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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. HENRY C. HAYES, Defendant and Appellant.	B171374 (Los Angeles County Super. Ct. No. BA 197149)
In re HENRY C. HAYES, on Habeas Corpus.	B171536

APPEAL from a judgment of the Superior Court of Los Angeles County. Lance A. Ito, Judge. Affirmed with modifications; petition denied.

Mark D. Lenenberg, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Steven D. Matthews and Allison H. Chung, Deputy Attorneys General, for Plaintiff and Respondent.

* * * * * *

Henry C. Hayes is appealing his conviction for two counts of murder and a multiple-murder special circumstance. He contends that (1) there was prosecutorial misconduct in closing argument; (2) evidence of his financial condition was erroneously admitted; (3) review is necessary of the in camera *Pitchess* proceedings (*Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*)); (4) there was insufficient evidence to support his conviction; (5) the trial court improperly modified a CALJIC instruction regarding the credibility of a child witness; (6) the cumulative effect of the individual errors resulted in prejudice; and (7) imposition of firearms use enhancements and a parole revocation fine were improper, when he was sentenced to life imprisonment without the possibility of parole.

The above issues were raised in the opening brief which was filed by appellant's counsel. Prior to the filing of that brief, appellant filed a petition for writ of habeas corpus, No. B171536, in propria persona. We ordered that the petition be considered along with the direct appeal. The People filed an informal response to it, and appellant filed a reply in propria persona.

We strike the firearms use enhancements and parole revocation fine, affirm the conviction, and deny the petition for writ of habeas corpus.

PROCEDURAL HISTORY

Appellant was charged with the murders of his wife and daughter (counts 1 and 2). Both counts included a multiple-murder special circumstance. Count 3 alleged assault on a child, causing death. All of the counts included an allegation that he caused death by personally discharging a firearm.

At the guilt phase, the jury found appellant guilty as charged. A mistrial was declared at the penalty phase after the jury deadlocked. The prosecution did not proceed further with the penalty phase.

Appellant was sentenced to two terms of life imprisonment without the possibility of parole, plus 50 years to life in prison. The court also imposed a $10,000 restitution fine and stayed a $10,000 parole revocation fine. This appeal followed.

FACTS

1. Prosecution Testimony

A. Appellant's Motives

The prosecution presented strong evidence that appellant murdered his wife Vangela Hayes and seven-year-old daughter Teanna Hayes during the early morning hours of Friday, August 27, 1999, for a combination of motives: love affairs with other women, avoidance of a disclosure of infidelity which would spoil his chance to be pastor of a larger congregation, and financial difficulties that would be resolved by life insurance benefits.

i. Extramarital Affairs

When Vangela was killed in 1999, she and appellant had been married for eight or nine years.

In 1990, appellant began paying a prostitute named Cassandra for sex. Around the second year of their relationship, he told her that he was married. After a couple of years, they continued to have sex, but he no longer paid her. At one point they broke off their relationship for about two years. They resumed it in 1997. After that, she considered herself to be appellant's girlfriend. She attended numerous events where he preached, but they kept their relationship a secret. He told her he was planning to divorce Vangela so that he could marry her. She became pregnant with his child in March or April 1999. He told her that it was her decision whether or not to have the baby.

Francesca was another prostitute with whom appellant paid for sex, beginning in 1996. Before that relationship had gone on very long, Francesca went to jail. Appellant visited her there. He told her he was a salesman, and never told her that he was a minister.

Lea met appellant when he was one of the ministers of Progress Baptist Church. When appellant started the Family of Christ Church, she became the church secretary there. Appellant made a "flirtatious" advance to her at a church retreat. She told Vangela about the incident, and left appellant's church soon afterwards.

Talika was a schoolteacher in an adjacent county who appellant met in an Internet chat room. They exchanged numerous e-mails between July 1, 1999, and August 23, 1999. Appellant told Talika that he was an African-American college professor named "Henry

Mitchell" whose wife "Tamara" had died in a car crash.[1] They met and had sex on the weekend of July 23-July 24 1999. In his subsequent e-mails, appellant told Talika that he wanted to marry her and act as the father to her young daughter. He never mentioned that he himself had a child.

Appellant visited Talika five times, including the weekend of August 14 to August 16, 1999. She was in love with him. On August 16th, Vangela spoke with Talika on the telephone, after she found Talika's number on some telephone records. Talika told Vangela that she was having a sexual relationship with a man she knew as Henry Mitchell. After that conversation, Talika told appellant she had spoken with a woman named "Angela" who said she was currently married to him and lived with him and their child. Appellant told Talika that he had been married to Angela before he married Tamara, and she had never recovered from his marriage to Tamara. He later told Talika that he had talked to Angela, the conversation "went well for him," and Angela "wouldn't call again."

