In the Supreme Court of the State of California

PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** v. **JAMES FRANCIS O'MALLEY,** **Defendant and Appellant.**	**CAPITAL CASE** Case No. S024046

Santa Clara County Superior Court
Case No. 131339-0
The Honorable Hugh F. Mullin, III, Judge

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

On April 24, 1991, the Santa Clara County District Attorney filed an amended information charging appellant with three counts of murder (Pen. Code, § 187; counts 1, 4 & 6),[1] two counts of conspiracy to commit murder (counts 2 & 5; § 182.1), and one count of robbery (count 3; §§ 211-212.5, subd.(b)). In connection with counts one and six, the information alleged that appellant personally used a firearm and a deadly and dangerous weapon; in connection with count one, it alleged that the murder was committed for financial gain, in connection with count four, a robbery special circumstance was alleged, and in connection with count six, it was alleged that appellant had been convicted of more than one count of murder in the instant proceeding. (§§ 12022, subd. (b), 12022.5, subd. (a).) The information also alleged three overt acts in connection with the offenses in counts two and five. (24 CT 5393-5396.)

On March 26, 1991, appellant's guilt-phase jury trial began. (24 CT 5239.) On September 9, 1991, the jury convicted appellant on all counts except that charged in count two, and found all attendant special circumstances and allegations to be true. (25 CT 5569-5585.) On September 24, 1991, appellant's penalty-phase trial began. (25 CT 5700.) On October 10, 1991, the jury determined that appellant should be sentenced to death. (25 CT 5722, 5727.) On November 21, 1991, the trial court denied appellant's motion to modify the verdict to life in prison without parole. (See 27 CT 6277-6279.) On that same date, the trial court sentenced appellant to death. (27 CT 6278.) Appeal is automatic.

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[1] Subsequent statutory references will be to the Penal Code unless otherwise indicated.

STATEMENT OF FACTS

A. Guilt Phase

Between April 25, 1986, and October 24, 1987, appellant killed Sharley Ann German, Herbert Parr, and Michael Robertson ("Hostage"). Appellant knew all of his victims through his association with the Freedom Riders motorcycle club. He implicated himself in one or more of the murders to various friends, including Laurel Bieling ("Lady Hawk" or "Hawk"), and not only told his girlfriend Brandi Hohman that he committed all three murders, but provided details and involved her in at least one of them after the fact. Not long after appellant killed Hostage, his third victim, he went "on the run," with Brandi, travelling from San Francisco to Reno, and then to the east coast where he was eventually apprehended.[2]

B. Prosecution Case

1. Appellant's association with the Freedom Riders

During 1986 and 1987, appellant was a member of a motorcycle club called the Freedom Riders. (See 13 RT 2826.) Nearly all of the members of the club had monikers; appellant's was "Knucklehead," after the Harley Davidson motorcycle of the same name. (See 13 RT 2833-2834.) Appellant became a prospect of the club sometime around 1984/1985,[3] and

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[2] During the time period in which the instant offenses were committed, appellant was dating Brandi Hohman and was also seeing his other girlfriend Karen Dolan, who was the mother of his three children. (See 26 RT 5450-5451.) By the time of trial, appellant had married Karen; she testified at trial as Karen O'Malley. (35 RT 7503.)

[3] A prospect is someone who is on probation with the club for about three to six months. (13 RT 2828-2830; 16 RT 3278.) If a prospect makes it through this period, he is awarded a "full patch," which indicates that he has become a full-fledged member. (13 RT 2830-2831.) The patch, which

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thereafter moved up the ranks to eventually become the president of the San Jose chapter. (See 16 RT 3241, 3244-3246.) There was also a Hayward chapter of the club; the president of that chapter was Gregg Hosac ("Hoss"). (16 RT 3246.)

2. Sharley Ann German's murder—April 25, 1986

Sharley Ann German married Geary German ("Easy") sometime in 1984. (13 RT 2822-2825.) At the time, Geary was a prospect for the Freedom Riders. (13 RT 2828, 2831-2832.)[4] In the three months before April 25, 1986, the couple's relationship became strained. (See 14 RT 2889, 3009; 18 RT 3585.) During that time, Sharley Ann learned that Geary was having an affair with his colleague Sandra Lithgow ("Crickett"). (15 RT 3187-3188; 18 RT 3587.) Sharley Ann called Sandra's husband, William, and told him about the affair. (15 RT 3177-3185.) Although Sandra initially denied the affair, she eventually admitted she was involved with Geary. (15 RT 3185.)

Judith Flemate, a good friend of Sharley Ann's, lived with Sharley Ann and Geary from about February 1986, until April 1986, at 696 Pecos River Court in San Jose. (13 RT 2823; 18 RT 3582-3583.) During that time, Sharley Ann told Judith she wanted to divorce Geary. (18 RT 3587.)[5] In front of Geary, Sharley Ann told Judith "that when they were married, she put up most of the money to clear all his debts and build on to the

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says "Freedom Riders" and is worn on a member's vest, is also known as the member's "colors." (16 RT 3216.)

[4] Geary eventually became a full-fledged member of the club. (13 RT 2831.)

[5] Sharley Ann also talked to her son Tom about divorcing Geary. (14 RT 2889.)

house, and that she wasn't going to allow him to take everything away from her and her son, and that she would see to it that he did not, that he lost his house." (18 RT 3587.) She also told Geary "[h]e would not have the house any longer, and as far as their bank account was concerned, that she was going to have it, too." (18 RT 3587-3588.) Geary responded angrily. (18 RT 3588.)

A few weeks later, Judith and her husband heard Sharley Ann and Geary "yelling and fighting and banging around" in the garage. (18 RT 3588-3589.) Afterwards, Judith saw Sharley Ann with a swollen eye, and purple marks on her throat as if someone had squeezed it. (18 RT 3589.)[6] A few days before April 25, 1986, Judith and her husband moved out at Geary's request. (18 RT 3650.) Sharley Ann told Judith she was hopeful she and Geary would be able to make their relationship work; Geary had told her his relationship with Sandra was over, and he had been nicer to Sharley Ann. (18 RT 3590, 3596-3597.)[7]

On April 25, 1986, Sharley Ann's son Tom McNeel, lived with Sharley Ann and Geary German; that morning he woke up at 6:00 a.m. and talked to his mother before he left for school. (13 RT 2843, 2851.) When Tom returned from school before 4:00 p.m., the front door of the house was not locked as usual. (13 RT 2871-2872.) After entering the house and hearing the stereo, Tom walked into his bedroom where he found his mother's body on the floor next to his bed and dresser. (13 RT 2872-2874.) He ran next door to ask his neighbor Reni Jensen for help. (13 RT 2874; 14

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[6] Within the month before April 25, 1986, Sharley Ann's friend Daniel Whitworth, and her mother also saw her with a black eye. (14 RT 3009; 15 RT 3141.)

[7] According to Sandra Lithgow, however, her relationship with Geary did not end until after Sharley Ann was killed. (16 RT 3215.)

RT 2930.) When Reni answered her door, Tom was "stark white and very, very upset." (14 RT 2930.) Tom told her his mother had been hurt and asked her to come back to the house with him; when the two went back into the German house, Reni checked Sharley Ann's pulse and determined she was dead. (14 RT 2930-2933.)

When police arrived on the scene around 3:45 p.m., they met with Tom and intercepted Geary, who arrived there around 4:45 p.m. (14 RT 2950-2954.)[8] One of the officers testified that when notified of his wife's death, Geary "didn't seem surprised and seemed to be forcing his anguish." (14 RT 2956.) According to another officer, in similar cases, spouses tend to exhibit "a lot of emotional trauma[;]" in his opinion, Geary did not exhibit any emotion and on the way to the police station for an interview "[s]eemed very nonchalant[.]" (14 RT 2962-2964.) A third officer testified that after being informed of his wife's death, Geary appeared to squint his eyes hard and then rub them; "[i]t looked like he was appearing to try and redden his eyes or bring tears to his eyes." (14 RT 2975.)

In the bedroom where Sharley Ann's body was found, police recovered a spent .25-caliber casing underneath the dresser. (19 RT 3708.) A .25-caliber bullet was recovered from inside Sharley Ann's head. (19 RT 3764.) Police did not discover any indication of forced entry at the German house. (19 RT 3717.)

The Germans had two "vicious" Dobermans that barked at strangers; on April 25, 1986, they were in the backyard of the house. (14 RT 2869-2870; 2927.) Reni Jensen testified that on that day, she did not hear the dogs bark. (27 RT 2927.)

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[8] Two witnesses testified that Geary was usually home by 2:30 on Fridays; Sharley Ann was killed on a Friday. (14 RT 2878, 3002; 15 RT 3045.)

After Sharley Ann's death, Geary used the proceeds from her life insurance policies to buy, inter alia, a Corvette whose license plate read, "Criket4[,]" after his girlfriend, and new furniture; he also used some of the money to throw several parties. (14 RT 2889.)

The pathologist who performed the autopsy on Sharley Ann, testified that she died as a result of a stab wound to her neck and a gunshot wound to her head, with the stab wound inflicted first. (15 RT 3112.) Her blood alcohol level was approximately .02, which indicated she had ingested something like a glass of wine or beer within 30 minutes of her death. (15 RT 3120.)

a. Appellant confesses to killing Sharley Ann

In April 1988, police interviewed appellant's friend and business partner Ted Granstedt during the course of their investigation. (See 16 RT 3306-19 RT 3790.)[9] Although reluctant to talk to them,[10] Granstedt ultimately told police that one day while he was at appellant's apartment in Redwood City, appellant returned home and told him he had killed "Easy's old lady." (19 RT 3791.) That "he had just finished doing the job[.]" (19 RT 3793.) Appellant told him he had "cut her throat and shot her in the head[,]" and "indicated it was a murder for hire[,]" and that "Easy" had hired him to kill Sharley Ann. (19 RT 3791-3793.) According to Granstedt, when appellant arrived home, "he seemed to be pumped up or on like an adrenaline rush[.]" (19 RT 3814.) Grandstedt thought he told police that appellant had a .25-caliber gun. (17 RT 3368.)

