosecutor also mentioned that "there may be another type of react belt or stun belt that can be used that fits on the leg of Mr. Simon." (35 RT 4869.) Deputy Franck explained that, "it's called Band-it," and it is "worn on the calf of the leg rather than the waist." Deputy Franck further explained, "that device is out in Corona," and noted, "we'd need one or two days' lead time in order to get that." (35 RT 4869-4870.) After the trial court observed it was "not available," it invited concluding remarks from Simon's lawyer, who responded:

> I'm assuming that Mr. Simon is searched at various stages on his way to this courtroom. So the concern of him bringing a weapon to court is nil if proper procedures are being followed and he's being searched prior to entry into this courtroom. So the likelihood of him carrying a weapon into this courtroom is zero if everybody does their job.
>
> So I don't see where there's any concern this morning for the safety of this – the Court, the Court's personnel, or any other person attending this trial.

(35 RT 4870.)

After saying, "I agree with a lot of what you said," the court ruled:

> The fact that he has had in his possession shanks in the jail in the past creates some concern to me. And I agree with you. I don't have the concern that he is going to bring those things into the [court] today. . . . I think the chances of him having a weapon in court is virtually nil as well. But it demonstrates to me an attitude of violence. It demonstrates to me a readiness to do – to do violence. And in a courtroom where we're dealing with one, perhaps two armed personnel, but perhaps almost as many as – what? – counting my staff and all the jurors, in excess of 90 people, I think the – "prospects" is not the right word. The situation could easily give rise to where he could act out on some of those, what appears to me to be violent tendencies, even though I don't think he would have a weapon. But he's demonstrated an attitude toward violence while in custody.
>
> So I am going to – I think the record is adequate. The react belt should be used this morning. But I will certainly direct the

> deputies at this time to put it on in such a way that it is as unobtrusive as possible. And I believe he will remain in his seat the whole time. I don't think he'll be getting up. But I believe it has to be attached to his left side or slightly to the back on the left side, or how it is attached.

(35 RT 4871.)

Defense counsel interjected that he was told at the last trial it "had to be worn on the left side, the left kidney," but that he had been in other trials "where they put it on the right side because of the potential for the jurors to see it." (35 RT 4871-4872.) The trial court confirmed with a second deputy who was present that the stun belt could be worn on the right side, where "it would be less likely to be seen." (35 RT 4872.) Defense counsel also asked the trial court whether it could obtain the other belt from Corona, and asserted, "If it's a much less obtrusive belt and has the same effect, I think we ought to be using it here in a death penalty case." The prosecutor alerted the court and defense counsel that another three weeks remained before Simon's retrial would begin, on August 7, 2001. At the court's suggestion, Deputy Franck agreed to talk to his supervisor about the possibility of obtaining the other device. When defense counsel observed it might require an order, the court responded, "Yeah. And I'll do that if it requires that. Okay. We can trade with Corona. I don't know." (35 RT 4872.)

B. The Record Clearly Demonstrates A Manifest Need For The Use of A Stun Belt

The record fully supports the trial court's decision to use physical restraints on Simon. In finding the trial court had abused its discretion in *Mar*, this Court pointed to three factors. First, this Court noted, "the security officials who placed the stun belt on defendant made no on-the-record showing of any circumstances to support the imposition of a stun belt on defendant and the trial court failed to require any such showing."

(*People v. Mar, supra*, 28 Cal.4th at p. 1220.) In the instant matter, the trial court originally held an unreported ex parte hearing on September 10, 1999, where it inquired as to the contents of the jail classification notes relating to Simon's behavior during his confinement. (2 CT 432.) On September 13, 1999, the trial court had the bailiff read the incidents into the record in the parties' presence. As previously discussed, those incidents involved a prior fight with an inmate; the prior discovery, on two different occasions, of shanks in Simon's cell; a refusal to obey orders on two different occasions, the discovery of feces and cleaning products which were stored in a container that had the potential to be used as an explosive, and a threat made against a corrections deputy. (2 RT 130-131.) The record established Simon's history of nonconforming behavior, and would have adequately supported a determination of manifest need as defined in Duran and applied to the use of stun belts in *Mar*.

Simon contends that unlike the circumstances presented in the cases he cites, "here there was no evidence of disruptive courtroom behavior or planned escape." (AOB 60.) As this Court has observed, "the requirement that the record establishes a threat of violence, escape, or disruption is framed in the disjunctive." (*People v. Gamache* (2010) 48 Cal.4th 347, 370.) Though the container filled with feces and cleaning chemicals provided some evidence that Simon may have had plans to escape, it was not necessary for the trial court to find that showing had been satisfied. It was enough to establish on the record that Simon had "behaved violently before coming to court or while in court." (*Duran, supra*, 16 Cal.3d at p. 293 [emphasis added].) Simon's assertions to the contrary notwithstanding (AOB 60-61), the fact that there were no incidents of violence while he was in trial does not establish the insufficiency of the showing in the instant case – it could just as easily establish the efficacy of the stun belt's deterrent effect. In any event, a showing of violence during the

proceedings was not required for a showing of manifest need. The fact that shanks were found in Simon's cell on two separate occasions, that he had gotten into a fight with another inmate, and that he had threatened a corrections deputy all established manifest need based on a proper showing that Simon had behaved violently before coming to court. (See, e.g., *People v. Hawkins*, *supra*, 10 Cal.4th at p. 944; *People v. Lomax* (2010) 49 Cal.4th 530, 562 [defendant attacked deputy in holding cell]; *People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1032 [defendant attacked another inmate and threatened to kill deputies].)

Simon also maintains the trial court erred when it "concluded that the stun belt was the less restrictive alternative available," and when it failed to consider "other relevant factors" aside from its potential visibility, such as the psychological impact of the device upon him, the advisability of using it in light of his medical conditions, and whether modifications could be made to the design or operation of the stun belt. (AOB 61-66.) During the proceedings below, Simon objected to the use of the stun belt because it was uncomfortable on account of a prior injury he had suffered to his left hip. Later defense counsel offered he was concerned not so much for Simon's personal comfort, as "his appearance of being uncomfortable in front of the jury. Because they are going to watch him. And he's obviously not able to lean back." (2 RT 133.) Defense counsel was also worried that "certain jurors may be able to see" the stun belt, though he also commented, "I'm not sure anyone would notice what it is." (2 RT 129.) Since he did not object on any of the grounds he now asserts, he has forfeited any claims based upon them. (*People v. Foster* (2010) 50 Cal.4th 1301, 117 Cal.Rptr.3d 658, 684.) Even if his claims are preserved for purposes of appellate review, they lack merit.

With respect to the psychological impact of the stun belt upon him, Simon cites the following language from *Mar*:

> [A]lthough the use of a stun belt may diminish the likelihood that the jury will be aware that the defendant is under special restraint, it is by no means clear that the use of a stun belt upon any particular defendant will, as a general matter, be less debilitating or detrimental to the defendant's ability fully to participate in his or her defense than would be the use of more traditional devices such as shackles or chains.

(*People v. Mar*, *supra*, 28 Cal.4th at p. 1226; AOB 62.)

In that context, this Court also observed:

> Even when the jury is not aware that the defendant has been compelled to wear a stun belt, the presence of the stun belt may preoccupy the defendant's thoughts, make it more difficult for the defendant to focus his or her entire attention on the substance of the court proceedings, and affect his or her demeanor before the jury – especially while on the witness stand.

(*Id.* at p. 1219 [emphasis added].) After concluding that the record before it did not establish that the trial court's ruling was based upon a determination of "manifest need to impose such a restraint for security purposes," this Court held, "In the absence of such a showing and finding, under the principles of *Duran* the trial court could not properly compel defendant *to bear the burden of testifying* while subjected to a remote-controlled stun belt that defendant objected to wearing." (*Id.* at p. 1223 [emphasis added].)

Simon did not take the stand in his defense. Nor can he demonstrate that wearing the stun belt affected his decision not to testify, or that it impaired his ability to assist counsel in his own defense. In the first instance, Simon's attorney announced that his client would not be taking the stand if his motion to sever the counts involving the murder of Michael Sterling from those involving the murders of Vincent Anes and Sherry Magpali was denied. (1 RT 97.) Second, Simon never complained that the stun belt was having any psychological effect on him whatsoever. (*Howard*, *supra*, 118 Cal.Rptr.3d at pp. 692-693.)

Though this Court's opinion in *Mar* did include a discussion of "the potential psychological consequences of wearing a stun belt and the physical effects from electric shock in subjects with certain medical conditions," it also expressly stated that its discussion of those topics "was offered to provide guidance 'in *future* trials.' " (*People v. Lomax*, *supra*, 49 Cal.4th at p. 562 [emphasis in original].) Since Simon's trial was held almost three years before this Court issued its opinion in *Mar*, it was "not required to foresee and discuss each of the concerns detailed in that opinion." (*Ibid.*) The same must be said of those factors raised by Simon relating to the design and operation of the stun belt itself.

Simon's claim that the trial court failed generally to consider the availability of less restrictive security measures is similarly unavailing. The trial court articulated the reasons why it did not want to dispense with physical restraints altogether. (2 RT 131-133.) Simon's lawyer was evidently aware that the stun belt could be worn on his client's right side, but failed to press the issue during the hearing preceding his guilt phase trial. (35 RT 4871-4872.) In the hearing prior to the second penalty phase trial, defense counsel acknowledged that the issue concerning Simon's discomfort had been satisfactorily addressed through the placement of pillows in his chair, the stun belt was not visible as long as his client was wearing his jacket, and it was "less obtrusive and noticeable than shackles or something of that sort." (35 RT 4863.) Though the record does not reveal whether the trial court or the parties were aware of the "Band-it" device's availability at the time of the guilt phase hearing (35 RT 4869), it is by no means clear that it would have presented Simon with the "least restrictive" option. Further, defense counsel apparently abandoned his initial request that courtroom staff attempt to obtain it for his client's use.

C. Simon Was Not Prejudiced by Wearing a Stun Belt

Even if this Court were to find the trial court's ruling was not based on a sufficient showing of manifest need, Simon cannot demonstrate prejudice. Unlike the circumstances presented to this Court by *Mar*, and given the state of the evidence below, this was not a "close case" – its resolution did not turn on the credibility of the witnesses, and Simon did not testify, so his demeanor was a negligible factor, if it was a factor at all. (*People v. Mar*, *supra*, 28 Cal.4th at pp. 1224-1225.) Further, there was no evidence the jury saw or recognized the stun belt that Simon was wearing; that it influenced his decision not to testify; that it impaired his ability to participate in his defense; or that it distracted him or affected his demeanor before the jury. (*Howard*, *supra*, 118 Cal.Rptr.3d at pp. 691-693.)

For all the same reasons, even if this Court were to find that wearing the stun belt somehow prejudiced Simon, it was harmless under any standard. Given the lack of record evidence that his stun belt was visible to jurors, that it influenced his decision not to testify, and that it had any adverse psychological effects upon him, this Court should evaluate the prejudicial effect under *Watson*, and not *Chapman*[20]. (See, e.g., *People v. Mar*, *supra*, 28 Cal.4th at p. 1225, fn. 7 [citing *People v. Jackson* (1993) 14 Cal.App.4th 1818, 1827-1830; *People v. Tuilaepa* (1992) 4 Cal.4th 569, 583-584].)

However, even if this Court were to determine that review under *Chapman* is required, the error must be considered harmless under either standard in light of the strong evidence pointing to his guilt: His semen was present in Ms. Magpali's vagina, and the gun Simon used to shoot both Mr. Anes and Ms. Magpali was found in a car Simon was driving. All of

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[20] *Chapman v. California* (1967) 386 U.S. 18 [87 S.Ct. 824, 17 L.Ed.2d 705] (*Chapman*).

the witnesses testified that Simon was the aggressor in the confrontation with Mr. Sterling, the latter man was unarmed and neither threatened nor provoked Simon, and the gun used to shoot Sterling was found in Simon's bedroom. Given this compelling evidence, "The procedures implemented could not have influenced either the guilt or penalty verdict." (*People v. Jackson, supra*, 14 Cal.App.4th at p. 1831 [internal quotation marks and citations omitted].)

II. THE TRIAL COURT PROPERLY DENIED SIMON'S MOTION TO SUPPRESS THE BLOOD EVIDENCE

Simon maintains the trial court erred when it denied his motion to suppress evidence, on grounds that his probationary search condition did not justify the warrantless extraction of his blood. (AOB 86.) Simon contends that when he agreed to submit his "person" to search or seizure at any time, he did not thereby consent to have his blood drawn. (AOB 86.) He reasons the "plain language" of the condition "did not require that he submit to a search beyond the surface of the body and, consequently, did not authorize the taking of a blood sample." (AOB 87-89.) Contrary to Simon's assertions, since he freely consented to the search term as a condition of his probation, Simon voluntarily relinquished whatever privacy rights he might once have had, and his blood could be drawn even in the absence of reasonable suspicion or probable cause. What is more, officers had ample evidence giving them not only reasonable suspicion but also probable cause to believe that Simon was connected to all three murders. Even assuming for purposes of argument the disputed search was impermissible, law enforcement personnel could have obtained Simon's DNA profile through other means, which would have inevitably led to the discovery of the same evidence. Since Simon is thus unable to demonstrate prejudice, this Court must deny him the relief he seeks.

"Under California law, a search conducted pursuant to a known probation search condition, even if conducted without reasonable suspicion of criminal activity, does not violate the Fourth Amendment as long as the search is not undertaken for harassment or for arbitrary or capricious reasons or in an unreasonable manner." (*People v. Medina* (2007) 158 Cal.App.4th 1571, 1577 [citing *People v. Bravo* (1987) 43 Cal.3d 600, 610 (*Bravo*)].) "Inasmuch as a search or seizure pursuant to a valid consent does not violate the Fourth Amendment, it is not unreasonable unless it exceeds the scope of consent." (*Bravo, supra*, 43 Cal.3d at p. 609.) A defendant who has "specifically agreed to submit to search 'with or without a warrant at any time' . . . has voluntarily waived 'whatever claim of privacy he might otherwise have had.' " (*Id.* at p. 610 [quoting *People v. Mason* (1971) 5 Cal.3d 759, 766 (disapproved on other grounds by *People v. Lent* (1975) 15 Cal.3d 481, 486, fn.1) (*Mason*)]; see also *People v. Hill* (2004) 118 Cal.App.4th 1344, 1350 ["the acceptance of a probation search condition constitutes 'a complete waiver of [the] probationer's Fourth Amendment rights' "].)

A. Law Enforcement Officers Were Entitled To Draw Simon's Blood Even In The Absence Of Reasonable Suspicion

On September 28, 1999, the trial court heard Simon's motion to suppress the blood evidence that was collected from him. The parties stipulated to the following facts: At the time of his arrest, Simon was on formal probation from a 1993 attempted robbery that he committed in Los Angeles. Term No. 18 from his probation conditions required Simon to "Submit your person and property under your control to search or seizure at any time of the day or night by any probation officer or other peace officer, with or without a warrant or probable cause." Investigators knew Simon was subject to that probationary term when they questioned him following

his arrest. Simon was arrested in the early morning hours of May 26, 1996, and a blood sample was taken from him at 7:00 a.m. Investigators then questioned Simon about the homicide that had occurred the previous evening, as well as "other homicides." At 12:25 p.m. on the same day, a second blood sample was taken from Simon, along with hair and saliva samples. A DNA profile was derived from the second blood sample for purposes of comparison to DNA samples from the homicides of Mr. Anes and Ms. Magpali. (7 RT 945-948; 14 RT 2035; 16 RT 2471.)

The prosecutor argued the entire motion could be dealt with "expeditiously," since Simon had waived his Fourth Amendment rights as a condition of his probation, and his consent to that search term authorized investigating officers to extract his blood. (7 RT 948-949.)

Simon's attorney referred the court to Simon's change of plea form from his prior conviction, and noted the box was not checked next to the provision that Simon would "Submit to periodic anti-narcotic test/alcohol test as directed by the probation officer or any other peace officer." Defense counsel asserted that fact limited the scope of Simon's consent to the search terms, and that Simon did not contemplate he would be required to allow law enforcement personnel to draw his blood. (7 RT 949.)

The prosecutor retorted that probation term No. 18 was a "broad, all-encompassing waiver of [Simon's] Fourth Amendment rights," and the fact that the drug-testing term was not checked did not "somehow reconvey to Mr. Simon a portion of his Fourth Amendment rights" that were waived under that term. The prosecutor added that the drug testing term was not in fact a "search term," and because Simon had pled guilty to attempted robbery and not to a drug or alcohol-related offense it was not required. (7 RT 950-951.)

Defense counsel disagreed, and maintained that Simon's waiver did not include testing. When the trial court inquired, "What would it mean to

the reasonable person reading the search terms of where it says, 'Submit [ ] your person?'," defense counsel responded, "I submit that means your person patted down. The outer part of your person, not your bodily fluids, which are internal." Simon's lawyer added, "That's a much more invasive type of thing that I don't believe [ ] his waiver included." (7 RT 951-952.) After both parties submitted, the trial court ruled:

> In reviewing these documents and now having heard the arguments, I agree with the position taken by [the prosecutor]. It does appear to me that the search terms, specifically No. 18 that we referred to, does include the right to search the person, and including even the bodily fluids, hair, various other samples that might be taken – urine samples, things of that nature. So I do feel that the search was appropriate. No law was violated. None of the defendant's rights were violated. So the motion to suppress is denied.

