IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, **v.** **JAMES ROBINSON, JR.,** Defendant and Appellant.	**DEATH PENALTY CASE** S040703

Los Angeles County Superior Court No. PA007095
The Honorable Ronald S. Coen, Judge

RESPONDENT'S BRIEF

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[Table of contents and authorities are at end of document.]

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STATEMENT OF THE CASE

In an information filed by the Los Angeles County District Attorney, appellant was charged in counts I and II, respectively, with the June 30, 1991, murders of James White and Brian Berry (Pen. Code, § 187, subd. (a)). It was further alleged as a special circumstance that appellant committed the murders while committing a robbery (Pen. Code, § 190.2, subd. (a)(17)). Count III charged appellant with second degree robbery (Pen. Code, § 211). The information further alleged that appellant personally used a firearm in the commission of all the offenses (Pen. Code, §§ 1203.06, subd. (a)(1); 12022.5). (CT 148-151.) Appellant was arraigned, pleaded not guilty, and denied the special circumstance allegations. (CT 185-187.)

Trial was by jury. (CT 257, 279.) The jury found appellant guilty of all three counts and found the special circumstance allegations of robbery to be true. The jury further found that appellant had personally used a firearm in the commission of the crimes. (CT 310-311, 388-391.)

Appellant's first penalty phase trial ended in a mistrial with after the jury deadlocked seven to five in favor of a sentence of death. (CT 518.) At the conclusion of the second penalty phase, the jury fixed the penalty at death. (CT

676-681.)

The trial court denied appellant's automatic motion for reduction of sentence, pursuant to section 190.4, subdivision (e). (CT 682.) In accordance with the jury verdict, the court sentenced appellant to death as to counts I and II. As to count III, the court imposed the middle term of three years, plus an additional four years for the firearm use enhancement. (CT 682, 685-686.)

This appeal is automatic following a judgment of death (Pen. Code, § 1239). (CT 688-693.)

STATEMENT OF FACTS

A. Introduction

In June 1991, 22-year-old appellant James Robinson, Jr., needed money. He had been expelled from college for failing to pay for student housing. His checking account had been closed because he had written too many bad checks. Some of his bad debts had been turned over to collection agencies. He had a job in a grocery store meat department, but did not pay the union dues required to keep his job. He could not afford to rent an apartment, so he moved in with his friend Tai Williams.

While living with Williams, appellant talked about robbing the Subway Sandwich store where he had worked for a few months. He had been fired from the store. Appellant planned to rob the store because he was familiar with the store layout, employees, safe, and lack of a security system. Appellant said he would pretend to be a customer. He would kill any people in the store, "execution style," to avoid being identified. Appellant bought a gun and practiced firing it at a shooting range.

On June 29, 1991, Tai Williams told appellant he had to move out of the apartment. Appellant was upset, and left the apartment with his gun. At approximately 1:30 a.m., appellant went to the Subway store he had talked

about robbing. James White was working behind the counter, and his friend Brian Berry was visiting. Appellant ordered sandwiches and salads. A woman walking by the store saw appellant inside, talking to the Subway employee.

Appellant shot Brian Berry once in the face, and again in the side of his head. Appellant forced James White to open the store's safe, then shot him once in the head. Appellant left the store with approximately $580 from the safe and cash register. Both White and Berry died of their wounds. The police found a Subway sandwich in a plastic bag in the alley behind the store. Appellant's fingerprints were on the plastic bag.

The next day, appellant rented an apartment using $425 in cash and money orders. A few days after the robbery and murders, appellant told a friend he had committed the crimes. On the same day, appellant showed a coworker his gun and said he had robbed the Subway and killed the two people in the store by shooting them in the head. Appellant's friends turned him in to the police.

Appellant was arrested and his gun seized. The bullets removed from the victims's heads and the bullet casings found at the scene were fired from appellant's gun.

B. Guilt Phase

1. Prosecution Evidence

a. Appellant Works At The Subway Sandwich Store, And Is Fired

In August 1990, appellant James Robinson, Jr., was hired to work at the Subway Sandwich store located at Zelzah and Devonshire streets in Northridge. (RT 390, 404-406.) Store owner Stuart Schlosser hired appellant as counter help, and trained him to prepare food, serve customers, and operate the cash register. (RT 429.) Throughout the business day, money was

transferred between the cash register and two safes in the back of the store. (RT 392.) Schlosser and the store manager had the combination to the floor safe. Only Schlosser had the combination to his personal wall safe. (RT 392-393.)

One day approximately a week after appellant started working at the store, Schlosser was ill, but came in to help appellant open the store. Schlosser opened the floor safe, which contained envelopes of money he had counted. When Schlosser left the back room to help appellant serve customers, he forgot to close the safe. While Schlosser was ringing up customers, another employee came in and went through the back room to change into his work clothes. Appellant also went into the back room. When Schlosser returned to the back room, two envelopes of money were missing from the safe. (RT 410-411.)

Schlosser talked to appellant and the other employee about the missing money. Schlosser also reported the theft to the police. The money was not recovered. (RT 411.)

Several months later in December 1990 or January 1991, Schlosser discovered that money was missing from the store during a shift worked by appellant and another employee. Schlosser told appellant and the other employee that if the money was not returned, both employees would be fired. (RT 409-410.) The money was not returned. Schlosser fired appellant and the other employee. (RT 409-410.) After appellant was fired, he continued to frequent the Subway store as a customer. (RT 410.)

b. Appellant's Financial Problems Mount, And He Plans To Rob The Subway Store

In the spring of 1991, defendant had financial problems. In April 1991, Matador Federal Credit Union closed appellant's checking account because he had written too many bad checks. (RT 684, 685-686.) However, appellant continued to write checks for which there were insufficient funds.

Appellant owed money to a record store and a shoe store. His newspaper subscription was cancelled for lack of payment. A collection agency pursued his debt. (RT 746-751.)

At the end of May 1991, appellant needed a place to live. (RT 493-494.) Appellant temporarily moved in with his longtime friend Tai Williams and Williams' girlfriend, Donna Morgan, and their toddler. (RT 458-459.) Appellant gave Williams $100 for rent. (RT 461.) At the time, appellant worked in the meat department of a Lucky supermarket. Dennis Ostrander also worked in the meat department, and occasionally loaned appellant money and shared his lunch with him. (RT 783-787.) Ostrander loaned appellant money, for lunch or bus fare, three or four times in June 1991. Appellant always repaid Ostrander. (RT 783-786, 827.) Appellant complained that Lucky was not paying him the correct amount. (RT 786-787.)

On June 3, 1991, appellant bought a .380 semiautomatic handgun. (RT 465, 704-706.) Williams and several of appellant's other friends owned guns, and planned to shoot at a firing range as a hobby. (RT 506.) After the required waiting period passed and appellant got his gun, Williams believed appellant's behavior changed. Appellant was "obsessed" with his gun. Appellant liked to handle and "play with" the gun. He acted like "a bigger man" who could "walk and talk big." (RT 507.) According to Williams, "wherever [appellant] went[,] the gun went." (RT 507-508.)

While appellant lived with Williams and Morgan in June 1991, he talked about robbing the Subway store where he had worked. The conversations usually took place at Williams's apartment, and included a third friend, Tommy Aldridge. Appellant, Williams, and Aldridge had been friends since the seventh grade. (RT 458, 466, 485, 547-548.)

According to Williams, appellant first mentioned robbing the Subway store while he still worked there. Appellant told Williams he needed money. (RT 486-490.) He said the Subway was an easy target because he was familiar

with the store. He volunteered details about the location of the store's safe, and the lack of security cameras. (RT 490.) Williams did not take appellant seriously. (RT 490.)

Appellant continued to talk about robbing the Subway after he moved in with Williams. Appellant told Williams "how he was going to do it, and what for." (RT 459.) Appellant "just needed to get his hands on some money." (RT 460, 486.) Appellant said he knew the layout of the store, and that there were no security cameras. (RT 468.) He thought it would be easy to get out of the store through the exit in the back. (RT 468.) He talked about using pliers to get money out of the store's safe. (RT 531.) Appellant said he would go into the store and order food, and then hold up the employees. (RT 460.) If the employees were people he knew, appellant "would have to kill them, shoot them execution style." (RT 460.)

Williams went with appellant to the Subway store once, after appellant no longer worked there. Appellant talked and joked with the employees. As they left the store, appellant told Williams, "Well, too bad if they are in there. Too bad. I'll have to kill them if they are in there." (RT 469.)

Appellant's longtime friend Tommy Aldridge was present at Williams's apartment when appellant talked about robbing the Subway store. (RT 549.) On June 24, 1991, a Monday, appellant knew he would soon have to leave Williams's apartment, and he needed money. (RT 550, 580.) According to Aldridge, appellant "had bills to pay," including money owed to Williams for telephone calls. Appellant "discussed all the money that he needed and how to go about getting it." (RT 581.) Appellant said he was going to rob someone, or possibly hold up a gas station. (RT 467-468, 550-551, 581, 585.)

Two days later, on Wednesday, appellant told Aldridge and Williams he wanted to rob the Subway store where he had worked. (RT 552, 583-585.)

According to Aldridge, appellant chose the Subway because,

> "he knew the hours. He knew the people who worked there. He knew . . . where the safe was and what he decided to do was pick this individual Subway because it was the easiest target for him to rob."

(RT 552, 584.) Appellant said he would use a screwdriver or wrench to extract money from a safe. (RT 500, 553.) Aldridge and Williams tried to discourage appellant by suggesting ways his plan would fail. They told appellant the safe would be locked, and asked how he would commit the robbery without a car. They told him he would be caught. (RT 500, 585-586.) Appellant was not dissuaded. (RT 586.) According to Aldridge, appellant "always found a reason, you know, some way he'd get out of it." (RT 586.) Appellant said he would kill any witnesses. (RT 586.) He wanted someone to drive him to the Subway. Aldridge refused. (RT 587-588.)

By Thursday, June 27, 1991, appellant said he had decided to rob the Subway store that weekend, and was looking for someone to drive him there. (RT 555, 5901-592.) Aldridge refused to drive appellant to the store. (RT 588.) Appellant again said he would rob the Subway because he was familiar with the employees, the safe, and the lack of security cameras. (RT 590.)

During the last two conversations, appellant said he would kill the people in the store to avoid being identified. (RT 555.) Appellant planned to make the people lie down, and then "blow them away" by shooting them in the back of their heads. (RT 527, 555.) Appellant told Aldridge he had "cased the place out," and "felt bad" because he would have to kill people he knew. (RT 604-605.) However, appellant repeatedly said he needed to get money and "didn't give a damn how he had to do it." (RT 607.) Appellant said, "I don't give a damn. They are going to have to die because I need the money." (RT 605-607.) Aldridge did not take appellant seriously, because appellant "was one for talking and not doing things." (RT 555, 584-585, 591-592.)

Appellant also told Williams that one night he cased the Subway with

the intent to rob it, but changed his mind when a security guard went into the store to buy food. (RT 527.)

c. On Saturday, June 29, 2002, Appellant Is Evicted, And Leave Tai William's Apartment With His Gun

By the end of June 1991, Tai Williams and Donna Morgan had decided to evict appellant. Appellant had told Morgan that Williams was unfaithful to her. Additionally, appellant was not paying his share of the bills and rent. (RT 470-472, 512-513.) Williams's telephone service had been disconnected because he refused to pay for appellant's long distance calls. (RT 527.)

At approximately 8:00 p.m. on Saturday, June 29, 1991, Williams and Morgan told appellant he had to move out of the apartment. (RT 470.) Appellant was quiet, hung his head, and looked depressed. (RT 514.)

Appellant left the apartment but returned a short time later. He was crying and appeared depressed to Williams. (RT 471, 515.) Appellant asked Williams to talk to him outside the apartment. (RT 515.) Appellant told Williams he did not want Williams to "be like him." He wanted Williams to "be better than him." (RT 471.) Appellant gave Williams a note that ended with the words, "Pray for me." (RT 516.) Because appellant "had no place to go," Williams told appellant he could stay there that night and move out in the morning. (RT 517.)

Williams returned to his bedroom. He and Morgan soon heard appellant in the living room, loading his gun. (RT 473, 518-519.) Williams heard appellant put the clip into his gun, and cock it so that a round was chambered. (RT 473.) Williams and Morgan had a rule that guns in the apartment could not be loaded. (RT 474.) Morgan said to Williams, "He is in

there loading his gun." (RT 518.) Williams replied, "Don't worry, he's not a fool." (RT 518.)

Appellant left the apartment again at approximately 11:30 p.m. (RT 473.) He took his gun with him. (RT 517.) Williams checked appellant's gun box and it was empty. (RT 474-475, 519.)

d. Appellant Robs The Subway Store And Kills Brian Berry And James White

Rebecca James lived in the apartment building next to the Subway store, which was approximately five blocks from Williams's apartment. (RT 263-264, 464.) At approximately 1:30 a.m. on June 30, 1991, James walked past the front of the Subway store on her way to her apartment. She noticed the store was open, and thought that was unusual because it was late at night. (RT 266, 274.)

The store was well-lighted. (RT 283.) James saw three people inside. One person, a White man who appeared to be an employee, was behind the counter. (RT 266-267.) He was holding what James thought was a metal bread pan. A Black man, whom James later identified as appellant, stood in front of the counter and appeared to be a customer. (RT 266-268, 269.) He wore a white t-shirt. (RT 282.) A third person was standing against a wall, to the right of the others. (RT 281.) James thought the people were friends. She did not detect any animosity. (RT 268.) As James continued walking, she heard a loud noise, which she believed was the metal pan hitting the floor. (RT 268, 288-289.) James stopped and looked through the store's front windows. (RT 287.) Appellant quickly moved to the other side of the counter, chasing the employee. (RT 268, 284-285.) James thought the men were "roughhousing." (RT 268.) She continued walking to her apartment. (RT 269.)

At approximately 1:45 a.m. that morning, James Kallman went to the Subway store because it appeared to be open. (RT 314.) When Kallman saw

"a body with blood around it" on the store floor, he telephoned the police. (RT 315-317.)

e. Evidence At The Crime Scene

When the first police officer arrived at the Subway store at approximately 2:00 a.m. on June 30, Brian Berry was lying dead in a pool of blood on the floor near the counter. (RT 325-326, 329-330, 374.) James White was lying face down in a pool of blood on the floor behind the cash register, alive but mortally wounded. (RT 325-326.)

The cash register was empty except for some rolled coins and loose change. (RT 332-333, 344, 375, 392.) The floor safe, which could be opened by certain Subway employees, was open. (RT 346, 392.) Approximately $200 in bills and rolled coins was missing from the top portion of the safe. (RT 394-395.) Altogether, approximately $580 had been stolen from the cash register and safe. The bills stolen included 60 to 75 one dollar bills. (RT 395.)

The cash register's journal tape showed the last sale at 1:32 a.m. for a turkey and bacon sandwich, a seafood sandwich, and two tuna salads. (RT 395.) The order was sub-totaled, but not completed. The items had not been paid for. (RT 399.) A turkey and bacon sandwich matching the sandwich listed on the register tape was found in an alley outside the back door, still wrapped in a plastic Subway bag. (RT 379, 381.) Appellant's fingerprint and thumbprint were on the plastic bag. (RT 768-769.)

The police found three expended bullet casings on the store's floor, and one bullet lodged in the ceiling. (RT 354-359, 362-363, 609-610, 1983-1988, 1991.) The bullet casings, the bullet removed from the store's ceiling, and the bullets removed from the bodies of Brian Berry and James White were each fired from appellant's gun. (RT 847-863.)

The store's silent security alarm had been activated at 1:40 a.m., but

due to a dispute between the Subway store and the alarm company, the alert was not forwarded to law enforcement. (RT 436-438, 449.)

James White and Brian Berry died of bullet wounds to their heads. (RT 628.) Brian Berry suffered two gunshot wounds to his head. One bullet, fired from a distance of 12 to 18 inches, entered Berry's left cheek and lodged in the bone behind his nose. (RT 629-635.) The wound was fatal, but would not cause instantaneous death. (RT 630.) Another bullet entered the right side of Berry's head, above his ear, and traveled through his brain before lodging in a bone behind his left ear. (RT 631.) The gun was in contact with Berry's head when fired. (RT 632.) Both bullets were recovered. (RT 631-632.)

James White died from a single bullet fired into the top of his head. (RT 641.) The gun was in contact with White's head when fired. (RT 642.) The bullet was recovered. (RT 642.) The angle of the bullet's trajectory was consistent with White having been shot while kneeling. (RT 649-652.)

f. Appellant Returns To Tai William's Apartment Early That Morning, Calls In Sick To Work, Rents An Apartment With Cash, And Soon Begins Bragging About Committing The Subway Robbery And Murders

At approximately 3:30 a.m. on Sunday, June 30, 1991, Williams heard appellant return to the apartment. (RT 476.) Williams went back to sleep, and when he awakened later that morning, appellant was gone. (RT 476.) When appellant came back to the apartment later, he was "very excited." Appellant asked Williams if he had read the newspaper, and told him the Subway store had been robbed. Appellant gave Williams $60 in cash for the telephone bill. (RT 477-479, 510.) He said he had made living arrangements in the dorms at California State University, Northridge. (RT 480.)

That Sunday, Tommy Aldridge saw on the news that the Subway store appellant had talked about had been robbed and "two people had been murdered, just as [appellant] said he would murder them." (RT 557.) Aldridge

telephoned Tai Williams, who had also seen the news report. (RT 557.) Then Aldridge received a call from appellant. (RT 557.)

Appellant was "very hyper." He repeatedly told Aldridge he had a surprise for him. Aldridge asked appellant if he had robbed the Subway store and committed the murders. Appellant would not answer "yes" or "no," but giggled. (RT 557-558.) Appellant repeatedly asked Aldridge to come and visit him. (RT 557.) He wanted Aldridge to come alone, or to only bring certain friends. Appellant said he did not want anyone to know where he was. (RT 558, 571.) He repeatedly told Aldridge that he had a surprise for him. (RT 557.)

Appellant was scheduled to work in the meat department of Lucky supermarket on that Sunday, June 30, but he called in sick that day. Appellant's meat department coworker, Dennis Ostrander, was told he would have to work a double shift because of appellant's absence. (RT 823-824.)

At approximately 11:00 a.m. that Sunday morning, appellant rented an apartment for $440 a month from Donna Lopez. (RT 663-665.) Appellant took a rental application, and wanted to give Lopez cash. (RT 666.) Appellant pulled $400 in cash from his fanny pack and counted it out in front of Lopez. Lopez told appellant she would not accept cash. (RT 666.) Appellant left and returned with $400 in two money orders. (RT 666-668.) Appellant also gave Lopez $25 in cash for a credit check. Appellant counted out the $25 entirely in one dollar bills. (RT 668.)

Also on Sunday, June 30, 1991, Rebecca James was contacted by police, and told them what she saw at the Subway store the previous night. (RT 270.) She described the man she saw in the store as a Black man whose skin was "not real dark." (RT 294.) He appeared to be in his early twenties, and had "big lips" and short-cropped, "Afro style" hair. (RT 305.) She had seen appellant's "full face" for "about a second." (RT 286.)

The next day, Monday, Aldridge had another telephone conversation

with appellant. (RT 559.) Appellant gave Aldridge instructions on how to meet him the following day, Tuesday. Appellant told Aldridge to go to a phone booth at a certain gas station, and to call appellant at a number he provided. (RT 559-560.)

On Tuesday, July 2, 1991, appellant worked in Lucky's meat department with Dennis Ostrander. (RT 798.) At some point appellant tried to talk to Ostrander, who was busy with customers and did not pay attention to appellant. Appellant finally grabbed Ostrander's arm and said, "I need to talk to you about something." (RT 788.) Appellant asked Ostrander if he was aware of the Subway store robbery and murders. (RT 787-788.) Ostrander said he did not know what appellant was talking about. Appellant said, "Well, there was killings at the Subway store. I popped those two kids." (RT 788.) Ostrander did not believe appellant, and said, "Yeah, right." (RT 788.) Appellant showed Ostrander a handgun he kept in his sock. (RT 789.)

Appellant told Ostrander he had worked at the Subway and had a falling out with the manager concerning stolen money. Appellant claimed some of the Subway employees blamed him for the theft, and that he was fired despite having told the manager that he did not steal the money. Appellant was upset about being fired. (RT 790.) Appellant said he knew from working at the Subway that the floor safe was in a back room. (RT 791.)

With regard to the robbery and murders, appellant told Ostrander "how he did everything." (RT 791.) Appellant went into the store and "made it look like he was purchasing a sandwich, and looked around." (RT 792.) He noticed "a young kid" sitting in a booth off to one side. (RT 792, 807.) The young man recognized appellant, and asked if he knew him from somewhere. Appellant demurred, but the young man insisted. Appellant told Ostrander that he did in fact recognize the young man, but acted like he did not. Appellant "knew he had to pop the kid," because "the kid would remember him." (RT 792, 807- 810.) He said he recognized the young man because he had worked

with him "in a Vons supermarket as a box person." (RT 808.)

According to Ostrander, appellant said he then pulled out his gun and made the two men go around the counter "to where the safe was in the floor." (RT 792, 810.) Appellant also wanted to keep the men away from a "buzzer or something" near the cash register. (RT 792.) Ostrander had never been to the Subway store, and knew nothing of its arrangement. (RT 841.) Appellant made the Subway employee open the safe. As soon as the safe was open, appellant "shot him in the back of the head." (RT 793, 811.) The man who was shot turned around and "just looked at [appellant], and he shot him again," this time in the face. (RT 793-795, 811-813.) Appellant told Ostrander he was "pissed" because the gun did not have enough "fucking killing power." (RT 793.)

The other young man tried to run, but appellant shot him "on the left side of the temple and he fell down on the opposite side of the counter." (RT 793, 812.) Appellant approached the downed man, who was "laying in a puddle of blood crying and screaming," and tried to shoot him again, but he was out of bullets. (RT 793.)

Appellant told Ostrander he had brought a brown bag to take away the bullet casings so that they could not be traced to his gun. (RT 794.) One of the victims "was still screaming," so appellant ran out of the store. (RT 794.)

Appellant said the Subway employee he shot was one of the people who told the manager appellant had stolen the missing money. (RT 795, 809.) He said the two young men did not resist, and begged, "Please don't shoot me. Please don't shoot me." (RT 795.)

Appellant told Ostrander he had taken "a couple hundred bucks" or a little less than $500 from the Subway store. (RT 796.) He said he was worried and thought someone might have "told on him." (RT 790.)

On Tuesday evening, the same day appellant told Ostrander about the crimes, Aldridge went to see appellant as arranged, and brought his friends

Racquel Rose and Wendell Jones with him. (RT 558, 599.) As Aldridge approached the gas station telephone booth, appellant called his name from across the street. (RT 561.) Appellant appeared nervous, and patted Aldridge down to see if he was armed. (RT 561.) Appellant got in the car and directed the group "in a wide circle and back around" to his apartment. (RT 561.) He was carrying his gun without the clip but with a bullet in the chamber. (RT 562.)

The group went into appellant's apartment. Aldridge took appellant's gun and put it on a shelf where everyone could see it. (RT 566, 568-569.) When appellant and Aldridge stepped outside to talk privately, Aldridge asked appellant if he committed the Subway murders. Appellant giggled and said, "Yeah, I blew them away." (RT 563-564.) Appellant said he knew the people inside the Subway, and thus had to kill them to avoid being identified. According to Aldridge, appellant said he

> "shot one of them behind the head and another one on the side of the head and he wasn't sure if he was dead yet, so he shot the other guy behind the head again."

(RT 565.)

Appellant showed no remorse, because he "didn't care, he needed the money." (RT 565.) When Aldridge asked why appellant only had one bullet in his gun, appellant giggled and laughed and said he had to use the other bullets. (RT 570.) He said he had taken $600 or $700. (RT 570.) That night, appellant treated the group to food and drinks. (RT 570.) Appellant's generosity struck Aldridge because appellant did not usually have any money. (RT 570.)

Aldridge, Rose, and Jones spent the night at appellant's apartment. Aldridge believed appellant would soon be "busted" for the crimes, and figured it was the last time he would be with his friend. (RT 572.) The next morning, Aldridge drove appellant to his job at a supermarket, and then went home and

telephoned Tai Williams. (RT 573.) Aldridge did not want to turn appellant in, and believed Williams would do it. (RT 573.) Williams and Morgan contacted the police. (RT 525.)

On July 6, 1991, appellant gave apartment manager Donna Lopez a check for $50. Two days later, appellant returned and told Lopez the check would be no good. He said he had closed his account in Santa Monica and had to open another account since moving to Northridge. Appellant gave Lopez $50 in cash. (RT 670.)

Appellant was arrested on July 9, 1991. (RT 729.) His gun was recovered from his apartment. (RT 567.) Also on July 9, 1991, Rebecca James helped police produce a composite drawing of the Black man she saw in the Subway store on the night of the crimes. (Peo. Exh. 2; RT 270; 296.) The finished drawing "looked something like" the person she saw. (RT 297.) Appellant, as depicted in the composite drawing, was not wearing eyeglasses. (RT 301.) According to people who knew appellant, he usually wore glasses (RT 431, 521, 524, 542, 675, 713, 759, 829), but sometimes did not (RT 448, 522, 526, 543, 829-830).[1/] James was unable to identify appellant in a photographic lineup. (RT 271.) At trial, James was positive that appellant was the man she saw in the Subway. (RT 272.)