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[9] Appellant and Gransted sold drugs together. (See 17 RT 3390-3391.)

[10] Granstedt told them he was unwilling to testify at appellant's trial. (19 RT 3791.)

From about 1971 to 1987, Robert Fulton ("Limpy Bob") was an active member of the Freedom Riders. (17 RT 3426-3428.) Sometime in either 1986 or 1987, appellant told Fulton he had killed Sharley Ann. (17 RT 3434-3436.) According to Fulton, appellant said "he went over to her house" and knocked on her door. (17 RT 3436.) Then appellant and Sharley Ann talked "for awhile in one of the rooms in the house[,]" before they went into another room where appellant stabbed her in the neck and "then shot her in the head." (17 RT 3437-3439.) Appellant explained that she "was going to divorce Geary and take everything, and apparently, Geary was upset about that, and evidently talked to [appellant] about taking care of his wife." (17 RT 3437.) Appellant said that Sharley Ann "was a tough bitch to kill[,]" and that he got $2,500 and Sharley Ann's silver Honda "for doing the job." (17 RT 3439-3440.) Fulton did not inform police of appellant's confession because appellant "was not incarcerated at the time" and Fulton was worried about his family's safety. (17 RT 3447.)

Robert Fulton's wife Marlene was also friends with appellant. (18 RT 3515-3416.) During a conversation she had with him sometime after Sharley Ann's murder, appellant told her he killed Sharley Ann. (18 RT 3524-3525.) She told police inter alia that appellant told her he had stabbed Sharley Ann on the side of her throat, but that she did not die right away. (18 RT 3551.)

While appellant and his girlfriend Brandi Hohman were in San Francisco, and before they left for Reno, (see § 6 *post*, "Appellant on the run"), appellant told Brandi he killed Sharley Ann. (28 RT 5860.) Specifically, appellant told her he killed Sharley Ann "because her husband had wanted him to do it." (28 RT 5860.) Appellant went to Sharley Ann's house with two beers and then "shot her in the head" with a .25-caliber gun and "cut her throat." (28 RT 5861, 5866.) Appellant sold the gun to a "dumb girl" at his friend Hawk's house. (28 RT 5867.)

Appellant told his friend Hawk that one of the Freedom Riders member's "ol' ladies had been taken out, killed because the guy didn't want to divorce her becaue she owned everything, so she was killed." (23 RT 4653.)[11] Appellant never told Hawk, however, that he killed Sharley Ann. (23 RT 4662.)

b. Evidence corroborating appellant's confessions to Sharley Ann's murder

Tom McNeel testified that his mother's silver Honda turned "up missing" after her death. (14 RT 2894; see also 15 RT 3047, 3152-3153.)[12] He also told Reni Jensen that he believed that Sharley Ann was alive at 10:00 the morning she died because he found a receipt in the house for beer purchased at that time. (14 RT 2938.) Sharley Ann's mother Betty Beeman testified that she spoke with her daughter by telephone on April 25, 1986, from about 9:45 to 10:15 a.m., and that she was alone at that time. (15 RT 3143.) Beeman also testified that Geary German did not call to tell her that her daughter was dead; she and her husband learned about it the next morning when they read the newspaper which Geary German and Tom McNeel brought to their house. (15 RT 3145, 3148.)

Appellant's friend Richard Balthazar testified that while appellant was living in Redwood City, possibly around the summer of 1986, Balthazar cleaned appellant's gun for him; when Balthazar admired the box the gun came in, appellant gave it to him. (16 RT 3263-3264, 3271-3272, 3274; see

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[11] According to Hawk, she and appellant were very close; "he used to confide in [her]." (23 RT 4648.)

[12] Geary told Sharley Ann's friend Joan Whitworth that he sold the car to appellant for $1,000. (15 RT 3064.)

also People's Exh. 21.)[13] Criminalist Edward Peterson testified that the class characteristics of the bullet removed from Sharley Ann's head were consistent with that of the gun which would have been contained in the box labeled People's Exhibit 21. (31 RT 6557.)

In 1986, Alison Hurst lived with Hawk at 524 Bush Street in Mountain View. (18 RT 3652-3653.) In December 1986, Hurst bought a .25-caliber semi-automatic pistol from appellant. (18 RT 3654, 3676.) Appellant told Hurst she "better never tell anybody where [she] got the gun." (18 RT 3660.) According to Hurst, the gun looked like the gun pictured on the front of the box admitted as People's Exhibit 21. (18 RT 3655.) Hurst sold the gun about six months after she bought it; the person who bought it from her sold it about three weeks after that. (18 RT 3656.)

c. Frank Ramos' murder

On September 14, 1985, Frank Ramos, a neighbor of the Germans, was shot to death in the garage of the German house. (14 RT 2862.)[14] Geary German was arrested in connection with the shooting, but after testifying at the preliminary hearing was released from jail. (14 RT 2837, 2862-2863.) After Sharley Ann told police where the weapon used to kill Frank could be found (14 RT 2863), police arrested Geary's friend, Freedom Rider's member, Rex Sheffield ("Yard"). (14 RT 2863-2864.)[15] Sheffield eventually pled guilty to involuntary manslaughter in connection

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[13] While cross-examining Balthazar, defense counsel noted that the box stated that it contained a .25-caliber gun. (16 RT 3263.)

[14] The Ramos family lived behind the Germans in a house they rented from Sharley Ann. (15 RT 3137.)

[15] Yard was charged with appellant in connection with two of the charged murders in this case; as noted *post*, (see Arg. III), his case was severed from appellant's. (See 3/5/91 RT 147 .)

with Frank's killing, and served a state prison sentence between October 15, 1985, and approximately May 31, 1987. (14 RT 2864-2865.) Geary pled guilty to being an accessory and was sentenced to ten months in jail. (19 RT 3821.)

As a result of the killing, hostilities developed between member of the Ramos family and the Germans. (14 RT 2867, 2911, 2913.) After Frank was killed, Sharley Ann became "more concerned about her well-being[.]" (15 RT 3062.) Because she felt intimidated by the Ramos's, she kept her doors locked while she was at home. (15 RT 3170-3171.) She would only let people into the house whom she knew and trusted. (15 RT 3174.)

When police were taking Tom McNeel to the police station to interview him after Sharley Ann's murder, McNeel told police that one of the Ramos's may have killed his mother as a result of their ongoing feud. (14 RT 2879-2880.)

3. Herbert's Parr's murder – August 14, 1987

Sometime before June 1987, Herbert Parr's girlfriend bought him a Harley Davidson Heritage motorcycle. (20 RT 3879-3880.)[16] Herb, who was associated with the Freedom Riders as a "wanna be" through his friendship with member Joseph Martinez ("Wahoo"), rode the bike "full-time" between June and August 1987. He was proud of the bike and bragged about it and "showed it off" "to just about everybody he encountered." (13 RT 2827; 20 RT 3875, 3883, 3892.)

Late on August 14, 1987, after spending the day with his girlfriend and her two children, Herb went to a party at his brother, David Parr's house. (20 RT 3887, 3905-3906.) Shortly after Herb got there, appellant, Wahoo, Hoss, Yard, Yard's wife Gail Sheffield, and Steve Dyson

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[16] The bike cost over $10,000; Parr's girlfriend took a second mortgage on her home in order to purchase it. (20 RT 3880-3881.)

("Seemore") arrived. (13 RT 2831-2832, 2836; 20 RT 3905-3909; 26 RT 5481-5482, 5484.) Appellant, who knew that Herb would be there, and had told Brandi he wanted Herb's bike (26 RT 5486-5488), had been waiting for Herb to arrive "because he wanted to intimidate [or bully] him somehow or another." (26 RT 5488.) When talking to Brandi about Herb, appellant usually referred to Herb as a "dork," a "nerd" and a "lop," a phrase appellant used to refer to someone he disliked. (26 RT 5492-5493.)

When appellant and Herb first encountered each other at the party, appellant was demeaning towards Herb and "verbally mean[.]" (26 RT 5495-5497.) Herb "acted like he was afraid of" appellant. (26 RT 5497.) At one point, when Yard and appellant were out of Herb's earshot, they discussed taking Herb's bike for a ride. (26 RT 5511-5512.) A short while later, Yard became upset with Herb because Herb talked about a Hell's Angel member coming to his house that weekend for a barbeque; Yard was friends with the member and knew that he was dead. Yard was upset with Herb for "dropping names[.]" (26 RT 5512-5514.)

After awhile, appellant took Herb to a room at the back of the house and tried to get Herb to let him ride his bike; when the two came out of the room they acted "friendlier;" "[t]hey came out as buddies[.]" (26 RT 5515-5516.) Appellant decided "to move the party" to Hawk's house in Mountain View. (26 RT 5516-5517.) While driving from the party to Hawk's house, appellant told Brandi "he was going to beat Herb up and take his motorcycle." (26 RT 5525.) After appellant, Brandi and Herb arrived at Hawk's house, the three "did a line of methamphetamine[.]" (26 RT 5528.) Then appellant asked Brandi to go to the store to buy cigarettes. (26 RT 5528-5529.) By the time Brandi returned, Yard and Gail had arrived; they were talking with appellant and Herb. (26 RT 5531-5532.)