(7 RT 952-953.)

The United States Supreme Court first considered a probationary search condition similar to the one at issue here in *United States v. Knights* (2001) 534 U.S. 112 [122 S.Ct. 587, 151 L.Ed.2d 497] (*Knights*). In *Knights*, the defendant was granted probation, one condition of which required him to "[s]ubmit his . . . person, property, place of residence, vehicle, personal effects, to search at anytime, with or without a search warrant, warrant of arrest or reasonable cause by any probation officer or law enforcement officer." (*Id.* at p. 114.) Not long after the defendant in *Knights* was placed on probation, officers conducted a warrantless search of his residence and found not only drug paraphernalia but also evidence that he had vandalized and committed acts of arson at Pacific Gas & Electric facilities. (*Id.* at pp. 115-116.) After the Ninth Circuit Court of Appeals concluded the search was conducted for investigatory rather than probationary purposes, it invalidated the search. (*Id.* at p. 116.) The high court reversed and upheld the search under a general Fourth Amendment

analysis. The *Knights* Court held that the defendant had accepted a probationary search condition that was "clear and unambiguous," and that this had served to "significantly diminish [his] reasonable expectation of privacy." (*Id.* at pp. 118-120.) The United States Supreme Court concluded the warrantless search of the defendant's apartment, which was based on both his probationary search condition and a reasonable suspicion of criminal activity, was proper under the Fourth Amendment. (*Id.* at p. 122.)

Knights was followed by *Samson v. California* (2006) 547 U.S. 843 [126 S.Ct. 2193, 165 L.Ed.2d 250] (*Samson*), where the high court considered the validity of a suspicionless search of a parolee under the Fourth Amendment. As the *Samson* Court observed, because the search at issue in *Knights* "was predicated on both the probation search condition and reasonable suspicion," *Knights* itself left open the question whether the search conducted there "would have been reasonable under the Fourth Amendment had it been solely predicated upon the condition of probation." (*Id.* at p. 850.) *Samson* addressed that very question and answered it in the affirmative, "albeit in the context of a parolee search." (*Id.* at pp. 847, 850.)

In *Samson*, the defendant was convicted of being a felon in possession of a firearm. He was paroled and, pursuant to section 3067, subdivision (a), he agreed in writing "to be subject to search or seizure by a parole officer or other peace officer at any time of the day or night, with or without a search warrant and with or without cause." While released on parole, the defendant was walking down the street with a woman and a child. A police officer who was aware that defendant was on parole approached him and asked whether he had an outstanding parole warrant. After the defendant answered in the negative, the officer searched him and found a baggie containing methamphetamine in his shirt pocket. (*Samson*, *supra*, 547 U.S. at pp. 846-847.) The California Court of Appeal affirmed, and relying on *People v. Reyes* (1998) 19 Cal.4th 743, held the search reasonable within

the meaning of the Fourth Amendment because it was not "arbitrary, capricious or harassing" (*Id.* at p. 847.)

In reaching its holding, the *Samson* Court noted that the "extent and reach" of the conditions to which parolees are subjected demonstrate that they "have severely diminished expectations of privacy by virtue of their status alone." The United States Supreme Court also observed:

> Additionally, as we found "salient" in *Knights* with respect to the probation search condition, the parole search condition under California law – requiring inmates who opt for parole to submit to suspicionless searches by a parole officer or other peace officer "at any time," Cal. Penal Code Ann. § 3067(a) (West 2000) – was "clearly expressed" to petitioner. *Knights*, 534 U.S., at 119, 122 S.Ct. 587. He signed an order submitting to the condition and thus was "unambiguously" aware of it. *Ibid.* In *Knights*, we found that acceptance of a clear and unambiguous search condition "significantly diminished Knights' reasonable expectation of privacy." *Id.*, at 120, 122 S.Ct. 587. Examining the totality of the circumstances pertaining to petitioner's status as a parolee, "an established variation on imprisonment," *Morrissey*, 408 U.S., at 477, 92 S.Ct. 2593, including the plain terms of the parole search condition, we conclude that petitioner did not have an expectation of privacy that society would recognize as legitimate.

(*Samson*, *supra*, 547 U.S. at p. 852.)

After finding that "a State's interests in reducing recidivism and thereby promoting reintegration and positive citizenship among probationers and parolees warrant privacy intrusions that would not otherwise be tolerated under the Fourth Amendment" (*Samson*, *supra*, 547 U.S. at p. 853), the high court concluded that "the Fourth Amendment does not prohibit a police officer from conducting a suspicionless search of a parolee." (*Id.* at p. 857.) In that context, the *Samson* Court noted that "The touchstone of the Fourth Amendment is reasonableness, not individualized suspicion," and though " 'some quantum of individualized suspicion is

usually a prerequisite to a constitutional search or seizure,' " it had also recognized that the " 'Fourth Amendment imposes no irreducible requirement of such suspicion.' " (*Id.* at p. 855, n. 4 [quoting *United States v. Martinez-Fuerte* (1976) 428 U.S. 543, 560, 561 [96 S.Ct. 3074, 49 L.Ed.2d 1116].)

Acknowledging the dissent's contention that "California's parole search law permits 'a blanket grant of discretion untethered by any procedural safeguards' " (*Samson, supra,* 547 U.S. at p. 856), the *Samson* majority cited *Bravo* and responded:

> The concern that California's suspicionless search system gives officers unbridled discretion to conduct searches, thereby inflicting dignitary harms that arouse strong resentment in parolees and undermine their ability to reintegrate into productive society, is belied by California's prohibition on "arbitrary, capricious or harassing" searches.

(*Ibid.*)

Though the *Samson* Court's holding addressed a suspicionless search of a parolee, there can be no doubt that it applies to suspicionless searches of probationers as well. (See, *Samson, supra,* 547 U.S. at pp. 858-859 ["Although the Court has in the past relied on special needs to uphold warrantless searches of probationers, [Citation], it has never gone so far as to hold that a *probationer or parolee* may be subjected to full search at the whim of any law enforcement officer he happens to encounter, whether or not the officer has reason to suspect him of wrongdoing"] (dissenting opinion of Stevens, J.) (emphasis added).)

Even if this Court were to find that *Samson's* holding is limited to suspicionless searches of parolees, it remains the law in California that suspicionless searches of probationers do not run afoul of the Fourth Amendment. This Court's opinion in *People v. Ramos* (2004) 34 Cal.4th 494, which was issued before the United States Supreme Court filed its

opinion in *Samson*, does not hold to the contrary. *Ramos* concerned a defendant who had pled guilty to driving under the influence in 1990. As a condition of his probation, the defendant agreed to a blanket search condition that required him to "submit his person, property and automobile, and any object under [his] control, to search and seizure by any probation officer or other peace officer at any time of the day or night with or without a warrant." At some later point, officers who were aware of this condition searched the defendant's house and truck in reliance upon it. After prying off the lock and opening the vehicle's camper shell, they discovered the victim's body, a blood-stained blanket, an empty box of .38 caliber ammunition, and a receipt for a Mossberg shotgun. (*People v. Ramos*, *supra*, 34 Cal.4th at pp. 504-505.) The defendant contended the police had no reasonable cause to search under authority of his probationary search condition. (*Id.* at p. 505.)

This Court in *Ramos* adverted to its prior holding that, "by accepting probation, a probationer consents to the waiver of Fourth Amendment rights in order to avoid incarceration" (*Id.* at p. 506), and then observed:

> The facts known to the police when they undertook the probation search provide ample support for the intrusion on defendant's privacy. Mary Cagle, who arrived on the scene of her daughter's murder shortly after the shooting, told officers that she had seen defendant driving his Ford pickup away from Karr's residence shortly before the shooting. Cagle told police that she feared defendant had shot Karr because he blamed her for their pending divorce. Officers also listened to a tape-recorded answering machine message defendant had left for Cagle shortly after he murdered Karr. In the message, defendant indicated where police could find Minnie Coombs's body. Thus, when the officers, as here, have reasonable suspicion that a probationer is engaged in criminal activity, there is enough likelihood that criminal conduct is occurring that an intrusion on the probationer's privacy is reasonable. (See *United States v. Knights* (2001) 534 U.S. 112, 121, 122 S.Ct. 587, 151 L.Ed.2d 497.)

(*Ibid.*)

As in *Knights*, this Court's holding in *Ramos* "was predicated on both the probation search condition and reasonable suspicion" (*Samson v. California*, *supra*, 547 U.S. at p. 850.) Though this Court found in *Ramos* that the facts known to the police at the time gave rise to reasonable suspicion, it also found the warrantless searches at issue there were proper because, "As we have held, by accepting probation, a probationer consents to the waiver of Fourth Amendment rights in order to avoid incarceration." (*People v. Ramos*, *supra,* 34 Cal.4th at p. 506.) In support of that proposition, this Court in *Ramos* quoted with approval the text of both *Mason* and *Bravo*. (*Ibid.*) As the United States Supreme Court made clear in *Samson*, a finding that reasonable suspicion is present is not tantamount to a holding that it must be present in order to satisfy the commands of the Fourth Amendment. This Court did not hold in *Ramos* that reasonable suspicion was necessary to make the intrusion on the probationer's privacy reasonable; to the extent that it did, this Court should disapprove that language in light of *Samson*.

B. The Blood Draw Did Not Exceed The Scope Of Simon's Consent, And It Was Reasonable Under The Totality Of The Circumstances

Simon's claim that the blood draw exceeded the scope of his consent also fails. His conditions of probation apprised him that he would be required to submit his person to search or seizure at any time, by any peace officer, "with or without a warrant or probable cause." Simon asserts the blood draw exceeded the scope of his probationary search condition because a search of his "person" contemplates only searches involving the exterior of his body, or his clothing, and not a search "beneath the skin." In support of this proposition, Simon cites both *People v. Bracamonte* (1975) 15 Cal.3d 394 (*Bracamonte*) and *Jauregui v. Superior Court* (1986) 179

Cal.App.3d 1160 (*Jauregui*). (AOB 88.) Both cases must be distinguished from the circumstances presented in the instant case, as they involved the proper scope of warrants, and searches which were much more invasive than the one conducted here.

In *Bracamonte*, law enforcement officers obtained a search warrant authorizing a search of the defendant's residence, her vehicle, and her person following a tip from two confidential informants that she was involved in drug-related activities. As agents attempted to serve the warrant, they saw the defendant place two balloons in her mouth and swallow them. (*Bracamonte, supra*, 15 Cal.3d at p. 397.) After they apprehended her, agents took the defendant to the hospital and, acting under authority of the warrant, instructed the attending physician to pump her stomach. When the defendant refused to drink the syrup of ipecac that had been prepared for her, two nurses strapped her to a table and inserted a tube through her nostrils and into her esophagus. After complaining that the tube was causing her too much pain, the defendant agreed to drink the emetic. Shortly thereafter, she regurgitated seven multi-colored balloons which contained heroin. She continued vomiting for 10 more minutes and remained nauseous for another 15 minutes after that. (*Id.* at pp. 397-398.)

In granting the defendant's motion to suppress the evidence, this Court observed:

> Although in the instant case there clearly was probable cause to believe that the defendant had swallowed packages containing heroin, there was no warrant justifying the intrusion into her body. As previously set forth, the agents had procured a search warrant authorizing the search of the residence of defendant and her husband, their vehicles and their persons. It is quite clear, and the People admit, that the warrant was not intended to authorize intrusions beyond the surfaces of their bodies. Assuming arguendo that the magistrate intended the warrant to justify such further intrusions, we find the warrant did not so specify.

(*Bracamonte*, *supra*, 15 Cal.3d at pp. 400-401 [emphasis in original].)

Similarly in *Jauregui*, this Court granted the defendant writ relief after his motion to suppress evidence had been denied. In *Jauregui*, police officers sought a telephonic warrant to retrieve some narcotics they believed the defendant had swallowed. The warrant sought heroin and associated paraphernalia and commanded a search of the defendant's "person." Officers confronted defendant with the warrant, advised him the court had "authorized them to administer the emetic to him," and watched as he drank syrup of ipecac. Defendant regurgitated five balloons of heroin about 15 or 20 minutes later. (*Jauregui*, *supra*, 179 Cal.App.3d at pp. 1162-1163.) In granting the extraordinary writ, the *Jauregui* court concluded:

> While the prosecution argues the magistrate intended to issue a warrant authorizing a body intrusion, it concedes the warrant is defective for failing to so specify. . . . The instant warrant simply failed to authorize the procedure performed, despite the officer's representation to Jauregui it did.

(*Id.* at p. 1164.)

Both cases found the searches and seizures unreasonable and violative of the Fourth Amendment by virtue of the fact that the warrants in question did not specifically authorize the severe intrusions to which the defendants were subjected. Though in *Bracamonte* this Court interpreted the term "person" narrowly for purposes of determining the warrant's validity, and required that any warrant purporting to authorize a search beneath the surface of the skin must specifically identify the contemplated procedure, its holding must be viewed in context. Under circumstances where a defendant enjoys the full panoply of traditional Fourth Amendment protections, a search is reasonable if it is based on probable cause and where a warrant has been issued for it. (*Bracamonte*, *supra*, 15 Cal.3d at p. 400.) In such a case, where the defendant has not consented to be searched, the language of a warrant is properly given a narrow construction, since the

defendant's Fourth Amendment protections apply in all cases except those specified under the warrant. The same principles apply when a warrantless search is conducted; there the defendant retains the full measure of his rights to privacy provided by the Fourth Amendment, except under certain judicially recognized exceptions. (*Ibid.*)

The inquiry regarding the scope of a search for a probationer who has waived his rights under the Fourth Amendment is different than the one that applies to a citizen who enjoys its full protections. "It is 'well settled that one of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent.' " (*People v. Woods* (1999) 21 Cal.4th 668, 674 [quoting *Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 219 [93 S.Ct. 2041, 36 L.Ed.2d 854].) In the former instance the probationer's consent is read as a complete waiver of "whatever claim of privacy he might otherwise have had," with the exception of his right to object to "harassment or searches conducted in an unreasonable manner." (*Bravo, supra*, 43 Cal.3d at p. 607 [citing *Mason, supra*, 5 Cal.3d at p. 765, fn. 3].)

It is thus appropriate to distinguish between searches on the surface of the skin and searches beneath the skin in the context of a warrant analysis, because there the presumption favors the retention of the defendant's Fourth Amendment rights and his reasonable expectations of privacy. In the context of probation search conditions, however, those rights have been waived, a defendant's privacy rights are greatly diminished, and a search is permissible unless it is undertaken for purposes of "harassment," or "for arbitrary or capricious reasons." (*Bravo, supra*, 43 Cal.3d at p. 610.) For those reasons, all of the cases cited by Simon (AOB 83-86), which were resolved based upon legal principles relating to the warrant requirement and its exceptions, are inapposite to this case, which involves a search pursuant to an agreed-upon probationary condition.

Simon cannot contend that a blood draw is not, as a matter of law, a search of the person. (*Schmerber v. State of California* (1966) 384 U.S. 757, 767 [86 S.Ct. 1826, 16 L.Ed.2d 908] ("Such testing procedures plainly constitute searches of 'persons,' and depend antecedently upon seizures of 'persons,' within the meaning of [the Fourth] Amendment").) Since the extraction of blood is properly viewed as a search of one's person, logically it could not exceed the scope of Simon's consent, and thus did not entail any violation of his Fourth Amendment rights, unless it was conducted in an unreasonable manner, for arbitrary or capricious reasons, or to harass him. None of those conditions obtained here.

Moreover, Simon's argument that the scope of his consent was somehow limited by the absence of a check mark next to the box on his change of plea form, which specified he would be required to "submit to periodic anti-narcotic tests/alcohol tests as directed by the probation officer or any other peace officer" (1 CT 290; AOB 81), is unavailing. Also left unmarked was the box which forbade Simon to "use or possess any narcotics, dangerous or restricted drugs" without a valid prescription. Under the same logic, Simon could contend that a specific exception for illegal drug possession had also been carved out of the more general requirement that he "obey all laws." Even allowing for purposes of argument that Simon has correctly interpreted the significance of the unmarked box, it would have exempted only anti-narcotic tests and alcohol tests from the scope of his consent. The language did not specifically exempt blood tests that were taken to conduct a DNA analysis for identification purposes.

Nor was the extraction of blood undertaken in an unreasonable manner. Unlike the invasive means that were pursued in *Bracamonte* and *Jauregui*, the blood evidence here was obtained by a registered nurse, in a controlled setting at the Moreno Valley Sheriff's Station, and without

protest or struggle.[21] (1 CT 93-94; 20 RT 2924.) It cannot be disputed that the search was conducted in a reasonable manner. (See, e.g., *Schmerber v. State of California*, *supra*, 384 U.S. at p. 771 ["Such tests are a commonplace in these days of periodic physical examination and experience with them teaches that the quantity of blood extracted is minimal, and that for most people the procedure involves virtually no risk, trauma, or pain"].)