Dennis Ostrander did not tell the police what appellant had told him until after appellant was arrested. (RT 813.) He did not believe appellant, because appellant had previously lied to Ostrander and other coworkers. (RT 813-814, 817-818.)

After appellant was arrested, Ostrander was repeatedly threatened by a pair of Black men who told him to "keep [his] fucking mouth shut." (RT 818-823, 831-837.) The men were waiting for Ostrander in the parking lot of his workplace. (RT 822.) One of the stores where Ostrander worked received

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1. Appellant was not wearing his glasses when he was arrested after leaving his apartment to make a telephone call. (RT 1159.)

threatening telephone calls. (RT 821-822.) Ostrander received a portion of the reward offered for help in solving the crimes. (RT 2202.)

2. Defense Evidence

Appellant took the stand and testified on his own behalf. According to appellant, Tai Williams committed the Subway robbery and murders, and framed appellant for the crimes. (RT 1179.)

a. Appellant's Testimony

Appellant knew Tai Williams and Tommy Aldridge since the 7th grade. (RT 876.) Williams was "a pretty close friend" of appellant's. Appellant never really liked Aldridge. (RT 877, 965.)

In the summer of 1990, appellant stopped attending the California State University at Northridge ("CSUN") because he had not paid for his tuition and student housing. He was kicked out of the college dormitories, and moved off-campus with friends. (RT 1001-1003.) Appellant worked at the Subway store from August to November 1990. (RT 878.) While appellant was working at the Subway, Tai Williams questioned the profitability of the store. (RT 881-882, 995-996.) In response, appellant showed Williams how cash was dropped into the manager's safe every hour throughout the day. (RT 881-882.) At the time appellant worked at the Subway, he had access to the floor safe in order to make change and replenish the cash register. Throughout the shift, larger sums of money from the day's sales were periodically dropped into the other safe, to which only the store owner had access. (RT 963-964.)

Appellant was not fired from his Subway job, but instead left because he could work more hours at Honeybaked Hams. (RT 879, 993-994.) Appellant soon left Honeybaked to work at Ralphs supermarket, then Vons, and

finally Lucky supermarket. (RT 880, 994.) Although appellant worked at Ralphs during the same time as James White, appellant never met White and did not even know he worked there. (RT 994-995, 1114-1118, 1122.)

In the beginning of June 1991, appellant was forced to move out of a condominium he shared with three other friends. (RT 882-884.) Appellant arranged to share an apartment with a friend, but the deal fell through. (RT 884-887.) Appellant moved in with Tai Williams and Donna Morgan on a temporary basis, and gave them $100 for the month of June. (RT 887-888.)

Appellant began working in the meat and seafood department of Lucky supermarket in early June 1991. (RT 891.) Appellant cashed his paychecks at the supermarket because he had problems with his checking account at Matador Federal Credit Union. (RT 889-891.) Appellant's problems with his checking account occurred in April, "drifted to May," and in June appellant was "pretty much working on getting it cleared up." (RT 966.) Appellant was issued new checks after his credit union was bought by another bank, but "for some reason" appellant continued to use the old checks. (RT 889-890.) Some checks were returned for nonsufficient funds, even though appellant had money in his account. (RT 890.) Appellant's credit union charged him nonsufficient funds fees for checks that had already cleared. (RT 890.) According to appellant, an employee of the credit union offered to "straighten everything out," but needed the original checks that were returned. (RT 890.) It "took a period of time" for appellant to gather the required checks. The credit union then reversed the nonsufficient funds fees for two of four bounced checks. (RT 890-891.)

Appellant "had a problem with a few creditors." (RT 967, 974-975.) He also had problems with the Department of Motor Vehicles, which suspended his drivers license for failure to show proof of registration and financial responsibility. (RT 982-983.) He never "got a chance" to pay the

union dues required to continue working as a meatcutter. (RT 967-969.) In April 1991, appellant received a letter from the meatcutter's union telling him he had until the end of May to pay his dues. (RT 969-970.) He knew his checks were bouncing, but his work schedule did not allow for him to go to the credit union during business hours, even though he had at least one week day off per week. (RT 891-892, 966, 970-972, 1014-1015.) In early April, appellant received letters from his credit union regarding his bounced checks. On April 23, 1991, appellant's credit union sent him a letter telling him his checking account had been closed. (RT 986.) However, appellant continued to write checks up until July 6, 1991. (RT 987.)

In May 1991, one creditor threatened to file a police report if the debt was not paid. (RT 984.) Appellant owed money for a newspaper subscription which was ultimately canceled for lack of payment. (RT 984-985.) Another creditor sent a "final notice" for payment of a bad check. Appellant did not pay the debt. (RT 984-985.) In June 1991, appellant wrote two bad checks to a public storage company. (RT 978-979, 990.) Even after his checking account was closed, he wrote a check to a shooting range. (RT 979.) He also wrote a bad check to Lucky supermarket. (RT 992-993.)

Appellant bought his own gun on June 4, 1991, because renting guns and buying ammunition at the firing range was expensive. (RT 892-894, 1005-1006.) Appellant wrote a bad check to the shooting range where he practiced. (RT 971-973.) Whether appellant carried his gun depended on what he was wearing and where he was going. (RT 1006.)

Williams and Morgan would "argue and bicker and yell every single day and . . . all day long" while appellant lived with them. (RT 895.) Williams and Morgan asked appellant for his opinion, to settle their differences. (RT 896.) However, approximately a week after appellant moved it, Donna Morgan "came on to" appellant. (RT 896-897.) Williams was also unfaithful to Morgan. (RT 897-899.) On the Wednesday before the Subway crimes,

Williams cheated on Morgan with a woman named Sherry. (RT 898-899.) Appellant did not tell anyone about Williams' unfaithfulness. (RT 899.)

After appellant moved in with Williams, Williams made two comments about robbing the Subway. (RT 901-903.) Williams asked appellant if he could go out the back door after robbing the store. Appellant told Williams, "Dude, there is no way you can go out the back door of Subway. They keep the back gate locked. There is one way in there. If you go in there, someone is going to see you." (RT 902, 1009.)

Williams made the second comment between June 1 and 10, 1991. Appellant and Williams were at the firing range when Williams asked, "If you shoot the people in the Subway, can't you kill them in the refrigerator?" (RT 904, 1037.) Appellant replied, "Dude, if you shoot anybody in a place like that, you'll lose your hearing." (RT 964, 1010, 1037.) Appellant did not have any other discussions with Williams and/or Tommy Aldridge regarding robbing the Subway store. (RT 904.)

On Saturday, June 29, 1991, appellant worked during the day until 6:00 or 7:00 p.m., then took a bus back to Williams's apartment, arriving there at approximately 10:00 p.m. (RT 911, 914.) When he got there, Williams and Morgan asked him to move out because appellant "was coming between them." (RT 915.) Tommy Aldridge had told Williams and Morgan that appellant talked about them. Aldridge said "a bunch of way out things" which were not true. (RT 915-916, 1024-1025.) Appellant wanted to confront Aldridge, but Williams did not. (RT 915.)

After the discussion, appellant gave Williams $60 he owed for a disputed telephone bill. (RT 916-917.) Appellant left the apartment, but returned shortly to talk to Williams privately. (RT 917-918.) Appellant did not understand Williams's attitude toward him, and assumed it was Morgan who wanted appellant to move out. (RT 918.) Williams told appellant, "[A]ll I've got to say [is] I can't show you any remorse and don't worry about me." (RT

981.) Appellant tried to convince Williams to "be a better man" and get a job with benefits. (RT 918.) Williams said, "I can't show you no mercy" and told appellant to worry about himself. (RT 918, 1036.) Appellant said, "What's going on? You know where we work." Williams replied, "Meet me at the Subway at one o'clock." (RT 918, 1037.) Appellant left and did not take his gun with him. (RT 1176.) He was wearing a white shirt and black pants, and his black work shoes. (RT 930, 932.)

Appellant rode his bike to Ralph's supermarket to see a friend about a roommate arrangement. The friend was not there, but appellant met a CSUN student named Etsuko, who lived in the dorms. (RT 921.) Appellant arranged to visit Etsuko in her dorm room at 12:30 a.m. (RT 922.) Appellant went to Etsuko's room and talked to her until her roommates came home. (RT 922.) He did not want to meet Williams at the Subway at 1:00 because he "didn't want to hear anything [Williams] had to say." (RT 923.)

Appellant left the dorms at approximately 1:30 a.m., and went to the Subway store. (RT 922-923, 925.) Appellant wanted to see who was working at the Subway, so he could tell Williams he had gone there and "got tired of waiting" and left. (RT 925-926.)

At first, appellant did not see anyone inside the Subway store. (RT 928.) He walked inside and saw Brian Berry "sitting straight up" with his legs out in front of him and his back against the wall, on the right side of the store. (RT 929, 935, 1047.) Berry was "bleeding from his face" as if he had been hit. (RT 929, 1047-1050.) Appellant did not see any pools of blood around Berry. (RT 1048-1051.) Appellant heard people fighting in the back of the store. He heard the sounds of tennis shoes "chirping" and other, "heavier" footsteps. (RT 931.) Appellant heard the sound of the two-by-four board, which usually secured the back door, hitting the ground. (RT 930.)

Appellant ran toward the back of the store and peered around the wall. (RT 933, 1045.) Appellant saw the back door swinging closed. (RT 934,

1045.) Appellant thought the store had been robbed. He saw James White lying face down on the floor behind the cash register. (RT 936-941, 1053.) He did not notice any blood around White. (RT 1053.) Appellant jumped over the body and went out the door, through a chain-link gate and into the alley. (RT 936-941.) He saw Tai Williams's car driving away. (RT 942-943.) He could not see who was in the car. (RT 945.)

Appellant saw an empty plastic Subway bag on the ground. (RT 941, 946.) Appellant thought he "should take something and let [Williams] know that I know what he did." (RT 942, 1059.) Appellant reached for the plastic bag, but changed his mind and did not touch it. (RT 942.) If appellant did touch the empty bag, he did not pick it up. (RT 946-947, 1059.) Then he ran away. (RT 944.)

If appellant saw someone "in a position where they can be helped," he would "try to help them." (RT 934.) However, he did not try to help James White and Brian Berry. (RT 1054, 1067-1069.) Appellant did not call an ambulance or the police, and did not attempt to administer first aid to the injured men. (RT 1055-1058.) He hoped they were okay. (RT 1067.)

Appellant thought about going to the police station, but did not know "if that was the right thing to do." (RT 948.) Appellant wondered if Williams had tried to frame him for the crime. He feared Williams was going to kill him, because Williams acted angry earlier that night. (RT 949.)

Appellant returned to Williams's apartment and tried to stay awake all night. (RT 949.) At 6:00 a.m. that Sunday morning, he left and checked in to a Days Inn Hotel. (RT 949-950, 1065.)

Later that day, appellant rented an apartment from Donna Lopez. (RT 950.) He did not count money in front of Lopez. (RT 952.) Appellant had approximately $687 in cash. (RT 952, 1018.) He had saved all his money and "didn't have an opportunity to put it in the bank." (RT 953, 1064.)

Appellant talked to Tommy Aldridge soon after renting his

apartment.[2/] (RT 954, 956, 1080, 1083-1088.) Aldridge repeatedly paged appellant, and at first appellant did not return the calls. (RT 954.) Appellant was angry at Aldridge for lying to Williams about appellant. (RT 954.) When appellant did talk to Aldridge on the phone, he asked Aldridge to go to a particular location before 7:00 p.m. and page him when he got there. (RT 956-957.) He did not give Aldridge his address. (RT 1091.)

Appellant met Aldridge, Racquel Rose, and Wendell Jones at approximately midnight. (RT 957.) The subject of the Subway robbery and murders "never came up." (RT 958, 1092.) Appellant did not want to mention the crimes because he did not know if Aldridge was "in on it." (RT 959.) However, appellant hoped Aldridge would "slip" and say something if he knew Williams committed the Subway robbery and murders. (RT 958.)

Appellant never discussed the Subway crimes with Dennis Ostrander, either. (RT 961, 1017.) Although he did occasionally borrow money from Ostrander for lunch and bus fare, appellant thought Ostrander was a "weirdo." (RT 1017.) He did not talk about the Subway robbery and murders with anyone because he did not know "how you bring up a subject of murder." (RT 959.) He figured people would tell him to turn in Tai Williams, and he did not know what to do. (RT 961.)

On July 6, 1991, appellant still owed Donna Lopez some money for the apartment rental. He gave her a check, then told her the check "would not go through." (RT 978.)

Appellant was arrested on July 9, 1991. Appellant was in his apartment when he received a page from an unfamiliar telephone number. (RT 1159.) Appellant grabbed some change, put on his shoes and hat, and went to return the page. He was not wearing his glasses. (RT 1159.)

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2. Appellant first testified that he next talked to Aldridge on Thursday or Friday (RT 954), but later said he called Aldridge "on Monday" (RT 1083) which was "the second day after [he] had the apartment." (RT 956.)

When the police arrested appellant, he assumed he had been arrested because he was Black and had worked at the Subway store. (RT 961, 999-1000.) He was scared, and the situation was "embarrassing" because he knew who had committed the crimes. (RT 960-961.) Appellant wanted to cooperate with the police and help them. (RT 1101-1102.) However, appellant did not tell the police that Tai Williams was the perpetrator, and repeatedly lied to police when questioned about the Subway crimes. (RT 962.) He told them what he thought they wanted to hear. (RT 1105, 1128-1129.) He did not think the police would believe him. (RT 961.) Appellant lied to the police in order to protect himself. (RT 1000-1001.)

Appellant told the police he had not been to the Subway store on the night of the murders. (RT 960, 1044, 1123, 1135.) He told the police he had left Etsuko's dorm room at 1:55 a.m. (RT 1043-1044.) Appellant was not aware that Etsuko told the police that appellant left her room at 1:00 a.m. (RT 1045.)

Petitioner told Detective Richardson he had bought his gun a few months earlier (RT 1107), and always carried his gun with him (RT 1105, 1107). He said Tai Williams, Donna Morgan and Tommy Aldridge had joked about robbing the Subway store. (RT 1107.) He said he and Williams were "not friends" because Williams had kicked him out of the apartment. (RT 1110.) Appellant said, "I ain't the one having hard times," and that Williams was "the one that don't have no money." (RT 1139.) Appellant "was trying to give Detective Richardson a hint" that Williams committed the crimes. (RT 1140.) Appellant also recognized a photograph of James White, identified him by name, and said that he and White had worked at the same place. (RT 1112-1114.) According to appellant, whoever robbed the Subway "didn't get the right safe. They got the wrong safe." (RT 965.)

3. Other Defense Evidence

Rebecca James was unable to identify appellant in a photographic line-up shown to her by Detective Peggy Moseley. (RT 1181-1183.)

C. Penalty Phase (Retried)

1. Prosecution Evidence

Appellant's first penalty phase trial ended in a mistrial with after the jury deadlocked seven to five in favor of imposing a sentence of death. (RT 1663-1667.)

After a new jury was empaneled, the prosecution presented evidence showing that for several months before June 1991, appellant had financial problems. Appellant's checking account had been closed because he wrote too many bad checks, and he was being pursued by creditors. (RT 2050-2062, 2121-2145.) Appellant was living with friends because he could not afford his own apartment. (RT 2208-2211.) In early June 1991, appellant bought a handgun. He talked about robbing the Subway sandwich store located at Zelzah and Devonshire streets, where he had worked for several months. He said he would kill the people inside the store. (RT 2210-2217.) Appellant had been fired from the Subway store after being suspected in two separate theft incidents. (RT 2065-2076.)

On June 29, 1991, appellant was kicked out of his friend's apartment where he had been staying. A few hours later, between 1:30 and 2:00 a.m. on June 30, 1991, appellant robbed the Subway store and murdered James White and Brian Berry by shooting them in the head. (RT 1959-2040.) A few days later, appellant told his friend Tommy Aldridge that he had committed the crimes. (RT 2217-2226.) He also described to a co-worker, Dennis Ostrander, how he robbed the store and shot White and Berry. (RT 2187-2202.)

Brian Berry's parents and twin sister, and James White's mother,

testified about the devastating impact of the victims' deaths on their lives. (RT 2247-2283.)

2. Defense Evidence

Appellant testified on his own behalf. (RT 2344.) Appellant described his childhood and his brief stints in the Marine Corps and in college. (RT 2344-2355, 2377-2388.) Appellant stopped going to college in January 1991 because he had "blown through" financial aid money meant to pay for his student housing. (RT 2353-2356, 2384.) In May and June of 1991, appellant "bounced a few checks" but mainly suffered financially because of his bank's errors. (RT 2402-2419, 2435-2439, 2447-2454, 2456.)

Appellant testified that he did not rob the Subway and murder James White and Brian Berry. (RT 2359.) Appellant maintained that Tai Williams committed the crimes, and set up appellant to take the blame. (RT 2363-2370.) Appellant did go to the Subway store at on the night of the robbery and murder. (RT 2485.) He had agreed to meet Tai Williams there at 1:30 a.m. (RT 2513-2514.) When appellant got to the store, he saw the bodies of the victims, but did not see blood around them. (RT 2489-2499.) Appellant ran through the store and out the back door. He saw Williams's car driving away. (RT 2513.) He assumed the victims were dead because Williams always carried his gun. (RT 2580.) He did not summon help or contact the police. (RT 2512, 2515-2518.) He moved out of Williams's apartment the next day. (RT 2533.)

Appellant repeatedly lied to the police about what he knew about the crimes, and about other things, because he did not trust the police. (RT 2375, 2427-2429, 2552, 2571, 2580-2585, 2599, 2604-2607.

James Park, a retired Associate Warden at San Quentin state prison, testified about the prison conditions experienced by prisoners sentenced to life without the possibility of parole. (RT 2289-2342.)

Twelve witnesses testified that they met appellant as a child when his

mother joined a choir group. The witnesses believed appellant generally to be a nice, mild-mannered, non-violent young man. (RT 2609-2637, 2667-2673, 2677-2682, 2688-2714, 2746-2754.)

Appellant's mother, Vesta Robinson, testified that she was strict in raising appellant and his sisters. Mrs. Robinson remained protective of appellant when he was in college. (RT 2638-2650.) She gave appellant money, groceries, clothing, household supplies, and took him and his college friends out to eat. (RT 2651, 2659-2650.) When appellant spent the $1,500 grant designated for to pay for his student housing, Mrs. Robinson took out a loan and repaid half the amount. (RT 2650-2651.) Appellant could count on his mother for help and a place to stay. (RT 2654.) Mrs. Robinson characterized appellant as meek, mild, and soft-hearted. (RT 2654.)

3. Prosecution's Rebuttal

Michael Yarborough, an Associate Warden at the California State Prison at Lancaster, testified about prison conditions experienced by inmates sentenced to life in prison without the possibility of parole. (RT 2718-2742.)

Detective Richardson interviewed appellant on the day he was arrested. Appellant repeatedly said he did not go to the Subway on the night of the robbery and murders. (RT 2744.)

APPELLANT'S CONTENTIONS

1. The trial court excluded substantive evidence indicating that two key prosecution witnesses committed the crimes and also refused to permit defense impeachment with this evidence, contrary to state law and in violation of appellant's state and federal constitutional rights. (AOB 40-89.)

2. The trial court's handling of the jury voir dire in both phases of this capital case violated California law and denied appellant his constitutional rights to equal protection, due process, a fair trial before an impartial jury and a reliable determination of guilt and of the penalty. (AOB 89-208.)

3. The trial court's admission of the coroner's testimony concerning the probable relative positions of the victims and killer(s) was contrary to California law and a violation of appellant's federal constitutional rights. (AOB 208-244.)

4. The trial court abandoned its duty to control and direct the trial and denied appellant his constitutional rights to due process of law and to a fair trial by allowing the court reporter to select irrelevant and highly prejudicial testimony for the requested readback to the jury. (AOB 244-264.)

5. The trial court's admission of a vast quantity of irrelevant and highly inflammatory victim impact evidence was contrary to California law and denied appellant his constitutional rights to due process of law and a fair and reliable determination of the penalty. (RT 264-336.)

6. The trial court's refusal to instruct the jury on lingering doubt as to appellant's guilt violated his federal constitutional rights as guaranteed by the Fifth, Eighth and Fourteenth Amendments. (AOB 336-350.)

7. Appellant did not receive a death verdict premised on findings by a unanimous jury beyond a reasonable doubt of the presence of one or more aggravating factors; his constitutional rights to jury determination beyond a reasonable doubt of all elements essential to the imposition of a death penalty was thereby violated. (AOB 350-366.)

8. The multiple instructions concerning reasonable doubt violated the Fifth, Sixth, Eighth and Fourteenth Amendments, mandating reversal. (AOB 366-376.)

9. This Court should reverse appellant's convictions and sentence of death due to the cumulative effect of the errors in this case. (AOB 376-404.)

RESPONDENT'S ARGUMENT

1. The trial court did not improperly exclude any evidence of third party culpability or impeaching evidence as to testifying witnesses.

   A. Guilt Phase: Excluding the evidence did not violate appellant's right to present a defense of third party culpability.

   B. Guilt Phase: Exclusion of the evidence did not violate appellant's right to confront and cross-examine witnesses.

   C. Penalty Phase: The trial court did not err in excluding the evidence of third party culpability, and any error was harmless.

   D. Appellant's claims of federal constitutional error are meritless.

2. Appellant's claims of error during voir dire are meritless.

   A. California Code of Civil Procedure section 223 is not unconstitutional.

   B. Appellant's claims of error in the jury selection process are meritless.

   C. Appellant's miscellaneous claims of error in voir dire are meritless.

3. The trial court properly admitted the coroner's testimony concerning the relative positions of the shooter and victims.

   A. Relevant proceedings.

4. The trial court properly presided over the readback of testimony.

5. Appellant has waived his claim that the victim impact evidence was improperly admitted, but even considering the claim on its merits, the evidence was admissible.

6. The trial court did not err in refusing to instruct the jury on the concept of lingering doubt.

7. Jury unanimity based upon proof beyond a reasonable doubt as to the presence of one or more aggravating factors is not required.

8. There was no error in the jury's instruction regarding reasonable doubt.

9. There were no cumulative errors requiring reversal of appellant's convictions and/or judgment of death.

ARGUMENT

II.

THE TRIAL COURT DID NOT IMPROPERLY EXCLUDE ANY EVIDENCE OF THIRD PARTY CULPABILITY OR IMPEACHING EVIDENCE AS TO TESTIFYING WITNESSES

In support of a third party culpability defense that Tai Williams and/or Tommy Aldridge, and not appellant, robbed the Subway store and killed Brian Berry and James White, appellant proffered evidence at trial that: (1) approximately a week after appellant was arrested, Williams and Aldridge were stopped by police at 1:30 in the morning and subsequently suffered misdemeanor convictions for possession of their concealed handguns; and (2) a witness saw a gray Mustang car (the same make, model and color as Williams's car) at the scene of the crime. Appellant claims the trial court erroneously excluded the evidence. (AOB 40-86.) Respondent submits the trial court properly excluded the evidence, and even if the trial court erred, the error was harmless.

A. Guilt Phase: Excluding The Evidence Did Not Violate Appellant's Right To Present A Defense Of Third Party Culpability

1. Evidence That Williams And Aldridge Were Convicted Of Misdemeanor Weapons Charges

a. Relevant Proceedings

During the guilt phase of the trial, defense counsel sought to introduce evidence of prosecution witness Tai Williams's 1991 misdemeanor conviction for possession of a concealed weapon. (RT 440-446.) Williams and prosecution witness Tommy Aldridge were arrested for carrying concealed weapons on July 17, 1991, approximately eight days after appellant was

arrested for the Subway robbery and murders. (RT 441.) Defense counsel expected Williams to testify that he owned a handgun for "hobby related purposes." (RT 442.) Counsel intended to use the conviction to impeach Williams's testimony on that point, and as evidence of third party culpability. (RT 442.)

Citing *People v. Sandoval* (1992) 4 Cal.4th 155, and *People v. Alcala* (1992) 4 Cal.4th 742, for the general principles governing the admission of third party culpability evidence, the trial court stated that the defense had not proffered "direct or circumstantial evidence linking the third person to the actual perpetration of the crime." (RT 443.) The trial court noted that a third person's mere motive or opportunity to commit the crime, without more, is insufficient to raise a reasonable doubt about a defendant's guilt. (RT 443.) The trial court excluded the evidence but said it would reconsider its decision "subject to other evidence coming in." (RT 443.) The trial court concluded, "At this time, there is nothing more than mere motive and opportunity as to that area." (RT 443.)