In the days and months before her death, Vangela was on an emotional "roller coaster," and sometimes appeared disheveled and stressed.

ii. Ambition

Vangela's father, brother and sister belonged to the New Pilgrim Baptist Church. Sometime in the mid-1990's, appellant was the associate minister there. When the minister died, he applied for that position. He was disappointed when he was not selected, and left to found a new church, Family Community Church.

Reverend Franklin Williams was the long-time pastor of a large church called New Mt. Olive Church. In 1998 or 1999, he was assigned to mentor appellant in setting up the new church. Appellant told Williams that he wanted to have a successful ministry with a sizeable congregation. He referred to himself as "Bishop Hayes," although Williams

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[1] The prosecutor later argued to the jury that appellant's talk about having a dead wife showed that he already was thinking about killing Vangela. The prosecutor also argued that appellant felt more strongly about Talika than he did about his other women, because Talika was an educated person.

thought that appellant was not qualified for that title. Appellant did not complete his apprenticeship with Williams.

In the summer of 1999, appellant's church, Family Community Church, had about 10 members. He was on the "short list" of ministers under consideration for the pastorship of St. Mark's Baptist Church, a medium-sized church whose pastor would earn $35,000 per year. Adultery would be grounds for immediate disqualification from the St. Mark's position.

On July 4, 1999, appellant spoke to Vangela's brother Cornelius at a family gathering. He said his application at St. Mark's was "on hold" while the church investigated false rumors that he had an extramarital relationship.

About a week before the murders, Vangela told a friend, Jacqueline Stewart, that her presence was required at an upcoming interview between appellant and the overseers of St. Mark's Church. Appellant had asked Vangela to lie about his infidelity. Vangela told Stewart that if she was asked, she planned to tell the truth. She also said she had known about appellant's other infidelities but was "overwhelmed with the last one because it had to do with a child."

During the week of August 23, 1999, Vangela made unsuccessful efforts to contact her spiritual advisor, Reverend Larry Lloyd.

iii. Financial Motivations

In August 1999, appellant lived with Vangela and Teanna at 631 1/2 West Gage Street in Los Angeles. In addition to working as a minister, he was employed as a security guard at a Rite-Aid drug store.

Vangela was a nurse at Centinela Hospital. She had a $160,000 life insurance policy through her job. If she died, Teanna would receive 60 percent of the proceeds and appellant 40 percent. If both Vangela and Teanna died, appellant would receive all of the proceeds.

Sometime before the murders, appellant told Vangela's sister Gwendolyn that he and Vangela had $500,000 in life insurance. Back in 1989 or 1990, he had told Vangela's brother Cornelius that he and Vangela already had life insurance, even though at that time they were not yet married.

On June 1, 1999, appellant pawned a camera and Vangela pawned a ring.

Gwendolyn, Vangela's sister, worked as a collection supervisor at a credit union. In August 1999, appellant's checking account there had been overdrawn over $400 for two months. Appellant had not been responding to Gwendolyn's efforts to reach him.

Appellant and Vangela were two or three weeks behind with the August rent on their residence at the time of the murders.

B. The Murders

The home that appellant and Vangela rented was one of three houses on the same lot. Their house, 631 1/2 West Gage Street, was the closest to the street. Directly behind it was a house, 631 West Gage Street, which was occupied by an elderly woman with impaired hearing. Behind that house was the third house, 629 West Gage Street, which was the home of Larhunda Moore and her children. Another neighbor, Gary Beard, lived directly across the street from appellant's home.

Around 5:00 p.m. on Thursday, August 26, 1999, appellant picked up Teanna from school.

Moore spoke with Vangela between 9:00 and 10:00 p.m. that evening. Moore told Vangela that she planned to take her daughter to an emergency room at midnight, when it would not be crowded. Vangela moved her car out of the driveway briefly so that Moore could park her car on the street.

Beard arrived home around 10:30 p.m. that night. He happened to notice that appellant's car was parked across the street, in front of his house.

When Moore and her daughter left for the hospital around midnight, Vangela's car was parked in the driveway.

Moore's 10-year-old son, Israel, remained at home. He awakened at some point, went into the living room, and watched television. To get some air, he opened the wooden front door, leaving the metal security door closed. From appellant's house at the front of the lot, Israel heard a "[t]errifying high-pitched scream" "[l]ike a horror movie scream." Israel thought the scream came from a woman. Ten minutes later, he heard "a car screeching off." He kept watching television until Moore and her daughter returned from the hospital around

4:30 a.m. When Moore drove up, she saw a light at the back of appellant's house, which seemed unusual.

At 6:15 a.m. on August 27, 1999, Beard, the neighbor across the street, happened to look out his front window. Appellant's car was already gone, which was unusual. Vangela's car was still in the driveway. At 7:30 a.m., a different neighbor noticed as she watered her lawn that Vangela's car was still in the driveway. Vangela usually left for work before that time.