The extraction of Simon's blood did not display any of the features that typically render a search unconstitutionally unreasonable – it was not "conducted too often or at an unreasonable hour," it was not "unreasonably prolonged," and it was not "conducted for other reasons establishing arbitrary or oppressive conduct by the searching officer." (*People v. Medina*, *supra*, 158 Cal.App.4th at p. 1577 [citing *People v. Reyes*, *supra*, 19 Cal.4th at pp. 753-754.) When it evaluates whether a search is reasonable under the totality of the circumstances, a reviewing court "assess[es], on the one hand, the degree to which it intrudes upon the individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." (*Samson*, *supra*, 547 U.S. at p. 848.) The blood draw here, taken by a registered nurse in a controlled setting, certainly involved a de minimis intrusion upon Simon's privacy. Moreover, Simon makes no claim, nor can he, that the extraction of his blood was motivated by personal animosity towards him, or to harass him, and so he fails to establish that the search in question was arbitrary or capricious. (*People v. Medina*, *supra*, 158 Cal.App.4th at p. 1577; *People v. Sardinas* (2009) 170 Cal.App.4th 488, 495-496.)

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[21] The stipulation at the guilt phase provided the sample had been drawn from Simon in a "medically approved manner." (20 RT 2924-2925.) The stipulation at the penalty phase provided that it had been taken in a "legally and medically prescribed manner." (42 RT 6008-6009.)

Finally, in light of the fact that probationers are " ' "more likely than the ordinary citizen to violate the law" ' " (*Samson*, *supra*, 547 U.S. at p. 849), and given the "State's dual interest in integrating probationers back into the community and combating recidivism" (*Ibid.*), Simon's probationary search condition was tailored to a countervailing, legitimate law enforcement purpose. (*People v. Ramos*, *supra*, 34 Cal.4th at p. 506 ["the purpose of the search condition is to deter the commission of crimes and to protect the public, and the effectiveness of the deterrent is enhanced by the potential for random searches"] (quoting *People v. Reyes*, *supra*, 19 Cal.4th at p. 753).) In light of these principles, the blood draw was unquestionably reasonable under the Fourth Amendment.

C. Deputies Had Both Reasonable Suspicion And Probable Cause To Suspect That Simon Had Committed The Murders Of Mr. Anes And Ms. Magpali At The Time They Drew Simon's Blood

Even if it could be said that some requirement of reasonable suspicion or reasonable cause applied to searches of probationers conducted under the auspices of the condition agreed to by Simon, that requirement was met under the facts of the instant case. At the time that his blood was drawn, police were already aware that Simon had shot Mr. Sterling. As of May 7, 1996, they were also informed that the .9 millimeter handgun which had been recovered from the automobile Simon was driving on January 18, 1996, had been linked to the murders of Mr. Anes and Ms. Magpali. (13 RT 1918-1922; 16 RT 2468.) Officers therefore had not only reasonable suspicion to believe that Simon was again involved in criminal activity (*People v. Ramos*, *supra*, 34 Cal.4th at p. 506), but also probable cause, and they were entitled under any analysis to draw a sample of Simon's blood in order to ascertain whether he had committed those other offenses. The minimal intrusion on whatever remaining privacy rights Simon possessed was reasonable under the circumstances. (*Ibid.*)

D. Because Simon's DNA Profile Would Have Been Obtained Through Other Lawful Means, The Exclusionary Rule Does Not Apply

Even assuming that the search conducted here was unlawful, exclusion of the blood evidence, and the DNA results obtained from it, is not warranted in this case. "Under the inevitable discovery doctrine, illegally seized evidence may be used where it would have been discovered by the police through lawful means." (*People v. Robles* (2000) 23 Cal.4th 789, 800.) Though Simon contends the prosecution abandoned its argument in the trial court that the same evidence would inevitably have been discovered (AOB 93-94), the doctrine still "may be applied on appeal if the factual basis for the theory is fully set forth in the record." (*People v. Robles*, *supra*, 23 Cal.4th at p. 801, fn.7.) Such is the case here. The record shows that deputies also collected samples of Simon's saliva and hair, which he did not challenge at trial on Fourth Amendment grounds. Simon's DNA profile could also have been extracted from those biological samples; therefore the evidence linking him to the rape and murder of Ms. Magpali would have been obtained through independent means.

The fact that the weapon used in the killings of Mr. Anes and Ms. Magpali was found in Simon's possession when police stopped his car would also have given law enforcement officials the probable cause they needed to obtain a warrant to extract his blood. Had the original blood sample been suppressed at the hearing, the trial court could have ordered that a new sample be drawn. For that reason, Simon is also unable to demonstrate prejudice, as "the blood sample would have provided the same information whether drawn at the station or after the suppression hearing." (*People v. Siripongs* (1988) 45 Cal.3d 548, 569.) Consequently, even if the trial court erred in finding that the blood sample was lawfully extracted, it was harmless beyond a reasonable doubt. (*Ibid.*)

III. THE TRIAL COURT PROPERLY DENIED SIMON'S MOTION TO SEVER THE COUNTS INVOLVING THE MURDER OF MICHAEL STERLING FROM THE COUNTS INVOLVING THE MURDERS OF VINCENT ANES AND SHERRY MAGPALI

Simon contends the trial court abused its discretion when it denied his motion to sever the counts involving his murder of Mr. Sterling from those counts involving his murders of Mr. Anes and Ms. Magpali. Simon makes the additional contention that the joinder resulted in gross unfairness, amounting to a denial of due process. (AOB 98.) Both contentions lack merit. In the first instance, Simon failed to make the requisite showing that the considerations of efficiency and judicial economy were substantially outweighed by the potential for undue prejudice resulting from joinder. Second, Simon cannot demonstrate that he suffered actual prejudice, given that the jury convicted him of second degree murder with respect to the killing of Mr. Sterling, and could not reach a verdict with respect to the allegations that he personally used a handgun during the killings of Mr. Anes and Ms. Magpali.

Two or more offenses may be joined into one accusatory pleading if the offenses are of the same class of crimes, subject to the trial court's discretion to order the charges severed and tried separately "in the interests of justice and for good cause shown." (§ 954; *People v. Geier* (2007) 41 Cal.4th 555, 574-575.) A defendant seeking to sever charges properly joined by statute must make a clear showing that joinder poses a substantial danger of prejudice. (*People v. Smith* (2007) 40 Cal.4th 483, 510; *People v. Carter* (2005) 36 Cal.4th 1114, 1153.) This is so because " ' "[T]he law prefers consolidation of charges." ' " (*People v. Smith*, *supra*, 40 Cal.4th at p. 510 [quoting *People v. Manriquez* (2005) 37 Cal.4th 547, 574].)

Trial courts have broader discretion to admit other-acts evidence in the joinder context. (*People v. Cummings* (1993) 4 Cal.4th 1233, 1284; *People v. Bean* (1988) 46 Cal.3d 919, 935-936; *Frank v. Superior Court*

(1989) 48 Cal.3d 632, 639.) Accordingly, a party seeking severance of properly joined charged offenses "must make a stronger showing of potential prejudice than would be necessary to exclude other-crimes evidence in a severed trial." (*People v. Soper* (2009) 45 Cal.4th 759, 774 [internal citations and quotation marks omitted, emphasis in original] (*Soper*).) The burden is therefore on the defendant to demonstrate that the countervailing considerations of efficiency and judicial economy "are outweighed by a substantial danger of undue prejudice." (*Id.* at p. 773 [quoting *People v. Bean*, *supra*, 46 Cal.3d at pp. 938-939 [emphasis in the original].)

Though a finding of cross-admissibility is dispositive of a defendant's claim that the risk of prejudice warrants severance, it is not required to negate such prejudice. (§ 954.1; *Soper*, *supra*, 45 Cal.4th at p. 775.) When this Court determines that the evidence underlying properly joined charges is not cross-admissible, it then considers " 'whether the benefits of joinder were sufficiently substantial to outweigh the possible "spill-over" effect of the "other-crimes" evidence on the jury in its consideration of the evidence of defendant's guilt of each set of offenses.' " (*Soper*, *supra*, 45 Cal.4th at p. 775 [quoting *People v. Bean*, *supra*, 46 Cal.3d at p. 938].) In making that assessment, this Court considers three additional factors when analyzing a trial court's ruling for abuse of discretion:

> (1) whether some of the charges are particularly likely to inflame the jury against the defendant; (2) whether a weak case has been joined with a strong case or another weak case so that the totality of the evidence may alter the outcome as to some or all of the charges; or (3) whether one of the charges (but not another) is a capital offense, or the joinder of the charges converts the matter into a capital case.

(*Ibid.* [citing *People v. Arias* (1996) 13 Cal.4th 92, 127; *Alcala v. Superior Court* (2008) 43 Cal.4th 1205, 1220-1221].) This Court then balances "the potential for prejudice to the defendant from a joint trial against the

countervailing benefits to the state." (*Ibid.*) These factors are considered in light of the record before the trial court at the time of the severance motion. (*People v. Geier*, *supra*, 41 Cal.4th at p. 575; *People v. Valdez* (2004) 32 Cal.4th 73, 120.)

A trial court's ruling on such a motion will not be disturbed absent an abuse of discretion. (*People v. Smith*, *supra*, 40 Cal.4th at p. 510.) "A court abuses its discretion when its ruling falls outside the bounds of reason." (*People v. Osband* (1996) 13 Cal.4th 622, 666.)

A. The Trial Court Properly Denied Simon's Severance Motion

During the hearing on Simon's motion for severance, defense counsel argued that evidence involving the murder of Mr. Sterling would not be cross-admissible in a trial involving the murders of Mr. Anes and Ms. Magpali, because it could only be used to impeach Simon's testimony, and he was not planning to take the stand. (1 RT 95-97.) Defense counsel contended joinder would also have a prejudicial "spill-over" effect, in that the murder of Mr. Sterling arose from a "gang confrontation," no evidence suggested a gang connection with respect to the killings of Mr. Anes and Ms. Magpali, and the trial as to those counts could be tainted by the gang references which witnesses to the murder of Mr. Sterling would inevitably make. (1 RT 97-98.) By the same token, defense counsel feared that the evidence concerning the kidnapping and rape of a 17-year-old girl[22], along with the gruesome nature of the double murders, would inflame jurors, and undermine the viability of a defense based upon heat-of-passion or imperfect self-defense. (1 RT 98-99.) Finally, defense counsel maintained

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[22] Simon's probation report indicated Mr. Anes and Ms. Magpali were both 18 years old when they were murdered; during her testimony in the second penalty phase, Jasmine Magpali recalled that her sister was either 18 or 19 years old at the time. (23 CT 6424; 39 RT 5697-5698.)

the murder of Mr. Sterling had been converted from a non-capital case to a capital case through the expediency of joinder, and added that even if a trial on the killings of Mr. Anes and Ms. Magpali preceded a separate trial on the killing of Mr. Sterling, the jury in the latter case would have heard evidence of the prior murders only during the penalty phase. (1 RT 99-100.)

The prosecutor rejoined, "I don't believe I've set forth any argument that contends that the evidence relating to the two incidents [is] cross-admissible." (1 RT 100.) He also argued that since gangs are now "commonplace," defense counsel was engaging in unwarranted speculation by suggesting jurors would disregard the instructions they received from the court and convict Simon of murdering Mr. Anes and Ms. Magpali based on the very limited gang evidence related to the murder of Mr. Sterling. (1 RT 100-102.) The prosecutor made essentially the same argument with respect to the spill-over effect from the murders of Mr. Anes and Ms. Magpali to the murder of Mr. Sterling. Citing *People v. Arias*, *supra*, 13 Cal.4th at p. 92, he asserted that given the accounts of widespread criminal activity that permeate the media, the nature of those killings "is not something that [jurors] are going to be affected by to the extent that they are going to ignore their instructions, decide this case on emotion rather than reason, and ignore everything that we expect them to do as jurors." (1 RT 102-103.)

Citing *Williams v. Superior Court* (1984) 36 Cal.3d 441, defense counsel countered that, "gang evidence is inflammatory." He also noted, "whether the Court feels it's – it's inflammatory enough that it's going to deprive the defendant of a fair trial in the double murder is the issue." (1 RT 104-105.) After hearing the arguments of both counsel, the trial court ruled:

> In hearing your arguments and in reviewing your – your papers, it does appear to me that there is some potential

> prejudice. However, I don't think that that prejudice outweighs the benefits. And so without saying more, I'm going to deny the motion.

(1 RT 105-106.)

Here, there is no dispute that the murder charges were properly joined as crimes of the same class. (*Alcala v. Superior Court*, *supra*, 43 Cal.4th at p. 1220.) The question is simply whether the trial court properly denied Simon's motion to sever the charges. The record before the court at the time of the motion shows it acted well within the bounds of its discretion in doing so.

On appeal, Simon repeats the contentions he made in the trial court; namely, that "Evidence of sex crimes against young people has been widely recognized as especially likely to inflame a jury," that "there were serious questions to be resolved by the jury regarding whether the [Michael] Sterling homicide was murder, manslaughter, or self-defense," and that "Jurors exposed to evidence relating to the [Vincent] Anes and [Sherry] Magpali offenses would certainly be more likely to view [him] as the aggressor in the [Michael] Sterling incident, and to discount or disregard defense evidence or argument to the contrary." (AOB 106-107.)

Simon's claims should be rejected. In the first instance, the offenses committed against Mr. Anes and Ms. Magpali were not more inflammatory than the killing of Mr. Sterling. Murder and rape (along with robbery and kidnapping) are all assaultive crimes against the person, and as such were offenses within the same class of crimes and properly joinable within the meaning of section 954. (*People v. Arias*, *supra*, 13 Cal.4th at p. 127; *People v. Geier*, *supra*, 41 Cal.4th at pp. 574-576.) Though she was only 18 years old at the time she was murdered, Ms. Magpali was significantly older than the 11-year-old and 13-year-old children who were the victims of the sex crimes in *Coleman v. Superior Court* (1981) 116 Cal.App.3d 129,

cited by Simon (AOB 106) as an instance where joinder was declared improper on grounds that "evidence of sex crimes with young children is especially likely to inflame a jury." (*Coleman v. Superior Court*, *supra*, 116 Cal.App.3d at p. 138.)

Second, joinder in this case did not create the danger of a " 'spillover' effect that occurs when 'weaker charges [are] joined with strong charges so that the effect of the aggregate evidence might alter the outcome of the trial.' " (*People v. Geier*, *supra*, 41 Cal.4th at p. 576 [quoting *People v. Marshall* (1997) 15 Cal.4th 1, 28]; see also *People v. Arias*, *supra*, 13 Cal.4th at p. 128 [no prejudice when capital case involving murder in the course of robbery was joined with separate incident involving robbery, kidnapping, kidnapping for purposes of robbery, vaginal penetration with a foreign object, attempted sodomy, forcible oral copulation, and rape where "evidence in both cases was 'very strong,' so that a weak case would not receive unfair support from the joinder of offenses committed at a different time"].)

Simon insists that "Severance was required to avoid prejudice . . . from prosecutorial bootstrapping of weak – but potentially sufficient – evidence together to overcome what might otherwise amount to reasonable doubt had the cases been tried separately." (AOB 108.) In that vein, Simon declares, "The primary issue with respect to the [homicides of Mr. Anes and Ms. Magpali] was the identity of the killer." He speculates that once exposed to the "gang evidence and strong proof that [he] shot and killed Mr. Sterling," the jurors were more likely to conclude that he, rather than someone else "shot and killed [Mr.] Anes and/or [Ms.] Magpali based upon a perception that he was the type of person to have committed such a crime." (AOB 107.)

The gang evidence that this Court found prejudicial in *People v. Williams*, *supra*, 36 Cal.3d at p. 441 [superseded by statute on other

grounds as stated in *Alcala v. Superior Court*, *supra*, 43 Cal.4th at p. 1229, fn. 19] (*Williams*) was of an entirely different nature and scope than the limited references made in the instant case. *Williams* involved two separate shooting incidents. In the first, a group of at least three assailants wielding multiple weapons fired upon rival gang members who were standing outside a Los Angeles gymnasium. Two of the victims were wounded, and the third was killed. The defendant was seen running with the group of assailants away from the site of the shootings. In the second incident nine months later, the defendant was driving a van containing at least two other occupants that pulled up alongside a boy who was standing in a rival gang's territory and wearing the rival gang's colors. The right front passenger shot the boy at close range with a handgun, killing him. The defendant moved to sever the counts relating to the two incidents, and the trial court denied the motion. The defendant then sought a peremptory writ of mandate. In granting relief, this Court held the trial court abused its discretion when it denied the defendant's motion. (*Id.* at pp. 445-446.)

In *Williams*, this Court first observed that "one of the crucial issues facing the jury [was] the identity of the perpetrator(s) of the two killings and the related crimes." (*Williams*, *supra*, 36 Cal.3d at p. 449.) Finding that the evidence from the two incidents was not cross-admissible on the issues of identity or intent, this Court then turned to the prejudice inquiry:

> [T]he evidence of gang membership - the sole distinctive factor allegedly common to each incident - might indeed have a very prejudicial, if not inflammatory effect on the jury in a joint trial. The implication that gangs were involved and the allegation that petitioner is a gang member might very well lead a jury to cumulate the evidence and conclude that petitioner must have participated in some way in the murders or, alternatively that involvement in one shooting necessarily implies involvement in the other. Further, although it is apparent that more than one assailant was involved in both killings, only petitioner will be standing trial in front of the jury. The absence

> of other known suspected participants coupled with the evidence of two seemingly senseless, gang-related shootings could indeed produce "an 'over-strong tendency to believe the defendant guilty of the charge merely because he is a likely person to do such acts.' (1 Wigmore, Evidence, § 194, p. 650.)" [Citation.] In addition, as petitioner suggests, it might be the highly publicized phenomenon of gang warfare in Southern California which would be on trial as much as the defendant, thereby raising the specter of prejudice far beyond the facts of the actual case.