Prior to the testimony of prosecution witness Tommy Aldridge, defense counsel again sought admission of the misdemeanor convictions in order to impeach Aldridge and as evidence of third party culpability. (RT 538.) The trial court again held that the probative value of the evidence was outweighed by its potential to confuse the jury. (RT 539-540.)

b. The Evidence Was Properly Excluded As Third Party Culpability Evidence

To be admissible, evidence of third-party culpability need not show "substantial proof of a probability" that the third person committed the act; it need only be capable of raising a reasonable doubt of the defendant's guilt. (*People v. Hall* (1986) 41 Cal.3d 826, 833-834.) Evidence of mere motive or opportunity to commit the crime in another person, without more, is insufficient

to raise a reasonable doubt about a defendant's guilt. "There must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime." (*People v. Hall, supra*, 41 Cal.3d at p. 833; see also *People v. Bradford* (1997) 15 Cal.4th 1229, 1324.) Courts should

> simply treat third-party culpability evidence like any other evidence: if relevant it is admissible ([Evid. Code,] § 350) unless its probative value is substantially outweighed by the risk of undue delay, prejudice, or confusion ([Evid. Code,] § 352).[3/]

(*People v. Hall, supra*, 41 Cal.3d at p. 834.) A trial court's discretionary ruling under Evidence Code section 352 will not be disturbed on appeal absent an abuse of discretion. (*People v. Lewis* (2001) 26 Cal.4th 334, 372; *People v. Alvarez* (1996) 14 Cal.4th 155, 201.)

Appellant claims the defense should have been permitted to present the third party culpability evidence because it offered "more than speculation about possible third party involvement." (AOB 58-62.) However, the trial court properly excluded the evidence of Williams's and Aldridge's misdemeanor convictions. The relevance of the concealed weapons crime was marginal. It did not directly or even circumstantially link the men to the Subway robbery and murders. (See *People v. Hall, supra*, 41 Cal.3d at p. 833.) At best, the evidence merely showed that on one occasion approximately one week after the Subway crimes, Williams and Aldridge were caught with illegally concealed handguns.[4/] The incident did not occur at or near the

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

4. Williams and Aldridge both testified that they legally owned their handguns and enjoyed target shooting with other friends. (RT 506, 530.)

Subway store. Ballistics tests proved that appellant's gun, and not Williams's or Aldridge's gun, fired the bullets that killed Brian Berry and James White. (RT 847-863.) Although appellant claims Williams and Aldridge were arrested by police in Beverly Hills "at 1:30 a.m., the same time of the night" that the Subway crimes were committed (AOB 44, 64), the time and place of their arrest does not appear in the record, and was not before the trial court at the time it ruled on the admission of the evidence. (See *People v. Berryman* (1993) 6 Cal.4th 1048, 1070 [a reviewing court examines the record before the trial court at the time of its ruling to determine whether the court abused its discretion], overruled on other grounds in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.)

Even if Aldridge and Williams were indeed stopped by police at 1:30 a.m., the facts that they were in a different city, on a different night than the Subway crimes, with guns totally unrelated to the Subway crimes, undermines any relevance in connecting the arrests to the actual commission of the Subway crimes. This Court made clear in *Hall* that "[W]e do not require that any evidence, however remote, must be admitted to show a third party's possible culpability[.]" (*People v. Hall, supra,* 41 Cal.3d at p. 833.) Accordingly, the trial court properly found the evidence of the misdemeanor convictions was not sufficiently capable of raising a reasonable doubt that a third party actually robbed the Subway and killed Brian Berry and James White. (*Ibid.*)

c. The Exclusion, If Error, Was Harmless

Even if the trial court erred in excluding the evidence of Williams's and Aldridge's misdemeanor convictions from the guilt phase, the error was

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Williams added that he bought his 9-millimeter handgun "for protection," because "the streets are crazy." (RT 506.) Aldridge, who owned a .380-caliber handgun and urged appellant to buy the same type of gun, fancied himself a gun collector. (RT 587.)

harmless under the *Watson*[5/] standard of review. (See *People v. Bradford, supra,* 15 Cal.4th at p. 1325 [because trial court's exclusion of third party culpability evidence did not constitute a refusal to allow defendant to present a defense, but merely rejected certain evidence concerning the defense, *Watson* standard is the proper standard of review]; *People v. Fudge* (1994) 7 Cal.4th 1075, 1102-1103.)

> The erroneous exercise of discretion under such "normal" rules does not implicate the federal Constitution. Even in capital cases, [the Supreme Court has] consistently assumed that when a trial court misapplies Evidence Code section 352 to exclude defense evidence, including third-party-culpability evidence, the applicable standard of prejudice is that for state law error, as set forth in *People v. Watson* (1956) 46 Cal.2d 818[.]

(*People v. Cudjo* (1993) 6 Cal.4th 585, 611; see also *People v. Alcala, supra,* 4 Cal.4th at p. 791; *People v. Babbitt* (1988) 45 Cal.3d 660, 688; *People v. Hall, supra,* 41 Cal.3d at p. 836.)

This case presents no exception to the general rule. Any erroneous exclusion of the evidence would not have affected the outcome because appellant's defense was not hindered by the exclusion, and the evidence presented overwhelmingly pointed to his guilt. Like the defendant in *People v. Hall, supra,* 41 Cal.3d at pp. 835-836, appellant's theory of Williams's and/or Aldridge's culpability would not exculpate him. No evidence limited the number of perpetrators and, in fact, appellant's defense attempted to implicate Tommy Aldridge as well as Tai Williams. Even Williams's and Aldridge's participation would not undermine the significant evidence linking appellant to the crimes.

Appellant had worked at the Subway store and knew its layout and

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5. *People v. Watson* (1956) 46 Cal.2d 818, 836.

cash management procedures. (RT 390-392, 404-406, 429, 500, 531, 553, 963-964.) Appellant needed money (RT 470-472, 486-490, 512-513, 550, 580-581, 684-686, 746-751) and talked about robbing the Subway store (RT 459-460, 467-469, 486-490, 527, 531, 549-555, 583-586, 590-592, 605-607.) He said he would kill the employees or witnesses he encountered. (RT 460, 469, 555, 586, 604-605.) He wanted someone to drive him to the Subway store. (RT 554.) At trial, appellant even admitted discussing robbing the Subway store with Williams and Aldridge, in the context of pointing out problems with their alleged plans to rob the Subway store. (RT 881-882, 901-903, 995-996, 1009.) Eyewitness Rebecca James identified appellant as the man she saw inside the store "roughhousing" with one of the victims at the time the crimes occurred. (RT 266-269, 281-289.) Appellant's own alibi placed him at the scene. He admitted being inside the Subway store, but claimed he heard the actual perpetrator struggling with one of the victims and then fleeing out the back door. (RT 930-934, 1045.)

The last transaction recorded on the store's cash register was the unfinished sale of a turkey and bacon sandwich, a seafood sandwich, and two tuna salads at 1:32 a.m. (RT 395.) A turkey and bacon sandwich in a plastic bag bearing appellant's fingerprints was found behind the store. (RT 379-381.) The bullets that killed James White and Brian Berry, and the bullet and shell casings found inside the Subway store, were fired from appellant's gun. (RT 354-359, 362-363, 609-610, 847-863, 1983-1988, 1991.) The day after the crimes, appellant attempted to pay cash to rent an apartment. He counted out the twenty-five dollar deposit in one-dollar bills. (RT 666, 668.) Appellant bragged about robbing the store and killing the victims to Dennis Ostrander (RT 787-795, 807-813) and Tommy Aldridge (RT 563-565, 570).

Again, even if the excluded evidence would have placed Tai Williams and/or Tommy Aldridge at the scene, it did not tend to exculpate appellant or even raise a reasonable doubt of his guilt in light of the overwhelming evidence

against him. A different result was not reasonably probable, and any error was therefore harmless.

Further, appellant's ability to mount a defense was not compromised by the exclusion. There was other evidence before the jury that the defense argued implicated Williams. (See *People v. Hall, supra,* 41 Cal.3d at pp. 835-836.) Eyewitness Rebecca James was unable to identify appellant in a photographic line-up, and initially gave the police a vague description of a man with "not real dark" skin and a "full" face that differed from appellant's angular face. (RT 294-295, 1181-1183.) A shoe print on the Subway store counter did not match appellant's shoes. (RT 757.) Appellant's fingerprints were not found anywhere inside the store. (RT 875.)

Additionally, the defense succeeded in introducing a significant amount of evidence it believed linked Tai Williams to the crime. Appellant testified about Williams's money troubles (RT 1139-1140), his interest in robbing the Subway store (RT 881-882, 902-904, 1140), his belief that appellant came between him and his girlfriend (RT 895-899, 1007-1008), and his demand that appellant meet him at the Subway store at 1:00 a.m. on the night of the crimes (RT 918). Appellant also testified that Williams had stolen money and behaved dishonestly in the past. (RT 1168-1170.)

The exclusion of the proffered third party culpability evidence did not prevent the defense from arguing that appellant was framed by Williams and/or Aldridge. (RT 1277-1289, 1307-1311.) In light of the extremely strong evidence against appellant, and the presence of other evidence that the defense argued exculpated appellant, it is not reasonably probable that a result more favorable to appellant would have been reached the evidence of Williams's and Aldridge's misdemeanor convictions had been admitted. (*People v. Hall, supra,* 41 Cal.3d at p. 836; *People v. Watson, supra,* 46 Cal.2d at p. 837; see also *People v. Bradford, supra,* 15 Cal.4th 1325; *People v. Fudge, supra,* 7 Cal.4th at pp. 1102-1103.) Appellant's claims should be rejected.

2. The Trial Court Properly Excluded Any Evidence That "Ralph Dudley" Saw A Gray Mustang At The Scene Of The Crimes

a. Relevant Proceedings

At the time of the Subway robbery and murders, Tai Williams drove a gray Mustang with broken taillights. (RT 522-523.) Appellant testified in the guilt phase of the trial that he saw Williams's Mustang, with its distinctive taillights, leaving the scene on the night of the crimes. According to appellant, when he arrived at the Subway store at approximately 1:30 a.m., the crimes had just been committed by an unseen perpetrator, and Williams's grey Mustang was driving away from behind the store. Appellant could not see inside the car. (RT 942-943.)

During the guilt phase, Detective Peggy Moseley was called to testify by the defense. (RT 1180.) Defense counsel asked Moseley Moseley if during her investigation of the crimes she recalled receiving or becoming aware of "any information that someone had imparted to the Los Angeles Police Department the fact that there had been a gray Mustang lurking in the area of this particular Subway sandwich shop?" (RT 1186.) The trial court sustained the prosecutor's objection on hearsay grounds. Defense counsel then asked the detective if she "personally conducted any interviews with anyone who indicated the presence of a gray Mustang at the scene[.]" Detective Moseley said, "Not that I recall." (RT 1186.) She also had no recollection of a witness named "Ralph Dudley." (RT 1186.)

b. The Trial Court Properly Excluded The Evidence

Appellant claims the trial court improperly excluded third party culpability evidence that a witness named Ralph Dudley saw a gray Mustang

car, the same color, make and model of Tai Williams's car, in the alley behind the Subway store on the night of the crimes. (AOB 44.) However, the form of the proffered evidence was not admissible. When defense counsel asked Detective Moseley about receiving information that someone reported seeing a gray Mustang at the crime scene, the trial court properly sustained the prosecutor's hearsay objection. (RT 1186; see also Evid. Code, section 1200.)

After defense counsel rephrased his question to inquire whether Detective Moseley personally interviewed anyone who saw a gray Mustang at the scene of the crimes, Detective Moseley said, "Not that I recall." (RT 1186.) She also had no recollection of a witness named "Ralph Dudley." (RT 1186.) Defense counsel abandoned the line of questioning.

If a witness had seen Williams's car at the scene of the crimes, then Williams might have been linked to the commission of the crimes. However, based on the record on appeal, no such evidence appears to exist. The only mention of such evidence occurred during Detective Moseley's testimony, described above. (RT 1186.) Detective Moseley had no recollection of such evidence. (RT 1186.)

The record thus reflects that the trial court did not improperly exclude evidence of "Ralph Dudley's" sighting of a gray Mustang – admissible evidence was never proffered by the defense to establish that fact. A properly-sustained hearsay objection, followed by questions which failed to elicit the existence of the alleged third party culpability evidence the defense sought, can hardly be construed as the trial court's erroneous exclusion of evidence at the guilt phase. There was nothing to exclude.

Even if the trial court should not have sustained the prosecution's hearsay objection to defense counsel's question to Detective Moseley, any error was harmless. The detective answered defense counsel's next, re-phrased question and did not recall any evidence of "Ralph Dudley" reporting seeing a gray Mustang car leaving the crime scene. (RT 1186.) For this reason, and

in light of the overwhelming evidence against appellant, a different result was not reasonably probable and any error was therefore harmless. (*People v. Watson, supra,* 46 Cal.2d at p. 836.)

B. Guilt Phase: Exclusion Of The Evidence Did Not Violate Appellant's Right To Confront And Cross-Examine Witnesses

1. Evidence Of William's And Aldridge's Misdemeanor Convictions Was Properly Excluded As Impeachment Evidence

Appellant also claims the trial court erroneously excluded the misdemeanor convictions evidence as impeachment evidence (AOB 62-69), and incorrectly found the evidence's probative value was outweighed by its potential to confuse the jury (AOB 69-71). Respondent disagrees.

A crime involving moral turpitude may suggest a willingness to lie and, therefore, is relevant to a witness's honesty and veracity. (*People v. Wheeler* (1992) 4 Cal.4th 284, 295.) However, the admissibility of such evidence is limited by the trial court's discretion under Evidence Code section 352 to exclude probative evidence that is unduly prejudicial. (*Id*. at pp. 295-297, & fn. 7.) In fact, "the latitude section 352 allows for exclusion of impeachment evidence in individual cases is broad." (Id., at p. 296.) A trial court's determinations in this regard are reviewed for abuse of discretion. (*People v. Clair* (1992) 2 Cal.4th 629, 655.)

Here, the trial court ruled that the misdemeanor convictions evidence was only marginally relevant, and ultimately inadmissible as impeachment evidence pursuant to *People v. Wheeler, supra,* 4 Cal.4th at p. 284, and Article 1, section 28(d) of the California Constitution. (RT 447.) The trial court stated that "whatever relevance the probative value [of Williams's prior conviction] may have is outweighed not by the fact of causing prejudice but in confusing the issues to the jury, especially in light of the third party culpability aspect,

even though I would instruct the jury otherwise." (RT 446.) The trial court's decision was reasonable under the facts of this case.

Although a misdemeanor conviction for carrying a concealed weapon is a crime of moral turpitude (see *People v. Garrett* (1987) 195 Cal.App.3d 795, 798-800), it is not as relevant to a witness's truthfulness as a conviction for perjury, fraud, or other crime bearing directly on a witness's veracity. Given the evidence's marginal significance as general impeachment evidence, it was very likely that the jurors would mistakenly and impermissibly interpret the evidence as bearing on third party culpability. That risk was heightened by defense counsel's stated intention to use the evidence as showing third party culpability.

Defense counsel admittedly sought to use the conviction not to just impugn Williams's credibility as a witness, but to show that he was the actual perpetrator. Although defense counsel sought to admit the evidence for the "dual purpose[s]" of impeaching Williams' credibility and arguing third party culpability, he clearly anticipated emphasizing the evidence's third party culpability aspect.

Defense counsel stated,

> I was thinking about impeaching the witness potentially, judge, but it would have to do with other responses to questions that I was going to ask, and I really did not have the intention of impeaching him with regard to the existence of a conviction.

(RT 441.) Defense counsel further explained that he intended to question Williams about "whether in fact he was carrying a gun, along with [prosecution witness Tommy Aldridge], on July 17th. I had no intention of going into the subject matter of the conviction." (RT 441.) The prosecutor confirmed, "We are going into the area of third party culpability." (RT 441.)

The trial court attempted to clarify whether defense counsel sought to admit the conviction "not for purposes of veracity but for purposes of third

party culpability." (RT 442.) Defense counsel said that the evidence would have a "dual purpose," but explained that he intended to use the conviction to impeach Williams's anticipated testimony that he only used his handgun for "hobby-related" purposes. (RT 442.) Defense counsel believed the fact that Williams was convicted for "driving around Beverly Hills with concealed weapons in the car" would be inconsistent with owning a handgun for hobby-related purposes. (RT 442.) In other words, defense counsel intended to use the facts underlying the conviction to imply that Williams carried a handgun for invidious purposes, and committed the Subway robbery and murders. Counsel thus intended not to impeach the truthfulness of Williams's testimony that appellant talked about robbing the Subway store, but to portray Williams as the real perpetrator.

The trial court had already ruled the evidence inadmissible as third party culpability evidence. (RT 443.) Appellant's thinly-veiled attempt to circumvent this ruling by recharacterizing it as impeachment evidence was properly rejected by the trial court.

Further, any error was harmless under state law. (See *People v. Hillhouse* (2002) 27 Cal.4th 469, 494-495 [applying *Watson* standard of harmless error to erroneous limitation of cross-examination of witness].) There would be no prejudice in light of the relatively minor probative value of the excluded evidence. Williams and Aldridge testified that they owned handguns, and it could be inferred that they also occasionally carried them, especially since Williams testified that he bought his 9-millimeter handgun "for protection," because "the streets are crazy." (RT 506.) Defense counsel's cross-examination of Williams and Aldridge was thorough and extensive. (RT 482-525, 534, 573-603, 607.) Their testimony that appellant committed the Subway crimes was independently corroborated by Dennis Ostrander's testimony, Rebecca James's identification of appellant, and physical evidence at the crime scene. It is not reasonably probable that the result of the guilt

phase would have been different had the jury considered Williams's and Aldridges's misdemeanor convictions. (*People v. Hillhouse, supra*, 27 Cal.4th at pp. 494-495.)

For the same reasons, any error would not violate appellant's Sixth Amendment right to confront and cross-examine witnesses. (See AOB 55.) A criminal defendant demonstrates a violation of the Confrontation Clause by showing he was "prohibited from engaging in otherwise appropriate cross-examination" designed to reveal a witness's "prototypical form of bias," and thereby expose to the jury facts from which the jurors could "appropriately draw inferences relating to the reliability of the witness." (*People v. Hillhouse, supra*, 27 Cal.4th at pp. 494-495; see also *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 680 [106 S.Ct. 1431, 89 L.Ed.2d 674].) However, the trial court "retains wide latitude in restricting cross-examination that is prejudicial, confusing of the issues, or of marginal relevance." (*Id.*, at p. 494.) Thus, a defendant must show that "the prohibited cross-examination would have produced a 'significantly different impression of [the witnesses'] credibility[.]'" (*Ibid.*)

Here, as discussed previously, the trial court prohibited the cross-examination because the evidence of the misdemeanor convictions had little probative value, and could likely be mistakenly and improperly considered by the jury as evidence of third party culpability. Moreover, evidence of misdemeanor weapon possession convictions does not reflect a "prototypical bias" of the witnesses against appellant. (See *People v. Hillhouse, supra*, 27 Cal.4th at p. 494.) Although carrying a concealed handgun is illegal under some circumstances, such an act in this case did not undermine Williams's and Aldridge's detailed, corroborated testimony regarding appellant's long-planned commission of the Subway robbery and murders. Not allowing the jury to consider the evidence of the misdemeanor convictions did not "produce a significantly different impression of [the witnesses'] credibility." (*Ibid.*)

Accordingly, the trial court's exercise of its discretion did not violate the Sixth Amendment, and any error is harmless beyond a reasonable doubt. (See *Delaware v. Van Arsdall, supra*, 475 U.S. at p. 684 [correct inquiry is "whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt"]; *People v. Mincey* (1992) 2 Cal.4th 408, 463 [error in limiting cross-examination on witness bias harmless beyond a reasonable doubt where "the jury had before it ample information of the possible bias" of witness].)

C. Penalty Phase: The Trial Court Did Not Err In Excluding The Evidence Of Third Party Culpability, And Any Error Was Harmless

Appellant claims he was improperly restricted from cross-examining Tommy Aldridge at the retried penalty phase. (AOB 47,53-56.) At the retried penalty phase during cross-examination of Tommy Aldridge, defense counsel attempted to read from a portion of the transcript of the preliminary hearing. (RT 2239.) Counsel began, "'Question: did you know that Tai Williams's car was seen in the alley the night of the murders'- -[.]" The prosecutor objected on grounds the line of questioning assumed facts not in evidence. The trial court sustained the objection. (RT 2239.) Defense counsel asked Aldridge where he was on the night of the robbery and murders. (RT 2239.) The prosecutor objected to the line of questioning as attempting to introduce evidence of third party culpability. Defense counsel proffered that based on appellant's testimony during the guilt phase, he expected appellant to testify at the retried penalty phase that he saw Williams's car at the scene of the crime, and that he believed Aldridge was in the car. (RT 2240.) However, defense counsel admitted, "I can't say that [appellant] is going to say that he saw Tommy Aldridge there." (RT 2240.)

The trial court again ruled that the defense had not met its burden of proffering evidence linking the third party, Aldridge, to the actual commission of the crimes. (RT 2241.)

Defense counsel's offer of proof for the third party culpability evidence was severely lacking; he merely proffered that appellant would testify that he saw Williams's car leaving the Subway store. (RT 2240.) That evidence in no way linked Aldridge to the actual commission of the crimes. (See *People v. Hall, supra*, 41 Cal.3d at p. 833.) No error occurred.

Even if the trial court erroneously foreclosed defense counsel's line of questioning, the error was harmless because there is no reasonable possibility that the jury would have rendered a different verdict absent the error. (See *People v. Ochoa* (1998) 19 Cal.4th 353, 480 [applying "reasonable possibility" standard to penalty phase error, and holding that the standard is "the same in substance and effect" as *Chapman*[6/] standard of "harmless beyond a reasonable doubt"].) As discussed previously, even if evidence was presented tending to show that Williams's car was at the scene of the crime, and that Williams and Aldridge carried guns, such evidence would not necessarily exculpate appellant in light of other independent evidence linking him to the crimes: appellant's financial difficulties, Rebecca James's identification, Dennis Ostrander's testimony, the bullets fired from appellant's gun, appellant's fingerprints at the crime scene, and appellant's use of cash to rent an apartment the next day. The retried penalty phase jury heard appellant's detailed testimony fingering Williams and Aldridge as the real perpetrators (RT 2352-2353, 2368-2373, 2508, 2513-2515, 2530, 2587-2588, 2590), and disbelieved it. There is no possibility the jury would have credited appellant's fantastic account based on only marginally relevant evidence that Williams's car was seen at the scene of the crime, and/or that Williams and Aldridge occasionally carried their guns.

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6. *Chapman v. California* (1967) 386 U.S. 18, 23-24 [87 S.Ct. 824, 17 L.Ed.2d 705].

Additionally, during the retried penalty phase, defense counsel succeeded in presenting evidence aimed at showing that Williams and/or Aldridge were the actual perpetrators of the crimes. Defense counsel elicited Tommy Aldridge's testimony that he and Williams illegally concealed their guns on one occasion. Defense counsel cross-examined Tommy Aldridge about whether he and Williams usually carried their guns. Aldridge said he and Williams "carried [the guns] to the shooting range, things like that[,]" and wouldn't just "carry them around." (RT 2233.) When asked if they carried their guns in the car, Aldridge answered, "Not all the time, no." (RT 2233.) Defense counsel asked, "Did you ever go into Beverly Hills and you and Tai Williams carry your guns?" (RT 2334.) Aldridge said, "Yes. We had our guns illegally stored. We ran into problems with having our guns illegally stored in the car, yes." (RT 2234.)

The record thus reflects that the defense was able to allude to third party culpability evidence, the focus of the questions about Williams's car allegedly being seen by appellant at the crimes scene. The jury already knew Williams and Aldridge both owned handguns. (RT 2211, 2508.) The trivial import of the concealed weapons charge is even more obvious in light of appellant's own admission on direct examination in the retried penalty phase that he sometimes carried a gun "in my jacket or my pants pocket," (RT 2358) even though those acts were sufficient to constitute the crime of carrying a concealed weapon. (See generally Pen. Code, § 12025; *People v. Miles* (1987) 196 Cal.App.3d 612, 618 [carrying concealed weapon in jacket]; *People v. May* (1973) 33 Cal.App.3d 888, 891 [weapon carried in pocket constitutes concealed weapon under Penal Code section 12025]; see also *People v. Hale* (1974) 43 Cal.App.3d 353, 356 [even partial concealment is required to commit crime of carrying concealed weapon].)

Accordingly, it is not reasonably possible that the jury's verdict would have been changed if the excluded evidence had been admitted. (*People v.*

Ochoa, supra, 19 Cal.4th at p.480; *People v. Hillhouse, supra,* 27 Cal.4th at p. 494).

D. Appellant's Claims Of Federal Constitutional Error Are Meritless

Appellant incorrectly claims that the erroneous exclusion of the third party culpability evidence violated his fundamental right to present a defense (AOB 51-53); confront and cross-examine witnesses (AOB 53-56); and to a reliable and individualized conviction and sentence, as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the Federal Constitution. (AOB 56-58.) He also argues that the error violated his state-created liberty interest. (AOB 72-73.)

Appellant failed to raise these claims below, and should be precluded from raising them now on appeal. (*People v. Sanders* (1995) 11 Cal.4th 475, 539, fn. 27.)

None of these claims has merit. This Court has found no constitutional violation in the erroneous exclusion of third party culpability evidence. "As a general matter, the ordinary rules of evidence do not impermissibly infringe on the accused's [constitutional] right to present a defense." (*People v. Hall, supra,* 41 Cal.3d at p. 834; see also *People v. Jones* (1998) 17 Cal.4th 279, 305; *People v. Mincey, supra,* 2 Cal.4th at p. 408.) Trial courts retain "a traditional and intrinsic power to exercise discretion to control the admission of evidence in the interests of orderly procedure and the avoidance of prejudice," and this principle "applies perforce to evidence of third-party culpability[.]" (*People v. Hall, supra,* 41 Cal.3d at pp. 834-835.)