When Vangela did not call or show up for work at the hospital, her coworkers became concerned, as she always telephoned if she was going to be absent or late. She did not answer their telephone calls, and Teanna had not shown up at school that morning. A coworker named Deborah Brown drove from the hospital to Vangela's house to check on her.

Brown arrived at the house around 10:30 a.m. There was no response to her knocks on the front door and windows. She went behind the house and spoke with Moore. She then went back to Vangela's house and knocked on the metal security door which was on the side of the house. The metal security door came ajar. The wooden door inside of it was off of its hinges. She entered the house and walked through it to the bedroom. The room was very dark. The television set was on. Vangela was lying in the center of the bed, with her left arm extended. The pillow was under her head, and the blanket was up to her shoulder. Brown called Vangela's name, touched her shoulder, and shook her. There was no response, and her body was very cold. Brown left quickly and dialed 911 on her cell phone.

The paramedics arrived. They discovered that Vangela had been shot. Then they found Teanna's body under a sleeping bag on a makeshift bed in the living room.

According to the autopsy, Vangela died from a single, close-range shotgun wound to the back of her neck. Teanna was killed by a single shotgun wound to her left chest area. That shot was also fired from close proximity. It could not be determined which shot was fired first. The coroner determined the general time of death was between 6:00 p.m. on August 26 and 9:00 a.m. on August 27.

The police arrived, began their investigation, and talked to the neighbors. Israel told them about the scream and the car he had heard during the night.

The coroner's investigator removed from Vangela's body her earrings, a chain, and two rings. However, she was not wearing the gold and diamond wedding ring which she habitually wore.

At the open viewing at the funeral, appellant's sister Angela noticed that Vangela's ring was missing and the socket on her ring finger was in an odd position. She asked appellant about the ring. He suggested that the mortuary might have given it to Vangela's mother.

C. Appellant's Conduct After the Murders

On the day the bodies were discovered, Friday, August 27, appellant worked as a security guard from 7:57 a.m. to 3:30 p.m. Around 11:00 a.m. that morning, he telephoned his sister-in-law Gwendolyn, whose calls he had been avoiding. He said he had talked to Vangela and would start making weekly payments on the overdrawn checking account.

There is no evidence that appellant tried to pick up Teanna from school when he finished work. He arrived home at 4:20 p.m. to find numerous police personnel and vehicles at the scene.

The evidence then showed around 9:00 p.m. that night, appellant asked Vangela's brother Cornelius for a ride from the hospital. Cornelius refused. Appellant told Cornelius that he had last seen Vangela and Teanna before he left for work at 7:30 that morning.

Appellant's sister Terri picked up him up from the hospital around 11:00 that night. He was wearing his security guard uniform and jacket. Terri drove him to his church because he said he needed to pick up a change of clothing there. He told Terri that the police had taken his keys, but he could obtain keys from Reverend Freeman, who lived next door to the church.

Reverend Freeman answered the door around 1:00 a.m. He gave appellant the key to the church's door, but did not have a key to appellant's office inside the church. Appellant went into the church alone. When he came out again, he had a large gym bag on a strap

over his shoulder.[2] He told Freeman that he had broken into his office. He joined hands with the people who were present to make a prayer circle. The bag fell from his shoulder with a loud thump or bang, as if "somebody dropped the Yellow Pages." He quickly picked it up and put it back on his shoulder.

Terri drove appellant to her apartment. He slept there on the living room floor, using the gym bag as a pillow. The next morning, he still wore the same clothes as the night before. He insisted that he had to go to a Laundromat to wash his clothes, even though there was a laundry room in the building. He told Terri that if he did not return in 30 minutes, she should go look for him. He then left the apartment with the gym bag.

When appellant did not return, Terri drove off to look for him. She found him walking on the street. He told her some children on bicycles had stolen the gym bag while he was using the telephone booth at the Laundromat. Terri and appellant drove around briefly looking for the children. Terri told him she did not believe anybody stole the bag. He slouched down in the car seat.

Appellant stayed at Terri's house for three days. He told her that on the morning of August 27, he left for work between 5:45 and 6:00 a.m., and Vangela was awake at that time. At a later point in time, after he was taken into custody, he tried to convince her that he was innocent. She told him that if he continued talking that way, she would stop visiting him. He answered, "Okay."

While appellant stayed with her, Terri heard him say into the telephone, "You need to keep your mouth closed and tell your big ass sister to keep her mouth closed because it is only going to make me look guilty."

On Monday, August 30, 1999, appellant telephoned the hospital's director of Human Resources regarding Vangela's death benefits. It was explained that in order for him to

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[2] Terri testified that the bag was 18 inches wide and seven inches tall. Reverend Freeman described the bag's size as "two to two and a half feet." At the trial, a ballistics expert testified that many shotguns are designed so that the barrel can be removed. Once that is done, the overall length of the weapon is decreased to a size which would allow the pieces to fit into a bag.

recover on the insurance policy, the director had to sign a claim form and submit it to the insurance company. After speaking with the police, she did not proceed with the claim process.