(*Id.* at p. 453.)

The circumstances presented here were far different than in *Williams*. The presence of his semen in Ms. Magpali's vagina not only provided irrefutable evidence that he had raped her, but also provided strong circumstantial evidence linking Simon to the killings of Ms. Magpali and Mr. Anes. (*People v. Hartsch* (2010) 49 Cal.4th 472, 494.) At a minimum, Simon was liable for their murders under either a felony-murder theory or an accomplice theory. Additionally, the evidence strongly supported the theory that Simon was the shooter; he was in possession of the gun that was used to kill both victims when officers stopped his car on January 18, 1996. Under the circumstances presented here, Simon thus could not have been prejudiced by the evidence that he shot Mr. Sterling, or that the incident was somehow gang-related.

Even if the jury had been inclined to disregard the court's instructions and view the murder of Mr. Sterling as "propensity evidence" in the murders of Mr. Anes and Ms. Magpali, it did not need to rely on his role in the shooting of Mr. Sterling to reach a rational inference that he also murdered the other two victims. What is more, the gang references made in the testimony relating to the murder of Mr. Sterling were both limited and fleeting, and it cannot be said they were prejudicial to Simon in the same manner they were to the defendant in *Williams*, where the testimony focused on the ongoing "gang warfare" between the 89 Family Blood gang,

the Green Meadow Park Boys, and the Grape Street gang. Simon's contentions to the contrary notwithstanding, the evidence in both cases was compelling. For that reason there was logically no "spillover effect," as the prosecution had no need to bolster a weak case with a strong one, or to aggregate two weak cases in order to fill the evidentiary gaps in both. (*People v. Geier*, *supra*, 41 Cal.4th at p. 576; see also *People v. Arias*, *supra*, 13 Cal.4th at p. 130, fn. 11 ["consolidation may be upheld on appeal where the evidence on each of the joined charges is so strong that consolidation is unlikely to have affected the verdict" (internal quotation marks and citation omitted)].)

Finally, Simon's argument that the cases should have been severed because a non-capital case was joined with a capital case must be rejected. This is not a case where, as in *Williams*, the joinder itself converted two non-capital cases into a capital case. In *Williams*, the defendant was charged with two separate murders, neither of which alleged any special circumstances. After the prosecution successfully joined the two cases, multiple-murder (former section 190.2, subdivision (c)(5)) was the only special circumstance alleged as to both killings. On the other hand, in the instant case the multiple-murder special allegation was already satisfied by the killings of both Mr. Anes and Ms. Magpali on December 2, 1995. (See, e.g., *People v. Ruiz* (1988) 44 Cal.3d 589, 607.)

Simon further contends the factors of judicial economy and efficiency did not outweigh the potential for prejudice, and he claims the prosecutor "tacitly conceded that there were no case-specific efficiencies to be served by a joint trial." In this context, Simon notes there was no DNA evidence in the case involving Mr. Sterling, the prosecution's fingerprint expert testified only in connection with the case involving Mr. Anes and Ms. Magpali, the autopsies were performed by different pathologists, different law enforcement personnel processed the two crime scenes, and the

investigating officers for both incidents were different. (AOB 108-110.) Though true, evidentiary overlap is not the only efficiency or economy militating in favor of joinder. In *Soper*, this Court also observed that even where case-specific efficiencies are absent, "Merely segmenting the proceedings typically will result in inefficiency." (*Soper*, *supra*, 45 Cal.4th at p. 782.) When two previously joined matters advance to separate trials, "each of the numerous procedural steps attendant to any criminal proceeding – such as discovery, pretrial motions, as well as trial sessions themselves . . . proceed on different tracks," and "twice as many prospective jurors would need to be summoned and subjected to the selection process." (*Ibid.*)

Finally, this Court noted a third set of inefficiencies, which appear post-trial:

> Further amplifying these and related trial-level inefficiencies resulting from separate trials is the appeal of right afforded to all convicted criminal defendants. Separate appellate records would be compiled by the clerk's offices of the respective trial courts. Even assuming the same appellate counsel could be appointed or assigned to represent the parties, once again merely segmenting the proceedings generally will cause inefficiency. Furthermore, the Court of Appeal, through its own clerk's office, would be required to manage and process discrete appeals, and provide an opportunity for separate oral arguments. Individual written decisions would be drafted, considered, and filed. Subsequently, separate petitions for rehearing could be filed in the Court of Appeal, followed by individual petitions for review in this court. This court, in turn, would need to process, analyze, and dispose of each. Thereafter, separate collateral reviews at the three levels of the federal court system -- reprising versions of many of the procedures outlined above -- could ensue.

(*Id.* at p. 782.)

B. The Trial Court's Denial Of Severance Did Not Result In Gross Unfairness, Or Render Simon's Trial Fundamentally Unfair

Simon makes the additional claim that even if joinder was proper in his case, it nevertheless resulted in gross unfairness amounting to a denial of due process. Simon alleges that his jury would have been unable to "compartmentalize" the evidence it was given regarding both incidents, especially in light of the trial court's allegedly defective instructions and the prosecutor's closing argument. Simon believes these factors in turn "reduced the jurors[']natural compunction about convicting [him] on questionable evidence, as well as impaired their ability to view the evidence of each offense objectively." Simon concludes that these factors "made it difficult, if not impossible, for jurors to view the two cases and applicable defenses separately," and that reversal is therefore warranted in his case. (AOB 111-120.)

A trial court has no sua sponte duty to instruct the jury regarding the limited purpose for which other acts evidence may be considered – i.e., that it may be considered only for the specific purposes for which it was admitted and may not be used to infer criminal character. (See *People v. Rogers* (2006) 39 Cal.4th 826, 853-854.) Even so, the trial court's charge to Simon's jurors dispelled any potential prejudice in the instant case. The trial court instructed the jury on the elements of murder, the burden of proof to convict Simon, and that each count charged a distinct offense the jury must decide separately. (CALJIC Nos. 2.90 [Presumption Of Innocence -- Reasonable Doubt -- Burden Of Proof], 8.10 [Murder – Defined], 17.02 [Several Counts -- Different Occurrences -- Jury Must Find On Each]; 14 CT 3583, 3594, 3637.) These instructions mitigated the risk of any prejudicial spillover from one case to the other (see *People v. Geier*, *supra*,

41 Cal.4th at pp. 578-579), and the jury is presumed to have understood and followed them (*People v. Coffman* (2004) 34 Cal.4th 1, 83).

In his closing argument, defense counsel also reminded the jury of its duty to consider and decide the counts separately:

> You have to consider the counts individually or separately. And you have to consider the January (sic) events and the May events separately. Okay. That's the law. You have to consider the events of May [19]96 based on the facts you heard about those events and not something that happened at a prior time.

(23 RT 3425.) Defense counsel's argument, along with the trial court's charge, "mitigated the risk of any potential spillover." (*Soper, supra*, 45 Cal.4th at p. 784.)

Simon relies heavily on *Bean v. Calderon* (9th Cir. 1998) 163 F.3d 1073 (*Bean*), in support of his contention that the circumstances of his case militated in favor of severance, due to the jury's alleged inability to compartmentalize the evidence it heard and the verdicts it was required to reach. Though they may be cited as persuasive authority, opinions of the intermediate federal courts are not controlling. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1292.) What is more, *Bean* is distinguishable. The Ninth Circuit in *Bean* determined severance was appropriate in light of the fact that the evidence was not cross-admissible; "the State repeatedly encouraged the jury to consider the two sets of charges in concert, as reflecting the modus operandi characteristic of Bean's criminal activities"; there was a "substantial disparity between the . . . evidence" of the two crimes the prosecution sought to join; and there was no acquittal on one or more of the charged offenses, which might provide "affirmative evidence of the jury's ability to assess the . . . evidence separately." (*Bean, supra*, 163 F.3d at pp. 1084-1086.)

When discussing evidence elicited by the defense of Mr. Sterling's prior incarceration for beating another man, the prosecutor argued here that:

> Richard Simon didn't know Michael Sterling. Richard Simon didn't know Michael Sterling from anyone else. He knew nothing about his background or his character or how he would act or react. You know, you knew, on May 25, 1996, something about Richard Nathan Simon's character for violence. He is one that could coldly, callously murder and rape a young, trembling, scared woman. That is a person who is prone to violence, acting in conformity with it. When you determine the issues as to whether he killed Michael Sterling and who acted aggressively in that situation, consider not only the character of Michael Sterling, [but also] the character of Richard Nathan Simon.

(23 RT 3345.)

In urging jurors to reject any claim that Simon might have acted in lawful self-defense, the prosecutor later argued:

> You know the defendant's attitude. You know Michael Sterling was an ex-felon. There's no indication whatsoever that he was an ex-felon with a firearm out there that day. None whatsoever. There's no indication that Mr. Simon knew Mr. Sterling was an ex-felon. And when you examine the character of Michael Sterling, at the same time you can examine the character of Richard Nathan Simon for violence. He was on that day an ex-felon in possession of a firearm at that location. He took that gun with him when he went out that day. That shows you a readiness to do violence. That shows you what his character was.

(23 RT 3446.)

The prosecutor was not thereby arguing that since he had previously committed the murders of Mr. Anes and Ms. Magpali Simon must have committed the murder of Mr. Sterling, or that he had a propensity to kill, or even that the two crimes shared a similar motive or modus operandi. Nor did the prosecutor thereby encourage the jury to consider the charges against Simon in concert. After Simon had introduced evidence of Mr. Sterling's character for violence, the People were entitled to rebut that evidence through references to other acts evidencing Simon's character for

violence, especially in the context of a self-defense claim that rested on a contention that Mr. Sterling was the initial aggressor. (Evid. Code, § 1103, subd. (b)).

As discussed earlier, this was also not the case where the stronger evidence that Simon committed two charged murders somehow "tainted the jury's consideration of [his] complicity in the [weaker murder]." (*Bean, supra*, 163 F.3d at p. 1085.) The evidence in both cases was exceedingly strong. Witnesses testified that Simon was the aggressor in the confrontation with Mr. Sterling, the latter man was unarmed and neither threatened nor provoked Simon, and the murder weapon was found in Simon's bedroom. Finally, the jury convicted Simon of first degree murder in the killings of Mr. Anes and Ms. Magpali, but only second degree murder in the killing of Mr. Sterling. What is more, Simon's jury was unable to reach a unanimous determination that he had personally used a firearm in the commission of counts 1 through 4. This shows it was capable of differentiating between the charges. (See *People v. Ruiz, supra*, 44 Cal.3d at p. 607 [jury's verdict of first degree murder on two charges and second degree murder on the third murder charge supported finding that joinder did not prejudice the defendant because the verdicts showed "the jury was capable of differentiating between defendant's various murders"].)

For these reasons, Simon cannot demonstrate that joinder of the two offenses actually resulted in gross prejudice, thereby rendering his trial fundamentally unfair. Thus, even if the trial court erred in denying his motion to sever the charges, his convictions must stand. (*Soper, supra*, 45 Cal.4th at p. 784.)

IV. SINCE NO EVIDENCE SUPPORTED THE PROPOSITION THAT SIMON ACTUALLY BELIEVED IT WAS NECESSARY TO KILL MR. STERLING IN SELF-DEFENSE, THE TRIAL COURT PROPERLY DECLINED TO INSTRUCT THE JURY ON THAT THEORY OF VOLUNTARY MANSLAUGHTER

Simon asserts the trial court erred when it declined to instruct his jury on unreasonable self-defense, thereby depriving him of the opportunity to obtain a guilty verdict on the lesser included offense of voluntary manslaughter, rather than murder. (AOB 121.) Contrary to Simon's assertion, substantial evidence did not support instructing the jury with that theory of voluntary manslaughter. The record reveals that Simon was the aggressor before and during the shooting, he was the only person who was armed during the confrontation, and that he did not actually believe it was necessary to defend himself from Mr. Sterling. Simon's jurors resolved this issue adversely to him by rejecting the twin propositions that he acted in justifiable self-defense or committed voluntary manslaughter in the heat of passion or upon a sudden quarrel. The evidence in the instant case overwhelmingly demonstrated that Simon acted with malice when he killed Mr. Sterling; consequently, even if the trial court erred, it was harmless under any standard.

It is established that even in the absence of a request, the trial court must sua sponte instruct on the general principles of law relevant to the issues raised by the evidence. (*People v. Breverman* (1998) 19 Cal.4th 142, 154 ("*Breverman*").) In determining whether such an instruction is required, the court does not determine the credibility of the witnesses or of the defendant, but rather merely determines whether there is some evidence, regardless of its source, to support the instruction. (*People v. Marshall* (1996) 13 Cal.4th 799, 847; *People v. Turner* (1990) 50 Cal.3d 668, 690.)

> An instruction on a lesser included offense must be given only when the evidence warrants such an instruction. [Citation.] To warrant such an instruction, there must be substantial evidence of the lesser included offense, that is, "evidence from which a rational trier of fact could find beyond a reasonable doubt" that the defendant committed the lesser offense. [Citation.] Speculation is insufficient to require the giving of an instruction on a lesser included offense. [Citations.] In addition, a lesser included instruction need not be given when there is no evidence that the offense is less than that charged. [Citation.]

(*People v. Mendoza* (2000) 24 Cal.4th 130, 174.) Accordingly, there is no need to instruct on imperfect self-defense "when the evidence is 'minimal and insubstantial.' " (*People v. Barton* (1995) 12 Cal.4th 186, 201.)

"If a person kills or attempts to kill in the unreasonable but good faith belief in having to act in self-defense, the belief negates what would otherwise be malice, and that person is guilty of voluntary manslaughter or attempted voluntary manslaughter, not murder or attempted murder. [Citation.]" (*People v. McCoy* (2001) 25 Cal.4th 1111, 1116.) The doctrine of imperfect self-defense is a narrow one. *(In re Christian S.* (1994) 7 Cal.4th 768, 783.) "It requires without exception that the defendant must have had an actual belief in the need for self-defense." (*Ibid.*) It also requires that the defendant must be in fear of imminent danger to life, or great bodily injury – fear of future ham will not suffice. (*People v. Manriquez* (2005) 37 Cal.4th 547, 581.) "An imminent peril is one that, from appearances, must be instantly dealt with." (*In re Christian S., supra,* 7 Cal.4th at p. 783 [internal quotation marks and citations omitted].)

A. Substantial Evidence Did Not Support Instructing The Jury On Unreasonable Self-Defense

During the conference regarding jury instructions, the prosecutor objected to the entire series of self-defense instructions, because he did not believe there was a sufficient factual basis that warranted giving them.

Defense counsel noted that Mr. Sterling was the larger man and had been convicted of a prior act of violence; witnesses testified they observed Simon and Mr. Sterling arguing outside; both Haynes and Gentry had testified to hearing at least three shots fired while officers recovered only one expended cartridge at the scene and one expended cartridge in the ejector mechanism of Simon's gun; and Dr. Choi opined the fatal gunshot wound sustained by Mr. Sterling was from a bullet that had been fired at close range. On that basis, defense counsel told the court he was requesting instructions on self-defense, imperfect self-defense, and involuntary manslaughter. (21 RT 3021-3023.)

The prosecutor conceded there was evidence of an argument between the two men, but added, "I don't recall any evidence whatsoever of there being any physical altercation being viewed by any witness such as would put Mr. Simon in a position to be able to claim self-defense." The prosecutor also observed that while it was possible to speculate that since witnesses reported hearing three gunshots, there was evidence that a second gun had been fired, "it's more likely if there were three shots they were all fired by the same gun." (21 RT 3023.)

Defense counsel reasserted his claim that the evidence supported the proposition that a second gun had been discharged, and also noted that about 15 or 20 minutes passed between the shooting and Officer Baer's arrival, during which time Gentry had left the scene in Williams's car. Defense counsel offered that was a sufficiently long period of time for Gentry to dispose of any gun Mr. Sterling may have used during the dispute. Defense counsel further noted that officers had not tested Mr. Sterling's hands for gunshot residue, and that they had not looked for a gun in Williams's car, Mr. Sterling's car, or Gentry's residence. Finally, defense counsel argued that Williams's appearance when he came to Gentry's door, his purported remark that they needed to leave the scene

immediately, and Mr. Sterling's comment to Gentry that he would be "going back to prison or to jail" all provided "some slight evidence of self-defense." (21 RT 3023-3026.)

The trial court then responded, "No, I don't see it, to be honest with you. I don't think there's a factual basis for this, and I'm going to refuse the entire [self-defense] series." The trial court then ruled that CALJIC Nos. 5.10, 5.12, 5.15, 5.16, 5.30, 5.31, 5.50, and 5.51 would all be refused. (21 RT 3026.)