As discussed in the preceding sections, the evidence was properly excluded because the minor probative value of Williams's and Aldridge's misdemeanor convictions was greatly outweighed by the potential it would confuse the jurors. The exclusion of the alleged evidence that "Ralph Dudley"

saw a gray Mustang car at the scene of the crime was particularly appropriate because, on the record of the appeal, no such evidence appears to exist. Thus, the exclusion did not significantly affect defendant's ability to present a defense, and it did not violate any of defendant's rights under the federal Constitution. (See *People v. Sanders, supra,* 11 Cal.4th at p. 539, fn. 27 [when a defendant claims errors in voir dire violated various constitutional rights, claims are waived by the failure to raise them below and, on the merits, rejection of the claims' underlying premise means constitutional claims must fail].)

Appellant's reliance on *Thomas v. Hubbard* (2002) 273 F.3d 1164, is misplaced. (See AOB 52-53, 55-56.) *Thomas v. Hubbard* is materially distinguishable. In *Thomas*, the victim was stabbed to death in an apartment building parking lot, and the police did not recover the murder weapon and had no physical evidence linking the defendant to the crime. (*Thomas v. Hubbard, supra,* 273 F.3d at p. 1168.) Austin Schwab, the only "eyewitness" to the crime, accused the defendant of the murder. It was "on the basis of this accusation alone that [the defendant] was arrested and charged with murder." (*Ibid.*) The trial court cut off inquiry on cross-examination of a deputy's difficulty in locating Schwab two months after the murder. (*Thomas v. Hubbard, supra,* 273 F.3d at p. 1177.) The Ninth Circuit held the trial court erred because the exclusion deprived the defendant of "the right to adduce evidence that someone else may have committed the crime, violated his right to elicit evidence that casts doubt on the credibility of the main prosecution witness against him, and infringed on his ability to question [the deputy] in violation of the Confrontation Clause." (*Ibid.*)

The instant case is factually distinguishable from *Thomas.* In *Thomas,* the reviewing court characterized the case as one "in which the evidence suggests that the prosecution's main witness may be the perpetrator." (*Thomas v. Hubbard, supra,* 273 F.3d at p. 1177.) Indeed, the prosecution's case "rested

almost exclusively on Schwab's allegations." (*Ibid*.)

> [The victim's] body was found in Schwab's car; Schwab was the last person seen with [the victim] when he was alive; Schwab interfered with Renee Ali's attempts to apply pressure to [the victim]'s chest wound in direct contravention of the instructions he was given by the paramedics; Schwab gave untruthful answers to the 911 operator and to the police; Schwab owed [the victim] money as evidenced by the note found in [the victim's] pocket; Schwab obtained possession of the note and later contended that he could not remember what he did with it; and Schwab, like the killer, is right-handed while [the defendant] is left-handed.

(*Thomas v. Hubbard, supra*, 273 F.3d at p. 1178.) In the instant case, however, compelling testimony from independent witnesses and physical evidence at the crime scene showed appellant was the killer. In light of the overwhelming evidence of appellant's guilt, the excluded evidence would not have undermined the credibility of the main prosecution witnesses or bolstered appellant's weak defense. The evidence was properly excluded, and appellant's federal constitutional rights were not violated.

III.

APPELLANT'S CLAIMS OF ERROR DURING VOIR DIRE ARE MERITLESS

A. California Code Of Civil Procedure Section 223 Is Not Unconstitutional

Although he makes numerous attacks on the specific voir dire conducted in his case, appellant also makes a general attack on the statute governing voir dire. Appellant contends that California Code of Civil Procedure section 223 denies criminal defendants their state and federal constitutional rights to equal protection, due process of law, and a fair trial, in comparison to civil litigants, by inhibiting the effective voir dire of jurors necessary to determining challenges for cause. (AOB 116-124.)

Proposition 115, codified as Code of Civil Procedure section 223, took effect on June 6, 1990, and at the time of appellant's trial provided:

> In a criminal case, the court shall conduct the examination of prospective jurors. However, the court may permit the parties, upon a showing of good cause, to supplement the examination by such further inquiry as it deems proper, or shall itself submit to the prospective jurors upon such a showing, such additional questions by the parties as it deems proper. Voir dire of any prospective jurors shall, where practicable, occur in the presence of the other jurors in all criminal cases, including death penalty cases.
>
> Examination of prospective jurors shall be conducted only in aid of the exercise of challenges for cause.
>
> The trial court's exercise of its discretion in the manner in which voir dire is conducted shall not cause any conviction to be reversed unless the exercise of that discretion has resulted in a miscarriage of justice, as specified in Section 13 of Article VI of the California Constitution.

(See also *People v. Banner* (1992) 3 Cal.App.4th 1315, 1320.) Civil Code section 222.5, governing jury selection for civil litigants, allows counsel for each party to question prospective jurors "to enable [the attorneys] to intelligently exercise both peremptory challenges and challenges for cause."

The right to voir dire, like the right to exercise peremptory challenges, "is not a constitutional right but a means to achieve the end of an impartial jury." (*People v. Bittaker* (1989) 48 Cal.3d 1046, 1086; see also *People v. Boulerice* (1992) 5 Cal.App.4th 463, 472-474.) Because section 223's limitation on voir dire does not directly impact a fundamental right (such as procreation or voting) or involve a suspect class (such as people of a certain race or wealth), the proper level of scrutiny for an equal protection evaluation is the "rational basis" test. (*People v. Boulerice, supra,* 5 Cal.App.4th at pp. 472-474; see also *People v. Leung* (1992) 5 Cal.App.4th 482, 494.) Thus, the state's jury selection limitations imposed on the class of criminal defendants need bear only a rational relationship to any conceivable, legitimate state interest. (*People v. Boulerice, supra,* 5 Cal.App.4th at p. 472.)

The statutory difference in jury selection between civil litigants and criminal defendants does not violate equal protection concerns because court-conducted voir dire is rationally related to the state's legitimate interest in "restor[ing] balance and fairness to the criminal justice system and creat[ing] a system in which justice is swift and fair[.]" (*People v. Boulerice, supra,* 5 Cal.App.4th at p. 478.) This Court recognized as early as 1927 that "the efforts on the part of counsel for defendants in criminal cases have developed into attempts to disqualify jurors, rather than seek to ascertain their qualifications." (See *People v. Boulerice, supra,* 5 Cal.App.4th at p. 479.) Even after trial judges were given primary responsibility for voir dire, trial court delays caused by "tedious and time-wasting questions" often designed "to accomplish purposes other than the legitimate objects of a reasonable voir dire examination" continued to plague the judicial system and prompt periodic

reform of jury selection procedures. (*Ibid.;* see also *People v. Leung, supra,* 5 Cal.App.4th at p. 496 [this Court has explicitly recognized "that the voir dire process was being abused in criminal cases and that these abuses were a matter of common knowledge"].)

Section 223's procedures address the significant problem of court delays caused by abuses of voir dire in criminal cases. The limitations also further the state's legitimate concern for "the interests of victims and witnesses in the timely resolution of the issues." (*People v. Boulerice, supra,* 5 Cal.App.4th at pp. 472-474.) Thus, section 223 is constitutionally valid, and its application does not violate a criminal defendant's rights unless he can show on the facts of the case that the scope of voir dire was so narrow that it constituted an abuse of discretion. (*People v. Banner, supra,* 3 Cal.App.4th at p. 1324; *People v. Leung, supra,* 5 Cal.4th at p. 496.)

Appellant makes a related claim contending that, even if section 223 is constitutional, reversal is required because the trial court did not understand it had discretion to conduct additional voir dire. (AOB 124-129.) This claim fails because the record reflects that the trial court knew it had considerable latitude to expand the voir dire, and allow attorney participation, as it deemed necessary. The court invited the defense and prosecution to suggest "additions or deletions" to the trial court's questionnaire. (RT 31.) The trial court also stated, "I am not precluding, by the way, any ruling I may make [sic] any consideration of additional questions on a juror by juror basis, and I will consider each request individually as they come up." (RT 83.) At the retried penalty phase, the trial court stated that he would likely question prospective jurors at the bench, and "may or may not ask [counsel] if you wish to inquire" of the prospective jurors as well. (RT 1803.) The prosecutor asked, "May we ask to approach if we deem it appropriate?" The trial court replied, "Of course." (RT 1803.) Additionally, as described in the following arguments, the trial court individually questioned most of the prospective jurors based on their

written answers on the questionnaire and entertained, the prosecutions requests for follow-up questioning. Thus, the record establishes that the trial court was well aware of its discretion to allow additional questioning, and conducted the voir dire accordingly.

As explained below, none of appellant's challenges to the jury selection procedures in his case has merit.

B. Appellant's Claims Of Error In The Jury Selection Process Are Meritless

Apart from his generic equal protection claim, appellant raises numerous specific claims of error in the selection of the juries which determined his guilt and sentenced him to death. (AOB 89-207.) None of the claims has merit.

1. The Trial Court's Voir Dire Questionnaire

On March 1, 1993, thirty days before the start of jury selection, the trial court told the prosecutor and defense counsel that "a questionnaire will be utilized [in voir dire], copies of which are available to counsel if they want to change anything. If you have any additions or deletions, please let me know."[7/] (RT 31.) The record contains no evidence that either party sought to alter the questionnaire before it was provided to the prospective jurors. Appellant's failure to object to the form and/or substance of the questions on the questionnaire waived his claims of error on appeal. (See *People v. Avena* (1996) 13 Cal.4th 394, 413 [capital defendant's failure to object to the trial court's procedure of conducting voir dire waived the issue for appeal]; *People v. Sanchez* (1995) 12 Cal.4th 1, 61 [capital defendant failed to preserve his

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7. As appellant observes (AOB 147), this Court has sanctioned the use of standard form questionnaires in jury selection. (See *People v. Waidla* (2000) 22 Cal.4th 690, 713-714.)

claim of improper voir dire by objecting to the court's questioning during trial]; *People v. Walker* (1988) 47 Cal.3d 605, 626 [failure to object to prosecutor's particular questions to jury during voir dire waived claim of misconduct].)

Prospective jurors for the First[8/] Jury empaneled filled out the trial court's 24-page questionnaire under penalty of perjury. (CT 234-255.) Prospective jurors were asked to list their name, age, sex, area of residence, occupation and employer, former occupations and prior places of employment. They were asked whether they had served in the armed forces, and more specifically if they had any involvement with the military police or military justice system. The questionnaire called for the prospective jurors' marital status, and the names, ages, occupations and employers of their spouses and children. It asked about the prospective jurors' levels of education, and any legal or medical training they received. (CT 234-238.)

Some questions required only "yes" or "no" or short answers. (See CT 242 [asking prospective jurors to characterize themselves as either leaders or followers].) Most questions were followed by several blank lines, and some urged the prospective jurors to "explain" their answers to open-ended questions such as inquiries regarding any experience visiting an incarcerated friend or family member, or any association with attorneys, law enforcement officials, or psychologists or psychiatrists. (CT 239.)

The questionnaire asked whether the prospective jurors or their close friends or relatives had ever been involved in a criminal incident, and whether they had ever served on a jury. (CT 240.) Other questions probed the prospective jurors' ownership or use of guns, participation in neighborhood crime prevention groups, health problems that could affect the jurors' ability to sit through the trial and concentrate, and any pressing business or personal

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8. Like appellant, respondent refers to the jury that determined appellant's guilt as "the First Jury," and the jury which ultimately sentenced appellant to death, following retrial of the penalty phase, as "the Second Jury."

matters. (CT 241-242.)

The questionnaire also explored whether prospective jurors would have difficulty following the law as given by the trial court, even if they disagreed with it. Prospective jurors were asked if they had "any feelings against the defendant solely because the defendant is charged with this particular offense[.]" (CT 242.) Further, they were asked whether the mere fact that criminal charges had been filed against the defendant caused them to conclude that the defendant is more likely to be guilty than not guilty. (CT 242.)

Prospective jurors were asked if they knew "anything about this case other than what you have heard in open court," and if they were acquainted with the defendant or attorneys. (CT 243.) They were also asked, "What, if anything, have you already learned about this case or the defendant?" The next two questions inquired where the information had come from, and whether it made the prospective juror favor the prosecution or the defense. (CT 243.) In the same vein, further questions asked about the newspapers, periodicals, radio and television news broadcasts frequently read, heard or watched by the prospective jurors. (CT 244.) Additional questions inquired about any specific news stories or topics followed by the prospective jurors. (CT 245.)

The questionnaire included open-ended questions concerning the prospective jurors' willingness to stay in deliberations as long as necessary to reach a verdict, and to keep an open mind until all the evidence and arguments were heard. (CT 247.) Prospective jurors were told that parties, attorneys, or witnesses "may come from a particular national, racial, or religious group" or have "lifestyles different from your own." They were asked, "Would that fact affect your judgment or the weight and credibility you would give his or her testimony?" (CT 247.) They were also asked:

> Do you know of any reason why you would not be a completely fair and impartial juror in this case regardless of whether the victim was

male or female, an adult or child, related to the defendant, or a stranger, etc.?

CT 248.)

A separate section of the questionnaire surveyed the prospective jurors' attitudes regarding the death penalty. Several pages of open-ended questions explored the prospective jurors' general and specific feelings on the death penalty, the strength of their views, and whether they would vote automatically for or against the death penalty. (CT 249-254.) The questionnaire was modified slightly (eliminating questions related to determining the defendant's guilt and the existence of the special circumstances) for use in selecting the Second Jury for the retried penalty phase. (CT 613-616.)

2. The Trial Court's Voir Dire Sufficiently Addressed The Issue Of Racial Bias

Appellant contends that the trial court's voir dire of both the First (guilt phase) and Second (retried penalty phase) juries was insufficient to discover the prospective jurors' racial biases and/or whether they would be unduly influenced by racial tensions existing in Los Angeles at the time of appellant's trial. (AOB 166-183.) Respondent submits the trial court made a full and proper inquiry into the possible racial bias of the prospective jurors.

a. The Trial Court's Specific Questions Addressing Potential Racial Bias

Before trial, appellant filed a written motion requesting attorney-conducted voir dire, specifically in the areas of prospective jurors' racial prejudices and exposure to pre-trial publicity about appellant's case. (CT 200-231; RT 72-79.) The trial court denied the motion, and stated the trial court's questionnaire and voir dire procedure would adequately address the areas of

concern. (RT 79-85.)

During voir dire for the First Jury, the trial court used the questionnaire summarized above. The questionnaire specifically asked the prospective jurors:

> A part(ies), attorney(s) or witness(es) may come from a particular national, racial or religious group or has a lifestyle different from your own. Would that fact affect your judgment or the weight and credibility you would give his or her testimony?

(CT 247.) The question was followed by several blank lines, allowing prospective jurors to explain their answers. The trial court denied defense counsel's request for attorney-conducted supplemental voir dire (CT 200-231; RT 72-84), but stated, "I am not precluding, by the way, any ruling I may make [sic] any consideration of additional questions on a juror by juror basis, and I will consider each request individually as they come up." (RT 83.)

The trial court conducted voir dire. (RT 39-243.) The trial court questioned one prospective juror about his response to the question of whether differences in a person's nationality, race or religion would affect his evaluation of their testimony, after Prospective Juror Gilbert[9/] had written, "I might - I try to control my prejudices but depending on what the differences were I might ascribe more or less weight to that person." (CT 564.) The trial court told the prospective juror,

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9. Being cognizant of recent changes in the law, as well as the policy of the courts regarding juror confidentiality, respondent would normally protect the identity of the jurors by referring to them by number or first name and last initial. Here, however, the trial occurred in 1993 – well before the recent changes in the law – and the jurors are referred to by name in the record. Appellant's opening brief also refers to the jurors by name. Given the state of the record, as well as for continuity in the briefs, respondent will likewise refer to the jurors by name.

> I am going to give you instructions on how to judge the credibility of a witness, how you can tell whether a witness is telling the truth and telling a lie, and it has nothing to do with any racial characteristics or ethnic characteristics or any different life-style than yours. That is not to be considered in determining whether a witness is telling the truth or not. [¶] Do you think you can follow that?

(RT 196.) Prospective Juror Gilbert answered, "Yes, sir." (RT 196.) Defense counsel used a peremptory challenge to excuse Prospective Juror Gilbert. (RT 212.)

Prior to jury selection for the Second Jury, defense counsel requested that the trial court tell the prospective jurors that a sentence of life without the possibility of parole "means life without the possibility of parole," and that prospective jurors are not to take into account the cost of the death penalty or whether it is a deterrent to crime. (RT 1800-1801.) The trial court denied the request because the issues were "more properly addressed to the area of instructions." (RT 1801-1802.) The trial court did agree to tell the prospective jurors that appellant is Black and the victims in the case were White. (RT 1802.)

The trial court stated that he would likely question prospective jurors at the bench, and "may or may not ask [counsel] if you wish to inquire" of the prospective jurors as well. (RT 1803.) The prosecutor asked, "May we ask to approach if we deem it appropriate?" The trial court replied, "Of course." (RT 1803.)

During voir dire of the Second Jury, the trial court used the same questionnaire, modified only to eliminate questions regarding whether the prospective jurors' feelings about the death penalty would affect their ability to determine the defendant's guilt of the crimes and the existence of the special circumstances. (CT 1740-3506.) The trial judge told the prospective jurors:

> One thing I will mention is the defendant, as you can see, is an

> African American. The victims in this case are White. Now race is not an issue at a penalty trial and is not to be considered by you. [¶] Is there anyone on the panel before me that would ignore this dictate? [¶] Negative response.

(RT 1807.)

Throughout the Second Jury voir dire, the trial court periodically emphasized that racial prejudice was an inappropriate consideration for prospective jurors. The trial court asked the entire panel, "Do you all understand, as I stated earlier, race is not an issue and is not to be considered at this trial? Is there anybody who would not follow that dictate? [¶] Negative response." (RT 1845.) The trial court later repeated, "You all understand that race is not to be considered until reaching the penalty? [¶] Is there anyone that could not follow this perception in my dictates?" (RT 1867.) "And again, you all understand that race has no part in these proceedings and that you will follow the dictates of the court regarding that?" (RT 1880.) "You have heard what I said about regarding race having no place in this trial. Would there be anybody here that would ignore that dictate? Negative response." (RT 1893.)

The trial court also periodically reiterated the anti-prejudice admonishment when he addressed individual prospective jurors. For example, the trial court said, "You heard what I said regarding race in this case? . . . You would follow the instructions of the court?" (RT 1895, see also 1896 ["You heard what I stated regarding race? . . . Would you follow the order?"], RT 1897 ["You heard what I said regarding race?"], RT 1906 ["You understood everything I said regarding race and you would follow the instructions?"], RT 1923 ["Do you understand everything I said regarding race?"].)

The trial court also specifically addressed prospective jurors whose written answers on the questionnaire indicated potential racial issues. (RT 1849 [Bradley], 1887 [Thompson].) Prospective Juror Bradley told the trial court that about he did not want "to use [his] race or color for any excuse," but his

mother had a brain tumor, his employer was pressuring him about missing work days, and he did not want to serve on a jury. (RT 1849.) The prosecution used a peremptory challenge to excuse him. (RT 1864.)

Prospective Juror Thompson wrote on his questionnaire that he could "possibly" be influenced by a witness's different race, nationality, or religion. (RT 1886.) However, in court he agreed that such factors were not to be taken into account in evaluating the weight of a witness's testimony. (RT 1887.) The defense used a peremptory challenge to excuse him. (RT 1908.)

b. The Trial Court's Voir Dire Was Sufficient To Reveal Prospective Jurors' Racial Prejudices

Under Code of Civil Procedure section 223, the "court shall conduct the examination of prospective jurors" in criminal cases. On a showing of good cause, however, the court may permit the parties to supplement the examination by further inquiry, or shall itself submit additional questions proposed by the parties. (*People v. Taylor* (1992) 5 Cal.App.4th 1299, 1309.) "If there is sufficient questioning to produce some basis for a reasonably knowledgeable exercise of the right of challenge, voir dire by the trial judge alone does not deprive a defendant of the right to adequate voir dire under the Sixth and Fourteenth Amendments." (*People v. Boulerice, supra,* 5 Cal.App.4th at p. 477.)

Trial courts have great latitude in deciding what questions should be asked on voir dire. (*Mu'Min v. Virginia* (1991) 500 U.S. 415, 424; *People v. Earp* (1999) 20 Cal.4th 826, 852.) The trial judge "is in the best position to assess the amount of voir dire required to ferret out latent prejudice, and to judge the responses." (*People v. Taylor, supra,* 5 Cal.App.4th at p. 1313.) Trial judges should "closely follow the language and formulae for voir dire recommended by the Judicial Council" in the California Standards for Judicial Administration to ensure that all appropriate areas of inquiry are properly

covered. (*People v. Holt* (1997) 15 Cal.4th 619, 661.) Unless the voir dire by a court is so inadequate that the reviewing court can say that the resulting trial was fundamentally unfair, the manner in which voir dire is conducted is not a basis for reversal. (*Ibid.*)

The federal Constitution does not require that a state-court trial judge ask voir dire questions involving racial prejudice simply because the victim and the defendant are of different races. (*Ristaino v. Ross* (1976) 424 U.S. 589, 597-598 [96 S.Ct. 1017, 47 L.Ed.2d 258].) Instead, voir dire questions about racial prejudice are only constitutionally compelled if racial issues are "inextricably bound up with the conduct of the trial," and thus, there is a significant likelihood that racial prejudice might infect the trial. (*Ibid.*)

The trial court's inquiry into the questions of racial bias was sufficient under the federal Constitution and California law. His case is similar to *People v. Chaney* (1991) 234 Cal.App.3rd 853. In *Chaney*, the defendant sought attorney-conducted voir dire as to racial bias and attitudes toward drug use and drug trafficking. The motion was based on the ground that the African-American defendant was to be tried in a "predominately white" community where "racial bias is common." Defense counsel asserted that he feared that the defendant "could be convicted based on a general bias that drug trafficking is associated with African Americans." The trial court denied the motion. (*Id.* at pp. 858-959.) During voir dire, the court asked the jury panel the following question:

> It may appear that one or more of the parties, attorneys or witnesses come from a particular national, racial or religious group or may have a lifestyle different from your own. Would this in any way affect your judgment or the weight and credibility that you would give this evidence?[10/]

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10. The trial court in the instant case used the same question in its questionnaire. (CT 247, 609-610.)

(*Id.* at p. 859.)

The appellate court in *Chaney* held that the trial court's voir dire on the issue of racial bias was constitutionally sufficient. The *Chaney* court found that the defendant had failed to show that racial issues were inextricably bound with the conduct of the trial. The court explained that the fact that the African-American defendant was being tried in a "predominately white community" did not constitute a special circumstance necessitating more specific voir dire inquiry. The *Chaney* court further noted that "defense counsel presented no evidence to support her hypothesis that Caucasians generally associate African-Americans with drug use and drug trafficking." (*People v. Chaney, supra,* 234 Cal.App.3d at pp. 862-863.)

Here, as in *Chaney*, the trial court conducted a sufficient and proper inquiry into the possible racial bias of the prospective jurors. Indeed, the trial court's voir dire question regarding racial bias matched the inquiry recommended by the California Standards of Judicial Administration. (Cal. Stds. Jud. Admin., § 8.5.)[11/] Thus, the trial court's voir dire on the issue of racial bias was constitutionally sufficient. (*See People v. Holt, supra,* 15 Cal.4th at p. 661 [voir dire covered all of the areas of inquiry in the Standards of Judicial Administration]; *People v. Chaney, supra,* 234 Cal.App.4th at pp. 862-863.)

Further inquiry into the issue of racial bias was not required because appellant failed to make any showing that racial issues were "inextricably

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11. Section 8.5(b)(18) of the California Standards of Judicial Administration suggests the following inquiry, when appropriate:

> It may appear that one or more of the parties, attorneys or witnesses come from a particular national, racial or religious group (or may have a life style different than your own). Would this in any way affect your judgment or the weight and credibility you would give to their testimony?

bound up with the conduct of the trial." (Cf. *People v. Wilborn* (1999) 70 Cal.App.4th 339, 344.) To the extent the defense believed further inquiry was warranted, it was obliged to request additional questioning. Defense counsel did not submit additional questions regarding racial biases for the questionnaire, despite the trial court's invitation to do so (RT 31). Nor did defense counsel request additional questioning of any particular juror, despite the trial court's pledge to "consider each request individually as they come up." (RT 83, 1803.) The trial court considered the prosecutor's requests for further questioning of particular jurors, and granted one request and rejected another. (RT 1822, 1903-1904.) Because the defense did not request further questioning of any juror, appellant's claim of error is waived. (See *People v. Avena, supra,* 13 Cal.4th at p. 413; *People v. Sanchez, supra,* 12 Cal.4th at p. 61.)