On the night of the funerals for Vangela and Teanna, appellant resumed his relationship with his girlfriend Cassandra. Within two weeks, he moved in with her. He lived with Cassandra from mid-September 1999 until his arrest in January 2000.

After the funeral, appellant made unsuccessful attempts to get copies of the death certificates from Vangela's parents.

Appellant's girlfriend Talika found out about the shootings when she saw a family portrait of appellant, Vangela and Teanna on the television news. Appellant later told her that he spent the morning of the murders at the library, working on his doctoral dissertation. He tried to resume their affair. She declined. He told her that if the police contacted her, she should say they had "just a friendship."

When appellant was arrested on January 11, 2000, he had a pawn slip which showed that he pawned Vangela's wedding ring on September 15, 1999. The ring was found at the pawn shop.

2. Defense Testimony

Stella Black met appellant in 1996, when they were both students at Reverend Lloyd's seminary school. A few days before the murders, Black and Vangela were at a Monday night Bible study class. Vangela appeared happy. In a taped statement for a class assignment on improving spousal relationships, Vangela said: "My husband loves a challenge and I am very, very predictable, so that was one of the things the Holy Spirit dealt with me on [*sic*] stop being so predictable in my actions."

Black was with appellant at the hospital before his sister Terri picked him up. He was trembling and pale, and cried on Black's shoulder while she prayed.

When the police interviewed Israel on the day the bodies were found, he said he heard two screams at approximately 12:30 a.m. He did not mention hearing a car or that the screams came from a woman.

Appellant and Vangela lived in the portion of Los Angeles which was covered by the 77th Division of the Los Angeles Police Department. That area traditionally led the city in violent crime. There were a large number of homicides, burglaries and robberies there in 1999.

After the bodies were found, Officer Jeff Nolte went to several locations in an effort to locate appellant, who was identified as the next of kin. Around 4:00 p.m., he went to the Rite Aid store. Appellant was not there at that time, but the officer ascertained that he worked there, and wrote down his pager number.

DISCUSSION

1. Prosecutorial Misconduct in Closing Argument

A. The Prosecutor's Words

Appellant's misconduct issue concerns the following dramatic language at the start of the argument:

"Webster's says, 'evil; wicked, to cause or threaten distress or harm. Evil; the source of suffering and wrongdoing.' 'Change; to make different, to exchange for something else.'

"Where evil meets change is where two innocents were slaughtered. The evil within.

"Evil fueled Henry Hayes and his obsessive desire for change. Change from small time minister to big time bishop. Change from educational never was to lettered Ph.D. candidate. Change from a family he had outgrown to be another more befitting his outsized ego and arrogance.

"The evil within Henry Hayes grew and grew from adultery to machinations, from cheating to deceit, from false prophecy to murder. You see, when you plant a seed of evil, a bed of weeds grows that chokes the life from all those around him.

"Unfortunately for Teanna and Vangela, they had to live with this evil within whose branches reached out and took the lives, took their lives in tribute to its master's whim.

"We now stand in awe of the evil that was wrought by this defendant. It pains me to have to spend even one minute breathing this man's name and by --

"MS. POLEN [defense counsel]: Objection, Your Honor.

"May we approach?

"MR. GRACE [the prosecutor]: By the time I finish this presentation, I will be disgusted.

"MS. POLEN: May we approach?

"Objection.

"THE COURT: Counsel approach."

Ms. Polen complained at bench that the argument was a totally improper appeal to passion and prejudice. She asked that Mr. Grace be cited for misconduct and that the jury be admonished. The judge pointed out that there was an evil component to malice aforethought. He did not think the argument was improper, but asked Mr. Grace to "tone it down." He did so immediately.

Later in the argument, Mr. Grace made a reference to his opening words. He said that when he said he was so disgusted that he did not want to hear appellant's name, he was thinking about the evidence. The particular item of evidence he discussed at that point was an e-mail in which appellant told Talika that he would be "honored" to be the "Daddy" of her daughter.

B. Analysis

A prosecutor's statements to the jury constitute federal constitutional error if the trial was so infected with unfairness that a denial of due process occurred. Behavior that did not result in a fundamentally unfair trial can still constitute misconduct under state law if it involved the use of deceptive or reprehensible methods of persuasion. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1000-1001.) "[W]hen the claim focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion." (*People v. Samayoa* (1997) 15 Cal.4th 795, 841.)

In essence, Mr. Grace referred to appellant as somebody who was so evil that he did not want to breathe his name. Our Supreme Court has permitted similar language in other cases.