Appellant "asked Herb if he wanted his last cigarette before they went back there." (26 RT 5533.) Appellant, Herb, and Yard then went into the

backyard to "settle differences." (26 RT 5533.) Either appellant or Yard told Brandi and Gail to go back to the front of the house. (26 RT 5534.) While the three men were in the backyard, Brandi heard something that sounded "like a woman screaming[,]" and then a "gurgling" noise. (26 RT 5536.) About 15 minutes later, appellant and Yard came back into the house, went into the bathroom, and closed the door. (26 RT 5537.) Herb never returned to the house and was never seen alive again. (20 RT 3913; 26 RT 5539-5540.) Eventually appellant or Yard told Brandi to take Hawk's roommate Yoshi to the store and "[t]o keep him there for awhile." (26 RT 5541.) After the pair returned from the store, Brandi and appellant went to a motel. (See 26 RT 5546.)

The next day, when Hawk went into her backyard, she "noticed that the shed where [she] kept wood . . . was completely disarrayed." (23 RT 4674.) The wood had been "knocked around" and inside she found a board of wood with "knife stabs in it and blood" and "little mounds of" "gooey material." (23 RT 4697.) When she called appellant, he told her to go to his house in San Jose. (23 RT 4704.) On the way there, Hawk stopped at the motel in San Jose where Brandi was staying; she told Brandi about what she had found and said, "how could [appellant] have done this to her." (26 RT 5547.) She also mentioned that her knife was missing. (26 RT 5547.) When Hawk spoke to appellant a short time later, he apologized to her and said something like, "I didn't mean to leave it in a mess. I was going to clean it up." (23 RT 4707.) He handed her her double-edged knife and told her it was clean and that she did not "have to worry about anything." (23 RT 4699, 4707.) Later on, appellant met Hawk at her house and the two "cleaned up the board and the blood." (23 RT 4713.) Appellant told Hawk that the less she "knew the better." (23 RT 4714.)

A day or so later, appellant took Brandi with him to Fremont in a U-Haul truck rented by Seemore; appellant was going to dismantle Herb's

bike. (26 RT 5550-5552, 5564.)[17] Appellant's friend Indian Bill was going to give appellant and Yard money for the parts. (26 RT 5553-5554.)

Not long after Herb's bike was dismantled, Brandi was at Hawk's house when appellant called; when appellant found out Brandi was there, he became angry. (26 RT 5567.) He "showed up" and screamed and yelled at Brandi, telling her to get into the U-Haul truck he was still driving. (26 RT 5568, 5572.) When Brandi refused, appellant threatened her; as a result of his threat, she got into the truck. (26 RT 5572.) Appellant drove to Hoss's house where Brandi called her mother because she was afraid appellant was going to kill her. (26 RT 5568-5569, 5572, 5591.) While Brandi was on the telephone, appellant walked into the room and told her he would take her to her mother's house. (26 RT 5575.) They got into the truck, but instead of driving to Brandi's mother's house, appellant drove towards San Jose; he explained that they had to go to his house first to "bury him," referring to Herb Parr. (26 RT 5576-5578, 5592.)[18] When Brandi told appellant she did not want to go, he told her she had to go, that "he wanted [her] to know how much he trusted [her]." (26 RT 5593.) While on the freeway, Brandi attempted to jump out of the truck "[b]ecause [she] was afraid [appellant] was going to kill [her] too, and bury [her] with Herb." (26 RT 5594.) Appellant grabbed her and promised her he would take her to a motel before he went to his house. (26 RT 5595.) Despite his promise, appellant went straight to his house and told her she could wait in the truck. (26 RT 5596-5597.)

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[17] Appellant had previously been driving a white Cadillac. (26 RT 5550.)

[18] Brandi testified that appellant told her about killing Herb either before they drove to San Jose, or on the way there. (26 RT 5569-5570.)

About 15 minutes later, appellant returned to the truck and told Brandi he wanted her to come with him to the garage. (26 RT 5598-5599.) Because Brandi felt she had no choice, she went with appellant to the garage; once there, she saw Seemore "digging a hole in the back of the garage." (26 RT 5600.) Appellant got inside the hole and helped with the digging. (26 RT 5600-5601.) When they were finished, Seemore backed appellant's white Cadillac[19] up to the hole and Brandi went into the garage as directed by appellant. (26 RT 5602.) Then appellant and Seemore "popped the trunk and took Herb out and put him in the hole." (26 RT 5603-5604.) Appellant forced Brandi to stand by the hole while it was still empty, and then again while he and Seemore filled it up with dirt. (26 RT 5609.)[20] After the hole was filled, appellant told Brandi to stay there; he and Seemore went into appellant's house and then came back outside with plates of food for themselves; they did not bring anything for Brandi to eat. (26 RT 5611-5613.) Appellant eventually left, taking Brandi with him to a local motel. (26 RT 5625.)

Sometime after Herb was buried, appellant's friend Hostage came to Hawk's house with appellant's Cadillac; Hostage asked Hawk to buy baking soda and apples to put in the trunk "[t]o take the smell out." (23 RT 4790.)[21] Hawk "went along with it because [she] thought that's what [appellant] wanted[.]" (23 RT 4792.)

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[19] The Cadillac, which Brandi had not seen since the night Herb was killed, was parked to the side of the garage. (26 RT 5576, 5602.)

[20] Brandi testified that when the hole was empty, she was afraid that appellant and Seemore would push her into it. (26 RT 5609-5610.)

[21] Brandi testified that around the time Herb's body was buried, appellant told her "he was going to buy a whole bunch of apples and put

(continued...)

Police eventually excavated Herb Parr's body; it was buried behind the garage at the house located at 655 North Fifteenth Street in San Jose where appellant lived at the time Parr was killed. (See 20 RT 3931-3933; 31 RT 6581-6582, 6654.) A search of appellant's white Cadillac revealed inter alia, baking powder and dried apples in the trunk of the car. (31 RT 6593-6594, 6562-6563.)

The pathologist who performed the autopsy on Parr's body testified that he suffered 18 stab wounds; the cause of death was multiple stabs to his chest and neck in particular. (31 RT 6613, 6617.)

a. Appellant confesses to killing Herb Parr

At some point, appellant told Hawk "about five different" versions about what had happened in her backyard; in one version, appellant and Yard "had taken this guy out in the backyard and he had had a big mouth, so he had to be taught a lesson." (23 RT 4727.) The most "specific" and detailed version appellant provided was one in which appellant had "killed the guy." (23 RT 4729.) According to this version, which appellant "acted out," appellant and Yard took the guy into the backyard to get high on nitric oxide. (23 RT 4730.) When "the guy wanted to know where the nitric oxide was," appellant told him, "here it is, and he stabbed him, or he slit his throat . . . and the guy slid back and he was asking for mercy, to please have mercy on him." (23 RT 4730-4731.) Appellant told Hawk "he was sitting there and he was smoking a cigarette waiting for this guy to die and he said that it was the longest dying guy, he took a really long time to die, and he didn't have that much time to wait and the kid was still asking for mercy, and [appellant] said, 'here's your mercy,' and he said he blew

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(...continued)
them in the trunk [of his car] so they—they would rot and that the smell of the apples would take away the smell of the dead body." (27 RT 5637.)

smoke in the kid's face, because he was smoking a cigarette. And he couldn't wait for him to die any longer, so he stabbed him, he leaned over him and stabbed him." (23 RT 4730-4731.) According to this version, Yard stood there and did nothing. (23 RT 4732.)

During a conversation Camolyn Ramsfield (Hawk's daughter) had with appellant, appellant asked Camolyn, "'you know what happened in the backyard?'" (23 RT 4612.) "'Do you know what I did'?" (23 RT 4612.) Camolyn testified that when appellant asked her these questions, she was "thinking about the person who was killed" in her mother's backyard. (23 RT 4613.)

Appellant told Brandi Hohman that he killed Herb; specifically, that he cut his throat and stepped on him; "trying to push the blood out of him because he wasn't dying." (26 RT 5573.) As with Hawk, appellant acted out the killing. (26 RT 5573.)[22]

4. Hostage's murder – October 24, 1987

In the beginning of October 1987, appellant had an accident while riding a motorcycle he had borrowed from Wahoo. (23 RT 4748-4749.) Appellant left the bike in Hawk's backyard and told her he did not want Wahoo to know where it was until appellant fixed it. (23 RT 4751-4752.) After the accident, appellant started spending less time with other club members; according to Hawk, "[h]e just didn't want to deal with the club." (23 RT 4752.) At the same time, appellant's friendship with Hostage was close; the two were together almost every day. (22 RT 4506.) Some nights, Hostage shared a motel room with appellant and Brandi Hohman. (22 RT 4506-4507.) During the time that appellant was estranged from the

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[22] Brandi testified that when appellant acted out a killing, it seemed "to excite him." (28 RT 5899.) Appellant had told Brandi that killing "was as good as sex to him." (28 RT 5899.)

club, appellant used "Hostage to take care of his business." (23 RT 4753.) For instance, appellant would give Hostage a message to take to the club members and would also accept messages through Hostage from the members. (23 RT 4753-4755.)