The mere fact that appellant and the victims were of different races was not a special circumstance warranting more specific voir dire inquiry. (*Ristaino v. Ross, supra*, 424 U.S. at pp. 597-598.) The circumstances of the crime - the late-night robbery of a sandwich shop and the murders of a shop employee and visitor - were unlikely to raise the issue of race. In fact, appellant and his victims were strikingly similar: each was an educated young man employed as an hourly worker in the food service/grocery industry. Appellant made no racially-charged comments in describing his crimes to others. (Cf. *In re Jackson* (1992) 3 Cal.4th 578, 588, fn. 5 [Black defendant described his victims to a Black audience as "two old White bitches"].) Racial prejudice played no role in appellant's crimes.

Appellant's defense - that he was framed by his friends Tai Williams and Tommy Aldridge - did not involve racial prejudice. (See *Ham v. South Carolina* (1973) 409 U.S. 524 [93 S.Ct. 848, 35 L.Ed.2d 46], [Black defendant claimed he had been framed by White law enforcement officers who were "out to get him" because of his civil rights activities]; *People v. Wilborn, supra,* 70 Cal.App.4th at p. 344 [Black defendant claimed that White police officers

fabricated the basis for the traffic stop and detention].) In fact, Williams and Aldridge are Black, and were the prosecution's main witnesses against appellant. Additionally, appellant expressly disavowed any racial prejudice on the part of the Devonshire Division police officers who arrested and questioned him. (RT 2564-2565.) There were simply no salient racial issues in the instant case. Whatever racial tensions were plaguing Los Angeles at the time of appellant's trial (see AOB 168-169), there is no reason to think that plague infected the jury's verdict here. Thus, additional voir inquiry, beyond the question sanctioned by the Judicial Council, was not warranted by the circumstances.

Appellant also faults the trial court for failing to inform the prospective jurors for the First Jury that the victims in the case were White. (AOB 170, 182.) Although the prospective jurors could see that appellant is Black, they were not told that the victims were White. (RT 39-243.) Prospective jurors who ultimately comprised the Second Jury for the retried penalty phase were told by the court:

> One thing I will mention is the defendant, as you can see, is an African American. The victims in this case are White. Now race is not an issue at a penalty trial and is not to be considered by you. [¶] Is there anyone on the panel before me that would ignore this dictate? [¶] Negative response.

(RT 1807.)

A capital defendant accused of an interracial crime "is entitled to have prospective jurors informed of the race of the victim and questioned on the issue of racial bias." (*People v. Holt, supra,* 15 Cal.4th at p. 660; *Turner v. Murray* (1986) 476 U.S. 28, 36-37 [106 S.Ct. 1683, 90 L.Ed.2d. 27].) However, if the trial court in this case erred in failing to advise the prospective jurors for the First Jury of the victims' race, the error was harmless because those prospective jurors did not ultimately determine appellant's sentence. In

Turner v. Murray, the United States Supreme Court held that the trial court's erroneous failure to ask *any* question during voir dire about racial prejudice only required retrial of the penalty phase. The Supreme Court stated, "Our judgment in this case is that there was an unacceptable risk of racial prejudice infecting the *capital sentencing proceeding*." (*Turner v. Murray, supra,* 476 U.S. at p. 37, emphasis in original.) "At the guilt phase of petitioner's trial, the jury had no greater discretion than it would have had if the crime charged had been noncapital murder." (*Turner v. Murray, supra,* 476 U.S. at pp. 37-38.) In noncapital murder cases, "the mere fact that a defendant is black and that a victim is white" does not constitutionally mandate an inquiry into racial prejudice. (*Ristaino v. Ross, supra,* 424 U.S. at p. 597.) "There is no constitutional presumption of juror bias for or against members of any particular racial or ethnic groups." (*Rosales-Lopez v. United States* (1981) 451 U.S. 182, 189-190 [101 S.Ct. 1629, 68 L.Ed.2d 22].) The trial court's question to the First Jury regarding the prospective jurors' feelings about people of different races, nationalities, religions and lifestyles matched the inquiry suggested by the California Standards of Judicial Administration, and was adequate to reveal such bias among the prospective jurors. (CT 247.)

In sum, the trial court properly conducted a full inquiry into the possible racial prejudice of the prospective jurors. The trial court's extensive questionnaire and follow-up questions were sufficient to "produce some basis for a reasonably knowledgeable exercise of the right of challenge," and thus appellant was not deprived of his right to adequate voir dire under the Sixth and Fourteenth Amendments. (See *People v. Boulerice, supra,* 5 Cal.App.4th at p. 477.) Appellant's claims should be rejected.

3. The Trial Court's Voir Dire Sufficiently Addressed The Issue Of Pretrial Publicity

Appellant also contends the trial court's voir dire was insufficient to

reveal prospective jurors' biases from exposure to pre-trial publicity about the case. (AOB 183-195.) Appellant is incorrect.

Prior to trial, defense counsel filed a written motion requesting attorney-conducted voir dire, specifically in the areas of prospective jurors' racial prejudices and exposure to pre-trial publicity about appellant's case. (CT 200-231; RT 72-79.) The trial court denied the motion, and stated the trial court's questionnaire and voir dire procedure would adequately address the areas of concern. (RT 79-85.) With regard to pre-trial publicity, the trial court stated, "I have read each and every one of [the completed questionnaires] [and] very, very few of them, if any, of the prospective jurors have detailed memory of this incident." (RT 82-83.) The trial court noted that the newspaper articles appended to the defense's motion were at least 15 months old. (RT 79.)

Defense counsel did not make a motion for supplemental voir dire regarding pretrial publicity, or renew the previous motion, in relation to voir dire of the Second Jury. (See, e.g., 1800-1803.) Therefore, this claim is waived. (See *People v. Avena*, *supra,* 13 Cal.4th at p. 413; *People v. Sanchez, supra,* 12 Cal.4th at pp. 61-62.)

In any event, detailed questioning of jurors regarding their awareness of the case from the media is not constitutionally required. (*Mu' Min v. Virginia* (1991) 500 U.S. 415, 424-426.) "Wide discretion [is] granted to the trial court in conducting voir dire in the area of pretrial publicity." (*Id*. at p. 427.) A trial court's failure to ask specific questions about the content of publicity is an error of constitutional magnitude only if it "render[s] the defendant's trial fundamentally unfair." (*Id.* at p. 425-427.)

Here, the questionnaire completed by each prospective juror in both the First and Second juries contained 13 questions about exposure to news media. The second question in the series specifically asked about the *content* of any pretrial publicity to which a prospective juror was exposed: "What, if

anything, have you already learned about this case or the defendant?" (CT 243, 605.) Additional questions followed, each followed by blank lines in which to explain any response:

> Do you know anything about this case other than what you have heard in open court? What newspapers and periodicals do you read frequently? What portion(s) do you read? (Front page? Sports? Editorials? Crime stories?) Do you try to follow major crime stories? Which stories do you follow? What radio and television broadcasts have you heard or seen frequently during the past year? Did you follow any criminal cases in the news? What did you learn about these cases? What are the most serious criminal cases you have followed in the media in the last year? Do you try to follow stories about the functioning of the criminal justice system? If the court instructs you not to read, view, or discuss any news media coverage of this case, will you follow the court's instructions? Do you subscribe to or regularly read any newspaper, or periodicals? (CT 243-246; 605-608.)

The questionnaires and the trial court's additional questions provided all parties with valuable information regarding potential juror bias. The trial court further questioned prospective jurors whose written responses indicated they had heard of appellant's case. For example, Prospective Juror Stevens stated in his questionnaire that "with the little facts I've heard [about the case], my sentiment would be with the prosecution." (RT 134.) The trial court asked:

> Do you understand that as I told you, things on T.V, things in the news, they are wrong anyway. And, also, a defendant in a criminal trial has an absolute presumption of innocence. Do you understand that?

(RT 134.) Prospective juror Stevens answered, "Yes." (RT 134.) The trial court pressed him further, asking, "Is your mind made up right now?"

Prospective Juror Stevens answered, "No." "Okay," the trial court continued, "Can you give both sides a fair trial or impartial trial?" "Yes," answered Prospective Juror Stevens. (RT 135.)

As demonstrated by the responses of Prospective Juror Stevens, the questionnaire and the trial court's questions provided defense counsel with enough information to make a challenge for cause against him. (RT 154.) The challenge for cause was denied, and defense counsel later exercised a peremptory challenge to dismiss Prospective Juror Stevens. (RT 175.)

Prospective Juror Kessler told the trial court that she heard about the crimes on the news, but she "hadn't heard about it until we came into court as to what really happened." (RT 182.) The trial court asked if anything she heard would interfere with her fairness and impartiality, and she replied, "No." (RT 182.) However, defense counsel used a peremptory challenge to dismiss Prospective Juror Kessler. (RT 194.)

The trial court's questionnaire ensured that each prospective juror was questioned about the content of news reports of which he or she became aware. The trial court's follow-up questions of individual prospective jurors confirmed that any exposure to pretrial publicity would not affect his or her fairness or impartiality. (See *People v. Bolin* (1998) 18 Cal.4th 297, 316 [defense counsel need not exercise peremptory challenges to excuse prospective jurors exposed to pretrial publicity where each juror gave credible assurances he or she would decide case based only on what transpired in the courtroom].)

The fact that at least 15 months had lapsed between the publication of newspaper articles about the crimes and jury selection also minimized any impact on prospective jurors. As this Court has noted in the context of motions for change of venue, the potency of media coverage fades over time. (*People v. Hernandez* (1988) 47 Cal.3d 315, 334-335 [venue change not mandated where bulk of media's coverage of gruesome facts was two years old]). "The passage of time weighs heavily against a change of venue" based on pretrial

publicity. (*People v. Dennis* (1998) 17 Cal.4th 468, 524, citing *People v. Pride* (1992) 3 Cal.4th 195, and *Odle v. Superior Court* (1982) 32 Cal.3d 932, 943.) Even the passage of several months can dispel the prejudicial effect of pretrial publicity in a large community. (*People v. Dennis*, *supra,* 17 Cal.4th at p. 524; *People v. Proctor* (1992) 4 Cal.4th 499, 525.)

Appellant contends the trial court should have "removed from the pool of prospective jurors" any juror who "indicated a familiarity with" appellant's case. (AOB 192.) However, jurors "need not be wholly ignorant of the facts of a case." (*People v. Weaver* (2001) 26 Cal.4th 876, 907; *People v. Cooper* (1991) 53 Cal.3d 771, 807.) It is sufficient if the jurors can assure the trial court they "can set aside their prior impressions and render a decision based solely on the evidence presented in court." (*People v. Weaver, supra,* 26 Cal.4th 876, 907; *People v. Bean* (1988) 46 Cal.3d 919, 941.)

In sum, the voir dire conducted by the trial court was "by no means perfunctory." (*Mu' Min v. Virginia*, *supra*, 500 U.S. at p. 431; see also *People v. Sanchez, supra*, 12 Cal.4th at pp. 61-63 [trial court's use of one-page questionnaire, asking prospective jurors if they had heard of the case and to name their source, assured defendant a fair and impartial jury].) The prospective jurors were asked no less than 13 questions designed to discern their familiarity with appellant's case, and their ability to be fair and impartial jurors. One question specifically asked prospective jurors if they knew "anything about this case other than what you have read in open court," and if they were acquainted with the defendant or attorneys. (CT 243.) Prospective jurors were also asked, "What, if anything, have you already learned about this case or the defendant?" (CT 243.) The trial court further questioned individual prospective jurors based on their responses. There was no reason to doubt the assurances given by the prospective jurors that they could be fair and impartial. The trial court "retains great latitude in deciding what questions should be asked on voir dire" (*Mu' Min v. Virginia*, *supra,* 500 U.S. at p. 424), and there

is no indication that the voir dire was lacking in any way which "rendered the defendant's trial fundamentally unfair." (*Id.* at p. 425-427.) Appellant's claims should be rejected.

C. Appellant's Miscellaneous Claims Of Error In Voir Dire Are Meritless

Appellant also faults nearly every aspect of the trial court's voir dire. He contends the questionnaire used by the trial court was poorly and improperly administered, confusing and too lengthy, that prospective jurors were not given enough time to meaningfully address the questions, that the voir dire did not produce enough information about the prospective jurors to allow defense counsel to make for challenges for cause, and that the prosecutor improperly exercised peremptory challenges to dismiss anti-death penalty prospective jurors. (AOB 129, 132-156.) Appellant also claims it was error to deny questioning by the attorneys, and to deny sequestered voir dire. (AOB 193-200.) None of the claims has merit.

The prospective jurors for the First Jury entered the courtroom at 10:46 a.m. on March 30, 1993. (RT 39.) The trial court briefly introduced the parties and described the charged offenses, and explained that prospective jurors claiming a hardship would be questioned individually. The prospective jurors were told to take a questionnaire, and were repeatedly told to return the completed questionnaires "hopefully, by noon today, no later than 1:30 p.m. this afternoon." (RT 41-42, 45, 59.) Prospective jurors assembled for the retried penalty phase entered the courtroom at 10:58 a.m. on April 20, 1994, and were told to return their completed questionnaires "at 1:30 at the latest." (RT 1733.) Thus, even if the prospective jurors for each jury did not begin filling out the questionnaire until 30 minutes after they entered the courtroom, they still had approximately two hours to complete the 24-page questionnaire.

Prior to commencement of voir dire for the First Jury, defense counsel

argued that based on the number of questions on the questionnaire, and the amount of time the jurors were given to complete the form, prospective jurors spent only an average of 28 seconds per question. (RT 72-79; see also AOB 132-134.) However, as explained by the trial court, defense counsel's estimation of 28 seconds per answer was "somewhat misleading" because:

> [t]he vast majority of the questions call for either a check mark such as income, a short answer such as level of education, last book read, et cetera, which would take far less than 28 seconds.

(RT 83.) Indeed, many of the questions called for routine information, such as one's sex, birthdate, marital status, length of employment, etc. Many other questions could be answered "yes" or "no," and only required elaboration if, for example, the prospective juror had served in the military or received legal training or psychiatric care. (See CT 236-248.)

The trial court further observed that

> it is evident from the questions that call for a substantial answering, such as, the general feelings on the death penalty, et cetera, that much thought was given to those questions and it wasn't merely 28 seconds per question.

(RT 83.) The record demonstrates that prospective jurors gave intelligent, considered responses to important questions, such as the inquiry regarding a prospective juror's "general feelings" about the death penalty. (See CT 249.) The question, placed near the end of the questionnaire, provoked consistently thoughtful answers. For example, a prospective juror ultimately seated on the First Jury wrote, "I have no strong feelings either for or against [the death penalty]. But, I do favor having the death penalty available." (CT 236 [Aldrich].) Another juror wrote,

> Confusion. [I] [d]on't necessarily believe it is a deterrent. However, as time has gone by and violent crimes are on the increase as are jails overcrowding and repeat offenders, I find it difficult to justify

> housing criminals at tax payers expense and/or relocating them to further [] society. In the past [I] have had no strong feelings either way - - other than violence and death at the hand of another (including capital punishment) have bothered me. However, the crime and violent crime have gotten so out of control I am less bothered by the thought of death penalties than I once was.

(CT 126 [Pascuzzi].) Another juror wrote:

> If the defendant is found guilty and is sentenced to death, I am in favor of the death penalty. I feel it is a very big responsibility to listen to the evidence presented and have another person's life in your hands.

(CT 60 [Knight].) An alternate juror wrote:

> It is a morale [sic] feeling - I feel God should decide between life & death. But on the other side, I think an extremely cruel person should be made to suffer as he did his victims. It would depend on the evidence given.

(CT 280 [Miller].)

The jury questionnaires completed by prospective jurors for the retried penalty phase reflect equally thoughtful responses. One prospective juror wrote, "In certain situations, depending on the circumstances, I am for the death penalty." (CT 1922 [Wilson].) The same juror also explained, "I would not automatically vote for either [the death penalty or life imprisonment] I would consider the facts, background, and character of the defendant." (CT 1925.) A prospective juror who was ultimately seated on the sentencing jury wrote,

> I believe in the death penalty in cases where (1) the person convicted admits to the crime or (2) wittnesses [sic] see the person committing the crime.

(CT 3353 [Goldstein].) Another member of the sentencing jury answered, "penalties should fit the crime and each circumstance/situation must be judged

on its individual merits." (CT 3374 [Gerstein].)

There is no evidence that prospective jurors were unable to thoughtfully complete the questionnaire. Appellant speculates that prospective jurors who left answers blank did so because they were rushed or confused. (AOB 134-144.) That assumption is unfounded. To the contrary, the record demonstrates that several prospective jurors meant the nonresponses to mean that the answer was "no" or "not applicable." For example, the trial court told one prospective juror, "There are some questions that you didn't answer. Let me go through." (RT 112.) The prospective juror answered "no" to all seven questions left blank on the questionnaire. (RT 112-113.) Another prospective juror did not answer several questions not because he was rushed or confused, but because he would have to "know all the circumstances" before answering questions about the death penalty. (RT 1824.) Similarly, the trial court questioned a prospective alternate juror who had left entire pages of the questionnaire blank. The prospective alternate juror explained, "That's because [the answers] were all no." (RT 1913-1914.) Appellant does not identify any prospective juror, either at the guilt phase or retried penalty phase, who indicated that he or she had difficulty completing the questionnaire in the time allowed.

The trial court was also receptive to requests by the attorneys to further question prospective jurors. Defense counsel made no such requests, but during the Second Jury voir dire, the prosecutor told the trial court:

> As to [prospective] juror, Ms. Goldstein, I have a request. That the court follow-up on the questionnaire in regards to Question 53 where she states that she could give the death penalty in cases where he admits the crime or if there is an eyewitness. [¶] I'd ask the court to follow up on that and see if there is a circumstantial - - if she would require an eyewitness or require an admission. And that would be the only circumstances that she could give the death penalty.

(RT 1903.) The trial court agreed to "give it some thought," and subsequently asked Prospective Juror Goldstein about her answer. She stated that she had thought more about her answer over the weekend, and had changed her mind. (RT 1904.)

The trial court also considered, but rejected, the prosecutor's request to further question a prospective juror who stated on his questionnaire that he was not willing to stay longer should deliberations exceed the projected time period. The trial court said, "That's right. There was no reason to ask that. The answer is there." (RT 1822.)

Appellant contends that the questionnaire was too confusing, based on the fact that a few jurors admitted momentary confusion in answering the written questions. (AOB 136-144.) Jurors who gave inconsistent or ambiguous answers to the written questions were further questioned by the trial court. In each case their confusion was easily dispelled. For example, although Prospective Juror Alcantar said she was "very confused" by the questions asking if she or a close friend or relative had ever visited anyone in jail, or been involved in a criminal proceeding, she answered the questions without difficulty when asked by the trial court. (RT 160-161; CT 239.) Additionally, her earlier confusion as to another written question was remedied by hearing the trial court explain the question to another prospective juror. When the trial court asked about her written response to that question, Prospective Juror Alcantar said, "No. I understood the question when you asked it earlier. It's no." (RT 161.) Isolated instances of such misunderstanding are not uncommon in the process of jury selection. (See *People v. Turner* (1986) 42 Cal.3d 711, 721-725 [prosecutor's explanation that a peremptory challenge was justified by the prospective juror's confusion in answering death penalty qualification questions was disingenuous, given that the record was "replete with similar mistakes by other prospective jurors"].)

The record shows that the trial court identified missing, ambiguous, conflicting, or otherwise problematic answers to the questions and further questioned the prospective jurors to clarify their responses. (See, e.g., RT 98, 102-106, 112-114, 117-121, 123, 131, 134-135, 138-139, 142, 145, 165, 178, 182, 197, 224, 233-234, 1808-1810, 1815, 1820-1822, 1824, 1833, 1859, 1849-1852, 1872, 1877, 1883, 1887, 1889, 1895-1898, 1904-1906.) The trial court repeatedly emphasized that the prospective jurors' honesty in answering the questions was paramount. For example, Prospective Juror Nagle's questionnaire revealed that she believed a defendant was "more likely to be guilty" based on the fact that an information had been filed against him. (RT 98.) The trial court explained, in the presence of all the prospective jurors, the presumption of innocence. The trial court then asked if Prospective Juror Nagle still felt a defendant was more likely to be guilty. When she answered, "No, probably not," the trial court said "'Probably' is not good enough." (RT 99.) Prospective Juror Nagle said, "No." The trial court persisted:

> When I say it's not good enough, I don't want you to change your answer just to please me. Don't worry about me. I like all of you. I don't care how you think. [¶] Do you understand this is very, very important?

(RT 99.) Prospective Juror Nagle admitted she still believed a criminal defendant to be more likely guilty than not. The parties stipulated to excuse the prospective juror, and the trial court added, "I want to thank you for your honesty." (RT 99.)

When questioning Prospective Juror Slettedahl, the trial court again emphasized the need for the prospective jurors' complete honesty. In response to the questions regarding her ability to impose the death penalty, Prospective Juror Slettedahl said, "I could say one thing to please the court, but on the other hand, on the last spur of the moment, would I lie just to - -" The trial court interrupted and said:

> I don't want you to lie. First of all, you are under oath. Secondly, you owe it to both attorneys to be honest. [] I am not here to judge you. That's why I want complete honesty.

(RT 119.) Based on Prospective Juror Slettedahl's stated refusal to impose the death penalty, the trial court sustained the prosecutor's challenge for cause. (RT 121.) Appellant's contention that the trial court pressured the prospective jurors to give more palatable answers (AOB 144-147) is simply not borne out by the record.

In sum, the record refutes appellant's assertions that the trial court's voir dire was inadequate in any way. The prospective jurors were thoroughly questioned, and there was no need for attorney-conducted voir dire.

Appellant also complains that the prosecutor improperly exercised peremptory challenges to remove all prospective jurors who expressed reservations regarding the imposition of the death penalty. "Assuming for the sake of argument that the prosecutor exercised peremptory challenges for this reason, [the California Supreme Court] ha[s] held on numerous occasions that the prosecution may do so." (*People v. Champion* (1995) Cal.4th 897, 907; *People v. Danielson* (1992) 3 Cal.4th 691, 714; *People v. Pinholster* (1992) 1 Cal.4th 865, 912.

Appellant relies on *People v. Cash* (2002) 28 Cal.4th 703, to argue that the trial court's allegedly inadequate voir dire compels reversal of both the guilt and penalty judgments in the instant case. (AOB 157-159.) His reliance on *Cash* is misplaced.

The defendant in *Cash* was charged with the murder of a housemate. The defendant had previously murdered his grandparents. The trial court ruled that defense counsel could not ask prospective jurors during voir dire whether they would automatically vote for the death penalty if the defendant had previously committed another murder. The trial court confined voir dire inquiries to facts or circumstances contained within the information, which did

not include the previous murders.

This Court held that the defendant's prior murders of his grandparents was a general fact or circumstance that was present in the case and that might "cause some jurors to invariably vote for the death penalty, regardless of the strength of the mitigating circumstances[.]" The prior murders were "likely to be of great significance to prospective jurors." Therefore, the trial court should have permitted the defense to inquire into jurors' attitudes as to that fact.

Here, however, voir dire was not deficient as to any fact or circumstance of the crimes which was likely to be of great significance to prospective jurors. For this reason, any error is harmless because the record establishes that "none of the jurors had a view about the circumstances of the case that would disqualify that juror." (*People v. Cash, supra,* 28 Cal.4th at p. 722.)

Appellant also contends that the exposure of prospective jurors to group questioning on their ability to impose the death penalty, combined with the dismissal (by challenges for cause and peremptory challenges) of prospective jurors with scepticism for or scruples regarding the death penalty, produced a jury that was conviction-prone at the guilt phase and death-prone at the penalty phase, and thus violated his Sixth Amendment right to a fair and impartial jury. (AOB 90, 92; 193-205.) This Court has "rejected these claims on a number of occasions as to both the guilt phase and the penalty phase of a capital case," and has "consistently declined to reconsider the issue." (*People v. Carrera* (1989) 49 Cal.3d 291, 331.) The argument "has met with no greater acceptance by the United States Supreme Court." (*Ibid.; Lockhart v. McCree* (1986) 476 U.S. 162, 173-184 [106 S.Ct. 1758, 90 L.Ed.2d 137].)

Appellant appears to contend that the trial court's voir dire was so inadequate that defense counsel was unable to challenge particular prospective jurors for cause. (AOB 163-164.) Appellant specifically claims the trial court did not sufficiently probe the views of Prospective Juror Merager, who

ultimately served on the Second Jury. (CT 257.)

A trial court should sustain a challenge for cause when a juror's views would "prevent or substantially impair" the performance of the juror's duties in accordance with the court's instructions and the juror's oath. (*People v. Earp, supra,* 20 Cal.4th at p. 853.) Like every other prospective juror, Prospective Juror Merager was asked in the questionnaire if he would

> Have any difficulty keeping an open mind until you have heard all the evidence, and you have heard all the arguments of counsel, and the court has given you all the instructions?