The court and the parties next discussed the instructions on voluntary manslaughter. Defense counsel maintained they were appropriate, and said, "I've already made my argument as to why I think self-defense applies, and my argument would be the same as to why I think imperfect self-defense applies." (21 RT 3037.) Defense counsel continued to maintain his client "could have honestly perceived a threat," and, "Whether it's reasonable or unreasonable, it doesn't matter." Simon's attorney then added, "But I also think under the facts of this case that there's an inference that could be drawn that this was a shooting out of a sudden quarrel or out of heat of passion." (21 RT 3037.) After citing the same record evidence as support for the latter theory of voluntary manslaughter, defense counsel concluded that "something more happened there than what – than just Mr. Simon casually and calculatingly pulling out a gun and shooting Mr. Sterling." (21 RT 3038-3039.)

The prosecution continued to maintain that voluntary manslaughter instructions were unsupported under either theory. (21 RT 3039-3040.) Simon's lawyer complained that in refusing to instruct on either theory of voluntary manslaughter, the trial court was "making findings as a matter of law that the killing of Mr. Sterling [was] second degree murder, based on the facts that it[']s heard at this point." (21 RT 3041.) Referring to Mr. Sterling, defense counsel asked rhetorically, "Now, are we supposed to

assume that that person did nothing, did nothing to provoke the shooting or did nothing to cause Mr. Simon to believe he was in some danger?" (21 RT 3042.)

The trial court then asked the prosecution, "is that what you're asking for, as a matter of law finding [the offense] to be nothing less than second degree?" (21 RT 3043.) After further argument, the prosecutor allowed:

> I think [defense counsel] makes an argument for voluntary manslaughter as it's defined in the sections under sudden quarrel or heat of passion with provocation, but not for imperfect self-defense, because there's no evidence whatsoever of any fear or honest belief on the defendant's part here. Because we have no idea whatsoever of any aggressive behavior by Mr. Sterling towards Mr. Simon.

(21 RT 3045.) The trial court responded, "Well, I agree with that." (21 RT 3045.)

On the following day, November 9, 1999, the prosecutor asked if it would be possible to "revisit this issue of the self-defense instructions." (21 RT 3146.) He explained that he wanted to do further research into whether they were warranted, based upon his assertions regarding the evidence of Mr. Sterling's character. The trial court replied, "It might be worth re-visiting," and defense counsel interjected, "I think we're entitled to them." (21 RT 3147.)

The next day, the prosecutor notified the court, "I've spoken to [defense counsel] about that[, a]nd I believe we're in agreement as to a number of different items and have agreed to try and work out some of our differences amongst ourselves outside of court and perhaps put things on the record Monday morning." The prosecutor then indicated he and defense counsel had agreed to request that the court charge the jury with CALJIC Nos. 5.12 [Justifiable Homicide in Self-Defense], 5.15 [Charge of Murder – Burden of Proof re Justification or Excuse], 5.50 [Self-Defense –

Assailed Person Need Not Retreat], and 5.55 [Plea of Self-Defense May Not Be Contrived]. (22 RT 3232-3233.)

The parties concluded their discussion regarding the proposed instruction on imperfect self-defense. The prosecutor again objected there was no testimony from Simon regarding his belief or his basis for it, and no evidence of any prior confrontation between Simon and the victim. (22 RT 3234-3235.) Defense counsel observed that jurors were already being instructed that it was a defense if Simon actually and reasonably believed in the need to exercise self-defense, and that there were scenarios where jurors might come to the conclusion that Simon actually but unreasonably entertained the same belief. When the trial court asked defense counsel to posit a hypothetical supporting such a view, Simon's lawyer replied, "Well, that's not my determination." (22 RT 3235.)

After additional argument, the trial court concluded, "Okay. I'm going to refuse it. I don't see any factual basis for it. I understand the argument, but I think there's got to be some basis for it. And I don't see it existing here." (22 RT 3236.)

Simon maintains the trial court should have instructed the jury on unreasonable self-defense. He notes that, "because there was no direct evidence that [Mr.] Sterling was armed, the jury could have concluded that a reasonable person in [his] position would not have believed [Mr.] Sterling was going to kill him or inflict great bodily injury upon him – in other words that [his] actions were not objectively reasonable or necessary under the circumstances." (AOB 130-131.) Nevertheless, Simon maintains his actions "were understandable in the context of confrontations between gang members," and his jurors could have concluded that he killed Mr. Sterling in the actual belief he had to defend himself against imminent peril. The fact that Mr. Sterling was unarmed certainly precluded a finding that Simon's belief was objectively reasonable; however, the same fact

foreclosed a finding that Simon actually believed his actions were necessary under the circumstances presented here. An examination of the record reveals that Simon was the aggressor, he acted with malice, and he did not shoot Mr. Sterling in self-defense.

Simon set the tone from the moment he was introduced to Mr. Sterling. Simon immediately began berating the other man, and then turned his wrath on Williams. Witnesses heard Simon tell Mr. Sterling that he "didn't like niggers from I.E." (15 RT 2155.) Simon also flew into a rage at Williams, and asked the latter why he was "hanging around these I.E. niggers." (15 RT 2165.) Mr. Sterling lifted up his shirt to show Simon he was unarmed and did not want any trouble even as Simon ordered Brown to "go get my gun," and said that he wanted to "shoot" Mr. Sterling. Before Simon went into the bathroom, both Brown and Williams were trying to dissuade him from his announced intentions; as he entered the bathroom, everyone in the room was fearful he would shoot them when he emerged. (15 RT 2155-2156, 2159-2161, 2165-2168, 2268-2270, 2279, 2308.)

Simon asserts he was a changed man once he left the bathroom. He notes that he had "calmed down" at that point, and that he had apologized to Mr. Sterling as he shook his hand.[23] (AOB 122.) That contention is belied by the fact that moments afterwards, he walked over to Williams and elbowed him in the mouth. (15 RT 2270.) When Gentry sought to intervene, he said, "shut up, bitch" and threatened to shoot her, too. (16 RT 2397.) Though Williams also protested Simon's behavior, he apparently did not dare to return the blow. (16 RT 2395-2396.) It is telling that once Simon had exited Gentry's apartment, both she and Haynes begged Mr.

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[23] Viewed in context, Simon's act of pulling Mr. Sterling towards him in order to "hug" him (16 RT 2397) seems less than benign, as it may well have been Simon's way of assuring himself that Mr. Sterling was indeed unarmed.

Sterling to stay inside. Their statements evinced a concern for Williams's and Mr. Sterling's safety, not for Simon's. Haynes told Mr. Sterling, "You don't know . . . what the guy is going to do," and Gentry said to him, "You know, if he does anything to Curtis, he won't kill him, you know." (15 RT 2170, 2271-2272; 16 RT 2398.) As Mr. Sterling exited the apartment, Haynes continued trying to call or pull him back inside. (16 RT 2399.)

Once outside, Simon and Mr. Sterling began to argue. Though it is unclear how much of the exchange was overheard or witnessed by Haynes, Gentry, and Brown, there was absolutely no trial testimony that Mr. Sterling had attacked Simon. Indeed, in his interview with Detective Ricciardi, Brown made it clear that Mr. Sterling's shooting was entirely unprovoked. Brown insisted that he "didn't know [Simon] was gonna do what he did, and added, "Fuckin' idiot shot him." (13 CT 3520.) Brown said when he turned around "everything was just already like in motion," and began to say that it looked as if Simon had "plotted" the series of events. Brown could only remark that Simon, "shot him[,] what for I don't know." (13 CT 3531.) Brown recalled seeing Mr. Sterling running into the field and Simon running towards his car. When officers asked Brown how he could have been sure Simon shot Mr. Sterling, Brown responded that Simon was the only one who had a gun and he was "the only one trippin' around there." (13 CT 3524, 3530-3531.) Significantly, in his interview Brown repeatedly insisted that he heard only two gunshots. (13 CT 3515, 3518-3521, 3529-3530.) After officers asked Brown whether Mr. Sterling was being cool outside, Brown replied, "Uh yeah. [Simon] totally shot him cold blooded, man." (13 CT 3524.)

Once Simon reached his car, Brown could see him moving around inside it in a manner that suggested he was again "stashing" the weapon. (13 CT 3518-3521, 3524-3526.) Next Simon fled the scene, and Brown testified that the three of them drove home in silence. (13 CT 3524.)

Notably absent was any expression of relief on Simon's part at having successfully defended himself from Mr. Sterling's attack, any proposal to treat Mr. Sterling's injury, or any desire to call 911 to report the incident and summon medical assistance.

Simon simply presents no evidence that Mr. Sterling was the aggressor, or that Mr. Sterling posed any kind of threat to him. This Court should similarly reject Simon's contention that, "although [his] actions were not those of an average citizen or 'reasonable' man, they were understandable in the context of confrontations between gang members." (AOB 130-131.) It is true that when Simon retrieved the gun that was used to kill Mr. Anes and Ms. Magpali from outside of Ferguson's house on January 18, 1996, he said he needed it for protection from "some of the gang bangers or something in San Bernardino he didn't get along with." (13 RT 1937-1939.) However, Simon cannot be heard to claim that his jurors should have applied a "reasonable gang member standard" to his benefit. Even if his actions might somehow have been "understandable" from a gang member's perspective, what gang evidence there was shed no light on whether Simon was in actual fear of death or great bodily harm.

A related issue was addressed by the Fifth District Court of Appeal in *People v. Romero* (1999) 69 Cal.App.4th 846. There, the defendant had stabbed the victim to death during a street fight which had escalated from a road rage incident. The defendant testified that he swung his knife at the victim in part because he felt he had to protect his younger brother, who was also at the scene. The defendant further testified that he never saw the victim with any weapons, the victim had never given him any reason to believe he was out to get his brother, and he could not explain to the jury what made him believe he had to stab the victim in order to protect his brother. The defendant maintained only that, "All I know I couldn't let [the

victim] get there. I can't let him pass me. All I know is to stop that guy." (*Id.* at pp. 849-852.)

The defense sought to introduce the testimony of an expert, who planned to opine that: (1) street fighters have a special understanding of what is expected of them; (2) for a street fighter in the Hispanic culture, there is no retreat; (3) the Hispanic culture is based on honor, and honor defines a person; and (4) in this culture the defendant "would be responsible to take care of someone," such as a younger brother, "whether he wanted to or not." (*People v. Romero*, *supra*, 69 Cal.App.4th at p. 853.) The trial court excluded the evidence, and the reviewing court affirmed. In doing so, the *Romero* court held:

> The evidence regarding honor, like evidence of street fighter mentality, is not relevant to whether deadly force was warranted under the circumstances. Is there honor in killing an unarmed man, and assuming that in defendant's mind it was the honorable thing to do, how does this relate to self-defense? Clearly, the question of defendant's honor was irrelevant to whether defendant was in actual fear of death or great bodily injury, and whether his fear was objectively reasonable.

(*Id.* at p. 854.)

In finding the exclusion of the evidence harmless, even if it could be considered error, the *Romero* court observed that "no sociological expert could have provided this missing mental state of defendant's actual subjective state of mind at the time he stabbed [the victim]" (*Id.* at p. 856), and held that, "Absent evidence that defendant was in fear of imminent death or great bodily injury, the jury had no evidentiary basis from which to conclude that defendant *subjectively* had an actual but unreasonable fear which negated malice aforethought" (*Ibid.* [emphasis in original].)

Similarly, all of the evidence that Simon marshals to support his claim that he was entitled to an instruction on unreasonable self-defense is irrelevant. None of the evidence to which Simon points – Mr. Sterling's

former membership in a rival gang, Williams's appearance and the remarks he made while at the door, and Mr. Sterling's dying remarks to Haynes – was relevant to a determination of Simon's subjective belief, or to the jury's determination whether they were sufficient to negate a finding of malice. As the prosecutor observed below, Simon did not testify, there was no evidence of any prior confrontation between him and Mr. Sterling, and none of the witnesses saw Mr. Sterling with a gun, heard him threaten Simon, or considered him to be the aggressor in the altercation between the two men.

B. Simon Was Not Prejudiced By The Lack Of An Imperfect Self-Defense Instruction

Simon contends the trial court's failure to instruct jurors on unreasonable self-defense, "and its failure to afford [his] jurors the opportunity to convict [him] of the lesser offense of manslaughter under this theory, was error." (AOB 131.) Assuming for purposes of argument the trial court below should have found the evidence warranted instructing the jury on unreasonable self-defense, the error was harmless under any standard.[24] Simon's jurors were given the opportunity to return verdicts of justifiable homicide under a theory of self-defense, and manslaughter under

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[24] Simon urges this Court to apply the *Chapman* standard of review, on the theory that the alleged instructional error deprived him of an "evidence-based opportunity to negate an element – which is effectively a misinstruction on an element of the offense." (AOB 132-133.) For this proposition, he cites *Beck v. Alabama* (1980) 447 U.S. 625 [100 S.Ct. 2382, 65 L.Ed.2d 392]. In *Breverman*, this Court noted the high court's holding in *Schad v. Arizona* (1991) 501 U.S. 624, 647 [111 S.Ct. 2491, 115 L.Ed.2d 555], which held that "*Beck's* principles [are] satisfied if the jury was provided some noncapital third option between the capital charge and acquittal." (*People v. Sakarias* (2000) 22 Cal.4th 596, 621, fn.3.) Since Simon's jury had the opportunity to convict him of second degree murder and manslaughter, the state constitutional standard of review for prejudice is applicable. (See, *Watson, supra*, 46 Cal.2d at p. 836.)

a theory of sudden quarrel or heat of passion. By finding Simon guilty of second degree murder, the jury necessarily determined that he acted with malice, and resolved this issue against him, "leaving no doubt the jury would have returned the same verdict had it been instructed regarding imperfect self-defense." (*People v. Manriquez* (2005) 37 Cal.4th 547, 582.) Simon's jury had the opportunity to find his crime constituted manslaughter and not murder – it decided that issue adversely to him.

V. THE TRIAL COURT PROPERLY ADMITTED THE VICTIM IMPACT EVIDENCE RELATING TO MR. ANES AND MS. MAGPALI

In a series of related arguments, Simon attacks the trial court's admission of victim impact evidence. Simon complains about the testimony from Ms. Magpali's surviving family members, who described life with Ms. Magpali, the day she was killed, and how life after her murder had affected them. Simon further complains about similar testimony that was provided by Mr. Anes's mother, his brother, and his stepfather. Simon also takes issue with the "numerous photographs of Sherry [Magpali] as a baby, a young child, and as a teenager," as well as the "numerous photographs of Vincent [Anes] as a young child and as a teenager." Simon asserts the victim impact evidence was irrelevant, excessive, cumulative, and highly prejudicial under Evidence Code section 352. He claims the testimony violated his right to due process and to a reliable penalty determination under the Eighth Amendment, and section 190.3, subdivision (a), which permits the prosecution to present circumstances of the crime as a factor for the jury to consider in rendering a penalty of death or life without the possibility of parole. Simon concludes that for all the above reasons, reversal of the penalty phase verdict is required. (AOB 136-144; 170-174.) Neither United States Supreme Court law nor the laws of California support Simon's position.

A. The Testimony of the Siblings and Parents of the Victims, Along with Photos Depicting the Victims' Lives, was Neither Irrelevant Nor Excessive

In his first sub-claim, Simon contends that much of the evidence pertaining to the lives of Ms. Magpali and Mr. Anes was irrelevant and that the amount of that evidence was also excessive. (AOB 155.) Simon complains:

> Here, five members of the [Vincent] Anes and [Sherry] Magpali families testified concerning the impact of the crime and the loss of the victim. This testimony was lengthy, taking up approximately 59 pages of reporter's transcript. In addition to the large volume of evidence, the content of the testimony was deeply disturbing. Family members recounted the life history of each of the victims, and illustrated their testimony with numerous photographs, many of which showed the victims as infants and young children. There were also photographs of the victims with various family members and friends. The witnesses[']descriptions of the effect the crimes had on them were very upsetting. Family members of both victims described ongoing feelings of intense grief, despair and hopelessness which had continued unabated in the years between the crime and their testimony at the penalty phase. The witnesses spoke of the victims and the central role each of them had held in the family. The picture which emerged from all of this testimony was one of the complete devastation of all of their lives as a result of the crime.

(AOB 155.)

In *Payne v. Tennessee* (1991) 501 U.S. 808 [111 S.Ct. 2597, 115 L.Ed.2d 720], the United States Supreme Court in large part overruled *Booth v. Maryland* (1987) 482 U.S. 496 [109 S.Ct. 2207, 104 L.Ed.2d 876], which had foreclosed all evidence and argument regarding victim impact. In *Payne*, the high court adopted the reasoning of the dissent in *Booth*, which had observed that, " 'the State has a legitimate interest in counteracting the mitigating evidence which the defendant is entitled to put in, by reminding the sentencer that just as the murderer should be

considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family.' " (*Payne v. Tennessee*, *supra*, 501 U.S. at p. 825 [quoting *Booth v. Maryland*, *supra*, 482 U.S. at p. 517] (disn. opn. of White, J.).)

In *People v. Sanders* (1995) 11 Cal.4th 475, this Court recognized that Payne only encompasses evidence that logically showed the harm caused by the defendant and does not mean there are no limits on emotional evidence and argument. (*Id.* at p. 549.) On the one hand, evidence and argument on emotional, though relevant, subjects that could provide legitimate reasons to sway the jury to show mercy, or to impose the ultimate sanction, are permissible. (*Ibid.*) Irrelevant information or inflammatory rhetoric that diverts the jury's attention from its proper role, or invites an irrational and purely subjective response, however, must be curtailed. (*Id.* at pp. 549-550.)