For example, *People v. Pensinger* (1991) 52 Cal.3d 1210, 1251, found that the prosecutor had not "exceeded the bounds of proper argument" by arguing that the defendant

was a "'perverted maniac,'" where the evidence showed that he beat, mutilated and killed a baby girl. As *Pensinger* observed: "A prosecutor is allowed to make vigorous arguments and may even use such epithets as are warranted by the evidence, as long as these arguments are not inflammatory and principally aimed at arousing the passion or prejudice of the jury." (*Ibid.*)

Citing *People v. Pensinger*, *People v. Sanders* (1995) 11 Cal.4th 475, 527, found no misconduct where the defendant robbed and killed employees of a Bob's Big Boy restaurant, and the prosecutor referred to him as "'the monster that is sitting before us.'" Also, assuming that the prosecutor's argument went too far, no prejudice was shown. (*Ibid*.)

Similarly, in *People v. McDermott* (2002) 28 Cal.4th 946, 1002, the evidence showed that the defendant planned a particularly brutal stabbing murder. The prosecutor told the jury that she was not sure she should categorize the defendant as a human being, because nobody with a heart and soul could have behaved that way. The Supreme Court declared: "[W]e do not condone the use of opprobrious terms in argument, but such epithets are not necessarily misconduct when they are reasonably warranted by the evidence. [Citations.] Here, the prosecutor's remarks, which the trial court understood as referring to conduct by defendant that was inhumane, did not exceed the permissible scope of closing argument in view of the evidence presented . . . ."

The evidence in this case established that appellant cold-bloodedly murdered his wife and child so that he could pursue extramarital affairs and obtain life insurance benefits. He stole his wife's wedding ring from her finger after he killed her. He wove an astonishing web of lies to further his nefarious purposes. To refer to him as evil or disgusting was basically to articulate facts which were obvious or readily inferable from the evidence.

Appellant further complains that the prosecutor's comments were improper because they improperly injected his personal opinion of appellant into the argument. Indeed, the prosecutor's personal opinion was present in statements like "[i]t pains me" to have to say appellant's name, and "[b]y the time I finish this presentation, I will be disgusted." Still, the statements do not approach the level of *People v. Kirkes* (1952) 39 Cal.2d 719, 722, in

which the prosecutor told the jurors that he had been prosecuting cases for 19 years, and would not have prosecuted the defendant unless he believed him to be guilty.

The references to evil and the prosecutor's personal disgust occurred only at the beginning of a lengthy argument which was otherwise appropriate. The prosecutor changed his tone in response to the judge's request. The jurors were instructed that the statements of counsel are not evidence. The evidence against appellant, was strong. (See part 4, *post*.) Assuming that there was misconduct in the prosecutor's opening words, there is no reasonable likelihood that the jurors were misled by this isolated problem at the beginning of the argument. (*People v. Cash* (2002) 28 Cal.4th 703, 733.)

Appellant's briefing stresses the fact the jury deliberated over 22 hours, over a span of five days. Given the seriousness of the charges, the length of the trial, and the amount of evidence the jury had to consider, we do not consider the length of the deliberations to be a sign that this was a close case.

2. Evidence of Appellant's Financial Condition

Appellant contends that evidence that he had pawned items and was behind on the bills and rent was irrelevant or should have been excluded under Evidence Code section 352. The argument lacks merit.

Wide latitude is permitted in admitting evidence of motive, as it tends to show an incentive for criminal behavior. (*People v. Beyea* (1974) 38 Cal.App.3d 176, 195.) While poverty alone is not a ground for suspicion, evidence of indebtedness is admissible to show a motive for murder. (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1024; *People v. Catlin* (2001) 26 Cal.4th 81, 127.) There was nothing unduly inflammatory about the evidence of appellant's financial problems, and no abuse of discretion in admitting it.

3. The* Pitchess *Rulings

At appellant's request, we have reviewed all of the sealed transcripts of the in camera proceedings which were held pursuant to his motion to discover police officer personnel records. (*People v. Mooc* (2001) 26 Cal.4th 1216, 1228-1229; *Brady v. Maryland* (1963) 373 U.S. 83, 86-87.) The trial court conducted an extremely diligent check of the officers'

personnel files before concluding that they contained no discoverable evidence. There was no error.

4. Sufficiency of the Evidence

Appellant contends that there was insufficient evidence to prove that he was the killer, because he was not connected to the shotgun which killed Vangela and Teanna.

We stated the applicable test in *People v. Sales* (2004) 116 Cal.App.4th 741, 746: "'In addressing a challenge to the sufficiency of the evidence supporting a conviction, the reviewing court must examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence -- evidence that is reasonable, credible and of solid value -- such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. . . . The appellate court presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. . . .' (*People v. Kraft* (2000) 23 Cal.4th 978, 1053, citations omitted; 6 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Criminal Appeal, § 147, p. 394.)"