(CT 146.) He wrote, "I'll go in with that expectation, but there's a possibility that something could be said that would form an opinion." (CT 146.) In court, the trial court asked him, "If that happens could you keep that in the back of your head and as to both sides be a fair and impartial juror until the case is finally submitted to you?" Prospective Juror Merager replied, "Yes." (RT 178.) Prospective Juror Merager's response was innocuous, given that he pledged to approach his jury service with an open mind, and the trial court confirmed that he would put aside any opinions formed until he had all the evidence and arguments before him. Prospective Juror Merager's responses to the voir dire questions did not warrant further inquiry, and did not even hint at views which would "prevent or substantially impair" the performance of the juror's duties. (See *People v. Earp, supra,* 20 Cal.4th at p. 853.) Defense counsel appears to have agreed; he did not request further voir dire of Prospective Juror Merager, nor did he use a peremptory challenge to excuse him.[12/] If defense counsel believed Prospective Juror Merager was not fit to serve on the jury, he had ample peremptory challenges with which to excuse

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12. Defense counsel Hill used 14 of 20 allotted peremptory challenges in selecting the First Jury. (See, e.g., RT 158, 174, 193, 212, 238, 242.) Defense counsel Leonard used all 20 peremptory challenges in selecting the Second Jury. (See, e.g., RT 1844, 1863-1864, 1879-1880, 1891-1892, 1907-1909, 1923, 1929, 1932.)

him, but chose to excuse other prospective jurors. Although defense counsel used all 20 peremptory challenges in selecting the Second Jury, counsel "did not express dissatisfaction with the jury as sworn." (*People v. Bittaker, supra,* 48 Cal.3d at p. 1087.) Appellant's claim of prejudice fails because "when the jury was finally selected, defendant did not claim that any juror was incompetent, or was not impartial." (*Ibid.*; see also *People v. Avena, supra,* 13 Cal.4th at p. 413.)

Appellant also argues that Prospective Juror Bianchi, who also sat on the guilt phase jury, should have been questioned further about his knowledge of the case based on media coverage of the crimes. (AOB 165-166.) Prospective Juror Bianchi stated on his questionnaire that he had read about the case in the newspaper and heard about it on television. (CT 186.) The trial court questioned Prospective Juror Bianchi about his answers on the questionnaire. (RT 124-126.) The trial court asked, "What, if anything, have you already learned about this case or the defendant?" (RT 125.) Prospective Juror Bianchi answered, "I don't know anything about the defendant. I read it when it first came out in the paper. That's all. This is close to where I live." (RT 125.) The trial court asked if the information he received made him favor the prosecution or the defense. He answered, "No." (RT 125.) The trial court asked, "Do you try to follow stories about the functioning of the criminal justice system?" Prospective Juror Bianchi said, "I read 'em, yeah." (RT 125.) Defense counsel did not request further questioning of Prospective Juror Bianchi.

The trial court's questioning revealed that the prospective juror read about local and national criminal news stories. He indicated on his questionnaire that he would not have any difficulty keeping an open mind in the instant case. (CT 190.) He did not know "anything about the defendant," and did not favor the prosecution or the defense. (RT 125.) The trial court's questionnaire and follow-up questions sufficiently dispelled any concern that

the prospective juror's views were tainted by pretrial publicity. No further inquiries were warranted. Appellant's claims to the contrary should be rejected.

IV.

THE TRIAL COURT PROPERLY ADMITTED THE CORONER'S TESTIMONY CONCERNING THE RELATIVE POSITIONS OF THE SHOOTER AND VICTIMS

Appellant contends the admission of portions of Deputy Medical Examiner Dr. Christopher Rogers's testimony, regarding the probable positions of the shooter and the victims, was contrary to California law and a violation of appellant's federal Constitutional rights. (AOB 208-244.) Appellant specifically argues: (1) the testimony was not relevant because the jurors received no appreciable help from the coroner's opinion (AOB 220-224); (2) even if the testimony was helpful, the prosecution did not lay a proper foundation (AOB 224-230); and (3) the testimony was more prejudicial than probative, in violation of Evidence Code section 352 (AOB 231-244). Respondent disagrees.

A. Relevant Proceedings

At trial, defense counsel argued that Dr. Rogers should not be allowed to testify as an expert as to matters beyond the cause of death, entry wounds, and the angles of the bullets' paths. (RT 618-619.) The trial court held that with a properly laid foundation, the coroner could give opinion testimony regarding the positions of the shooter and victims. (RT 623.) The trial court explained:

> It doesn't take much imagination, or much of an expertise based upon trajectory and the angle and the contact nature of a wound, to proffer an opinion whether a person was standing on a stepladder or on tiptoes or laying on his stomach when he fired a weapon or aiming down when a victim is on his knees. [¶] The same with victim White regarding the probable position of the person at the time of the

shooting.

(RT 623.)[13/] However, the trial court reserved ruling "pending a proper qualification of the doctor[.]" (RT 623-624.)

Dr. Rogers, a board-certified pathologist, performed the autopsies on James White and Brian Berry. (RT 626-653.) When asked about his "training and experience in regards to gunshot wounds," Dr. Rogers said he had done "hundreds" of autopsies in such cases. (RT 628.) His reference sources for gunshot wound examinations included "Spitz & Fisher, the Medical Investigation of Death," and "DeMayo, Gunshot Wounds." (RT 628.)

Dr. Rogers testified that Brian Berry suffered two gunshot wounds to his head. The wound to Berry's left cheek was surrounded by "stippling" caused by unburned grains of gunpowder embedded in the skin. (RT 629.) Dr. Rogers found stippling on Berry's nose and on the sclera, or white part, of his eye. (RT 629.) The stippling on Berry's sclera indicated his eye was open when the shot was fired. (RT 630.) The presence of stippling indicates the gun was fired from an intermediate distance of 12 to 18 inches, close enough for unburned gunpowder particles to penetrate the skin. (RT 633.)

One bullet entered Berry's left cheek and traveled front to back, slightly downward, through the sinus and nasal pharynx. The wound was fatal, but would not cause instantaneous death. (RT 630.) Based on Dr. Rogers's experience, if the wound was caused by a .380 semiautomatic handgun, the gun was likely fired from twelve to eighteen inches from the face. (RT 633-635.)

Another bullet entered the right side of Berry's head, above his ear. The bullet traveled from right to left, slightly back to front, slightly downward, and through the brain before lodging in a bone behind Berry's left ear. (RT 631.) The presence of burned gunpowder or "sooting" in the tissues indicated

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13. Defense counsel conceded that as far as James White's single bullet wound in the top of his head, it "would not require a great deal of expertise to draw conclusions with respect to where the position of the shooter might have been." (RT 618-619.)

the wound was inflicted with the gun in contact with the head. (RT 632, 640.)

Dr. Rogers testified that James White was killed by a single gunshot to the "crown" of his head. (RT 641.) The wound was a contact wound. (RT 642.) The bullet went mostly downward and slightly from the back to the front of White's skull. (RT 642, 646.)

The prosecutor requested a bench conference and proffered that based on the number of gunshot wound autopsies Dr. Rogers had performed, and his reading of related research resources, he could offer an opinion on the position of the bodies at the time of the shootings. (RT 647.) The trial court agreed, and stated:

> [B]ased on the proffered offer of proof that the People have made . . . it doesn't take much of expertise to render an opinion as to the position of the bodies based upon the medical evidence. In fact, it is something that almost a lay person, given these facts, could render.

(RT 647.) The court offered to allow defense counsel to voir dire the doctor outside the presence of the jury, but defense counsel declined. (RT 647.) Defense counsel objected to the testimony as more prejudicial than probative, under Evidence Code section 352. (RT 647.) The trial court found the evidence was relevant to one of the prosecution's theories of the murders. The court stated:

> Although this is a felony-murder, one of the theories that can be proffered, and I expect to be proffered, is premeditated and deliberated [murder], which this is extremely real [sic] as to that.

(RT 648.) The trial court also found the evidence was relevant "as to the aggravating nature of these crimes" should there be a penalty phase. (RT 648.)

After expressly balancing the probative value of the testimony against any potential prejudice, the trial court stated the evidence would be "no more prejudicial" than evidence that the jury had already received regarding the

"execution-style" slayings appellant described to prosecution witnesses.[14/] (RT 648.) The trial court found the probative value of the evidence "far outweighs any prejudice or undue consumption of time," and overruled defense counsel's objections. (RT 648.)

Dr. Rogers testified that James White was six feet, one inch tall. (RT 649.) The prosecutor posed a hypothetical situation in which "a person who is approximately 5-10 to 5-11 and [] were to shoot a person who is six foot one with a .38 caliber handgun." (RT 649.) Dr. Rogers agreed that to achieve the bullet path angle of White's contact wound, the shooter would have to hold the gun "straight at the top of the head[.]" (RT 649-650.)

Similarly, Dr. Rogers agreed that if the victim were lying face down on the ground when shot, the shooter would have to bend over or lie on the ground with the victim to achieve the angle of the bullet wound suffered by James White. (RT 650-651.) According to Dr. Rogers, the shooter could be in any number of positions as long as the gun was held almost perpendicular to the top of the victim's head. (RT 650-652.)

The prosecutor posed a third hypothetical, in which the victim knelt before the shooter, and the shooter stood and extended the gun at waist-level. (RT 651.) Of the three scenarios, Dr. Rogers believed the third to be most likely to have resulted in James White's head wound. (RT 652.) According to Dr. Rogers, the other two scenarios required the shooter to be in "an awkward

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14. By the time Dr. Rogers testified, the jury had already heard prosecution witness Tai Williams's testimony that appellant said he would kill any witnesses to the robbery "execution-style" by shooting them in the head. (RT 527.) Tommy Aldridge had also already testified that appellant said he would murder any witnesses by "blow[ing] them away in the backs of their heads." (RT 555.) After the crimes occurred, appellant told Aldridge that he killed White and Berry to avoid being identified. Appellant said he "shot one of them behind the head and another one on the side of the head and he wasn't sure if he was dead yet, so he shot the other guy behind the head again." (RT 565.)

position, but the last scenario is a somewhat natural position." (RT 652.)

On cross examination, defense counsel asked Dr. Rogers the following question:

> [I]sn't it a fact that there are a multitude of different positions that could have been assumed by the decedent and a person inflicting the injury in order to create the [bullet] track which you detected during the course of your autopsy?

(RT 653.) Dr. Rogers answered, "Yes." (RT 653.)

In closing argument, the prosecutor argued that Dr. Rogers's testimony corroborated prosecution witness Dennis Ostrander's testimony that appellant shot James White while White was on his knees, begging for his life. (RT 1246.)

Dr. Rogers testified again in the retried penalty phase. Dr. Rogers again described Berry's and White's fatal gunshot wounds. (RT 2008-2025.) Dr. Rogers also posited that the shooter could have shot James White in the top of his head from a number of positions: standing on a chair or counter and aiming down at White's head; crouching or kneeling in a position close to the ground; or standing near the kneeling victim. (RT 2025-2027.) White's gunshot wound was consistent with a scenario in which he was shot while kneeling. (RT 2029.) However, Dr. Rogers testified that based on the wound alone, he could not discern the position of the shooter. (RT 2027.) Defense counsel did not object to any of Dr. Rogers's testimony during the penalty phase.

B. Standard Of Review

Only relevant evidence is admissible. (Evid. Code, § 350.) Relevant evidence is evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) "The test of relevance is whether the evidence tends 'logically,

naturally, and by reasonable inference' to establish material facts such as identity, intent, or motive." (*People v. Garceau* (1993) 6 Cal.4th 140, 177, citing *People v. Daniels* (1991) 52 Cal.3d 815, 856.) The trial court has broad discretion in determining the relevance of evidence. (*People v. Garceau, supra,* 6 Cal.4th at p. 177, citing *People v. Babbitt, supra,* 45 Cal.3d at p. 681.) A claim that expert opinion evidence was improperly admitted is reviewed on appeal for abuse of discretion. (*People v. Catlin* (2001) 26 Cal.4th 81, 131.) Pursuant to the abuse-of-discretion standard, the trial court's ruling must not be disturbed on appeal *except* on a showing that the court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124; see also *People v. Cox* (1991) 53 Cal.3d 618, 666; *People v. Harris* (1989) 47 Cal.3d 1047, 1095.)

Appellant argues his claim raises a constitutional issue. (AOB 218-219.) It does not. It is true that the United States Supreme Court has referred to capital cases as "different." *Ford v. Wainwright* (1986) 477 U.S. 399, 411; see *Woodson v. North Carolina* (1976) 428 U.S. 280, 305 (opinion of Stewart, Powell, and Stevens, JJ.). Under appellant's reasoning, however, every error in a capital case would necessarily be a constitutional violation. This Court has rejected the premise of appellant's argument by repeatdly applying the harmless error test applicable to state law evidentiary errors in capital cases. (E.g. *People v. Earp, supra,* 20 Cal.4th at p, 878; *People v. Fudge, supra,* 7 Cal.4th at pp. 1102-1103.) Even in a death penalty case, "A state-law violation is not automatically a violation of federal constitutional due process -- and certainly, the violation here does not offend that guaranty." (*People v. Ashmus* (1991) 54 Cal.3d 932, 984, fn. 14.)

Appellant's assertions of violations of his federal constitutional rights (AOB 233-234) caused by the admission of Dr. Rogers's opinion testimony are waived for failure to object on these grounds in the trial court. (See *People v.*

Anderson (2001) 25 Cal.4th 543, 592, fn. 17; *People v. Davenport* (1995) 11 Cal.4th 1171, 1205.) In any event, as discussed below, because the trial court did not abuse its discretion in admitting the challenged evidence, there was no constitutional or state law violation.

C. The Challenged Evidence Was Relevant To Prove Premeditation And Deliberation, And To Corroborate Witnesses' Testimony

Here, the trial court acted well within its broad discretion in finding the challenged evidence relevant on the issue of premeditation and deliberation. The prosecution's theory of the case was premeditated and deliberate murder, as well as felony murder. (RT 1209, 1223-1227.) This Court has identified the manner of killing as a category of evidence relevant to resolving the issue of premeditation and deliberation. (See *People v. Steele* (2002) 27 Cal.4th 1230; *People v. Anderson* (1968) 70 Cal.2d 15, 73.) Whether appellant premeditated and deliberated was thus a disputed fact of consequence. An execution-style shooting of a kneeling victim supports the inference of a calculated design to ensure death. (See *People v. Bolin* (1998) 18 Cal.4th 297, 320 [evidence of victim's pleas for his life "reflected [the] defendant's deliberate callousness," and thus were "particularly relevant to his intent and the issue of premeditation."]; *People v. Hines* (1997) 15 Cal.4th 997, 1046 [photographs of victim showing position of body and wounds inflicted were relevant to show defendant's premeditation and intent to kill].)

In the penalty phase of the trial, the evidence was relevant to the issues of aggravation and penalty. Evidence showing that the victims were shot while kneeling demonstrated the circumstances of the crime and therefore was "relevant to a determination of the appropriateness of the death penalty." (*People v. Wash* (1993) 6 Cal.4th 215, 266; *People v. Raley* (1992) 2 Cal.4th 870, 914 [autopsy photos showing manner in which victim was wounded relevant "not only to the question of deliberation and premeditation but also

aggravation of the crime and the appropriate penalty[.]")

The evidence was also relevant to the disputed issue of witnesses' credibility. Prosecution witnesses Tai Williams, Tommy Aldridge, and Dennis Ostrander each testified that appellant told them that he planned to or already had shot the unresisting victims in the head. (See *People v. Scheid* (1997) 16 Cal.4th 1, 15-17 [photograph admissible to corroborate a witness's testimony]; see also *People v. Garceau, supra*, 6 Cal.4th at p. 181; *People v. Allen* (1986) 42 Cal.3d 1222.) The challenged testimony corroborated those independent accounts.

Accordingly, the trial court did not abuse its discretion in finding the challenged evidence relevant.

D. The Subject Of Dr. Roger's Opinion Was Sufficiently Beyond The Common Experience Of The Jurors

Appellant contends the evidence was inadmissible because jurors were capable of drawing their own conclusions about the manner of the shootings without the expert's opinion. (AOB 220-224.) Respondent disagrees.

California Evidence Code section 801 limits an expert's opinion testimony to that which is "related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact[.]" (See also *People v. Champion* (1995) 9 Cal.4th 879, 924-925 [meaning of slang words used by defendants was sufficiently foreign to jurors].) Here, the trial court could reasonably conclude that the position of the shooter and victims, based on the nature of the bullet wounds, was sufficiently beyond common experience. The jury "need not be wholly ignorant of the subject matter of the opinion" in order to allow its admission. (*People v. Farnam* (2002) 28 Cal.4th 107, 162.)

Testimony regarding the manner in which wounds were inflicted is

admissible as "a proper subject for expert opinion." (*People v. Steele, supra*, 27 Cal.4th 1230, 1274, conc. opn. of George, C.J.) "A basic question that must be considered by a pathologist in performing an autopsy concerns 'the manner and mode of death,' including whether the death was accidental, suicidal, homicidal, or the result of natural causes." (Ibid.) A forensic pathologist who has performed an autopsy is generally permitted to offer an expert opinion "not only as to the cause and time of death but also as to circumstances under which the fatal injury could or could not have been inflicted." (See *People v. Cole* (1956) 47 Cal.2d 99, 104-106 [fatal wound not self-inflicted].)

The subject of gunshot wounds is not of such common knowledge that laypersons would not be assisted by the opinion of a doctor, who has special knowledge and experience regarding anatomy and injuries to the human body. Thus, for example, a pathologist properly may give an opinion as to whether certain wounds on the victim were defensive and indicative of a struggle. (See *People v. Bemore* (2000) 22 Cal.4th 809, 819 [forensic pathologist testified regarding defensive knife wounds].) An execution-style shooting differs from an accidental, suicidal or defensive shooting. A medical expert can explain those differences to a jury.

The prosecution presented evidence through the testimony of other witnesses that appellant executed the unresisting victims. (RT 527, 555, 565.) However, appellant testified that he heard people fighting in the back of the Subway store during the robbery, prior to James White's death. He heard the sounds of tennis shoes "chirping" and other, "heavier" footsteps. (RT 931.)

Thus, the circumstances of the infliction of James White's fatal wound were actively disputed. Dr. Rogers helped resolve that dispute. The significance of the bullet's trajectory and the relative heights of the parties was sufficiently beyond the common experience of the jurors to warrant Dr. Roger's expert opinion. (See *People v. Welch* (1999) 20 Cal.4th 701, 750-751 [autopsy photographs properly admitted so that pathologist could illustrate and explain

the nature of the wounds, to indicate the killing had been done at close range and in a deliberate manner].) The jurors undoubtedly lacked the experience of shooting a six-foot man in the crown of his head, or even reviewing autopsy results of such a victim. Here, James White was found lying face-down in a pool of blood. (RT 326.) Relying on intuition alone, jurors might reasonably have no idea how his fatal wound was inflicted. Here, however, Dr. Rogers's testified that although the shooter might have assumed any number of positions when necessarily placing the gun perpendicular to the crown of the victim's head, the least awkward position would be that with the victim kneeling. Such evidence would thus "assist the trier of fact" (Evid. Code, § 801) in determining whether the murder was premeditated and deliberated, and in evaluating the credibility of witnesses testifying to the execution-style murder. The trial court did not abuse its discretion in admitting the challenged testimony.

Even if the evidence were improperly ruled to be helpful to the jury, its admission was harmless. Appellant contends the evidence was prejudicial because it added the weight of an expert's credibility to "facts commonly understood by the jurors" and elevated the opinion to the level of scientific fact. (AOB 216, 224.) But if the jurors already completely understood the meaning of the victims' injuries, then at worst Dr. Rogers confirmed what they already knew -- that the likeliest explanation was that the shooter executed his victims. If the jury was given merely cumulative evidence, the error was harmless. (See *People v. Jenkins* (2000) 22 Cal.4th 900, 1016 ["the challenged evidence was cumulative, and any error in its admission was harmless beyond a reasonable doubt"]; *People v. Smithey* (1999) 20 Cal.4th 936, 972-973; *People v. Ainsworth* (1988) 45 Cal.3d 984, 1010 [evidence of a defendant's callousness which is "only cumulative" is not prejudicial].)

E. The Prosecution Laid A Proper Foundation For Dr. Roger's Testimony

Appellant argues there was no foundation laid for Dr. Rogers to give an expert opinion on the positions of the shooter and victims. (AOB 224-231.) The trial court ruled that Dr. Rogers could testify as to the likely positions of the shooter and victims. (RT 623, 647.) The court offered to allow defense counsel to voir dire Dr. Rogers outside the presence of the jury, but defense counsel declined. (RT 647.)

Trial courts are given considerable latitude in assessing expert qualifications and will only be reversed for a manifest abuse of discretion. (*People v. Davenport* (1995) 11 Cal.4th 1171, 1207.) Error regarding a witness's qualifications as an expert will be found only if the evidence shows that the witness "clearly lacks qualification as an expert." (*People v. Farnam, supra,* 28 Cal.4th at p. 162, quoting *People v. Chavez* (1985) 39 Cal.3d 823, 828, internal quotations omitted.)

Here, Dr. Rogers was the Chief of Forensic Medicine at the Los Angeles County Coroner's Office. (RT 2008.) He attended the University of California, San Diego, for medical school, then completed a pathology residency at Los Angeles County U.S.C. Medical Center. (RT 627.) Dr. Rogers also trained in forensic pathology at the Los Angeles County Coroner's Office. (RT 627.) Dr. Rogers had performed "hundreds" of autopsies in gunshot wound cases. (RT 628.) He was also familiar with published references for gunshot wound examinations. (RT 628.) He qualified to testify as an expert in approximately 200 cases. (RT 627.)

A medical expert generally may give an opinion as to "the ability or inability of a person to do certain acts." (*People v. Mayfield* (1997) 14 Cal.4th 668, 765-766.) In *Mayfield*, an experienced forensic pathologist was permitted to testify whether victim's gunshot wound could have been inflicted in the

manner described by defendant, that is, whether the victim could have shot himself without leaving gunpowder "stippling" or "tattooing" in the wound. The pathologist opined that the victim could not have held his gun in his two hands, pointed at his face, and shot himself from a great enough distance to avoid the deposit of gunpowder particles in the wound. (*Ibid*.) This Court reiterated that a pathologist may offer an expert opinion "not only as to the cause and time of death but also as to circumstances under which the fatal injury could or could not have been inflicted." (*People v. Mayfield, supra,* 14 Cal.4th at p. 766.)

This Court further explained that the pathologist "did not give a legally prohibited opinion . . . on what positions [the victim] and defendant were in when the fatal shot was fired." (*People v. Mayfield, supra,* 14 Cal.4th at p. 766.) The pathologist in *Mayfield* testified that the autopsy results

> [were] not sufficient to permit him to give an opinion *fixing* the relative positions of [the victim] and defendant when the fatal wound was inflicted, but it was sufficient to support an opinion *eliminating* certain positions from the realm of possibility. There is no rule of law prohibiting such testimony.

(*People v. Mayfield, supra,* 14 Cal.4th at pp. 766-767, emphasis in original.)

Here, Dr. Rogers testified that it was possible for James White's fatal wound to have been inflicted by a shooter in a "multitude" of different positions. (RT 649-651.) Of the three positions the prosecutor described (the shooter standing above the upright victim, crouching down near the prone victim, or standing near the kneeling victim), Dr. Rogers merely stated that the third scenario was least awkward and "somewhat natural." (RT 652.) Dr. Rogers did *not* definitely fix the relative positions of the shooter and victim; he merely gave his opinion that the wounds were consistent with many possible positions. Indeed, during the retried penalty phase, Dr. Rogers stated that based on the wound alone, he could not discern the position of the shooter. (RT

2027.) As an experienced forensic pathologist, Dr. Rogers was clearly qualified to render such an opinion. (*People v. Mayfield, supra,* 14 Cal.4th at p. 766.)

As noted by the trial court, the issue of the position of the shooter and victim "is something that *almost* a lay person, given these facts, could render." (RT 623, 647, emphasis added.) The issue did not require expertise *beyond* that of an experienced forensic pathologist. However, as explained previously, Dr. Rogers's training and extensive practical experience in examining gunshot wounds was useful to the jury in its consideration of the circumstances of the victims' murders. The trial court did not abuse its discretion in favorably assessing Dr. Rogers expert qualification, and appellant's claim that the trial court had insufficient information to exercise its discretion (see AOB 226) is meritless. (*People v. Davenport, supra,* 11 Cal.4th at p. 1207; see also *People v. Farnam, supra,* 28 Cal.4th at p. 162.)

F. Dr. Rogers's Testimony Was More Probative Than Prejudicial

Appellant contends the trial court should have excluded Dr. Rogers's opinion on the probable positions of the shooter and victims as more prejudicial than probative, in violation of Evidence Code section 352. (AOB 231-237.) At trial, appellant objected to the evidence as being unduly prejudicial. (RT 648.) The trial court found the evidence highly probative on the issues of premeditation and deliberation, and relevant to the "aggravating nature of the crimes" in the penalty phase. (RT 648.) The trial court expressly found that "the probative value far outweighs any prejudice or undue consumption of time[.]" (RT 648.)

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

misleading the jury." The "prejudice" referred to in Evidence Code section 352 is that which "uniquely tends to evoke an emotional bias against a party as an individual, while having only slight probative value with regard to the issues." (*People v. Garceau, supra,* 6 Cal.4th at p. 178.) A trial court has broad discretion in determining the admissibility of evidence under Evidence Code section 352 when a claim is made that the evidence is unduly gruesome or inflammatory. (*People v. Crittenden* (1994) 9 Cal.4th 83, 133-134 [admissibility of photographs of victim].)