At a certain point, however, appellant started "having problems" with Hostage; appellant "started not trusting him." (27 RT 5683-5684.) Appellant told Brandi that he believed that Hostage, who had recently been released from jail, could not 'have gotten out of jail when he did, . . . and that [appellant] thought that Hostage had made some type of deal with somebody to come and be a part of [appellant's] life to give them information about him." (27 RT 5684.) Appellant and Hostage had other run-ins as well; for instance, one night when Hostage was staying in the motel with appellant and Brandi, Hostage urinated in bed "because he'd been drinking and blamed it on [appellant's] dog." (27 RT 5685.) "[T]hat made [appellant] really mad[;]" so he got up and grabbed a shotgun "and acted like he was going to shoot Hostage, but then he stopped." (27 RT 5685-5686.) Around the time of this incident, appellant referred to Hostage as a snitch and a lop. (27 RT 5693-5694.) During a conversation Brandi had with appellant about snitches, appellant told Brandi that he thought snitches "should be killed and that snitches breed snitches and their kids should be killed too." (27 RT 5695.)

On October 24, 1987, appellant wrote Brandi a couple of notes referring to Hostage, including one that said, "I don't like this situation. I want you here more than anything, but I wish you weren't right now. I keep talking myself out of dealing with this lop'." (27 RT 5723-5724.) Another said, "[t]he serious mother fucker has to go'" and "'possums die too.'" (27 RT 5723-5724.) That morning appellant called Camolyn Ramsfield and told her he thought that Hostage was a "federal snitch." (22 RT 4541.) Camolyn told police that appellant also told her that "he was

going to take Hostage out." (22 RT 4552.)[23] To "take someone out" was understood to mean, "to kill somebody[.]" (23 RT 4842.)

Appellant also called "Yard and Hoss on the morning of the 24th[.]" (27 RT 5726.) He told Brandi that they "were going to to to the bar" to meet Hoss and Yard "[t]o get everything straightened out[.]" (27 RT 5706.) Specifically, appellant "wanted to find out if Hostage had been lying to him." (27 RT 5706-5707.) Appellant wanted to "talk to Hoss and see if everything that Hostage had been telling Hoss and [appellant] was the same as what they both had been hearing from him." (27 RT 5707-5708.)[24]

Later on October 24, 1997, appellant and Brandi went to J.W.'s Bar in Mountain View (21 RT 4252; 27 RT 5730.) After Hoss arrived, he and appellant went "off to the side somewhere to talk." (27 RT 5732.)[25] A short while later, they returned and appellant told Brandi "that he was right that Hostage had been lying to him and to the club." (27 RT 5733.) Not long afterwards, Hostage arrived at the bar. (27 RT 5733.) Neither Hoss nor appellant seemed pleased; Hostage did not join the group, but remained at the other end of the bar. (27 RT 5733-5734.) Sometime later, after appellant had disappeared, Brandi went to the back of the bar and found him talking to Yard in a driveway behind the bar. (27 RT 5737.) Appellant told her to go back into the bar. (5738.) Later, when Yard and appellant returned to the bar, they stood with Hoss and invited Hostage to join them;

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[23] Appellant was Camolyn's godfather. (22 RT 4480, 4518-4519.) While Camolyn was friends with Hostage, she was closer with appellant. (22 RT 4517-4519.)

[24] After talking with Yard on the telephone, appellant had told Brandi that "he and Yard both agreed [that Hostage] was a snitch." (27 RT 5709.)

[25] Although appellant had allegedly been avoiding the Freedom Riders, appellant and Hoss hugged at the bar. (See 27 RT 5732.)

when he did, they hugged "each other and everybody all of a sudden was best friends again." (27 RT 5742.) After having a drink and playing pool, Hoss left and appellant said something about going to Santa Cruz with Yard and Hostage to buy "some really good crank.[.]" (27 RT 5746.) Hostage, however, indicated he did not want to go. (27 RT 5749.) When appellant made a remark about Hostage being "one of the women" Hostage changed his mind and decided to go with appellant and Yard. (27 RT 5749.) Yard, Hostage, and appellant got into a station wagon Yard had borrowed from Wahoo; Yard got into the driver's seat, Hostage in the middle, and appellant sat next to Hostage in the front passenger's seat. (27 RT 5750-5754.) Appellant told Brandi to wait for him at the Rainbow West Motel where they had been staying. (27 RT 5755.)

Once at the motel, Brandi fell asleep; at about 3:00 a.m. she was awakened by a knock on the door. (27 RT 5762.) When she opened the door, appellant and Yard came in; Hoss arrived a short while later. (27 RT 5763-5764, 5772.) Hoss said something about the police finding the car with blood in it "and something about they thought that [appellant] had done it." (27 RT 5773.) Then Yard and Hoss talked "about alibis." (27 RT 5773.) Appellant "interrupted them and he told them that they didn't have to tell the police anything." (27 RT 5774.) After discussing the fact that "they needed to leave[,]" they realized that Hostage had been carrying a key to the motel room and that "it must be still on the body." (27 RT 5775.)[26] "[T]hen everybody was in a big rush to get everything and get out of there." (27 RT 5775.)

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[26] There had been two keys to the motel room where appellant, Brandi, and Hostage were staying; appellant had been carrying one, and Hostage the other. (27 RT 5775.)

Later on Sunday, Hoss and his wife Carol came to see appellant and Brandi at the Der Ghan Motel in Sunnyvale. (22 RT 4321; 27 RT 5783.) At one point while appellant was talking with Hoss, he "acted out" "shooting [Hostage] in the head and cutting [his] throat." (27 RT 5784.) While at the motel, appellant took a paper grocery bag with the bloody clothes appellant and Yard were wearing when Hostage was killed and, along with his Nazi swastika knife, put it in one of the ceiling tiles of their motel room. (27 RT 5805.) Appellant also shaved his head so it was completely bald. (27 RT 5800-5801.)[27]

On or about October 26, 1987, appellant was arrested at the Der Ghan Motel for a failure to appear in court on an unrelated case. (See 22 RT 4415-4420; 4428-4431.) After appellant was arrested, Brandi called her mother to come to the motel and pick her up; before she left, Brandi took the bag hidden in the ceiling tile. When she got to her mother's house, she hid the bag in her mother's attic where it was eventually recovered by police. (27 RT 5807-5808; 31 RT 6478.)

Ellen McDonough testified that on October 24, 1987, around 8:15 p.m. on her way to dinner, she saw a parked car on Highway 17. (20 RT 3939.) Someone with "[a]n unusual hair style[]" was "running around the vehicle[.]" (20 RT 3941-3942.) According to McDonough, the man's hairstyle "was like a mane of a horse down the center of the person's head" with either side of the head. (20 RT 3943-3944.)

Appellant's fingerprints were discovered on the rear window of the station wagon found on the side of Highway 17. (21 RT 4175-4186.) The

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[27] At the time Hostage was killed, except for one section of hair that appellant wore down the back of his scalp and head in a ponytail "like some kind of Medieval warrior," appellant's head was shaved. (27 RT 5739.)

area around where the fingerprints were lifted was bloody. (21 RT 4188-4189.)

The pathologist who performed the autopsy on Hostage testified that the cause of death was a gunshot wound to the head and a stab wound to the neck. (21 RT 4286.)

a. Appellant confesses to killing Hostage

Appellant told Brandi that he, Yard and Hostage were driving on Highway 17 when "Hostage said something to make [appellant or Yard or] both of them mad" and then appellant shot Hostage in the head. (27 RT 5791.)According to appellant, Yard was driving, Hostage was seated in the middle of the seat, and appellant was to Hostage's right in the front passenger seat. (27 RT 5791.) Appellant told Brandi that when he shot Hostage, "the bullet went right through his head and that "it almost got Yard[.]" (27 RT 5791.) "[T]he car ran out of gas right after that[,]" so appellant and Yard tried to push the car to the side of the road. (27 RT 5791.) When they were unsuccessful, they pulled Hostage's body out of the car and appellant "slit his throat" and removed the boots from Hostage's feet. (27 RT 5791-5792.)[28] Appellant and Yard then walked to a nearby restaurant and called a friend to come get them. (27 RT 5794-5796.)

5. Appellant's reputation and abusive treatment of others

Robert Fulton described appellant as "charismatic;" "people got involved in things appellant did" because they were "drawn in by his personality[.]" (17 RT 3476.) Marlene Fulton testified that if appellant

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[28] The boots Hostage was wearing had been appellant's; appellant was wearing them when he killed Herb Parr, and he was afraid that Parr's blood might be on the boots and thus tie him to Parr's murder. (See 27 RT 5792; 28 RT 5851.)

"asked you to do something for him, he would expect it." (18 RT 3523.) Likewise, Brandi Hohman testified that "everyone did" what appellant told them to do. (27 RT 5644.) According to Hawk, appellant had "a way of manipulating people." (25 RT 5253.)

During the relevant time period, appellant maintained a romantic relationship with Karen Dolan, with whom he had three children, and Brandi Hohman. (See 16 RT 3307; 26 RT 5450-5451.)[29] Brandi testified to at least three instances where appellant hit or beat her; on one occasion, appellant beat her "up really bad[,]" resulting in a broken eardrum, bruising on her entire face, and a lip resembling "hamburger." (27 RT 5646-5647, 5662-5669; 28 RT 5904.)

When describing appellant's relationship with Karen, Marlene Fulton testified that Karen was afraid of appellant and that Marlene had seen Karen "a couple of times after [appellant] beat her up." (18 RT 3536.) Likewise, Marlene testified that Brandi was afraid of appellant and that he treated her "[l]ike she was a whore." (18 RT 3558.) According to Hawk, if appellant told Brandi to do something, and she did not comply, appellant would "get mad." (23 RT 4722.)

Elfriede Paoletti who worked at J.W.'s Bar in Mountain View, which was frequented by appellant and his friends, testified that she had seen Brandi with a black eye; appellant told Paoletti that he had hit Brandi. (21 RT 4252, 4267.)