Although the shotgun was never produced, appellant was tied to the crimes through many other pieces of evidence.

He had opportunity, as he lived with Vangela and Teanna, and his car was in front of the house on the night of the murders.

He had multiple motives, including his affairs with other women, his fear that Vangela would disclose his infidelity to the interviewers at St. Mark's Baptist Church, and his need for the life insurance money. He may have been angry with Vangela because she told Talika that he was married, and may have felt additional pressure due to Cassandra's pregnancy.

In addition to opportunity and motive, the prosecution's case contained suspicious behavior and conflicting statements by appellant following the murders. He made an overly hasty inquiry about Vangela's life insurance benefits. He felt so little grief over her death and the death of his daughter that he resumed his relationship with Cassandra on the night of the funerals. He tried to renew his affair with Talika, while advising her to tell people that they were only friends. He made conflicting statements about the time he left the house on

the morning the bodies were found. Most importantly, he had possession of Vangela's missing wedding ring, although her body was found wearing other jewelry. (See *People v. Jennings* (1991) 53 Cal.3d 334, 370.)

Appellant's reliance on *People v. Blakeslee* (1969) 2 Cal.App.3d 831 is misplaced. As explained in *People v. Thomas* (1992) 2 Cal.4th 489, 516, *Blakeslee* found insufficient evidence principally because the prosecution failed to link a specific weapon to the crime or the defendant, the evidence was consistent with the guilt of the defendant's brother, and the defendant explained that she had given a false alibi to protect her brother. Here, in contrast, the prosecution's case was far stronger than in *Blakeslee*, and it pointed solely to appellant as the perpetrator of the crimes.

Moreover, the evidence suggested that appellant hid the missing shotgun in his gym bag, and later disposed of the bag. Specifically, there was testimony that a shotgun could be dissembled and hidden in a bag; the police had taken appellant's keys; he broke into his church office at 1:00 a.m. to get the gym bag, purportedly because he needed a change of clothes; the bag was suspiciously heavy; he never changed his clothes; he kept the bag close to him by using it as a pillow at his sister's apartment; and, after he left the apartment carrying the bag, he gave a dubious explanation for how it disappeared.

Under the circumstances, we are satisfied that the jury's verdict here was amply supported by the evidence.

5. The Witness Credibility Instruction

Appellant's next issue concerns a modification to CALJIC No. 2.20.1, the instruction on testimony by a child who is 10 years of age or younger.

Israel testified that between midnight and 4:30 a.m. on August 27, 1999, he heard a terrifying, high-pitched woman's scream come from appellant's home, followed 10 minutes later by a car screeching off. He was 10 years old at that time. However, when he took the witness stand in July 2003, he was 14 years old.

The defense introduced a slightly different version which Israel gave to a police officer on the afternoon the bodies were discovered. According to that officer, Israel said he

"heard two screams at about 12:30 in the morning." He did not mention that it was a woman who screamed or that he heard the screech of a car 10 minutes later.

The trial court gave a modified version of CALJIC No. 2.20.1 which added the italicized language: "Now, in evaluating the testimony of a child ten years of age or younger *at the time of the incident in question*, you should consider all of the factors surrounding the child's testimony, including the age of the child and any evidence regarding the child's level of cognitive development. A child, because of age and level of cognitive development, may perform differently than an adult as a witness, but that does not mean that a child is any more or less believable than an adult. You should not discount or distrust the testimony of a child solely because he or she is a child. [¶] 'Cognitive' means the child's ability to perceive, to understand, to remember, and to communicate any matter about which the child has knowledge."

The unmodified form of CALJIC No. 2.20.1 has been approved in several cases, all of which involve testimony by witnesses who were under the age of 10. (*People v. Jones* (1992) 10 Cal.App.4th 1566, 1572-1574; *People v. Gilbert* (1992) 5 Cal.App.4th 1372, 1392-1394; *People v. Harlan* (1990) 222 Cal.App.3d 439, 455-457.)[3]

As explained in *People v. Gilbert*, *supra*, 5 Cal.App.4th at page 1393, CALJIC No. 2.20.1 basically adds a second paragraph, which defines the term "cognitive," to the language of Penal Code section 1127f, which states: "In any criminal trial or proceeding in which a child 10 years of age or younger *testifies as a witness*, upon the request of a party, the court shall instruct the jury, as follows: [¶] In evaluating the testimony of a child you should consider all of the factors surrounding the child's testimony, including the age of the child and any evidence regarding the child's level of cognitive development. Although,

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[3] Appellant further argues that CALJIC No. 2.20.1 unfairly restricted the jury's consideration of the evidence affecting Israel's credibility, in violation of his state and federal constitutional rights to jury trial, due process of law, to present a defense, and to confront the witnesses against him. (U.S. Const., 5th, 6th & 14th Amends.; Cal. Const., art. I, §§ 7 & 16.) We reject that argument, for the reasons given in the cited cases which approved the instruction.

because of age and level of cognitive development, a child may perform differently as a witness from an adult, that does not mean that the child is any more or less credible a witness than an adult. You should not discount or distrust the testimony of a child solely because he or she is a child."