The victim impact evidence that was presented in this case was neither excessive nor inflammatory. In *People v. Russell* (2010) 50 Cal.4th 1228, 117 Cal.Rptr.3d 615 (*Russell*), this Court held, "Admission of testimony presented by a few close friends or relatives of each victim, as well as images of the victim while he or she was alive, has repeatedly been held constitutionally permissible." (*Id.* at p. 648.) Such evidence is admissible "to demonstrate how a victim's family is impacted by the loss and to show the victim's uniqueness as an individual human being[.]" (*Ibid.* [citations and internal quotation marks omitted].)

Similarly, in *People v. Panah* (2005) 35 Cal.4th 395, 494-495, this Court upheld the admission of testimony by the victim's family that the victim's brother had begun doing poorly in school and begun using drugs and alcohol after his brother's death. In rejecting the defendant's constitutional arguments, this Court held, "There is no requirement that family members confine their testimony about the impact of the victim's

death to themselves, omitting mention of other family members." (*Id.* at p. 495.) Additionally, the " 'residual and lasting impact' " the victim's brother " 'continued to experience' " as a result of his sister's murder was properly admitted. (*Id.* at p. 495.) "It is common sense that surviving families would suffer repercussions from a young [person's] senseless and seemingly random murder long after the crime is over." (*People v. Brown* (2003) 31 Cal.4th 518, 572-573 [surviving family members testified that they were still afraid to leave their homes more than three years after the robbery and murder].)

In yet another example, this Court found in *People v. Taylor* (2001) 26 Cal.4th 1155, 1171, that the trial court properly admitted evidence from the victim's wife and son about the "various ways they were adversely affected by their loss of [the victim's] care and companionship." This Court found that evidence of this kind, directed towards showing "the impact of the defendant's acts on the family of his victims is admissible at the penalty phase of capital trials." (*Ibid*; *People v. Boyette* (2002) 29 Cal.4th 381, 444 [testimony of family members describing their love of the victims and how they missed the victims in their lives, as well as photographs of the victims while still alive, properly admitted under § 190.3, subd. (a)].)

The jury may know "the full extent of the harm caused by the crime, *including its impact on the victim's family* and community." (*Payne v. Tennessee, supra*, 501 U.S. 808, 830 (conc. opn. of O'Conner, J.) [emphasis added].) Murderers know their victims "probably ha[ve] close associates, 'survivors,' who will suffer harms and deprivations from the victim's death . . . . [T]hey know that their victims are not human islands, but individuals with parents or children, spouses or friends or dependents." (*Id.* at p. 838 (conc. opn. of Souter, J.).) Accordingly, nothing precluded the witnesses in this case from also testifying to their personal reactions to

the murders of Ms. Magpali and Mr. Anes. (*People v. Mitcham* (1992) 1 Cal.4th 1027, 1062 [trial court properly permitted witness to testify to length of extensive hospitalization for psychiatric problems, two nervous breakdowns, suicide attempts, phobias of entering small stores and continuing inability to work.].)

Nor can Simon be heard to object to the photographs that were shown to his jurors. In *People v. Prince* (2007) 40 Cal.4th 1179, in addition to testimony by several members of the victim's family, which included testimony by the victim's father who broke down in tears while testifying, the prosecution presented a 25 minute videotape of the victim being interviewed about her musical and other talents. This Court found the trial court properly exercised its discretion in admitting the videotape; it was not set to stirring music, and the record showed it did not evoke an emotional response from the jury. (*Id.* at pp. 1287-1291.) Here the jury saw no videotape at all, and it heard no music. Simon's jurors viewed a total of 29 separate photographs depicting Mr. Sterling, Mr. Anes, and Ms. Magpali, plus an additional five photographs of Mr. Anes and Ms. Magpali as a couple. (23 CT 6410-6411.) The photographs in this case were nothing more than visual glimpses of the lives of the victims: their families, activities, and dreams. Along with their accompanying testimony, the photographs imparted to the jury each surviving family member's unique loss. In light of the fact that photographs and the testimony of bereaved parents carry a much smaller potential for prejudice than video productions (See, e.g., *People v. Prince, supra*, 40 Cal.4th at p. 1289), Simon's claims necessarily fail.

B. The Victim Impact Evidence In This Case Was Properly Admitted As A Circumstance Of The Crime Under Section 190.3, Subdivision (a)

Simon contends that the victim impact evidence here exceeded the scope of what is admissible as a circumstance of the crime under section 190.3, subdivision (a). He maintains that in order to preserve the constitutionality of section 190.3, subdivision (a), the phrase "circumstances of the crime" must be given a narrow construction which would restrict the admissibility of victim impact evidence "to those facts or circumstances either known to the defendant when he or she committed the crime or properly adduced in proof of the underlying charges adjudicated at the guilt phase." (AOB 169.) As Simon acknowledges (AOB 159), his claims are foreclosed by this Court's holdings in *People v. Zamudio* (2008) 43 Cal.4th 327, 364-365, and *People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1057. More recently, this Court reaffirmed those holdings in *People v. Carrington* (2009) 47 Cal.4th 145, 196-197, and *People v. Bramit* (2009) 46 Cal.4th 1221, 1240.) This Court should decline Simon's request to revisit the issue.

C. The Trial Court Properly Exercised Its Discretion Under Evidence Code Section 352 When It Admitted The Victim Impact Testimony Into Evidence

Simon asserts the "emotionally charged and detailed" victim impact evidence surpassed "acceptable limits and reached prejudicial proportion." Simon reasons that the witnesses' responses to the prosecutor's "emotionally charged questions" were "bound to intensify natural feelings of sympathy for the victims and their families and may have encouraged a desire for retribution against [him by] inviting an emotional and purely subjective response." (AOB 171-172.) Simon concludes the evidence "was far more prejudicial than probative" and should have been excluded under Evidence Code section 352. (AOB 172.)

First, as discussed previously, the victim impact evidence presented here was not unduly prejudicial. The jury was not shown a videotape set to stirring music that constituted a memorial service or eulogy for the victims. (*People v. Kelly* (2007) 42 Cal.4th 763, 795.) Photographs do not entail the same risk of injecting the proceedings with a legally impermissible level of emotion (*People v. Prince*, *supra*, 40 Cal.4th at p. 1289), and do not include special effects that amount to a "clarion call to vengeance" (*People v. Kelly*, *supra*, 42 Cal.4th at p. 797.) The witnesses in Simon's case exercised admirable emotional restraint, presented material that was relevant to the penalty determination because it humanized the victims, and gave testimony that assisted jurors in understanding "the loss to the [victim's] family and to society which ha[d] resulted from [Simon's] homicide[s]." (*People v. Zamudio*, *supra*, 43 Cal.4th at p. 367.)

Nor was the jury exposed to inflammatory rhetoric that "divert[ed its] attention from its proper role or invite[d] an irrational, purely subjective response." (*People v. Edwards* (1991) 54 Cal.3d 787, 836.) Here Priscilla Severson answered affirmatively when the prosecutor asked her if she has nightmares when she thinks about "The way in which [Mr. Anes] was robbed and murdered, having his clothes stripped off and things . . . ." (39 RT 5683.) Jeffrey Magpali testified that it hurt knowing his sister had been raped and how painful Ms. Magpali's death must have been. (42 RT 6017-6018.) Finally, Dino Anes told the jury that it was difficult for him to accept the fact that Mr. Anes was "brutally murdered and robbed of all of his belongings, and humiliated like that . . . ." (42 RT 6022.) This testimony never crossed the line dividing proper victim impact testimony and "improper characterization and opinion by the victim's family," never presented an imagined version of the crimes, and never made Simon's crimes seem more "horrific" than the evidence showed them to be. (*People v. Robinson* (2005) 37 Cal.4th 592, 656-658 (conc. opn. of Moreno, J.).)

All of the victim impact testimony was relevant and properly admissible, and the probative value of the evidence received at Simon's trial far outweighed any prejudicial effect it might have had. The trial court therefore properly exercised its discretion when it declined to exclude it under Evidence Code section 352.

D. Simon Was Not Prejudiced By The Victim Impact Evidence

Simon alleges that "the excessive quantity and highly emotional content of the victim impact evidence erroneously admitted during the penalty phase created an atmosphere of prejudice in which emotion prevailed over reason." (AOB 172.) Simon notes that his first penalty phase trial resulted in a split verdict, and contends that he presented a strong case in mitigation. (AOB 173-174.) He also maintains that the prosecution's reliance on an "emotional appeal" and his emphasis on the "improperly admitted victim evidence in urging the jurors to return a verdict of death, confirms the prejudicial nature of the error." (AOB 174.) Simon concludes "it cannot be said that the death sentence was 'surely unattributable to the error,' " and reversal is therefore required. (AOB 174.)

In his brief, Simon focuses on the following portion of the prosecutor's final summation (AOB 144-145):

> [Sherry Magpali and Vincent Anes] did everything right, and they didn't deserve what Richard Nathan Simon did to them. Nor did these people, the Magpalis. They are left with the never-ending agony. And along with Vincent [Anes]'s family, an infinite sadness that will never end.
>
> You get to consider the impact the defendant's crimes have on their families. Sometimes it's analogizing the impact of a crime like this to a rock or a boulder that gets thrown into a body of water and you have this big splash in the center and then the ripples emanate outwards. And the crime and its immediate impact on the victim's family is that big splash in the center that devastates their lives and tears them apart. And the ripples

emanate out to their close friends and their acquaintances, their neighbors, their relatives. Actually ends up touching out into the community.

And I thought about that. And I've used that analogy before. But it really doesn't fit. Because soon after you throw a rock or boulder into the water, once the splash and the ripples subside, the water is calm again and things return back to normal. And that's not what happens when crimes like this are committed.

A better analogy is to perhaps consider what occurs when a meteor strikes the surface of a planet. And recently there was a photo spread on the landscape of Mars that was in the "National Geographic" edition. And it showed the pockmarked surface of Mars with the impact of all the craters. And that's more a better analogy as to what effect crimes like the defendant's have on people's lives. It leaves a huge devastating hole in the victims' family's lives. A hole that will never be filled. A hole that will forever scar their lives.

It's been almost six years. You heard the testimony of some of the family members. And to some extent, perhaps, there's been dust that's been blown over that crater that the defendant has caused in their lives. But you can see the infinite sadness that remains. You get to consider and you should consider and you have to consider the devastation that the defendant has visited upon the lives and the families of Vincent [Anes] and Sherry [Magpali] and Michael Sterling. You get to consider that impact because that's part of the crime. That's what Richard Nathan Simon has done.

(46 RT 6555-6557.)

Simon cannot establish that the testimony the jurors heard, or the prosecutor's argument, was so prejudicial that it rendered the trial fundamentally unfair. (*Russell, supra*, 117 Cal.Rptr.3d at p. 648.) The focus on the victims' lives and the pain their death caused their families was "rather typical" of the victim impact evidence this Court routinely permits. (*People v. Kelly, supra*, 42 Cal.4th at p. 793; *People v. Burney, supra*, 47 Cal.4th at p. 258.) The prosecutor's argument, and the victim

impact evidence expressed sadness, not outrage over the victims' deaths, and there was no "clarion call for vengeance." (*People v. Kelly*, *supra*, 42 Cal.4th at p. 797.) Though they may never be influenced by passion or prejudice, in considering the impact of a defendant's crimes, jurors may " 'exercise sympathy for the defendant's murder victims and . . . their bereaved family members.' " (*People v. Zamudio*, *supra*, 43 Cal.4th at pp. 368-369 [quoting *People v. Pollock* (2004) 32 Cal.4th 1153, 1195].)

Even assuming any of the victim impact testimony was erroneously admitted, any error was harmless beyond a reasonable doubt in light of the circumstances surrounding the murders of Mr. Anes and Ms. Magpali, and the balance of the circumstances in aggravation reflecting the impact of the victims' murders on their families. (*Russell*, *supra*, 117 Cal.Rptr.3d at p. 648; *People v. Lewis and Oliver*, *supra*, 39 Cal.4th at p. 1058 [*Chapman* standard applies to improper victim impact evidence].)

VI. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON THE APPROPRIATE USE OF VICTIM IMPACT EVIDENCE

Simon argues the trial court failed to provide the jury with an appropriate limiting instruction regarding the victim impact evidence presented at the penalty phase retrial. Simon asserts that CALJIC No. 8.84.1 did not "tell the jury why victim impact evidence was introduced," and did not "caution the jury against an irrational decision." Simon contends the instructional error violated his "right to a decision by a rational and properly-instructed jury," as well as his due process rights to a fair trial and a reliable penalty determination. (AOB 175-178, citing U.S. Const., Amends., 6, 8, 14.; Cal. Const., article 1, sections 7, 15, 16 & 17.)

The trial court instructed the jurors with a modified version of CALJIC No. 8.84.1, which provided:

> You will now be instructed as to all of the law that applies to the penalty phase of this trial.

> You must determine what the facts are from the evidence received during the trial unless you are instructed otherwise. You must accept and follow the law that I shall state to you. You may consider pity, sympathy, or mercy for the defendant in determining the penalty in this case, should you find them to be warranted under the circumstances.
>
> You must neither be influenced by bias nor prejudice against the defendant, nor swayed by public opinion or public feelings. Both the People and the defendant have a right to expect that you will consider all of the evidence, follow the law, exercise your discretion conscientiously, and reach a just verdict. [25]

(23 CT 6351; 46 RT 6627.)

Simon maintains that the trial court should have also instructed the jury with the following language, derived in part from *Commonwealth v. Means* (Pa. 2001) 773 A.2d 143, 159, and *State v. Koskovich* (N.J. 2001) 776 A.2d 144, 177:

> Victim impact evidence is simply another method of informing you about the nature and circumstances of the crime in question. You may consider this evidence in determining an appropriate punishment. However, the law does not deem the life of one victim more valuable than another; rather, victim impact evidence shows that the victim, like the defendant, is a unique individual. Your consideration must be limited to a rational inquiry into the culpability of the defendant, not an emotional response to the evidence. Finally, a victim-impact witness is precluded from expressing an opinion on capital punishment and, therefore, jurors must draw no inference whatsoever by a witness's silence in that regard.

(AOB 176-177.)

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[25] When the trial court read the end of the second paragraph to the jury, it said, "which you find to be warranted under the circumstances" instead of "should you find them to be warranted under the circumstances." Simon cannot contend that this minor discrepancy affected any of his substantial rights; consequently, his failure to object to the wording as read by the court below forfeits any claim he might make on that basis.

As Simon acknowledges (AOB 175), he did not request the trial court provide his proposed instruction or amplify the instructions it did provide to the jury. Accordingly, his claim is forfeited on appeal. (*People v. Boyer* (2006) 38 Cal.4th 412, 465.) The only remaining issue is whether the trial court had a sua sponte duty to give such an instruction. (*People v. Edwards*, *supra*, 54 Cal.3d at p. 843.) This Court has held repeatedly it did not. (*People v. Zamudio*, *supra*, 43 Cal.4th at pp. 369-370 [discussing identical language]; *People v. Bramit*, *supra*, 46 Cal.4th at pp. 1244-1245 [same]; *People v. Carrington*, *supra*, 47 Cal.4th at p. 198.) Accordingly, even assuming Simon preserved this issue for appellate purposes, the argument is without merit.

"A trial court must instruct sua sponte 'only on those general principles of law that are closely and openly connected with the facts before the court and necessary for the jury's understanding of the case.' " (*People Zamudio*, *supra*, 43 Cal.4th at p. 370, quoting *People v. Price* (1991) 1 Cal.4th 324, 442 [emphasis in original].) In *Zamudio*, this Court noted that the first two sentences of Simon's proposed instruction were adequately covered by CALJIC No. 8.85, in the sense that the jury was told to "consider, take into account and be guided by . . . [t]he circumstances of the crime of which the defendant was convicted in the present proceeding . . . ." (*Id.* at p. 369.) That instruction was also given in the instant case. (23 CT 6366-6367; 46 RT 6632-6634.) With respect to the remaining language of Simon's proposed instruction, this Court held:

> Instructions informing the jurors that the law does not deem the life of one victim more valuable than another, and cautioning them not to draw an adverse inference from a victim impact witness's silence regarding capital punishment, were not necessary to the jury's understanding of this case. Therefore, the trial court had no sua sponte duty to give such instructions.

(*Id.* at p. 370.)

Simon urges that the jury would not have realized the terms "bias" and "prejudice" encompassed "the intense anger or sorrow that victim impact evidence is likely to produce," or that the phrase "public opinion or public feeling" extended to "the private opinions of the victims' relatives." (AOB 177-178.) However, during his final summation, the prosecutor reminded the jurors that:

> You have to bear in mind one thing when you consider this evidence. Don't decide this case on an emotional gut reaction. You've been warned about this already. You can recognize emotional, heart-wrenching evidence as such. And what we ask you to do is a very difficult, difficult task.
>
> Recognize your emotional reaction. Don't decide this case based on an emotional reaction. Consider and place yourself, to understand the circumstances of the crimes, at the scene of the crime or in the victims' shoes and recognize how heart-wrenching that it must have been for them to live through, and then step back and weigh that evidence for its full aggravating value and keep it in perspective.
>
> Don't decide it on a gut reaction. You don't need to in this case. You can step back and see the horror and then rationally and logically, in a reasoned determination, conclude that the aggravating circumstances in this case are so substantial in comparison to the mitigating, if any, that death is warranted for the murder of Sherry [Magpali] and Vincent [Anes] and Michael Sterling.