6. Appellant on the run

After Hostage's killing, appellant spent some time in San Francisco, where Brandi frequently met him. (See 28 RT 5847.) At one point, appellant and Brandi left San Francisco and went to Reno, Nevada; appellant's girlfriend Karen and their three children also went to Reno. (28

[29]See fn. 2 *ante*.

RT 5866, 5882.)[30] From Reno, Karen and the children flew to Massachusetts to stay with appellant's parents, and Brandi and appellant took the train back east, stopping in Chicago, inter alia, on the way. (28 RT 5883-5889.) Appellant and Brandi arrived in Boston before Christmas 1987. (28 RT 5889, 5992.) On New Year's Eve, the two were at a bar in Boston when Brandi took some money appellant had left on the bar and left. (28 RT 5910-5911.) Intending to fly back to California, Brandi was arrested just outside the airport. (28 RT 5910-5912.) Shortly before Brandi was arrested, appellant told Brandi "that if his mom and dad ever got involved or in trouble for this, he would kill [her]." (28 RT 5905.) Appellant also threatened to kill Brandi and her son and to blow up the office where her aunt worked. (28 RT 5905.)

Sometime after December 27, 1987, appellant called Hawk from New York; during the conversation, he threatened to kill Karen's sister and her family, including her four children. (23 RT 4833-4834.) Afraid for the childrens' lives, Hawk contacted the Santa Cruz County District Attorney's Office and advised them of appellant's location. (23 RT 4834, 4858; 25 RT 5250.)

On January 28, 1988, acting on information obtained by authorities in Santa Cruz, local police arrested appellant at a hotel in New York City. (31 RT 6485-6486.)

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[30]Sometime before Halloween 1987, appellant told Hawk he was "going to go back east[,]" because "there was too much heat." (23 RT 4812-4813.)

C. Defense Case

1. Sharley Ann German murder

San Jose police officer David Harrison testified that a few days after Sharley Ann was murdered, he interviewed Sharley Ann's neighbor Connie Ramos, Frank Ramos's widow. (32 RT 6901-6902.) At that time, Connie was not formally classified as a suspect in Sharley Ann's murder, but police recognized that she "had a motive to want Sharley Ann dead[]" given the hostilities that existed between the Ramos and German families. (32 RT 6902; 33 RT 7011-7012.) During the course of their investigation, police received three anonymous calls, including one "Crime Stoppers" tip. (33 RT 6997, 7012.)[31] They also investigated inconsistencies in Connie's version of her whereabouts at the time of Sharley Ann's murder. (33 RT 7022.) At the time Sharley Ann was killed, Geary German was not a suspect, nor was there any information available to police at that time to link Geary with appellant. (33 RT 7021.)[32] Appellant did not become the chief suspect in Sharley Ann's killing until after Brandi Hohman was arrested and interviewed by police in February 1988. (33 RT 6992.)

Several of appellant's childhood friends testified that they saw appellant in Massachusetts in 1986, and that they believed it was at the end of April. (31 RT 6656-6657, 6659-6660, 6675, 6680-6681, 6733-6734,

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[31] During appellant's case-in-chief, Harrison testified that police never had sufficient evidence to charge Connie Ramos with Sharley Ann's murder, and that another police officer believed that Geary German had someone make the anonymous telephone call to Crime Stoppers. (39 RT 8208-8214, 8227-8231.)

[32] Officer Harrison testified that although Geary German had an alibi for the time during which his wife was murdered, he was not ruled out as a suspect; given his alibi, though, Connie Ramos did remain a suspect in the murder. (33 RT 7015-7021.)

6743-6744, 6748-6749; 34 RT 7328-7330, 7353.) Appellant's friend Glenn Johnson testified that he picked appellant up from the airport in San Francisco in late April or early May of 1986, and drove appellant to his apartment in Redwood City. (33 RT 6915, 6918.)

2. Herb Parr's murder

Terry Ellis testified that she "partied" with Hawk on the night of August 14, 1987, and that the two returned to Hawk's house in Mountain View in the early morning hours of August 15, 1987. (33 RT 6949-6952.) Several times before the sun came up, Ellis went into Hawk's backyard; she stumbled into the shed and saw what looked like human blood. (33 RT 6952-6953.) Hawk told her "it was probably a cat that had gotten in a fight or something." (33 RT 6954.) Hawk did not go to sleep from Friday evening, August 14, 1987, until several days later. (33 RT 33 RT 6969.)[33]

3. Brandi Hohman's credibility

Kari Sardell testified that Brandi Hohman and Brandi's young son lived at her house from about February 1987 until April 1987. (33 RT 7052-7056.) During those two months, Brandi brought home several different men and also began an affair with Sardell's husband. (33 RT 7052-7054.) Sardell often cared for Brandi's son while the two were living with her. (33 RT 7055.)

Laura Chase testified that Brandi also lived with her for a time; sometime around spring/summer of 1986. (33 RT 7123.) During that period, Brandi used drugs and dated several men. (33 RT 7128.) Brandi had bragged to Chase about some murders that were allegedly commited by one of the men Brandi dated. (33 RT 7128-7129.) Chase helped Brandi's

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[33] During the prosecution's case-in-chief, Hawk testified that on the night Herb Parr was killed, appellant had taken her knife while she was sleeping. (See 23 RT 4718.)

mother care for Brandi's son. (33 RT 7129.) According to Chase, Brandi "will say whatever she wants to get what she wants. I wouldn't believe her for a minute." (33 RT 7129-7130.)

Defense investigator Joe Jones testified that he went to the motel room at the Der Ghan Motel where Brandi and appellant stayed just after Hostage was killed and measured the distance between the ceiling tile and the ceiling. (See 34 RT 7242-7245.) The distance between the two was only three-quarters of an inch; in Jones's opinion, it would not have been possible to place a bag with two pairs of pants and a shirt in that space. (34 RT 7255, 7298.)

4. Laurel Bieling's credibility

In 1987, Veronica Bell lived at Hawk's house in Mountain View. (32 RT 6818.) Bell overheard a telephone conversation between Hawk and Yard in which Hawk told Yard that "everything was going to be okay. She was going to do what she had to do for him and his wife. She would do everything to get her out." (32 RT 6825.) After the call, Hawk called Officer David Harrison. (32 RT 6825.)

During the time Bell lived with Hawk, appellant called Hawk from jail and Bell implemented a "three-way" call. (32 RT 6838.) Several times during the conversation, Hawk apologized to appellant "for all the trouble he's been in and if she wouldn't have lied, he probably wouldn't be in all this mess[.]" (32 RT 6830.)

Around the end of October 1987, Hawk told Bell and others living at the house to move out because Hawk believed she was in danger and did not want anyone else to get hurt. (32 RT 6822.) In Bell's opinion, Hawk "was a nut case[,]" and "wouldn't know the truth if she knew the truth." (32 RT 6817-6818.) According to Bell, Hawk was "not to be believed under any circumstances[.]" (32 RT 6856.)

Donna Mitchell lived with Hawk for about three months in 1988. (33 RT 7168.) When Mitchell first moved in, Hawk told her that she assumed that appellant "had committed some murders in her yard[.]" (33 RT 7170.) She later retracted the statement when she "[f]ound out some more facts and stuff[.]" (33 RT 7170.) At that point, Hawk took precautions to ensure her safety, including putting a video camera in her room. (33 RT 7169-7170.) Hawk also received a threatening telephone call around that time, and told Mitchell "straight out it wasn't [appellant]." (33 RT 7170.) Mitchell opined that Hawk was not very reliable. (33 RT 7195.)

5. Appellant's childhood

Appellant's childhood friend Robert Thompson testified that appellant's father would beat him if appellant did not respond to his father's whistle, and that he had seen appellant's father hit appellant's mother. (31 RT 6674.) The only time Thompson had ever seen appellant exhibit violent behavior was when he played hockey. (31 RT 6673.)

Appellant's half-sister, Gael Stewart, testified that their father was "hard" on appellant when he was growing up, and that when appellant was living with her and her family in California, appellant's lifestyle was "pretty straight." (34 RT 7221-7223.)

6. Freedom Riders attempt to influence appellant's case

Robert Furlan, a private investigator assigned to appellant's case, testified that when he interviewed Wahoo around February 1987, Wahoo patted him "down for weapons." (34 RT 7267.) Shortly thereafter, Yard's wife, Gail, arrived with "two large white male adults." (34 RT 7268.)[34] After this interview, Furlan became aware that a threatening telephone call

[34] Furlan testified that he became anxious given that Gail Sheffield was the wife of appellant's codefendant. (34 RT 7269.)

was received by a secretary at his office. (34 RT 7270.) As a result, Furlan had a security system installed in his home and obtained "a license to carry a concealed weapon[,]" after "realizing the element that [he] was up against." (34 RT 7270, 7279.) After another interview that Furlan conducted at a "biker bar in Sunol," Furlan was followed out to his car by someone who took note of Furlan's license plate number. (34 RT 7270.) Around this time, Furlan was working almost exclusively on appellant's case. (34 RT 7270.) Furlan's "perception was that these threats were inspired by something that [he] was doing in the O'Malley case." (34 RT 7282.)

Hawk told Furlan that while appellant was back east evading authorities, Rex and Gail Sheffield had "the idea to have her, Laurel Bieling, go back east and hook up with some friends of Rex's and kill [appellant] while he was a fugitive back east." (34 RT 7291.) The Sheffields "said that [appellant] had a hit list out and that was the primary reason." (34 RT 7291.)