In proposing the modification below, the judge recognized that Israel was 10 years old at the time of the murders, but not at the time of his testimony. The judge added the words "at the time of the incident," because he believed he had an obligation to point out Israel's age at the time of his observations. When the modification was discussed, defense counsel objected that CALJIC No. 2.20.1 was intended for the performance of a child witness. The prosecutor expressed concerns that it might be difficult for the jurors to imagine what Israel was like four years earlier.

In our view, the judge's modification added an element of confusion regarding whether the jurors should focus their attention on Israel's age at the time of the incident, or the time of his testimony. The modified first sentence told them to consider the child's age "at the time of the incident in question." The second sentence then stated that a child might "perform differently than an adult as a witness." The third sentence talked about discounting or distrusting the "testimony of a child."

Assuming there was any error in the modification, there was no prejudice. Immediately before giving CALJIC No. 2.20.1, the trial court gave CALJIC No. 2.20, which gives the jury a list of factors to consider in evaluating the testimony of a witness.[4] The

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[4] The form of CALJIC No. 2.20 which the jury received stated:

"Now, every person who testifies under oath or affirmation is a witness. You are the sole judges of the believability of a witness and the weight to be given the testimony of each witness.

"In determining the believability of a witness you may consider anything which has a tendency to prove or disprove the truthfulness of the testimony of the witness, including but not limited to any of the following factors:

"The extent of the opportunity or ability of the witness to see or hear or otherwise become aware of any matter about which the witness has testified;

prosecutor specifically asked the jurors to consider Israel's testimony in light of those factors.[5] Israel consistently said that he heard at least one scream, which tended to show that the murder occurred during the night. The point of his testimony was already established by the evidence that Vangela moved her car between 9:00 and 10:00 p.m. and

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"The ability of the witness to remember or to communicate any matter about which the witness has testified;

"The character and quality of that testimony;

"The demeanor and manner of the witness while testifying;

"The existence or nonexistence of a bias, interest, or other motive;

"The existence or nonexistence of any fact testified to by the witness;

"The attitude of the witness toward this action or toward the giving of testimony;

"A statement previously made by the witness that was consistent or inconsistent with his or her testimony here in court;

"An admission by the witness of untruthfulness; and,

"Past criminal history of a witness amounting to a misdemeanor."

[5] "For example, Israel . . . is a very important witness in this case, so what you want to do is you want to take your tools that appear on the right side of the slide and you want to think about in your mind right now -- well, think about Israel . . . . Was he clear in his testimony? Was he able to remember and communicate what he talked to you about? What was the character and quality of his testimony? What was his demeanor as a witness? Did he have any bias, interest or motive in coming here and testifying? Was anything said? Or existence or nonexistence of any fact that may tend you [*sic*] to believe or disbelieve what he said? What was his attitude toward the action? Were there any prior consistent or inconsistent statements that were made?

"And remember that with this particular witness, he is on record very early in the case, in fact, the same day, saying that he heard screams coming from the Hayes' residence in the early morning hours of August 27th, so that is something that you can take into consideration. [¶] . . . [¶]

[A]nd what I said for Israel applies to every one of these witnesses that I am placing on the board for you."

did not appear at work at 8:00 the next morning. Under the circumstances, it is not reasonably probable that the jury would have reached a result more favorable to appellant in the absence of the error. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

6. Cumulative error

Appellant argues that his conviction must be reversed due to the cumulative impact of the errors, under the standard of *Chapman v. California* (1967) 386 U.S. 18, 24. We do not agree. Appellant received a fair trial in which error, if any, played no part in the jury's decision.

7. Sentencing issues

Appellant was sentenced to two terms of life imprisonment without the possibility of parole, plus 50 years to life in prison. The sentence was based on consecutive terms of life without parole for the two murders, plus two consecutive 25-year firearms discharge enhancements, which were imposed pursuant to Penal Code section 12022.53, subdivision (d).[6] He was further ordered to pay a victim restitution fine of $10,000. (§§ 1202.4, subd. (b), 2085.5.) A parole revocation fine of $10,000 was suspended unless parole was revoked. (§ 1202.45.)

We agree with appellant that the language of subdivision (j) of section 12022.53 (section 12022.53(j)) precludes any section 12022.53 enhancement in this case.[7]

Section 12022.53(j) provides: "For the penalties in this section to apply, the existence of any fact required under subdivision (b), (c), or (d) shall be alleged in the information or indictment and either admitted by the defendant in open court or found to be true by the trier of fact. When an enhancement specified in this section has been admitted or found to be true, the court shall impose punishment pursuant to this section rather than

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[6] All subsequent code references are to the Penal Code unless otherwise stated.