As described previously, evidence tending to prove that appellant shot the victims as they knelt was extremely probative of the issues of premeditation and deliberation, and also to corroborate the credibility of prosecution witnesses who testified that appellant boasted of shooting the victims execution-style. Thus, appellant's claim that the evidence served only to inflame the jury's passions (see AOB 236-237) is incorrect. Moreover, testimony regarding premeditated and deliberated killings is inevitably disturbing, and the jurors here were instructed not to be influenced by sympathy, passion, or prejudice and to conscientiously consider and weigh the evidence, apply the law, and reach a just verdict. (RT 1350-1351, 1385.) The jurors presumably followed those instructions. (*People v. Sanchez* (2001) 26 Cal.4th 834, 852.) Finally, admission of the coroner's testimony was not unduly prejudicial, given the fact that it was not the sole evidence tending to show that the victims were shot execution-style. By the time Dr. Rogers testified, three lay witnesses had attested to appellant's statements about executing any witnesses by shooting them in the head. (RT 527, 555, 565, 648.) Accordingly, the trial court acted well within its broad discretion in admitting the evidence at issue.

Appellant also argues that there was evidence other than the coroner's opinion that the prosecution could have used to prove that the victims were shot while kneeling. (AOB 232.) However, a prosecutor "is generally entitled to

tell his or her story with the most persuasive and forceful evidence." (*People v. Scheid* (1997) 16 Cal.4th 1, 16-17 [defense's offer to stipulate as to the fact or manner of the shootings did not negate the relevance of the photograph showing victims at the crime scene].)

Finally, even assuming arguendo the trial court abused its discretion in admitting the evidence regarding the probable position of the shooter and victims, the admission of the evidence was harmless. There is no reasonable probability a result more favorable to appellant would have been reached at the guilt phase had the challenged evidence been excluded. (See *People v. Welch* (1999) 20 Cal.4th 701, 750-751, citing *People* v. *Watson, supra*, 46 Cal.2d at p. 836; AOB 264-265.) Dr. Rogers's testimony was relatively sterile compared to the testimony of prosecution witnesses Tommy Aldridge and Dennis Ostrander, who described appellant's unrepentant boasts of shooting the unresisting victims in the head. (See RT 564-565, 793-795, 811-813.) Prosecution witness Tai Williams also testified that prior to the robbery and murders appellant said he would shoot the victims in the head and thus "blow them away" execution-style. (RT 527, 555.)

For the same reasons, any penalty phase error was also harmless. State law error occurring during the penalty phase "will be considered prejudicial when there is a 'reasonable possibility' such an error affected a verdict." (*People v. Jackson* (1996) 13 Cal.4th 1164, 1232.) Here, it is not reasonably possible that admission of Dr. Rogers's testimony made the difference between a verdict of death and one of life imprisonment without possibility of parole. (See *People v. Jackson, supra,* 13 Cal.4th at p. 1232; see also *People v. Brown* (1988) 46 Cal.3d 432, 446-449.)

The evidence outlined in prior arguments not only reveals substantial evidence supporting the first degree murder convictions and the true finding on the special circumstance of robbery, but the overwhelming evidence is such that, if it was error to admit Dr. Rogers's testimony regarding the positions of

the shooter and victims, it was harmless under any applicable standard. (See Arg. I.) Accordingly, no reversal is required even assuming error occurred in the court's ruling.

V.

THE TRIAL COURT PROPERLY PRESIDED OVER THE READBACK OF TESTIMONY

Appellant contends the trial court abandoned its duty to control and direct the trial and denied appellant his constitutional rights to due process of law and to a fair trial in its handling of the jury's request to be reread certain portions of testimony. (AOB 244-264.) Specifically, appellant's claim concerns the trial court's response to the jury's request at the guilt phase to hear appellant's testimony regarding "whether James [Robinson] had the gun Sunday morning after he returned home." (AOB 245, fn. 47; see also RT 1392.) Appellant waived any claim of error. Even if the claim were preserved, it is meritless.

A. Relevant Proceedings

During guilt phase deliberations, the jury requested to have reread three portions of testimony. In the presence of the prosecutor, defense counsel and appellant, the trial court related the jury's request for the following items: (1) Barbara Phillips's testimony regarding the position of the fingerprints on the Subway sandwich bag, as well as the number of prints and whether they were applied at the same time; (2) appellant's testimony "regarding whether Tai [Williams] was home when James [Robinson] returned home on Sunday morning;" and (3) "whether James had the gun Sunday morning after he returned home." (RT 1392.)

With regard to the jury's second requested item, the trial court stated, "The reporter informed me that there is no such testimony. And I take it that counsel recalls there was no such testimony by the defendant." The prosecutor and defense counsel agreed. (RT 1392.)

As to whether appellant had his gun on Sunday morning after he returned to Williams's apartment, the trial court said, "I take it all the testimony

has been found as to those items and the jury and the alternates will be read those in the jury room." (RT 1393.) The trial court asked if counsel wished to be present during the re-reading of the testimony, and both the prosecutor and defense counsel answered, "No." (RT 1393.) On the advice of counsel, appellant also waived his presence during the rereading. (RT 1393-1394.)

The trial court informed the jury that:

> After a thorough search, and after discussion with counsel, I can tell you right now there was no testimony of James Robinson regarding whether Tai was home when James returned home on Sunday morning.

(RT 1395.) The trial court explained that the other requested testimony would be re-read by the court reporter. (RT 1395-1396.) The readback was identified on the record as volume 11, page 1176, line 19 to line 24; page 1069, line 23 to page 1073, line 17. (RT 1396.)

B. Analysis

Appellant claims the trial court violated Penal Code section 1138[15/] by abdicating its control over the testimony reread to the jury, which allowed the court reporter to reread irrelevant and prejudicial testimony. (AOB 244-264.) Initially, appellant has waived this claim by not objecting at trial to the court's alleged failure to comply with section 1138. (*People v. Frye* (1998) 18 Cal.4th

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15. Penal Code section 1138 provides:
After the jury have retired for deliberation, if there be any disagreement between them as to the testimony, or if they desire to be informed on any point of law arising in the case, they must require the officer to conduct them into court. Upon being brought into court, the information required must be given in the presence of, or after notice to, the prosecuting attorney, and the defendant or his counsel, or after they have been called.

894, 1007; see also *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1193; *People v. Price* (1991) 1 Cal.4th 324, 414.)

Even if the claim is preserved for appeal, it is meritless. An appellate court applies the abuse of discretion standard of review to a trial court's exercise of its supervision over a deliberating jury. (*See People v. Gurule* (2002) 28 Cal.4th 557, 649.) Here, there is no evidence that the trial court abdicated or abused its discretion in handling the jury's request for readback of testimony. First, appellant claims the trial court erroneously "failed to participate in the planning and supervision of the readback[.]" (AOB 254-256.) Appellant bases his claim on the trial court's statement, after listing the jury's requests for the record, that ". . . I take it all the testimony has been found as to those items and the jury and alternates will be read those in the jury room." (AOB 245; see also RT 1393.)

The trial court's statement merely acknowledged the procedure for fulfilling the jury's requests, i.e., the jury's requests are received by the trial court, the trial court reads the requests and notifies counsel, the requested testimony is located and re-read to the jury. Counsel was notified of the jury's questions, a hearing was held, and the requested testimony was read to the jury by the court reporter, without objection by defense counsel. (RT 1392-1397.) Unlike the cases cited by appellant (see *Fisher v. Roe* (9th Cir. 2001) 263 F.3d 906; *Riley v. Deeds* (9th Cir. 1995) 56 F.3d 1117; see also AOB 251, 253-256), this is not a case in which the readback occurred without the knowledge or participation of trial court and/or counsel. To the contrary, the record reflects that the trial court, defense counsel, and the prosecutor actively participated in accommodating the jury's requests. For example, in response to the trial court's inquiry whether appellant would waive his presence during the readback, defense counsel said:

> Let me explain this to you, Mr. Robinson, before you answer. [¶] The lady who has been here, who is the court reporter, has not only taken

down the testimony of the witnesses but she has transcribed it. *We have had an opportunity to read it for any errors.*

(RT 1393, emphasis added.)

Additionally, when the trial court addressed the jury's request for readback of appellant's testimony regarding whether Tai Williams was at home when appellant returned to the apartment, the trial judge personally vouched for the careful consideration of the jury's request. The trial court told the jury:

After a thorough search, and after discussion with counsel, I can tell you right now there was no testimony of James Robinson regarding whether Tai was home when James returned home on Sunday morning.

(RT 1395, emphasis added.) The records thus refutes appellant's claim that the trial court abandoned or abused its discretion in responding to the jury's requests.

Appellant also argues that the trial court erroneously allowed "much prejudicial, non-responsive" testimony to be re-read to the jury. (AOB 246.) However, the challenged testimony, only five transcript pages long, directly speaks to the time period about which the jury inquired; that is, when appellant returned to Tai Williams's apartment from the Subway store. (RT 1069-1073, 1392.) In the readback testimony, the prosecutor's questions established that appellant was at the apartment from approximately 2:20 a.m. until 6:00 a.m., and he feared that Williams might kill him. He had his gun at that time, and took it with him when he left. (RT 1069-1073, 1176.) The testimony properly answered the jury's inquiry as to "whether James [Robinson] had the gun Sunday morning after he returned home." (RT 1392.) Section 1138 "does not forbid giving the jury more than it requests so it also receives the context." (*People v. Hillhouse, supra,* 27 Cal.4th at pp. 506-507.)

Appellant complains that the selected testimony stopped short of relating the question, "Did you have [your gun] during the hours of, say, 11

o'clock on Saturday night and the time when you returned to the apartment?" Appellant answered, "No, sir." (RT 1176.) That testimony was clearly unresponsive to the jury's question. The jury did not ask whether appellant had his gun with him at the time of the robbery and murders. (See RT 1392.) There was no violation of the jury's or appellant's right to have the jury provided a rereading of testimony on request.

Even if the trial court abused its discretion in handling the jury's request, the error was harmless by any standard. "A conviction will not be reversed for a violation of section 1138 unless prejudice is shown." (*People v. Jenkins, supra,* 22 Cal.4th at p. 1027; *People v. Frye, supra,* 18 Cal.4th at p. 1007; see also *People v. Box* (2002) 23 Cal.4th 1153, 1213-1214 [applying *Watson* standard of review to find similar error harmless]; *People v. Jennings* (1991) 53 Cal.3d 334, 384-385 [finding error based on violation of section 1138 harmless beyond a reasonable doubt]; *People v. Ainsworth* (1988) 45 Cal.3d 984, 1020 [applying *Watson* standard of review to find similar error harmless].)

Here, the testimony that was reread to the jury was appropriately tailored to their request. In light of substantial evidence of appellant's guilt (see Arg. I), any error was harmless beyond a reasonable doubt. (See *People v. Jennings, supra,* 53 Cal.3d at pp. 384-385.) For the same reasons, it is not reasonably probable that the outcome would have been different had the testimony been incrementally limited or expanded as appellant argues. (See *People v. Ainsworth, supra,* 45 Cal.3d at p. 1020.) Thus, there is no support for appellant's claim that automatic reversal is required. (See AOB 252-253.) Finally, appellant's claims that the alleged error violated various Federal Constitutional rights are waived for failure to object on those grounds below, and fail on the merits because they are based on an unsupported premise or error. (See *People v. Sanders* (1995) 11 Cal.4th 475, 539, fn. 27.) Appellant's claims should be rejected.

VI.

APPELLANT HAS WAIVED HIS CLAIM THAT THE VICTIM IMPACT EVIDENCE WAS IMPROPERLY ADMITTED, BUT EVEN CONSIDERING THE CLAIM ON ITS MERITS, THE EVIDENCE WAS ADMISSIBLE

Appellant raises several claims regarding the admission of the prosecution's victim impact evidence in the penalty phase of the trial. (AOB 264-336.) None of the claims has merit.

A. The Victim Impact Testimony

During the retried penalty phase, family members of victims Brian Berry and James White testified about the impact of the murders on their lives. Brian Berry's mother, father, and twin sister each described the shock and horror of learning of Brian's murder, and the permanent devastation his death caused to their extremely close and loving family. (RT 2247-2268.) James White's mother gave similar testimony about the impact of her son's murder on her and her family. (RT 2268-2284.) The witnesses articulately conveyed their pervasive grief and the irreparable harm to their lives caused by the senseless, violent killings. (RT 2247-2284.)

B. Appellant Waived His Challenge To The Victim Impact Testimony

First, appellant failed to preserve his claims by making a timely and specific objection to the victim impact evidence at trial. Appellant did not object to any of the testimony by the victims' family members. (RT 2247-2268 [Brian Berry's family], RT 2269-2284 [James White's family].) Accordingly, he has failed to preserve the issues for appeal. (See Evid. Code, § 353; *People v. Hines* (1997) 15 Cal.4th 997, 1047 [defendant's failure to object to victim impact evidence waived issue on appeal]; *People v. Sanders* (1995) 11 Cal.4th

475, 549 [nonspecific objections to victim impact evidence failed to preserve claim for review]; *People v. Montiel* (1993) 5 Cal.4th 877, 934 ["Counsel's failure to object and/or request an admonition waives any direct appellate challenge to [victim impact] evidence and argument."]; *People v. Johnson* (1992) 3 Cal.4th 1183, 1245 [same]; see also *People v. Gurule* (2002) 28 Cal.4th 557 [stipulation to admit victim impact evidence generally waives challenge to evidence on appeal].)

Even if appellant had made appropriate objections at trial, however, his claims here would fail.

C. The Victim Impact Evidence Was Properly Admitted

In *Payne v. Tennessee* (1991) 501 U.S. 808 [111 S.Ct. 2597, 115 L.Ed.2d 720], the United States Supreme Court overruled its prior holdings in *Booth v. Maryland* (1987) 482 U.S. 496 [107 S.Ct. 2529, 96 L.Ed.2d 440] and *South Carolina v. Gathers* (1989) 490 U.S. 805 [109 S.Ct. 2207, 104 L.Ed.2d 876], which generally barred admission of victim impact evidence and related prosecution argument during the penalty phase of a capital trial. In *Payne*, the United States Supreme Court held that the Eighth Amendment does not bar the admission of victim impact testimony in the sentencing phase of a capital trial. Victim impact evidence is designed to show the victim's uniqueness as an individual human being, "whatever the jury might think the loss to the community resulting from his death might be." (*Id.* at p. 823.)

In *Payne*, the defendant was convicted of the first degree murder of a mother and her two-year-old daughter and first degree assault with intent to murder her three-year-old son. The capital sentencing jury heard that defendant was a caring and kind man who went to church and did not abuse drugs or alcohol. He was a good son and suffered from low intelligence. The prosecution presented testimony from the three-year-old victim's grandmother that he missed his mother and baby sister. Her testimony "illustrated quite

poignantly some of the harm that Payne's killing had caused; there is nothing unfair about allowing the jury to bear in mind that harm at the same time as it considers the mitigating evidence introduced by the defendant." (*Id.* at p. 826.)

The *Payne* Court recognized that, within constitutional limitations, the States enjoy their traditional latitude to prescribe the method by which those who commit murder shall be punished, and the Court has deferred to the State's choice of substantive factors relevant to the penalty determination.

> The States remain free, in capital cases, as well as others, to devise new procedures and new remedies to meet felt needs. Victim impact evidence is simply another form or method of informing the sentencing authority about the specific harm caused by the crime in question, evidence of a general type long considered by sentencing authorities.

(*Id.* at pp. 824-825.)

The *Payne* Court concluded that a state may properly determine that for the jury meaningfully to assess the defendant's moral culpability and blameworthiness, it should have before it at the sentencing phase evidence of the specific harm caused by the defendant. "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." (*Id.* at p. 825.) Turning the victim into a faceless stranger at the penalty phase of a capital trial deprives the State of the "full moral force of its evidence and may prevent the jury from having before it all the information necessary to determine the proper punishment for a first-degree murder." (*Ibid.*)

Thus, if a state chooses to permit the admission of victim impact evidence, the Eighth Amendment erects no *per se* bar. "A State may legitimately conclude that evidence about the victim and about the impact of

the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed. There is no reason to treat such evidence differently than other relevant evidence is treated." (*Id.* at p. 827.)

In California, the admission of victim impact evidence is subject to the trial court's discretion. (See *People v. Raley* (1992) 2 Cal.4th 870, 916 [permitting "evidence and argument on emotional though relevant subjects that could provide legitimate reasons to sway the jury to show mercy or to impose" the death penalty]; *People v. Johnson, supra,* 3 Cal.4th at p. 1245 [court may admit evidence of impact of the crime on the victim's family]; Evid. Code, § 352.) This Court has consistently approved the trial court's admission of such evidence under Penal Code section 190.3, subdivision (a). (See *Raley, supra,* 2 Cal.4th at p. 915 [the law "allows evidence and argument on the specific harm caused by the defendant, including the impact on the family of the victim"], citing *People v. Edwards* (1991) 54 Cal.3d 787, 835 [victim impact evidence is "a circumstance of the crime" admissible under factor (a)].)

Appellant contends the evidence was not properly admitted under Penal Code section 190.3 as a circumstance of the crime. (AOB 286, fn. 50, 319-320.) However, it is now well settled that the immediate effects of a capital crime on the victim's family constitute a "circumstance of the crime" under Penal Code section 190.3, subdivision (a) and that prosecutors can introduce and argue specific harm caused by the defendant to victim's family. (*People v. Taylor* (2001) 26 Cal.4th 1155, 1171-1172 [no error to allow family members to explain various ways their lives were adversely affected by victim's death]; *People* v. *Kirkpatrick* (1994) 7 Cal.4th 988, 1017; *People v. Edwards, supra,* 54 Cal.3d at pp. 833-836.)

In *People v. Edwards,* a post-*Payne* case, this Court found that "evidence of the specific harm caused by the defendant" is generally a circumstance of the crime admissible under factor (a) of Penal Code section

190.3. (*People v. Edwards, supra,* 54 Cal.3d at p. 833.) This Court explained that the word "circumstance" under factor (a) means the immediate temporal and spatial circumstances of the crime, as well as that "which surrounds materially, morally, or logically" the crime. (*Ibid.*) Factor (a) therefore allows evidence and argument on the specific harm caused by the defendant, including the impact on the family of the victim. (*Id.* at p. 835; see *People v. Johnson, supra,* 3 Cal.4th at p. 1245.) This holding "only encompasses evidence that logically shows the harm caused by the defendant." (*People v. Edwards, supra,* 54 Cal.3d at p. 835.)

This Court in *People v. Edwards*, *supra*, 54 Cal.3d 787, expressly refused to explore the "outer reaches" of evidence admissible as a circumstance of the crime. (*Id.* at pp. 835-836.) Instead, this Court quoted the limitation expressed in the "leading pre-*Booth* case" (*id*. at p. 834) of *People v. Haskett* (1982) 30 Cal.3d 841. Although emotional evidence is permissible, "irrelevant information or inflammatory rhetoric that diverts the jury's attention from its proper role or invites an irrational, purely subjective response should be curtailed." (*People v. Edwards*, *supra*, 54 Cal.3d at p. 836, quoting *People v. Haskett, supra,* 30 Cal.3d at p. 864.)

In the twenty years since *Haskett* was decided, this Court has not defined what might constitute "inflammatory rhetoric" which diverts the jury's attention from its "proper role." The jury's proper role, simply put, is to decide between a sentence of death and life without the possibility of parole. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1193.)

A penalty phase jury "performs an essentially normative task. As the representative of the community at large, the jury applies its own moral standards to the aggravating and mitigating evidence to determine if life or death is the appropriate penalty for that particular offense and offender." (*People v. Mendoza* (2000) 24 Cal.4th 130, 192, internal quotations omitted.) The jury is therefore making a "moral assessment," not a mechanical finding

of facts. (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1268, quoting *People v. Brown* (1985) 40 Cal.3d 512, 540.) In deciding which defendants receive a death sentence, states must allow an "*individualized* determination on the basis of the character of the individual and the circumstances of the crime." (*Zant v. Stephens* (1983) 462 U.S. 862, 879 [103 S.Ct. 2733, 77 L.Ed.2d 235], emphasis in original.) That determination, however, should be based not on abstract emotions, but should instead be rooted in the aggravating and mitigating evidence. (See *California v. Brown* (1987) 479 U.S. 538, 542 [107 S.Ct. 837, 93 L.Ed.2d 934][discussing limitations on verdict on based on "mere sympathy"].)

It is true that the court must "strike a careful balance between the probative and the prejudicial." (*People v. Lewis* (1990) 50 Cal.3d 262, 284.) However, in the penalty phase of a capital trial, a trial court has less discretion to exclude evidence as unduly prejudicial than in the guilt phase, because the prosecution is entitled to show the full moral scope of the defendant's crime. (*People v. Anderson* (2001) 25 Cal.4th 543, 591-592.) As part of the jury's normative role, it must be allowed to consider any mitigating evidence relating to the defendant's character or background. (*Lockett v. Ohio* (1978) 438 U.S. 586, 604.) There is nothing unconstitutional about balancing that evidence with the most powerful victim evidence the prosecution can muster, because that evidence is one of the circumstances of the crime. (*People v. Kirkpatrick, supra,* 7 Cal.4th at p. 1017; *People v. Edwards, supra,* 54 Cal.3d at pp. 833-836.)

In the context of the penalty phase, "emotional evidence" and "inflammatory rhetoric" are different concepts. The limitation against "inflammatory rhetoric" is similar to the federal limitation against evidence which is "so unduly prejudicial that it renders the trial fundamentally unfair." (*People v. Howard* (1992) 1 Cal.4th 1132, 1190-1191.) But as the United States Supreme Court has stated in *Payne,* victim impact evidence is not unfair

in any way.

Because of the penalty phase jury's particular duties, even highly emotional victim impact evidence will not divert it from its proper role. An improper diversion might occur if, for example, the prosecution were to urge that a death sentence should be imposed on the basis of the victim's or defendant's race. (*Booth v. Maryland* (1987) 482 U.S. 496, 517, dis. opn. of White, J. [victim impact evidence should be held constitutionally permissible, but "the State may not encourage the sentence to rely on a factor such as the victim's race in determining whether the death penalty is appropriate"]; *South Carolina v. Gathers* (1989) 490 U.S. 805, 821, dis. opn. of O'Connor, J. ["It would indeed be improper for a prosecutor to urge that the death penalty be imposed because of the race, religion, or political affiliation of the victim"]; *Furman v. Georgia* (1972) 408 U.S. 238, 242, conc. opn. of Douglas, J. [death penalty "unusual" if imposed on the basis of "race, religion, wealth, social position, or class"].) Here, however, the prosecutor did not urge a death sentence on an unconstitutional basis, and so the jury was not diverted from its proper role.

The specific harm caused by appellant when he murdered White and Berry -- the impact on their extremely close families -- was relevant to the jury's meaningful assessment of appellant's "moral culpability and blameworthiness." (See *Payne*, 501 U.S. at p. 809.) Evidence of the impact of appellant's crimes on the victims' families advanced the State's interest in "counteracting the mitigating evidence which the defendant is entitled to put in[.]" (*Payne*, 501 U.S. at p. 825.) Fairness demands that evidence of the victims' personal characteristics, and the harm suffered by their families, be considered along with the "parade of witnesses" praising the "background, character, and good deeds" of the defendant . . . without limitation as to relevancy[.]" (*Payne*, 501 U.S. at p. 826; see also *People v. Dennis, supra,* 17 Cal.4th at p. 498 [capital defendant in penalty phase presented evidence from

his friends and associates as to his childhood difficulties, his shyness and loneliness due to his hearing problem, his friendly and easygoing nature, his pride and love for his son and his devastation at his son's death, his honesty, thoughtfulness, and sensitivity, his good record at Lockheed, and his compassion for others. Defendant's mother presented a pictorial biography of defendant's life and their relationship and spoke of awards he won. The jury also heard a tape recording of defendant and his son].)

In the instant case, the sentencing jury heard testimony from 13 defense witnesses that appellant was kind and nonviolent, a good friend and son. The testimony spanned approximately 58 pages of the reporter's transcript, not including the prosecutor's cross-examination. Several defense witnesses knew appellant through his participation in a gospel choir. Those witnesses testified that appellant was a "nice young man" and a "very helpful" member of the choir. (RT 2612.) Appellant was responsible and polite. (RT 2612, 2691.) Appellant was often placed in charge of younger choir members. (RT 2615, 2702.) He was a role model for children. (RT 2711.) He was quiet, nonviolent, obedient, and "a fine young man[.]" (RT 2617.) He was a "nice, mannerable, respectful young man." (RT 2622.) One defense witness described appellant as easygoing, friendly, passive. (RT 2677-2678.) Still another said he was a calm and studious child, "very loving," and "mannerable." (RT 2706.) Appellant was a "very nice, kind person. Soft-hearted and very loyal. Faithful to his friends and family." (RT 2748.)

One of appellant's college friends testified that he was nonviolent and trustworthy, and that it would be out of character for him to buy or carry a gun. (RT 2627-2631.) Another college friend, Kristi Skinner, talked about her relationship with appellant:

> [W]e were great friends. We enjoyed spending time together. Oh, we spent time together alone or with friends. I used to take him places when he needed a ride. And we had a great friendship.