7. Rex Sheffield's role in Parr's and Hostage's murders

Danny Payne testified that while he was incarcerated at the Santa Clara County Jail, he was housed next to Rex Sheffield; the two communicated with each other through a window and vents in the cells. (34 RT 7369.) Sheffield told Payne about several homicides he had committed; one involved a person who was buried in someone's backyard, and one where Sheffield shot a man in a garage. (34 RT 7369-7374.) "[S]ome lady . . . was supposed to dump his old [pants] . . . evidently she didn't dump them or something[,] and that the police had the pants. (34 RT 7378-7379.) Sheffield mentioned appellant as his "crime partner" and told Payne "he was disappointed in [appellant]" and "that he was waiting for an opportunity to deal with him[.]" (34 RT 7378, 7382.) Sheffield also told

Payne he was disappointed that Karen O'Malley had testified at appellant's preliminary hearing because her testimony had placed Hoss and others in danger, and that Sheffield knew people "on the outside who could take care of things for him[.]" (34 RT 7409-7410.)

8. Karen O'Malley's testimony

a. Sharley Ann German's murder

Karen O'Malley testified that appellant took a trip New Jersey, Massachusetts, and New York in April 1986, and that appellant did not return to California until after April 27, 1986, when she called to tell him that Sharley Ann had been murdered. (35 ERT 7526-7531.) Appellant returned to California a day or two later, in time for Sharley Ann's funeral. (35 RT 7528.)

b. Hostage's murder

According to Karen, the day after Hostage was killed, while she was at the Hosac's house, she heard Yard talk about the killing with Hoss and Gail Sheffield. (35 RT 7558-7571.) Yard said he had shot Hostage in the face that that appellant was "lucky he didn't get it too." (35 RT 7570.)[35] The look in Yard's eyes was "really strange." (25 RT 7572.) Karen had seen Yard with the same look in his eyes after Herb Parr was killed. (35 RT 7572, 7626; 36 RT 7751.) According to Karen, before Hostage was killed, Yard said something like, "'he has to go[.]'" (37 RT 7816.) "They were mad because they couldn't get to Jimmy and [Hostage] was the middleman." (37 RT 7817.) When Karen was in Reno, appellant told her he did not kill Hostage and that he did not want her "to know any details." (35 RT 7573-7574; see also 37 RT 7865.)

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[35] Karen testified, however, that Rex never told her he cut Hostage's throat. (37 RT 7970; 38 RT 8070-8071.)

c. Attacks on other witness' credibility

Karen contradicted some of Hawk's testimony on matters including Karen's relationship with appellant, and whether several of the Freedom Riders kidnapped her and her children the night before Hostage was killed. (See e.g., 35 RT 7505-7515, 7548-7553.) She also testified that Brandi Hohman was "not dealing with a full deck." (37 RT 7859.)

9. Appellant's testimony

a. Sharley Ann German's murder

At the time Sharley Ann was killed, appellant was back east; he returned to California because of her death. (43 RT 8967-9001, 9038.) As to Ted Granstedt, appellant testified that he gave him "the impression that [he was] a person that had a lot of knowledge of criminal activity." (39 RT 8299.) Appellant "did that with a lot of people at the time to impress, make them feel [he] was more, maybe, of a bad guy." (39 RT 8299.) Appellant never told Brandi, Granstedt or the Fultons he had killed Sharley Ann. (39 RT 8301; 40 RT 8367-8368, 45 RT 9372-9378, 9401-9402.)[36] He may, though, have talked to Robert Fulton about things he overheard. (39 RT 8303.) Appellant did not tell Brandi he sold his gun to a "dumb broad" at Hawk's house. (45 RT 9386.) Appellant learned of Sharley Ann's death while he was back east. (39 RT 8327-8331.)

Appellant acknowledged that from April 7, 1986, to April 24, 1986 (the day before Sharley Ann was murdered), there were at least 12 telephone calls between his residence in Redwood City and the German residence in San Jose. (See 44 RT 9125-9139.) Appellant also admitted there were no telephone records to show that he made any telephone calls

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[36] Appellant did acknowledge, though, that as to Brandi, he may have inferred it. (45 RT 9402-9403.)

from the east coast which were billed to his home (as was his practice) after April 5, 1986. (44 RT 9190.) Nor were any telephone calls made after April 10, 1986, from appellant's home in Redwood City to the motel he was allegedly staying at in New Jersey. (44 RT 9239.)

While appellant was in Reno he learned from his mother that police believed he had killed Sharley Ann. (45 RT 9323.)

b. Herb Parr's murder

Appellant had no personal problems with Herb Parr, and had no intention of intimidating him the night of David Parr's party. (40 RT 8371-8371.) At one point during the party, appellant noticed friction between Yard and Herb. (40 RT 8391-8392.) Yard told appellant he was upset with Herb because he had claimed to know someone he did not really know. (40 RT 8398.) Yard wanted to beat Herb, but appellant told Yard that Herb "really wasn't that bad, he just tried to [*sic*] hard." (40 RT 8398.) At some point while Yard, appellant, and Herb were in Hawk's backyard, "[Yard] snapped." (40 RT 8404.) "He snapped and started stabbing Herb Parr." (40 RT 8404.) Appellant yelled at Yard, saying something like, "what the fuck are you doing[?]" (40 RT 8405.) Appellant was afraid of Yard while he was stabbing Herb. (45 RT 9609-9610.)

After Yard went to wash his hands, he and appellant talked "about what to do." (40 RT 8410.) Yard and Gail went to buy a sleeping bag; when they returned, appellant had Brandi take Yoshi (Hawk's roommate) to the store, and he and Yard put Herb into the sleeping bag and then placed him into the trunk of appellant's car. (40 RT 8410-8413.) Appellant returned Hawk's knife to her a day or two later, but never told her it was clean; Hawk's knife was not used to stab Herb. (40 RT 8437-8439.) Appellant admitted that Herb's body had been buried in his backyard, but claimed that he was disturbed about it, and that it was not done with his

consent. (See 40 RT 8445-8458.) He just went along with what other club members wanted. (47 RT 9721.)

c. Hostage's murder

In October 1987, appellant had virtually no contact with the Freedom Riders; at the beginning of that month, Hostage was appellant's best friend. (40 RT 8495-8507.) At the same time, appellant was trying to distance himself from the club members because of Parr's murder. (40 RT 8502-8503.) Appellant was afraid of Yard. (40 RT 8517.)

The night Hostage was killed, appellant went to J.W.'s to meet with club members; appellant told Yard he had told Hostage nothing about Parr's killing and burial, but Yard told appellant "that he felt that Hostage was no good." (40 RT 8549.) Appellant, Yard, and Hostage went to Santa Cruz to buy "crank," but while driving there, the car ran out of gas and they pulled it to the side of the road. (40 RT 8567-8570.) Yard got out of the car, put the hood up and signaled for Hostage to try to start the car; Yard opened the front passenger door of the car and reached under the seat as if to grab a flashlight. (40 RT 8572-8574.) Yard then pulled out a gun, "raised [it] up and shot Hostage right in front of [appellant's] face." (40 RT 8573-8574.) When Yard stepped back, Hostage's head was slumped forward; appellant, who was "scared," stepped out of the car and "[s]tood there in a daze." (40 RT 8577.) Appellant followed Yard's instructions to push the car and then the two walked to Santa Cruz to find a telephone. (40 RT 8586-8587.)

Appellant testified at trial that he helped Yard dispose of Hostage's body because he was afraid of Yard at the time, and was still afraid of him. (41 RT 8691; 49 RT 10150-10151, 10167.) He never told Brandi to conceal his knife and clothes, nor did he used the knife to cut Hostage's throat. (50 RT 10275, 10332-10333.)

d. Freedom Riders conspiracy

Appellant testified that he never told the Fultons he had killed Sharley Ann, and that Robert Fulton in particular had a motive to lie about an alleged confession because he was still a Freedom Rider. (45 RT 9378-9380.) Appellant believed that Robert Fulton lied about him confessing to Sharley Ann's murder because "this is a setup, and the Freedom Riders have sent him in to testify against [appellant]." (45 RT 9380-9381.) "Because they'd like to see me in custody where they can deal with me." (45 RT 9380.) Marlene Fulton is part of the conspiracy. (45 RT 9381.)

Appellant has been afraid of the Freedom Riders since Herb Parr was killed. (49 RT 10056.)

e. Brandi Hohman's and Hawk's credibility

Appellant testified that he never told Brandi he killed the instant victims or compared the victims to each other. (45 RT 9410-9414.)[37] Appellant never had Brandi stand near Herb Parr's grave, nor did he refuse to take her to her mother's house just before Herb was buried. (47 RT 9731-9732, 9742, 9749-9750.) He believes that Brandi lied at trial to "save herself" and because appellant resumed a relationship with Karen. (45 RT 9409, 9414-9415.)

Appellant never talked to Hawk about Sharley Ann's murder, nor did he tell her that he was going to kill Karen's sister, her husband, and their kids. (45 RT 9470, 50 RT 10383.) In appellant's opinion, Hawk testified at trial to assist "the Freedom Riders in this conspiracy against" appellant. (45 RT 9470.) Hawk was also trying to protect Yard. (47 RT 9812.)

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[37] Appellant admitted he may have told Brandi he killed Parr, but that if he did, it was a lie. (45 RT 9911-9912.)