[7] We used similar analysis for this issue in *People v. Shabazz* (2004) 125 Cal.App.4th 130, review granted March 16, 2005, S131048. A contrary result was reached in *People v. Chiu* (2003) 113 Cal.App.4th 1260.

imposing punishment authorized under any other provision of law, *unless another provision of law provides for a greater penalty or a longer term of imprisonment.*" (Italics added.)

We are "guided by the rule of statutory construction which directs us, when determining legislative intent, to look first to the words themselves for the answer." (*Owen v. Superior Court* (1979) 88 Cal.App.3d 757, 762.) There is no ambiguity in the statute. (*Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 901.) A section 12022.53 enhancement was precluded here because the trial court imposed a "longer term of imprisonment," life without the possibility of parole, pursuant to the felony-murder special circumstance of section 190.2, subdivision (a)(17).

If the Legislature intended to limit the second sentence of section 12022.53(j) to enhancements, it could have easily done so. Rather than refer in the second sentence to "another provision of law," reference could have been made to enhancements. The choice of the phrase "another provision of law," rather than the word "enhancement," in the second sentence of section 12022.53(j) indicates that the Legislature did not intend to limit this provision to enhancements. This choice appears to have had cases in mind such as the one at bar, when the punishment for the offense exceeds the 25 years to life enhancement of section 12022.53(d). The choice appears to be reasonable, since one cannot "enhance" a life sentence without the possibility of parole, if the premise of a criminal sentence, whether for an offense or an enhancement, is that the offender can serve the sentence. However, a person cannot serve an enhancement that is to take effect only upon his or her death, i.e., upon the expiration of a life sentence without the possibility of parole.

We conclude that appellant's sentence precludes imposition of a section 12022.53 enhancement. We therefore strike the two 25-year-to-life enhancements that were imposed.

8. The Petition for Writ of Habeas Corpus

Appellant's petition argues that the police failed to preserve forensic evidence which could have formed a basis for exonerating him. Citing to specific pages from the transcripts of the preliminary hearing and the trial, he complains that the police did not book into evidence the sleeping bag which was placed over Teanna after she was shot; did not take fingerprints from all of the doors and doorways of the house; and did not find matches for

some of the fingerprints they found there. He also asserts that the police allowed hair and fiber evidence to be destroyed, apparently basing that assertion on the lost sleeping bag. None of those arguments has been repeated in the briefs filed by appointed counsel, although we previously gave counsel the option to raise the contentions either in the opening brief or in a supplement to the petition.

Respondent's informal response maintains that (1) the claims are procedurally barred, as the matters could have been, and were not, raised on the direct appeal; and (2) if the contentions are cognizable, a prima facie showing to warrant relief has not been made, as the state had no obligation to preserve the evidence in question.

Assuming arguendo that appellant's claims are not procedurally barred, they lack merit.

Our Supreme Court explained the applicable principles in *People v. Catlin*, *supra*, 26 Cal.4th 81, 159-160: "'Law enforcement agencies have a duty, under the due process clause of the Fourteenth Amendment, to preserve evidence "that might be expected to play a significant role in the suspect's defense." (*California v. Trombetta* (1984) 467 U.S. 479, 488; accord, *People v. Beeler* (1995) 9 Cal.4th 953, 976.) To fall within the scope of this duty, the evidence "must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." (*California v. Trombetta*, *supra*, 467 U.S. at p. 489; *People v. Beeler*, *supra*, 9 Cal.4th at p. 976.) The state's responsibility is further limited when the defendant's challenge is to "the failure of the State to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant." (*Arizona v. Youngblood* (1988) 488 U.S. 51, 57.) In such case, "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." (*Id*. at p. 58; accord, *People v. Beeler*, *supra*, 9 Cal.4th at p. 976.)' [Citations.]"

Here, the sleeping bag and fingerprint evidence which are the subject of the petition did not have significant exculpatory value that would have been evident to the police before

the evidence was lost or destroyed. Also, there is no suggestion that the loss of any evidence was made in bad faith. Instead, the evidence shows that the police made a concerted effort to comb the house for any evidence they could find which would establish who committed the killings.

DISPOSITION

In accordance with the views expressed herein, the judgment is hereby modified to strike the two 25-year enhancements which were imposed pursuant to section 12022.53, subdivision (d), and the suspended parole revocation fine which was imposed pursuant to section 1202.45. The superior court is directed to send a corrected abstract reflecting these changes to the Department of Corrections. In all other respects, the judgment is affirmed.

The petition for writ of habeas corpus is denied.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

FLIER, J.

We concur:

COOPER, P.J.

RUBIN, J.