(46 RT 6557-6558.)

In his summation, defense counsel also cautioned jurors:

> So don't allow your decision to be made on the basis of how it might help bring closure to the victims' families, things of that sort. Those are not aggravating factors. Those are not relevant factors under the law, and it won't bring [the victims] back.
>
> * * *
>
> I would suspect that coming out here and saying that you've reached a verdict of life without parole or an individual

juror reaching such a verdict is going to cause you to think about how the loved ones would feel if you did that. How would Sherry [Magpali]'s family feel, or how would Vincent [Anes]'s family feel if I came back and say I think life without parole is the appropriate penalty? And I think that would be a human thing to consider, what is my verdict going to say to those people? Is it going to say their loved one's life isn't worth enough? Isn't worth more than Mr. Simon's life?

Again, that's not something you can do. You can't compare Mr. Simon's life to the life of Sherry Magpali or Vincent Anes. If you did that, in all these cases, we wouldn't even need to have a penalty phase. We could just stop after a jury came back and found people guilty of special circumstances murder because in all those cases, if you do that kind of comparison, the victim's life is going to be more valuable than the defendant's.

So you can't vote for death because you're concerned about the message that it might convey to the surviving loved ones, and I suspect that it would be very difficult to come out here and face them and tell them a decision was life without the possibility of parole. And I'm not suggesting that it's easier to come out here and say the death penalty. I think either direction, it's a very hard process and a very difficult decision that you have to make.

(46 RT 6574-6576.)

Finally, the court instructed the jury in relevant part that:

It is now your duty to determine which of the two penalties, death or imprisonment in the state prison for life without possibility of parole, shall be imposed on the defendant.

After having heard all of the evidence, and after having heard and considered the arguments of counsel, you shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed.

An aggravating factor is any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself. A mitigating

> circumstance is any fact, condition or event which does not constitute a justification or excuse for the crime in question, but may be considered as an extenuating circumstance in determining the appropriateness of the death penalty.
>
> The weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side of an imaginary scale, or the arbitrary assignments of weights to any of them. You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider. In weighing the various circumstances you determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances. To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without possibility of parole.

(CALJIC No. 8.88; 23 CT 6399-6400; 46 RT 6651-6652.)

Given the court's instructions, and the arguments of counsel, there was no reasonable likelihood that his jurors would have misunderstood the language of CALJIC No. 8.84.1, or that his jurors would have applied that instruction in an unconstitutional manner. (*People v. Mayfield* (1993) 5 Cal.4th 142, 184; *People v. Clair* (1992) 2 Cal.4th 629, 663.) Even assuming the trial court erred by not charging the jury with Simon's proposed instruction, he is unable to demonstrate prejudice; consequently, the error was necessarily harmless under any standard.

VII. BECAUSE THE PROSECUTION WAS ENTITLED TO RESPOND TO THE EVIDENCE IN MITIGATION, THE TRIAL COURT PROPERLY ALLOWED THE PROSECUTION TO READ THE KEISIA SIMON LETTER TO THE JURY IN REBUTTAL

Simon contends that during the penalty phase when the prosecutor read jurors the letter Simon had written from jail to his wife Keisia, he exceeded the permissible scope of his rebuttal, because it was not directly

relevant to any of the specific evidence in mitigation presented by the defense. In that regard, Simon maintains that since he "did not introduce any evidence relating to [his] character for non-violence, evidence purporting to show [his] character for violence constituted improper rebuttal." (AOB 184-187.) Simon asserts the letter's admission into evidence violated his rights to have reasonable limits placed on the admission of aggravating evidence, to due process and a fair trial, and to a reliable penalty determination. (AOB 187-189.) Notwithstanding his contentions to the contrary, Simon placed his general good character into issue during the penalty phase, and so the prosecution was entitled to introduce evidence that would give the jurors a more balanced view of the man whose life they were asked to spare.

As this Court has observed:

> When a defendant places his character at issue during the penalty phase, the prosecution is entitled to respond with character evidence of its own. The theory for permitting such rebuttal evidence and argument is not that it proves a statutory aggravating factor, but that it *undermines* defendant's claim that his *good* character weighs in favor of mercy. Once the defendant's general character [is] in issue, the prosecutor [is] entitled to rebut with evidence or argument suggesting a more balanced picture of his personality.

(*People v. Loker* (2008) 44 Cal.4th 691, 709 [citations and quotation marks omitted] (emphasis in original].)

Though it is not the case "that *any* evidence introduced by defendant of his 'good character' will open the door to *any and all* 'bad character' evidence the prosecution can dredge up" (*People v. Rodriguez* (1986) 42 Cal.3d 730, 792, fn. 24 [emphasis in original]), it is also true that "If the testimony is 'not limited to any singular incident, personality trait, or aspect of [the defendant's] background,' but 'paint[s] an overall picture of an honest, intelligent, well-behaved, and sociable person incompatible with a

violent or antisocial character,' rebuttal evidence of similarly broad scope is warranted." (*People v. Loker*, *supra*, 44 Cal.4th at p. 709.)

Simon asserts that "In the present case the mitigating evidence presented by the defense did not relate generally to [his] character." (AOB 184.) Simon distinguishes a long line of this Court's cases admitting character evidence in rebuttal by alleging that in the instant case "the defense did not offer evidence of good character and more specifically did not offer evidence of a non-violent character." (AOB 186-187.) Though none of Simon's witnesses testified that Simon had a character for non-violence in so many words, they variously testified that he was: a "very disciplined young person," and "quite a good kid" (43 RT 6085); someone who was taught the difference between right and wrong (43 RT 6159); a good role model (43 RT 6197); an even-tempered person who was patient and restrained with his children (44 RT 6227, 6230-6231); and an advisor who discouraged his family members from engaging in criminal behavior. (44 RT 6216.) Simon's witnesses surely painted "an overall picture of an honest, intelligent, well-behaved, and sociable person incompatible with a violent or antisocial character." (*People v. Loker*, *supra*, 44 Cal.4th at p. 709.) Accordingly, even though his witnesses never uttered the word "nonviolent," rebuttal evidence of a broad scope was certainly permissible given the tenor of their testimony regarding his character. (*Ibid.*)

In claiming that the prosecution's rebuttal evidence exceeded its permissible scope, Simon engages in a "hypertechnical parsing" of the testimony provided by his penalty phase witnesses. (*People v. Clair*, *supra*, 2 Cal.4th at p. 684 [testimony that defendant was "compassionate, warm and considerate of other people" was "good-character evidence by means of opinion" under any standard].) Simon's witnesses offered "substantial evidence and argument that he was a kind, loving, contributive member of his community, regarded with affection by neighbors and family." (*People*

v. Rodriguez, supra, 42 Cal.3d at p. 791.) In finding permissible a reference made during the prosecutor's closing argument to an incident where the defendant had reached for a shotgun when he was pulled over by police, this court held in *Rodriguez*, "Once appellant placed his general character in issue, the prosecutor was entitled to rebut with evidence or argument suggesting a more balanced picture of his personality." (*Ibid.*)

The testimony regarding Simon's religious convictions (45 RT 6488, 6493-6494) also opened the door to the kind of evidence which was reflected in the letter he wrote to Keisia. In *People v. Ramos* (1997) 15 Cal.4th 1133, a defense witness testified that during her visits with the defendant at San Quentin they "talked about church," "about the Lord," "about serving Him, seeking Him, His consolation for us. His strengthening for us." The witness accordingly testified that she perceived "a recommitment toward his religion." (*Id.* at p. 1172.) Finding that "This testimony tended to suggest not only devout faith but concern for others to embrace its spiritual benefits by turning away from past misdeeds involving force and violence," this Court found no error when the prosecutor cross-examined the witness regarding her knowledge of defendant's possession of hand-made knives while in prison. (*Id.* at p. 1173.) This Court held:

> In light of Ahumada's portrayal of defendant's religious recommitment, the prosecution could impeach her testimony with acts tending to contradict that impression. Evidence of weapons possession, particularly in a prison environment, would reasonably implicate a violent character whether defendant intended to use them offensively or defensively.

(*Ibid.*)

In any event, the introduction of the letter Simon wrote to Keisia was harmless. (*People v. Loker, supra*, 44 Cal.4th at p. 726.) Simon's defense was premised on the fact that the damage to his frontal lobe, as well as the emotional and physical abuse he suffered as a child, accounted for his

criminal behavior. (46 RT 6600-6601, 6609-6617.) Nothing in the letter undercut that defense. Instead, it was "consistent with the portrait of [Simon] as an abused, confused, emotionally disturbed youth." (*People v. Loker*, *supra*, 44 Cal.4th at p. 726.) The jury also had before it overwhelming evidence that Simon had robbed and murdered Mr. Anes; robbed, kidnapped, raped, and murdered Ms. Magpali; and murdered Mr. Sterling. Given the strength of the evidence, the nature of his penalty defense, and the other evidence of Simon's violent background, there is no reasonable possibility that the letter to Keisia Simon affected the verdict. (*Ibid.*)

VIII. THE TRIAL COURT DID NOT VIOLATE SIMON'S RIGHTS TO COUNSEL AND DUE PROCESS WHEN IT REFUSED TO ALLOW HIS ATTORNEY TO DISCUSS OTHER PROMINENT MURDER CASES IN THE PENALTY PHASE CLOSING ARGUMENT

Simon contends the trial court erred by "precluding him from referring to matters of common knowledge in order to illustrate the worst of the worst cases and give the jurors a point of reference in assessing the circumstances of the offense." (AOB 205.) Simon complains that defense counsel's penalty phase argument "comparing the facts of the case to other well-known murder cases was entirely proper," and that the trial court's ruling constituted an improper limitation on the scope of his lawyer's final summation. (AOB 190-192, 205-206.) Simon asserts the trial court thereby "skewed the weighing process in favor of the prosecution," because it "improperly deprived him of an appropriate means of rebutting the prosecution's argument that the facts of this case were so egregious as to make death the only just result." (AOB 192, 205.) Simon maintains that these errors were prejudicial, and they resulted in a denial of his constitutional rights to due process, a fair trial, the effective assistance of counsel, and a reliable penalty determination. (AOB 192, 206, citing U.S. Const., Amends., 5, 6, 8, 14; Cal. Const., article 1, section 15.) The record

reveals that the trial court placed no improper limits on defense counsel's final summation.

During his summation, defense counsel argued as follows:

> [The prosecutor] talked about that you're not making a comparison here, that you're not comparing Mr. Simon to other similar offenders, and I disagree with that. I disagree with that because what we are actually doing is we're comparing him to those offenders who are eligible for the death penalty, and we are asking ourselves is he so bad among that group that death is necessary? That is what we're doing here, and that is a valid thing for you to consider. What kind of case in your mind is sufficient for the death penalty? And it might be different for each one of you.
>
> But the only way you can know that is to think about what are those cases, and if we can't consider that, why would we ask you about those things in voir dire[?] Why would we ask you, can you sit on a case where there's multiple murders that have been proved? Would you automatically vote for the death penalty in a case where it's been proved that three people have been killed, two in special circumstances and one under a second degree murder theory? And all of you said, I could be fair. I wouldn't automatically vote for the death penalty under those circumstances.
>
> So, of course, we're talking about a comparison to other similar offenders. We're not comparing him to how I would live my life, how you would live your lives, how the court would live his life. He's obviously not a pillar of the community, and this is not the kind of assessment that you're here to make.
>
> So you do have to put him into that category of convicted offenders of special circumstances murder, and then evaluate whether he's the worst in that – or among the worst in that category.

(46 RT 6576-6577.)

Defense counsel next showed jurors a chart, and told them he wanted to "put into context what we're talking about with the death penalty and the types of offenders that it applies to." The chart consisted of a pyramid,

with the offense of manslaughter at its base. The next level was occupied by the offense of second degree murder. Above that rested the offense of first degree murder, with special circumstances murders at the pyramid's top. Simon's lawyer noted that the law pertaining to homicide had created "a structure to narrow down the people that are going to fit into this category of deserving the death penalty." (46 RT 6579-6582.) He then continued:

> That's where I get back to my point[:] you're doing a comparison, you're doing a comparison to those kind of persons who have committed special circumstances murder, and you're asking yourselves who are the worst among that group because those are the ones who deserves (sic) the death penalty.
>
> So be sure when you're considering this case that you're not evaluating Mr. Simon in comparison to some respectable member of our community, or to a minor offender, a petty thief, or even to more serious offenders, drug users, drug traffickers, bank robbers, that's not where we are at this point. We're not asking ourselves is Mr. Simon one of the worst thieves out there? We're asking ourselves, we're up in this upper category, is he among that select group that deserves the death penalty?
>
> And think about, I mean, you've all read cases, you're all familiar with the types of cases where you may have a feeling that the death penalty is warranted because those cases are usually in our media, the Timothy McVeighs[,] the Charles Mansons, those types of people. You're free to consider that. You're free to consider what types [of] offenders you've read about are deserving of the death penalty.

(46 RT 6582.)

At that point the prosecutor objected, and made a motion to "strike the comparison argument." (45 RT 6582.) The parties then held a discussion outside the presence of the jury. Defense counsel adverted to a case where the prosecutor argued, over objection, that the defendant was like Adolph Hitler and Charles Manson. Defense counsel noted the California Supreme

Court found it was "a valid argument because it helped the jurors put into context what kind of offenders deserve the death penalty."[26] (46 RT 6583.)

The prosecutor countered, "You know, I think it's one thing to equate somebody to being a monster like one of these people," but added that it was not the same thing as asking "the jurors to actually perform a comparison of other crimes and those defendants [to] this particular crime and this defendant." The prosecutor asserted that "is not the proper evaluation that takes place in the penalty phase." The prosecutor urged that the jury was to make "an individual determination" based upon Simon's background, his history, and his crime, and that he had to be judged based on his crimes and "not anybody else's." (46 RT 6584.)

To bolster his position, the prosecutor cited *People v. Jenkins* (2000) 22 Cal.4th 900, 1052, where this Court held that a jury's consideration of the circumstances of the crime under factor (a) "is an individualized function and not a comparative function." Defense counsel responded, "That's factor (a) only. So that's not the same thing." When the prosecutor replied that it was, the trial court interjected, "Frankly, I'm inclined to sustain the objection. The question is what do we do? Is there any curative act that's necessary at this point?" (46 RT 6585.)

The prosecutor asked the trial court to instruct the jurors that they were not to perform a comparison between the defendant and other murderers or cases of which they might be aware, and that they must "base their decision on his background, history, and record." After defense counsel protested, the trial court ruled, "I'm going to sustain the objection. I am not inclined to give any kind of curative instruction. I think the instructions themselves are specific enough[.]" (46 RT 6586-6587.)

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[26] As Simon notes (AOB 193, fn. 35), defense counsel was apparently referring to *People v. Milwee* (1998) 18 Cal.4th 96.

Defense counsel then continued his argument to the jury:

> The point I'm trying to make is that we have a category of offenders up here in the top of this pyramid, and the law reserves the death penalty for those that are the worst among that group, and I've invited your attention to some cases where those offenders are probably deserving of that penalty. It doesn't mean that their case is exactly the same as Mr. Simon's. It's just merely to help guide you in understanding the kind of people we're talking about in this category. So to that extent you are making a comparative analysis.

(46 RT 6587-6588.)

At that point the prosecutor objected on grounds that defense counsel was making an "improper argument." The trial court sustained the objection and said, "I think comparative analysis is improper, I agree." (46 RT 6588.)

Simon contends that in his case "the trial court issued an outright ban regarding any discussion of other cases and prevented counsel from making the central point that there were murder cases involving more shocking, heinous, cruel or callous facts." (AOB 202.) Simon cites *People v. Benavides* (2005) 35 Cal.4th 69, 110, for the proposition that he should have been allowed to give the jury "a point of reference with which they were familiar in assessing whether or not [he] was one of the 'worst of the worst.' " (AOB 204-205.) Simon concludes that "[t]he trial court not only prevented defense counsel from comparing the facts of the case to the facts of other well known cases, but also prevented the jurors from evaluating the gravity of the offense in light of other cases." (AOB 205.)

The trial court's ruling did not have the effect alleged by Simon, and in fact his attorney was permitted to make the arguments he contends he was precluded from making in his appeal. (*People v. Farley* (2009) 46 Cal.4th 1053, 1129-1131.) Though the trial court commented that defense counsel's argument was "improper," when it sustained the prosecutor's

final objection, it permitted defense counsel to make the following remarks: "So you do have to put him into that category of convicted offenders of special circumstances murder, and then evaluate whether he's the worst in that – or among the worst in that category." (46 RT 6577.) Defense counsel was also permitted to argue that, "We're asking ourselves, we're up in this upper category, is he among that select group that deserves the death penalty?" (46 RT 6582.) After noting that they are the types of cases that are "usually in our media," defense counsel mentioned those cases involving Timothy McVeigh and Charles Manson, and added, "You're free to consider that. You're free to consider what types [of] offenders you've read about are deserving of the death penalty." (46 RT 6582.) Though it did sustain the prosecutor's objection, the trial court never struck those remarks, and never admonished Simon's jurors to disregard them.