(RT 2633.) Appellant was "very caring and gentle, mild-mannered." He "would do anything for a friend." (RT 2633.) Skinner had never seen appellant raise his voice and argue with anyone. (RT 2633.) Skinner did not believe appellant was capable of placing a gun to someone's head and pulling the trigger. (RT 2634-2365.)

Kevin Forester "became very close friends" with appellant while they were in college, and played computer games with him. Appellant and Forester went bowling together and went out with groups of friends. (RT 2667.) Appellant was "easygoing and compassionate," trustworthy, and not violent. (RT 2667-2668.) Another defense witness, a childhood friend who maintained contact with appellant up through the time of the crimes, described him as nice, kind, softhearted, and not violent. (RT 2748.)

Appellant's mother, Vesta Robinson, testified about her relationship with her son. She raised appellant and his two older sisters alone. (RT 2640.) Appellant was caring, fun-loving and church-going. He "has compassion for people." (RT 2641.) He was a tenor in his church's Life Choir, and an officer of the choir's youth committee. (RT 2643.) Mrs. Robinson took appellant on a seven-day cruise for his 16th birthday. (RT 2643.) When he went to college, she visited him several times a month, bringing him groceries and cleaning supplies. (RT 2649.) She repaid $800 of the $1,500 appellant owed the school. (RT 2652.) Her partial payment was not meant to teach appellant a lesson, but to "shar[e] the problem." (RT 2658.) Mrs. Robinson said she loved her son, did her best to raise him well, and did not believe he was guilty of the crimes. (RT 2663-2664.) It was "totally impossible" that appellant was capable of robbing a sandwich shop and shooting two young men at point-blank range. (RT 2655.) He is "meek, loving, soft-hearted." (RT 2655.) She loved her son and visited him in jail. (RT 2656.)

The defense introduced a photograph of appellant at age 15, taken during a family trip to Hearst Castle. (RT 2643.) Another photograph showed

appellant at a banquet for an "Eastern Star" organization to which his mother and sisters belonged. (RT 2644.) Another picture showed appellant and his sister at a children's military camp they attended yearly when they were young. (RT 2645.) Another picture showed appellant graduating from high school. (RT 2645.)

Particularly in light of appellant's parade of witnesses which he used to describe his own circumstances, the prosecution's victim impact evidence properly allowed the jury to meaningfully assess appellant's moral culpability. (See *Payne,* 501 U.S. at p. 809.) Although undeniably powerful, the evidence of the families' persistent grief was not so inflammatory that it diverted the jury from its proper role. (*Ibid.*; see *People v. Edwards, supra,* 54 Cal.3d at p. 836.) The court did not abuse its discretion in admitting the victim impact testimony.

Appellant also argues that the victim impact evidence presented did not concern the circumstances of the crimes because the family members were not physically present at the crime scene. (AOB 321-322.) He is incorrect. Victim impact evidence properly includes the impact of the *loss* of the victims. This does not require the victim's family to have been present at the murder. (*Payne v. Tennessee, supra,* 501 U.S. at p. 826-827 ["a state may legitimately conclude that evidence about the victim and about the impact of the murder on the victim's family is relevant to the jury's determination as to whether or not the death penalty should be imposed"]; *People v. Edwards, supra,* 54 Cal.3d at pp. 835-836 ["the injury inflicted is generally a circumstance of the crime"; Penal Code section 190.3, subdivision (a), "allows evidence and argument on the specific harm caused by the defendant, including the impact on the family of the victim"].)

Appellant further argues that the victim impact evidence admitted was not relevant as a circumstance of the crime because such circumstances should be limited to those facts or circumstances known to the defendant at the time of the crimes or properly adduced in proof of the charges adjudicated at

the guilt phase. (AOB 323-327.) Again, appellant is incorrect. Victim impact evidence properly includes the impact of the murder on the family and loved ones of the victims, not simply those details of which the defendant was aware. (See *Payne v. Tennessee, supra,* 501 U.S. at pp. 826-827 [broad latitude has been given to defendant "to introduce relevant mitigating evidence reflecting on his . . . individual personality;" state similarly may present evidence of the "human cost" of the defendant's crime; state may conclude evidence about the victim and impact of the murder is relevant to jury's sentencing decision]; *People v. Taylor, supra,* 26 Cal.4th at pp. 1171-1172 [admission of victim impact evidence upheld even where the defendant had no prior knowledge of the victim when he killed her]; *People v. Fierro* (1991) 1 Cal.4th 173, 234 [same]; *People v. Edwards, supra,* 54 Cal.3d at p. 836 [trial court may admit evidence on "emotional though relevant subjects that could provide legitimate reasons to sway the jury to show mercy or to impose the ultimate sanction"].)

Appellant killed two human beings, James White and Brian Berry. Though he may not have known the precise dimensions of the tragedy his actions left behind, the profound harm to the survivors was "so foreseeable as to be virtually inevitable." (*Payne v. Tennessee, supra,* 501 U.S. at p. 838 conc. opn. of Souter, J..)

D. Appellant Was Not Prejudiced By The Admission Of The Testimony

Even if the court had erred in admitting the victim impact evidence, any error was harmless in light of the record. The victim impact evidence was limited to the two victims' immediate families: Brian Berry's parents and twin sister, and James White's mother. The entire presentation, concerning two victims, spanned only 37 pages of reporter's transcript. The witnesses testified about their close relationships with the victims, the importance of the victims to their lives, and the impact their deaths had on them personally. The

testimony gave context to the stark facts of the senseless murders. Thus, the evidence gave the jury a "quick glimpse" (*Payne v. Tennessee*, *supra*, 501 U.S. at p. 830, O'Connor, J., concurring) of the two lives that appellant chose to extinguish. None of the witnesses expressed any opinion regarding appropriate punishment.

The testimony was not inflammatory. That the families were aggrieved was an "obvious truism." (*People v. Sanders*, *supra*, 11 Cal.4th at p. 550.) Even if the testimony aroused emotions and evoked sympathy, "it was not so inflammatory as to have diverted the jury's attention from its proper role or invited an irrational response." (*People v. Mitcham* (1992) 1 Cal.4th 1027, 1063.) Additionally, the trial court's instructions told the jury not to be swayed by prejudice against appellant (CT 633) and that they were "free to assign whatever moral or sympathetic value you deem appropriate to each and all the various factors you are permitted to consider." (CT 667.) The jury is presumed to have followed these instructions. (*People v. Rich* (1988) 45 Cal.3d 1036, 1102.) Defense counsel also urged the jury not to sentence appellant to death based on sympathy for the victims' families. (RT 2829-2830.) Defense counsel told the jury:

> [Appellant's mother] doesn't believe her son committed these two murders. And let's assume hypothetically even if he did, she would still love her son. And that's the way a mother is, and that's the way it should be. And I know the Berrys and the Whites would say I'd like to have that chance for my kids, too, and that's not possible. And there is a tragedy. [¶] We heard Shannon [Berry] up there the other day. Boy, your heart had to go out to Shannon. Lovely young lady, lost her brother. [¶] Now, I've got five brothers and two sisters. It's neat. No one has died yet. It's lucky. All you can do is hope for her, and for the rest of the family, is that somehow they put this behind them and keep on going. [¶] And I know as I look at all of you jurors

> up there right now, I know a lot of you have looked over, you have looked at my client, and I know you have looked at the Berrys and the Whites, and I know you have thought, God, what a terrible position. I know what grief they are going through. I can feel it. Those are the vibes you get. You can just feel that. There is nothing wrong with that.
>
> But what you don't do is, as bad as it is, as heartwrenching as it is, it can't be undone, what you don't do, you don't say, because of that, therefore I am going to vote death. No. It's easy to do. It would be easy to do. There is no doubt about it. But the legislature, what they have done, is they have taken the aggravating and mitigating factors and they give that to you as a guideline. Okay?

(RT 2829-2830.)

Additionally, the jury at the retried penalty phase heard evidence of the callousness and brutality of the murders: the execution-style shootings (RT 2008-2029), the victims' bodies lying in pools of blood (RT 1961-1967) with "sounds coming from [the] face area" of James White (RT 1961-1965). (See *Payne, supra*, 501 U.S. at p. 831.)

In light of the relatively few number of victim impact witnesses, when compared to the number of defense character witnesses, the defense's argument against the jury being overly swayed by the evidence, the court's instructions, and the abundance of evidence which overwhelmingly established that appellant committed a heinous and brutal crime against two innocent young men, any error in allowing the witnesses to testify was harmless. As this Court has observed, "among the most significant considerations [in the jury's assessment of punishment] are the circumstances of the underlying crime." (*People v. Mitcham, supra*, 1 Cal.4th at p. 1062.) The admission of the challenged testimony "did not undermine the fundamental fairness of the penalty-determination process." (*Id.* at p. 1063.) The admission of the

witnesses' testimony did not violate appellant's federal or state rights to due process, a fair trial, or a reliable penalty determination. Appellant's claims should be denied.

VII.

THE TRIAL COURT DID NOT ERR IN REFUSING TO INSTRUCT THE JURY ON THE CONCEPT OF LINGERING DOUBT

Appellant claims the trial court prejudicially erred in refusing to instruct the penalty phase jury with the defense's proposed instructions regarding lingering doubt. (AOB 336-350.)

Prior to closing arguments in the penalty phase, defense counsel requested that the trial court instruct the jury with two special instructions urging the jury to "consider as a mitigating factor residual or lingering doubt as to whether the defendant intentionally killed the victims." (CT 671-672.) The trial court refused the proffered instructions on the basis that "a defendant has no federal or state constitutional right to have the penalty phase jury instructed to consider any residual or lingering doubt about the defendant's guilt, although the defendant may argue such fact to the jury." (RT 2767.) Defense counsel devoted nearly half of his argument (12 of 24 transcript pages) to reviewing and attacking the evidence of appellant's guilt. (RT 2811, 2814-2824, 2833.)

This Court has "repeatedly . . . held that although it is proper for the jury to consider lingering doubt, there is no requirement that the court specifically instruct the jury that they may do so." (*People v. Slaughter* (2002) 47 P.3d 262, 282; *People v. Staten* (2000) 24 Cal.4th 434, 464; *People v. Millwee* (1998) 18 Cal.4th 96, 166.) Appellant had "no state or federal constitutional right to such an instruction." (*People v. Slaughter, supra,* 47 P.3d at p. 284.) The trial court did not err in refusing to give the defense's proposed instruction.

Appellant contends that by failing to give the instructions, the trial court "effectively barred the jury's consideration of this relevant defense evidence." (AOB 341.) However, both the prosecutor and defense counsel

discussed the concept of lingering doubt in their arguments to the jury. When discussing appellant's credibility, the prosecutor told the jurors, "What happened at the Subway is not before you. That's been proven beyond a reasonable doubt. Why it happened and how it happened is what's important. [¶] As I said to you in the opening statement, again, that was not evidence. The fact that the defendant did it is not in issue. How and why are relevant for this proceedings [sic]." (RT 2786-2787.) The prosecutor made a permissible and accurate argument that appellant had already been found guilty beyond a reasonable doubt.

Defense counsel strenuously argued the concept of lingering doubt as a mitigating factor. For example, defense counsel argued:

> Now, is [appellant] lying? That's for you to consider because [the prosecutor] says lingering doubt doesn't mean anything. It does mean something, ladies and gentlemen. He has already been convicted. I told you that. We can't take that away. So you don't have to find whether he is guilty or not guilty. That's not in issue. [¶] The only issue before you is does he get life without the possibility of parole, which means he dies a natural death in prison, or does he die by the hands of the state. Those are your only two choices. [¶] But if you look at the evidence, you can also consider was that other jury right or were they wrong. That's where the lingering doubt comes in. Because if you have a doubt as to whether he committed these two horrible murders, they are vicious, they are cruel, they are every adjective you can think of and use, but if he didn't do it, you don't give death.

(RT 2812.)

Appellant claims that defense counsel's argument, "unsupported by instruction," "carri[ed] little weight with jury." (AOB 346.) However, the prosecutor's argument against consideration of lingering doubt was simply that:

argument. The jury was free to accept or reject that argument. The jury was instructed that counsels' arguments were not evidence. (RT 2837; see also *People v. Raley, supra*, 2 Cal.4th at p. 917 [pointing to this instruction in rejecting claim prosecutor mischaracterized evidence].) The jurors were also instructed that they must accept and follow the law as given by the court. (RT 2836.) The trial court did not instruct the jury that it could not consider lingering doubt. To the contrary, the jury was instructed that that it could consider the circumstances of the crime (Penal Code section 190.3, factor (a); RT 2852), any other circumstances that extenuated its gravity (Penal Code section 190.3, factor (k); RT 2853-2854), and other aspects of defendant's character or record that suggested a sentence other than death (factors (b), (c), (d), and (e), i.e., appellant's age, the absence of past violent criminal activity, any emotional or mental disturbances). Those instructions were sufficiently broad to encompass any residual doubt any jurors might have entertained. (*People v. Lawley* (2002) 7 Cal.4th 102, 166*; People v. Sanchez* (1995) 12 Cal.4th 1, 77-78.) Additionally, as described above, defense counsel emphasized lingering doubt as a mitigating factor. (RT 2811, 2814-2824, 2833.) Appellant's claim should be rejected.

Because there was no error in refusing to give the instruction, appellant's claims that various federal Constitutional rights were violated (See AOB 348-349) must also necessarily be rejected. (See *People v. Boyette* (2002) 29 Cal.4th 381, 445, fn. 2 ["finding no state law violation, we also reject defendant's further claim that he was denied a state-created liberty interest under the federal due process clause of the Fourteenth Amendment to the United States Constitution"]; *People v. Ayala* (2000) 24 Cal.4th 243, 253, 288 ["Because there was no violation of defendant's state law rights, and his constitutional claims are predicated on his state law claim, we reject them as well."]; *People v. Roybal* (1998) 19 Cal.4th 481, 530, fn. 18 [same].)

VIII.

JURY UNANIMITY BASED UPON PROOF BEYOND A REASONABLE DOUBT AS TO THE PRESENCE OF ONE OR MORE AGGRAVATING FACTORS IS NOT REQUIRED

Relying on *Ring v. Arizona* (Jun. 26, 2002; No. 01-488) ___ U.S. ___ [122 S.Ct. 2428, 153 L.Ed.2d 556], appellant argues that, for a death penalty determination to satisfy the federal Constitution, the jury must find beyond a reasonable doubt that any particular aggravating factor exists, and agree on the same aggravating factors, and submit written findings specifying the aggravating circumstance(s) on which they relied. (AOB 350-365.) Prior to *Ring, t*his Court had repeatedly rejected such assertions. (*People v. Millwee* (1998) 18 Cal.4th 96, 162, fn. 33; *People v. Medina* (1995) 11 Cal.4th 694, 782; *People v. Berryman*, *supra,* 6 Cal.4th at p. 1101; *People v. Taylor* (1990) 52 Cal.3d 719, 749 [California Supreme Court has "consistently held that unanimity with respect to aggravating factors is not required by statute or as a constitutional procedural safeguard."].) In *People v. Ochoa* (2001) 26 Cal.4th 398, this Court also rejected the contention that the United States Supreme Court's decision in *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435], which requires a jury finding, beyond a reasonable doubt, as to any fact that will support a sentence greater than that authorized by the jury's simple finding of guilt, applies to California's capital sentencing scheme such that a beyond-a-reasonable-doubt burden of proof must attach to a penalty-phase finding. (*Ochoa*, *supra*, 26 Cal.4th at pp. 453-454.) Respondent submits that *Ring* requires no different result.

Apprendi has no application here since a penalty-phase verdict of death does not produce a sentence any greater than that already authorized by the jury's guilt-phase verdict, which included the necessary jury finding, beyond a reasonable doubt, of at least one death-qualifying special circumstance. Put another way, the penalty-phase verdict merely reflected a

choice between two previously-authorized sentences (death or life without the possibility of parole), but the sentence range is not and cannot be increased at the penalty phase. (See *Jones v. United States* (1998) 526 U.S. 227, 249 [119 S.Ct. 1215, 143 L.Ed.2d 311] [recognition that the finding of aggravating facts in capital sentencing involves a choice between a greater and lesser penalty, not a process of raising the ceiling of the sentencing range available].) Nor does the United States Supreme Court decision in *Ring*, which among other things overruled an earlier decision upon which this Court had partially relied in *Ochoa, supra*,[16/] suggest a different result. The Court in *Ring* invalidated Arizona's death penalty sentencing scheme on *Apprendi* principles because, for the death penalty to be imposed under that system, the jury returned verdicts as to the substantive crime, but the death-qualifying circumstance was determined by the judge sitting without a jury who had to find at least one specifically enumerated factual circumstance to be true. (*Id.*, ___ U.S. at p. ___ [122 S.Ct. at pp. 2434-2435].) In other words, under the Arizona system, the judge and not the jury made what is the equivalent of the death-qualifying special circumstance finding under California law.

This Court's holding in *Ochoa, supra*, survives the decision in *Ring*. This is so because, under California's system, in contrast to the one employed in Arizona, all necessary facts to support imposition of the death penalty must be determined by the jury "beyond a reasonable doubt" during the guilt phase. At the penalty phase, all that is left is a normative, moral evaluation of the offense and the offender based on the considerations listed in section 190.3. Again, as this Court stated in *People v. Carpenter* (1997) 15 Cal.4th 312, 417-418,

> The sentencing function is inherently moral and normative, not

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16. *Walton v. Arizona* (1990) 497 U.S. 639 [110 S.Ct. 3047, 111 L.Ed.2d 511].

> factual; the sentencer's power and discretion under [California's death penalty law] is to decide the appropriate penalty for the particular offense and offender under all the relevant circumstances." (*People v. Rodriguez, supra*, 42 Cal.3d at p. 779.) Because of this, instructions associated with the usual fact-finding process –such as burden of proof– are not necessary. [Citations.] Except for the other crimes, the court should not [] instruct[] at all on the burden of proving mitigating or aggravating circumstances.

(See also *People v. Hayes* (1990) 52 Cal.3d 577, 643 [burden of persuasion is inappropriate given the normative and moral nature of the determinations made in the penalty phase].) Appellant's claims should be rejected.

IX.

THERE WAS NO ERROR IN THE JURY'S INSTRUCTION REGARDING REASONABLE DOUBT

Appellant contends that the jury instruction CALJIC No. 2.90, defining reasonable doubt, is "incomprehensible to a modern jury[,]" and compels reversal of his convictions and death sentence. (AOB 366-372.) Both this Court and the United States Supreme Court have already upheld the version of CALJIC No. 2.90 given in this case. (CT 342.) Respondent submits this Court should again affirm its previous decisions declaring that this instruction provides no basis for the reversal of a conviction. (See *People v. Seaton* (2001) 26 Cal.4th 598, 668; *People v. Ray* (1996) 13 Cal.4th 313, 347; *People v. Horton* (1995) 11 Cal.4th 1068, 1120; *People v. Medina* (1995) 11 Cal.4th 694, 762; *People v. Freeman* (1994) 8 Cal.4th 450, 501-504; *People v. Webb* (1993) 6 Cal.4th 494, 531; *People v. Jennings* (1991) 53 Cal.3d 334, 386; see also *Victor v. Nebraska* (1994) 511 U.S. 1, 7-17 [114 S.Ct. 1239, 127 L.Ed.2d 583], affirming *People v. Sandoval* (1992) 4 Cal.4th 155.)

Appellant also contends that the combination of CALJIC 2.90 and two other instructions[17/], relating to circumstantial evidence, lightened the prosecution's burden of proof. (AOB 372-375.) As conceded by appellant (AOB 367, fn. 62), this Court has rejected this claim. (*People v. Jennings* (1991) 53 Cal.3d 334, 386.)

In *Jennings,* the jury was given CALJIC No. 2.01, which stated, "If ... one interpretation of [circumstantial evidence] *appears* to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable." (*People v. Jennings, supra,* 53 Cal.3d at p. 385-386, emphasis added.) The defendant argued that

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17. CALJIC No. 2.01 (sufficiency of evidence to show guilt), 8.83 (sufficiency of circumstantial evidence to show special circumstances).

the use of the word "appears" in the instructions (and in another instruction using similar language regarding circumstantial evidence of specific intent) "eviscerate[d] the federal and state constitutional requirement of proof beyond a reasonable doubt." (*Ibid.*)

This Court stated,

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

(*People v. Jennings, supra,* 53 Cal.3d at p. 385.) Appellant's claim should be rejected here as well.

X.

THERE WERE NO CUMULATIVE ERRORS REQUIRING REVERSAL OF APPELLANT'S CONVICTIONS AND/OR JUDGMENT OF DEATH

A. There Were No Cumulative Errors

Appellant contends the cumulative effect of the guilt phase errors requires reversal of the guilt judgment. (AOB 376-379.) Appellant also contends the cumulative effect of the guilt and penalty phase errors requires reversal of the judgment of death. (AOB 379-381.) Respondent disagrees because there was no error, and, to the extent there was error, appellant has failed to demonstrate prejudice.

Moreover, whether considered individually or for their cumulative effect, the alleged errors could not have affected the outcome of the trial. (*People v. Seaton, supra,* 26 Cal.4th at pp. 675, 691-692; *People v. Ochoa, supra,* 26 Cal.4th at pp. 447, 458; *People v. Catlin, supra,* 26 Cal.4th at p. 180.) Even a capital defendant is entitled only to a fair trial, not a perfect one. (*People v. Cunningham* (2001) 25 Cal.4th 926; *People v. Box, supra,* 23 Cal.4th at pp. 1214, 1219.) The record shows appellant received a fair trial. His claims of cumulative error should, therefore, be rejected.

B. The Death Penalty Is Constitutional

Appellant mounts a series of separate attacks on California's death penalty law and death-sentencing process. (AOB 381-403.) Preliminarily, appellant failed to raise these claims in the trial court; therefore, they have been waived on appeal. (See *People v. Catlin, supra,* 26 Cal.4th at p. 179.) In any event, this Court has repeatedly rejected each of these claims. Appellant provides no new reason why this Court should reconsider its previous decisions. Thus, all of the claims are without merit.

1. The Special Circumstances Perform The Narrowing Function

Appellant argues that the special circumstances enumerated in California's death penalty law fail adequately to narrow the class of persons eligible for the death penalty. (AOB 382-387.) The United States Supreme Court has found that California's requirement of a special circumstance finding adequately "limits the death sentence to a small subclass of capital-eligible cases." (*Pulley v. Harris* (1984) 465 U.S. 37, 53 [104 S.Ct. 871, 79 L.Ed.2d 29].) Likewise, this Court has repeatedly rejected, and continues to reject, the claim raised by appellant that California's death penalty law contains so many special circumstance that it fails to perform the narrowing function required under the Eighth Amendment. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1179; *People v. Ray* (1996) 13 Cal.4th 313, 356; *People v. Arias* (1996) 13 Cal.4th 92, 186-187.) Nor have the statutory categories been construed in an unduly expansive manner. (*People v. Barnett, supra,* 17 Cal.4th at p. 1179; *People v. Ray* (1996) 13 Cal.4th 313, 356; *People v. Arias, supra,* 13 Cal.4th at pp. 186-187.)

2. Penal Code Section 190.3(a) Does Not Allow Authority And Capricious Imposition Of Death

Appellant claims that Penal Code section 190.3(a) has been applied so arbitrarily and contradictorily that its application in appellant's case violated the United States Constitution. (AOB 387-394.) In *People v. Lewis* (2001) 26 Cal.4th 334, 394, this Court rejected the same claim. (See also *Tuilaepa v. California* (1994) 512 U.S. 967, 976 [114 S.Ct. 2630, 129 L.Ed.2d 750]; *People v. Jenkins, supra,* 22 Cal.4th at pp. 1050-1053.)

> Finding that section 190.3, factor (a) provides adequate guidance to a jury in sentencing, [this Court has] concluded that the jury in determining penalty "should" consider circumstances of the crime,

> but that this is "an individualized, not a comparative function." [Citation.] As such, "[t]he ability of prosecutors in a broad range of cases to rely upon apparently contrary circumstances of crimes in various cases does not establish that a jury in a particular case acted arbitrarily and capriciously." [Citation.]

(*People v. Lewis, supra*, 26 Cal.4th at p. 334, 394.) Accordingly, appellant's claim must similarly fail.

3. Additional Safeguards Are Not Required For California's Death Penalty Statute

Appellant contends California's death penalty statute is unconstitutional because it fails to include safeguards such as written findings and unanimity on aggravating circumstances beyond a reasonable doubt. (AOB 394-403.) These claims have previously been rejected by this Court (see *People v. Kraft* (2000) 23 Cal.4th 978, 1078-1079; *People v. Majors* (1998) 18 Cal.4th 385, 432), and for the reasons previously stated in Argument VI, *ante*, nothing in *Ring v. Arizona, supra*, ___ U.S. ___ [122 S.Ct. 2428, 153 L.Ed.2d 556] or *Apprendi v. New Jersey*, supra, 530 U.S. 466, requires a different result.

CONCLUSION

For the reasons stated above, respondent respectfully requests that the judgment and sentence be affirmed.

Dated: January 28, 2003

Respectfully submitted,

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TABLE OF CONTENTS

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

Page

TABLE OF CONTENTS (continued)

Page

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

Page

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

Constitutional Provisions

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

Page