10. Testimony of various defense witnesses

It was stipulated that if called as a witness, Inspector Dennis Clark would testify that during an interview with Gail Sheffield, Gail told him she had given her handgun to Pamela Manns because she could not have it in the house when her husband got out of prison sometime around the end of 1986 and the beginning of 1987. (48 RT 9945-9946.) Gail told Clark that appellant had later rented a room from Manns, but that it had not worked out and appellant had to move. (48 RT 9946.)[38]

Pamela Murdock, who lived at 655 North Fifteenth Street in San Jose before appellant, Karen, and their children moved in, testified that around Easter of 1989, several Freedom Rider members approached her and asked her to talk to Gail Sheffield. (49 RT 10185-10189.) When Murdock did, Gail asked her if she "would say the gun [a .25-caliber] was mine and I left it at the house before I moved out of Fifteenth Street." (49 RT 10188.) Despite Murdock's refusal to get involved, Gail approached her a second time and asked her if she could "go to court and testify the gun was mine and I left it in the—in the house for [appellant] to get his hands on it." (49 RT 10190.) Murdock testified that Gail never gave or sold her a gun and that Gail told Murdock she wanted her to testify to help "Yard's case." (49 RT 10190, 10197.)

Lawrence Walton, the chaplain at the jail where appellant was housed between being arrested and trial, testified that he had gotten to know appellant extremely well, and that he had not found appellant to be

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[38] Manns also testified that sometime around the summer of 1987, appellant and Seemore rented a house that Manns managed. (48 RT 9954-9955.) When they initially met with her, they told her they only wanted to pay $600 a month, despite the fact that the rent was $800. (48 RT 9957.) Appellant grabbed Manns' throat and told her, she "would take it or he would choke" her. (48 RT 9957-9958.)

manipulative; to the contrary, appellant had "been truthful in his dealings with [Walton] in every possible way." (50 RT 10410.)

D. Rebuttal

Lyle Coon testified that after appellant was arrested in 1988, Coon saw him at the courthouse. (51 RT 10477-10478, 10481.) Appellant "expressed displeasure with Laurel Bieling for dropping a dime on him and getting him arrested[.]" (51 RT 10483.)

Sally Varao, the custodian of records for Pacific Bell, testified as to the collect telephone calls that were made between the telephone number at the O'Malley residence in California to a motel in Milburn, New Jersey between March 1, 1986 and April 3, 1986. (51 RT 10503-10504) She further testified that on April 4, 1986, collect calls were made from Newark, New Jersey and from East Boston to the O'Malley home. (51 RT 10507.) On April 5, 1986, a call was made from Massachusetts to the O'Malley home, and on April 6, 1986, two collect calls were made from New Hampshire to the O'Malley residence. (51 RT 10518-10519.) On April 7, 1986, there was a call from the O'Malley residence to a motel in Milburn, NJ, and on April 8, 1986, a call from the residence to the motel. (51 RT 10520-10521.) On April 9, 1986, several collect and direct dial calls were made between the O'Malley residence and the motel. (51 RT 10521-10522.) On April 10, 1986, two collect calls were made to the O'Malley residence from two telephone numbers in New Jersey. (51 RT 10523-10524, 10526.) On April 14, 1986, April 15, 1986, and April 16, 1986, direct dial calls were made from the O'Malley residence to a number in Boundbrook, New Jersey. (51 RT 10524-10525.) The last collect call made from the motel in Millburn, New Jersey to the O'Malley residence was made on April 9, 1986. (51 RT 10525-10526.) The last call made from the O'Malley residence to that motel was made on April 10, 1986. (51 RT 10526.) A collect call was made from Newark, New Jersey to the

O'Malley residence on April 10, 1986, at 3:32 p.m. (51 RT 10526-10527.) On April 10, 1986, a collect call was also made from a public telephone at the San Francisco International Airport to the O'Malley residence at 8:49 p.m. (51 RT 10527-10529.) So, "after the last collect call to the O'Malley residence from the number in Newark, New Jersey at 1532 hours, there was a six-minute collect call from . . . the San Francisco Airport to the O'Malley residence." (51 RT 10529.) The "large flurry of collect calls" from back east to California "stopped immediately" as of April 10, 1986. (51 RT 10555.)

Officers Harrison, Clark and Henard testified that they never told appellant's mother or father that appellant was wanted in connection with Sharley Ann German's murder. (51 RT 10565, 10568, 10571; 52 RT 10637.)

Nora Rivera testified that during the summer of 1987, she lived next door to appellant in San Jose. (52 RT 10586.) One night she saw some people with shovels, a Cadillac backed into the backyard, and heard digging sounds at appellant's house; she also saw a young girl crouched near a parked U-Haul truck who "was real scared and trying to hide, or trying not to be noticed over there." (52 RT 10590, 10593-10595.) A male called for the girl with "abusive" and "very profane language." (52 RT 10592.) He called "her a whore and different kinds of things[.]" (52 RT 10592.) The girl tried to hide from the male, but he became demanding, "telling her to do something or else." (52 RT 10593.) When he called her, the girl "looked even more scared, kind of jumped and kind of tried to hide." (52 RT 10607.)

Karen O'Neal testified that while she was married to John Mercuri, a friend of appellant's, the couple lived in Seagoville, Texas. (52 RT 10644-10645.) As part of her divorce from Mercuri, O'Neal asked to keep their home. On April 14, 1986, however, she returned a telephone call from

appellant, who told her that if she tried to leave her marriage with assets, he would "blow your fucking head off in DFW Airport, it doesn't matter, in front of anybody, and it would be a real good idea if you took your daughter somewhere else, and I am going to get your sister and your mother, too." (52 RT 10659, 10663.) After the call, O'Neal signed everything over to Mercuri. (52 RT 10660.) O'Neal left her "marriage with nothing." (52 RT 10665.)

Paul Doty, a clerk at the Terrace Motel in Brighton, Massachusetts, where appellant was a registered guest in January 1988, testified that while at work, he received a call from a male who said something like, "you dropped a dime on me and they have got my wife and my kid, and I am going to come up there and blow your brains out." (52 RT 10710.) Earlier that day, manager David Douglas had identified appellant as a registered guest to police; when police entered appellant's room, however, appellant was gone. Police removed Karen O'Malley and her child from the property. (52 RT 10702.)

Wrentham, Massachusetts police officer John Acord testified that at about 1:05 a.m., on September 11, 1979, while he was on patrol, he received a radio dispatch call about someone in a vehicle involved in disturbing the peace. When he arrived at the location where the vehicle was headed, he saw a white male "waving his arms" near the property located at 574 South Street. (52 RT 10716.) When Acord tried to exit his vehicle to assist the male, appellant "came running from the right side of the [patrol car] . . . screaming at [him]." (52 RT 10718, 10723.) Appellant was screaming, "'[w]hat the fuck do you want.'" (52 RT 10718.) Appellant then reached his arm up and started slashing at Acord with a knife; just missing his eyes and nose. (52 RT 10719.) Appellant also tried to knock Acord into the patrol car by kicking its door, which was between appellant and Acord. (52 RT 10719.)

E. Surrebuttal

Marilyn Byrnes, a travel agent for Travel Travel, testified that to fly nonstop from Newark, New Jersey to San Francisco International Airport takes at least five hours and 59 minutes. (52 RT 10741.)

F. Penalty Phase

1. Defense

Reverand Lawrence Walton testified regarding appellant's spirituality; according to Walton, appellant had become a new person in jail. (56 RT 11505, 11511.) Walton opined that if sentenced to life without the possibility of parole, appellant would be a benefit to society. (56 RT 11511.) Walton believed that appellant would set a positive example for other incarcerated inmates, and that he "would be an aiding member to the church, to the chapel," and that appellant "would be a leader in whatever he did." (56 RT 11511-11513.) Appellant falls within the small group of people who committed capital crimes and "comes to god." (56 RT 11519.) Walton testified that he was "absolutely certain" that appellant would not "revert to what he has been" while incarcerated. (56 RT 11561.) Catholic priest Jim Misfud also testified as to appellant's spirituality. He offered that appellant is "one of the few that don't take." (58 RT 11923-3, 11923-6.)

Vincent Schiraldi, the director for a group that works with inmates and juvenile delinquents, testified as to the social background report he conducted on appellant's behalf, including inter alia his interviews with appellant's family and friends. (56 RT 11562-11569.) According to Schiraldi, while appellant's mother doted on him, appellant was beaten by his father as a child. (56 RT 11621-11622, 11628.) Appellant's upbringing "left him without the" necessary consistency to shape him into a law-abiding citizen. (56 RT 11628.) Although appellant showed a lot of

promise as a child, by the time he reached the age of 14, he began to abuse drugs and alcohol, and had stopped playing hockey, which had been a priority. (56 RT 11625, 11631-11635.)

Several witnesses who were employed by the Department of Corrections testified that appellant's behavior in jail has been good; appellant had been cooperative, his behavior is better than other incarcerated inmates, he is not manipulative, and that he could be a benefit to prison society if sentenced to life without the possibility of parole. (See e.g., 57 RT 11719-11720, 11731-11733, 11742, 11744, 11752, 11785-11786, 11804, 11845-11847, 11850-11857, 11889-11891, 11893-11897.) Appellant actively pursued his high school diploma and is highly intelligent. (57 RT 11752-11753, 11755, 11803, 11897.)

Former inmate Scott Jensen, who was incarcerated with appellant, testified that appellant was very giving, and that he helped "take the edge off" when Jensen was first incarcerated. (57 RT 11859-11860.) Because of appellant, Jensen "established a bit of faith." (57 RT 11860.) Likewise, because of appellant's treatment of him and fellow inmate Murray Lodge, appellant was Jensen's "hero." (57 RT 11861-11863.)

Appellant's half-sister Gael Stewart testified that growing up, there "was a tremendous amount of pressure on [appellant]." (57 RT 11817.) She saw her and appellant's father "shove [apellant's mother] around." (57 RT 11821-11822, 11828.) Stewart also saw their father spank and grab appellant when he was a child. (57 RT 11828-11829.)

The former principal of appellant's elementary school, who taught appellant in the sixth grade, testified that appellant had a very good attendance record, was an above-average student, and was very well-behaved. (58 RT 11880-11883.)