Simon's contentions to the contrary notwithstanding, his attorney was allowed to make the argument that "there were other murderers worse than he." (*People v. Benavides*, *supra*, 35 Cal.4th 110.) Simon concedes, as he must, that he was not allowed to compare the penalties imposed on other murderers, but he nevertheless contends there is precedent in this Court's opinions that would allow him to discuss the facts of those cases. (AOB 191, 200-201.) He points to the following language from *People v. Marshall* (1996) 13 Cal.4th 799:

> We cannot say the trial court exceeded its discretion in implicitly determining that specific and detailed comparison of the facts of this case with those of other Stanislaus County capital trials would not have assisted the jury. Meaningful comparisons of this kind cannot be made solely on the basis of the circumstances of the crime, without consideration of the other aggravating and mitigating factors. Yet the trial court could properly conclude that to allow counsel to argue all such factors would consume too much time and draw the jury's focus away from the instant case. In any event, counsel was granted the latitude to argue, as he sought, that this case lacked the

> cruelty and callousness found in other murder cases. There was no abuse of discretion.

(*Id.* at p. 855.)

This language does not support Simon's contention. The *Marshall* Court unequivocally held that the defendant's attorney was not permitted to make a "specific and detailed comparison of the facts" of his case with those of other capital murder cases. (*Ibid.*) Assuming for purposes of argument that this Court's jurisprudence allows for any factual comparison at all, it extends no further than what is necessary to make the general contention that a particular defendant's case "lack[s] the cruelty and callousness found in other murder cases" (*Ibid.*), or that a particular defendant is not the "worst of the worst" (*People v. Benavides*, *supra*, 35 Cal.4th at p. 110.) Other cases are in accord. (See, e.g., *People v. Roybal* (1998) 19 Cal.4th 481, 528-529; *People v. Hughes* (2002) 27 Cal.4th 287, 398-400; *People v. Sanders* (1995) 11 Cal.4th 475, 554-555 [no abuse of discretion where defense counsel not permitted to make references to the Charles Manson case].) Here, Simon had the opportunity to make his central point: "that there have been murder cases involving more shocking, heinous, cruel or callous facts than those present [in his case]." (*People v. Marshall*, *supra*, 13 Cal.4th at p. 854.)

Simon seeks to distinguish his claim from those similar claims that were rejected in the cases cited above by maintaining that "here counsel was not seeking to discuss sentences imposed in other cases in order to argue for a particular result in this case, but instead was seeking only to refer to other cases in order to give the jurors a frame of reference in evaluating the primary factor in aggravation relied upon by the prosecution – the gravity of the circumstances of the offenses." (AOB 199-200.) As previously discussed, Simon's attorney was allowed to do just that. He alluded to those cases involving Manson and McVeigh, he observed that

jurors were familiar with the facts of those cases as the result of intensive media coverage, he invited those jurors to reach the conclusion that the murders his client committed were not as atrocious, and he urged them to find based on the facts of Simon's case that he was not among the worst of the worst whose crimes merit imposition of the death penalty. Simon is therefore unable to establish that the trial court abused its discretion, or that he was deprived of his constitutional right to counsel under the Sixth Amendment.

IX. CALIFORNIA'S DEATH PENALTY STATUTE DOES NOT VIOLATE FEDERAL CONSTITUTIONAL STANDARDS

Simon raises a plethora of constitutional challenges under the Sixth, Eighth and Fourteenth Amendments to California's death penalty statute and to the instructions given in the penalty phase of his trial. (AOB 207-243.) He recognizes all have been rejected by this Court, but raises them to preserve his right to later state and federal review. (AOB 207.)

A. Section 190.2 Is Not Impermissibly Broad

Simon argues that "California's death penalty statute does not meaningfully narrow the pool of murderers eligible for the death penalty" in violation of the Eighth and Fourteenth Amendments to the United States Constitution. He contends the reach of section 190.2 has been extended so far that it now encompasses nearly every first-degree murder, and that the statute "now comes close to achieving its goal of making every murderer eligible for death." (AOB 209-210.) These claims have been rejected in numerous decisions, and Simon gives this Court no reason to reconsider them. (See, e.g., *People v. Snow* (2003) 30 Cal.4th 43, 125; *People v. Robinson, supra*, 37 Cal.4th at p. 655; *People v. Kelly, supra*, 42 Cal.4th at p. 800; *People v. Zamudio, supra*, 43 Cal.4th at p. 373; *People v. Prieto* (2003) 30 Cal.4th 226, 276.)

B. Section 190.3, Subdivision (a) Does Not Allow The Arbitrary And Capricious Imposition Of The Death Penalty

Simon maintains that section 190.3, subdivision (a) has been applied in a "wanton and freakish manner" because almost any circumstance of every murder can be characterized as "aggravating" within the meaning of the statute, and contradictory circumstances may be argued in support of the death penalty in distinct capital cases. (AOB 211-213.) This claim has also been frequently rejected within this Court's jurisprudence. (See, e.g., *Russell*, *supra*, 117 Cal.Rptr.3d at p. 655; *People v. Zamudio*, *supra*, 43 Cal.4th at p. 373; *People v. Bramit*, *supra*, 46 Cal.4th at p. 1248; *People v. Carrington*, *supra*, 47 Cal.4th at p. 200.) Simon gives this Court no reason to revisit its previous holdings.

C. California's Death Penalty Statute Contains Adequate Procedural Safeguards, And Does Not Result In Arbitrary Or Capricious Sentencing

Simon makes a number of other standard challenges to the death penalty statute (AOB 214-236), all of which have been rebuffed by this Court's opinions.

1. The United States Constitution Does Not Require The Jury To Find The Existence Of An Aggravating Factor Beyond A Reasonable Doubt, To Agree Unanimously As To Aggravating Factors, Or To Find That The Aggravating Factors Outweigh The Mitigating Factors Beyond A Reasonable Doubt

Simon contends that his constitutional rights under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution were violated because his jurors were not instructed in the penalty phase that they had to find the existence of any aggravating factor beyond a reasonable doubt, that they needed to agree on the presence of any

particular aggravating factor, and that they must find the aggravating factors outweighed the mitigating factors beyond a reasonable doubt. Simon contends the failure to assign a burden of proof in California's death penalty scheme should be revisited in light of the United States Supreme Court's decisions 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]; and *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856, 166 L.Ed.2d 856]. (AOB 215-225.)

This Court has determined on many occasions that section 190.3 and the pattern instructions are not constitutionally defective because they fail to require the state to prove beyond a reasonable doubt that an aggravating factor exists, and that aggravating factors outweigh mitigating factors. This Court has also consistently rejected the claim that the pattern instructions are defective because they fail to mandate juror unanimity concerning aggravating factors. (See, e.g., *Russell, supra*, 117 Cal.Rptr.3d at p. 654; *People v. Bramit, supra*, 46 Cal.4th at pp. 1249-1250; *People v. Burney* (2009) 47 Cal.4th 203, 267-268.)

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

(*People v. Ward* (2005) 36 Cal.4th 186, 221-222 [quoting *People v. Prieto, supra*, 30 Cal.4th at p. 263].) As this Court explained in *Prieto*, "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.' " (*People v. Prieto, supra*, 30 Cal.4th

at p. 263 [quoting *Tuilaepa v. California* (1994) 512 U.S. 967, 972 (114 S.Ct. 2630, 129 L.Ed.2d 750].) Simon gives this Court no reason to reconsider its previous holdings.

2. The Trial Court Was Not Required to Instruct The Jury That It May Impose A Sentence Of Death Only If It Was Persuaded Beyond a Reasonable Doubt That Death Was The Appropriate Penalty

Simon contends his rights under the Eighth and Fourteenth Amendments to the United States Constitution were violated because the jury was not instructed in the penalty phase that a sentence of death could be imposed only if it was persuaded beyond a reasonable doubt that the aggravating factors outweighed the mitigating factors and that death was the appropriate penalty. (AOB 225-228.) This Court has repeatedly reaffirmed its rulings that instructions on burden of proof or persuasion are not required, and should not be given. (See, e.g., *People v. Carrington*, *supra*, 47 Cal.4th at p. 200; *People v. Hoyos* (2007) 41 Cal.4th 872, 926; *People v. Blair* (2005) 36 Cal.4th 686, 753.) There is no reason to reexamine this Court's decisions.

3. The United States Constitution Does Not Require Jurors To Return Written Findings Regarding Aggravating Factors

Simon alleges that "The failure to require written or other specific findings by the jury regarding aggravating factors deprived [him] of his federal due process and Eighth Amendment rights to meaningful appellate review." (AOB 228-230.) This contention has also been repeatedly rejected by this Court, and Simon offers no persuasive reasons to revisit this issue. (See, e.g., *People v. Robinson*, *supra*, 37 Cal.4th at p. 655; *People v. Zamudio*, *supra*, 43 Cal.4th at p. 373; *People v. Snow*, *supra*, 30 Cal.4th at p. 126; *People v. Burney*, *supra*, 47 Cal.4th at pp. 267-268.)

4. The United States Constitution Does Not Require Comparative Intercase Proportionality Review

Simon asserts that this Court's refusal to engage in comparative intercase proportionality review violates his rights under the Eighth Amendment. (AOB 231-232.) This Court should decline to entertain this claim, as it has done on many previous occasions. (See, e.g., *People v. Zamudio*, *supra*, 43 Cal.4th at p. 373; *People v. Prieto*, *supra*, 30 Cal.4th at p. 276; *People v. Snow*, *supra*, 30 Cal.4th at pp. 126-127; *People v. Bramit*, *supra*, 46 Cal.4th at p. 1250.)

5. The Instruction To The Jury Regarding Unadjudicated Prior Criminal Activity As An Aggravating Circumstance Under Section 190.3, Factor (b) Did Not Render Simon's Death Sentence Unreliable

Simon contends his due process rights and his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments were violated when the prosecutor introduced evidence that shanks were found in his cell and made references to these incidents during his closing argument. Simon makes the further contention that "even if it were constitutionally permissible to rely upon alleged unadjudicated criminal activity as a factor in aggravation, such alleged criminal activity would have to have been found beyond a reasonable doubt by a unanimous jury." Simon complains specifically that his jury was not instructed "on the need for such a unanimous finding," and generally that California's capital sentencing scheme does not provide for such an instruction. (AOB 232-233.)

In relevant part, Simon's jurors were instructed as follows:

> Evidence has been introduced for the purpose of showing that the defendant, Richard Nathan Simon, has committed the following criminal acts or activity: (1) Possession or manufacture of sharpened instruments or weapons by a person in

> custody, in violation of Penal Code section 4502 which involved the express or implied use of force or violence. Before a juror may consider any criminal acts or activity as an aggravating circumstance in this case, a juror must first be satisfied beyond a reasonable doubt that the defendant, Richard Nathan Simon, did in fact commit the criminal acts or activity. A juror may not consider any evidence of any other criminal acts or activity as an aggravating circumstance.
>
> It is not necessary for all jurors to agree. If any juror is convinced beyond a reasonable doubt that the criminal activity occurred, that juror may consider that activity as a fact in aggravation. If a juror is not so convinced, that juror must not consider that evidence for any purpose.

(CALJIC No. 8.87; 23 CT 6388; 46 RT 6645.)

Since Simon failed to request a clarifying instruction below, his claim that the jury should have been required to reach a unanimous finding as to his unadjudicated criminal activity is forfeited for purposes of appeal. (*People v. Arias*, *supra*, 13 Cal.4th at p. 171.) Even if Simon's claims are preserved, they lack merit. "The 'jury need not unanimously agree on the truth of aggravating factors.' " (*People v. Dykes* (2009) 46 Cal.4th 731, 799 [quoting *People v. Hines* (1997) 15 Cal.4th 997, 1066].) What is more, " '[j]ury unanimity is not required with respect to unadjudicated criminal conduct.' " (*Ibid.*, quoting *People v. Harris* (2008) 43 Cal.4th 1269, 1316.) In *Dykes*, this Court further held that "Juries are not required to agree unanimously on 'foundational' matters such as that a crime involving violence has been committed." (*Ibid.* [citing *People v. Hines*, *supra*, 15 Cal.4th at pp. 1066-1067; *People v. Brown* (2004) 33 Cal.4th 382, 402].) This Court also noted it had previously rejected claims that *Apprendi*, *Ring*, and *Cunningham* "require juries to enter unanimous findings concerning aggravating factors." (*People v. Dykes*, *supra*, 46 Cal.4th at pp. 799-800 [citing *People v. Salcido* (2008) 44 Cal.4th 93,167; *People v. Williams* (2008) 43 Cal.4th 584, 649.)

6. The Use Of The Adjectives "Extreme" And "Substantial" In Section 190.3, Factors (d) And (g) Was Not Unconstitutional

Simon makes the perfunctory claim that the use of the adjectives "extreme" and "substantial" in section 190.3, factors (d) and (g) "acted as barriers to the consideration of mitigation in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments." (AOB 233.) Simon's failure to request a clarifying instruction in that regard below has forfeited his claim on appeal. (*Russell*, *supra*, 117 Cal.Rptr.3d at p. 655.) Even if his claim is preserved, it must be rejected. This Court has consistently held that the "so substantial" language of CALJIC No. 8.88, with which the jury in the instant case was instructed (23 CT 6399-6400; 46 RT 6651-6652), is neither vague, nor inadequate, nor misleading. (*Ibid*; see also *People v. Kelly*, *supra*, 42 Cal.4th at p. 801; *People v. Zamudio*, *supra*, 43 Cal.4th at p. 373.)

7. The Trial Court Was Not Required To Instruct The Jury That Statutory Mitigating Factors Are Relevant Solely As Potential Mitigators

Simon contends that the jurors' instructions encouraged them to convert the absence of a mitigating factor into an aggravating factor, and to view potentially mitigating evidence as aggravating evidence supporting imposition of the death penalty. (AOB 234.) From there, Simon concludes "It is thus likely that [his] jury aggravated his sentence upon the basis of what were, as a matter of state law, non-existent factors and did so believing that the State – as represented by the trial court – had identified them as potential aggravating factors supporting a sentence of death" in violation of state law and the Eighth Amendment to the United States Constitution. (AOB 236.)

This claim has also been repeatedly rejected by this Court. A trial court is not required to delineate which factors are aggravating or

mitigating, or to instruct the jury that statutory mitigating factors are relevant solely as potential mitigators. (*People v. Zamudio*, *supra*, 43 Cal.4th at p. 373; *People v. Wilson* (2008) 43 Cal.4th 1, 32; *People v. Kelly*, *supra*, 42 Cal.4th at p. 801.) Further, "The use of the phrase 'whether or not' to preface certain factors does not improperly prompt the jury to consider the absence of such factors as aggravating circumstances." (*People v. Bramit*, *supra*, 46 Cal.4th at p. 1249.)

D. California's Capital Sentencing Scheme Does Not Violate The Equal Protection Clause Of the Federal Constitution

Simon argues that California's capital sentencing scheme "provides significantly fewer procedural protections for persons facing a death sentence than are afforded persons charged with non-capital crimes." Simon also contends this disparate treatment violates due process and equal protection principles, as well as the "cruel and unusual punishment clauses of the Eighth and Fourteenth Amendments." (AOB 237-239.)

Like Simon's other sentencing claims, this one, too, has been soundly rejected by this Court. (*People v. Barnwell* (2007) 41 Cal.4th 1038, 1059 ["The death penalty law does not deny capital defendants equal protection because it provides a different method of determining the sentence than is used in noncapital cases"]; see also, *People v. Smith* (2005) 35 Cal.4th 334, 374; *People v. Kelly*, *supra*, 42 Cal.4th at p. 801; *People v. Zamudio*, *supra*, 43 Cal.4th at p. 373.) Accordingly, this Court should decline to reconsider the argument.

E. Simon's Death Sentences Do Not Violate International Law, the Eighth Amendment, Or The Fourteenth Amendment

Lastly, Simon claims the use of the death penalty violates international law, and as a regular form of punishment violates the prohibition against cruel and unusual punishment under the Eighth and

Fourteenth Amendments. (AOB 240-243.) Because this Court has consistently rejected such challenges, it should reject Simon's as well. This Court has repeatedly held the use of the death penalty in California does not violate international law. (*People v. Hoyos*, *supra*, 41 Cal.4th at p. 927 [and cases cited therein]; see also, *People v. Kelly*, *supra*, 42 Cal.4th at p. 801; *People v. Zamudio*, *supra*, 43 Cal.4th at p. 373; *People v. Bramit*, *supra*, 46 Cal.4th at p. 1250; *People v. Burney*, *supra*, 47 Cal.4th at p. 270.) The same authorities hold that use of the death penalty as a "regular" form of punishment does not constitute cruel and unusual punishment. There is no need for this Court to reconsider these holdings.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests the judgment be affirmed in its entirety.

Dated: February 11, 2011

Respectfully submitted,

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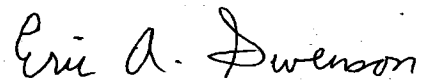

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CERTIFICATE OF COMPLIANCE

I certify that the attached Respondent's Brief uses a 13 point Times New Roman font and contains 41,220 words.

Dated: February 11, 2011

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DECLARATION OF SERVICE

Case Name: **People v. Richard N. Simon** Case No.: **S102166**

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; my business address is 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On February 14, 2011, I served the attached **[Respondent's Brief]** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail system of the Office of the Attorney General, 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 February 14, 2011, at San Diego, California.

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Declarant

Signature

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