University of California at Berkeley sociology professor Martin Jankowski testified as to the nature of gangs, including their informal and

formal rules. (58 RT 11900-11904.) One of the informal gang rules is allegiance; members of a gang must take on a group identity, and must give up some of their individualism in order to be a part of the group. (58 RT 11905.) While a member may not want to engage in criminal activities, he may do so because of pressures he faces from the group. (58 RT 11907.) A dysfunctional family may provide "the beginning seeds of gang membership[.]" (58 RT 11910.) It is very difficult for "top people" within the gang to withdraw from the gang. (58 RT 11913.)

Psychiatrist Eugene Schoenfeld testified that appellant has a dependency on methamphetamine and alcohol, and that appellant showed "evidence of a type of fetal alcohol syndrome[,]" which was due to appellant's mother ingesting alcohol while she was pregnant with appellant and/or drinking alcohol while she breastfed appellant. (58 RT 11925, 11931-11932.) In Schoenfeld's opinion, appellant exhibited sociopathic behavior attributable to fetal alcohol syndrome. (58 RT 12046-12047.) Some of the defects which may result from fetal alcohol syndrome include an impairment in judgment; for instance, fetal alcohol syndrome can trigger a "condition in which a person doesn't seem to have the same kind of moral physical constraints." (58 RT 11929.) It may also cause a "condition in which a person becomes antisocial[.]" (58 RT 11930-11931.) Appellant's use of drugs may have exacerbated the difficulties appellant had conforming to normal standards of behavior, and would have tended "to put him more out of control." (58 RT 11938.) Schoenfeld opined that appellant was very bright, and had leadership qualities; moreover, that appellant would continue to adjust to being in a custodial setting. (58 RT 11940-11941.)

2. Prosecution

When Lyle Coon met appellant while they were both in "the tombs[,]" appellant told him something about other people "messing with him down

there and wouldn't leave him alone." (58 RT 12057.) Appellant told Coon that one time when sometime tried to harass him, appellant asked the person to stop; when he refused, appellant "head butted the guy and shoved his head in the toilet." (58 RT 12057.) Appellant described a second incident in which someone was "bothering him while he was carrying a load of books and court papers and [appellant] handed those to someone and beat the guy up with his chains somehow." (58 RT 12057-12058.)

Jane Anderson, appellant's next-door- neighbor growing up, testified that appellant's father was a "kind-hearted person[.]" (58 RT 12065-12069.) Anderson never saw any evidence that appellant was physically abused or noticed anything that "seemed unusual or out of the ordinary" about appellant's childhood. (58 RT 12071.)

Joseph Collamati testified that he had worked with appellant's father at the Wrentham Police Department, and that the elder O'Malley was very proud of appellant was that he was "a loving man." (58 RT 12082.) Collamati never saw any evidence that appellant was abused as a child. (58 RT 12088.) Likewise, James Anderson and William Manning, childhood friends of appellant's, testified that he never saw appellant's father hit appellant. (58 RT 12100-12104, 12166-12168.) Manning, did, however, witness an incident where appellant hit his father hard enough to cause him to fall against the refrigerator. (58 RT 12100-12104.) One time, when Manning and appellant were about 21 years old, appellant's mother called Manning and asked him for help; appellant had pushed his father down the stairs. (58 RT 12114-12115.)

3. Rebuttal

Appellant's father's first wife, Ellen Muzzy, testified that while she was pregnant with their daughter Gael, appellant's father slapped her and tried to choke her. (58 RT 12180-12182.) The elder O'Malley had a violent temper and would "slap [her] around." (58 RT 12182.)

4. Penalty phase closing arguments

a. Prosecution

The prosecution relied on both "factor A" and "factor B" evidence to urge the jury to impose death in this case. (See 59 RT 12227; see also § 190.3, subds. (a) & (b).) As to the circumstances underlying the three murders in this case, the prosecutor argued that appellant had taken advantage of people who trusted him, and that the murders were premeditated. (See 59 RT 12234, 12236-12237, 12239-12240.) As to the "factor B" evidence, the prosecutor relied on the following incidents: (1) appellant's assault against Officer John Acord in Massachusetts; (2) appellant's attempt to choke Pamela Manns; (3) his threat to assault Karen O'Neal and her family members; (4) appellant's assault of Christopher Walsh (see Arg. VII, *post*); (5) appellants assaults of Brandi Hohman, and his threats to harm her and her son. (59 RT 12241-12246.)

b. Defense

In closing argument and rebuttal, defense counsel urged the jury to consider inter alia appellant's alleged abuse as a child, and the fact that it may have caused him to repeat patterns begun by his father. (59 RT 12272-12273.) Counsel also asked the jury to consider that appellant had not been a disciplinary problem in prison, and in fact had been a model prisoner, often helping other inmates adapt to their environment. (59 RT 12275.) Appellant had strived to earn a degree and had turned to God since being in custody. (59 RT 12276-12278.) Counsel urged that appellant's life had value and that while appellant may not deserve to live in society, the evidence showed that if the jury sentenced appellant to life without the possibility of parole, it would enable appellant to further contribute and to allow him to repent for the crimes he committed. (59 RT 12290, 12329, 12335.)

ARGUMENT

I. THE TRIAL COURT PROPERLY DENIED APPELLANT'S *BATSON/WHEELER* MOTION

Appellant claims that the trial court erroneously denied his *Batson/Wheeler* motion.[39] (AOB 52-71.) Specifically, he claims that the prosecutor's reasons for excusing the only two African-American jurors were implausible given they were equally applicable to white jurors not stricken. (See AOB 66, 69-71.) Appellant's claim is without merit.

A. Relevant Proceedings

After the prosecution exercised a peremptory challenge against prospective juror Richard Allen, the following proceedings ensued.

> [DEFENSE COUNSEL]: I want to put on the record that the district attorney has excused the second and only remaining black juror from the panel.
>
> THE COURT: Who is the other one?
>
> [DEFENSE COUNSEL]: Mr. Carey, number seven.
>
> THE COURT: What was the actual juror number? Fifteen.
>
> [DEFENSE COUNSEL]: And the basis is that the defendant is denied a representative cross-section. Those were the only two black jurors in the panel out of the four panels called from this entire area. They both have been eliminated by peremptories.
>
> [PROSECUTOR]: Your honor, I would be more than happy to respond as to the reasons, but I don't think that it would be appropriate to do it here. I have—
>
> . . . .

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[39] *Batson v. Kentucky* (1986) 476 U.S. 79; *People v. Wheeler* (1978) 22 Cal.3d 258.

. . . .

[PROSECUTOR]: As far as [defense counsel's] arguments are concerned, I think that it's interesting he is objecting that the People have excluded the two black jurors and the People are conscientiously discriminating against a particular class.

I think Mr. O'Malley has been involved in white supremacy. If anything, he would like to not have black members on this particular jury. [§] But as far as Mr. [Carey] is concerned, he is a 33-year-old black male, married, three kids, renting.

There were answers in his questionnaire that talked about that his father was a police officer back in the 60's. However, he recalled and spoke of the prejudice. He mentioned the license tag and so on.

But primarily there was a question which asked how he felt about if somebody bragged about something, whether they could be punished—whether or not they actually did it. He put down in response to that, in effect, that a bragger could simply be joking about something.

Mr. O'Malley's defense in this particular case is that his confessing to all three murders is that he was only bragging, he was not actually telling the truth about what it was he was confessing to. And I didn't like the answer in terms of a bragger could be joking.

In connection with the demographics in connection with some other answers, 55-J, he was talking about strongly agreeing, a person should be more than - - proof should be more than beyond a reasonable doubt, to an absolute certainty.

THE COURT: How about number three, juror number three.

[PROSECUTOR]: Okay. Jury [*sic*] number three, which is Mr. Allen. Mr. Allen.

Mr. Allen is a 59-year-old black male, divorced with two kids, he rents. As I indicated, the other juror is a renter.

In terms of the demographics with not owning a home, and answer 11 on the questionnaire, the question about his children, and it was something in the answer indicating that lack of knowledge or something about certain circumstances regarding his children.

Mr. Allen, for what it's worth, had a hobby as an amateur magician, which, in any event, I didn't like the situation of one of the potential jurors being involved in magic, slight-of-hand [*sic*].

He also indicated in terms of the burden of proof involved, a phrase during the voir dire where he said, "I'd have to be convinced pretty well," and my feeling from that was, the context of which it was said, and again, I don't have a transcript handy here, but I noted it down, something about the way that he said it in connection with the questioning that he believed that he may require burden of proof over and above what the law required.

As far as the death penalty was concerned—and I had another note down here. My impression was he wanted more than proof beyond a reasonable doubt. [§] In terms of the death penalty he was somewhat equivocal. As I recall, I summarized rather than giving him a rating on the death penalty how he felt. He was not sure of his feelings, except he was ambivalent about that.

And quite frankly, I would like people a little bit more, in this particular case, more indicative one way or the other how they feel about it rather than a question mark, that can't indicate how they feel about it.

THE COURT: The court finds that the People are not intentionally excluding one class of people, and the People's reasons for exercising the peremptory challenges are valid reasons. Okay.

(13 RT 2658-2660.)

B. Applicable Legal Principles

Both the state and federal Constitutions prohibit the use of peremptory challenges to exclude prospective jurors based on race or gender. (*People*

v. Wheeler, *supra*, 22 Cal.3d at pp. 276-277; *Batson v. Kentucky*, *supra*, 476 U.S. at p. 97; *J.E.B. v. Alabama ex rel. T.B.* (1994) 511 U.S. 127, 130-131.) The discriminatory use of peremptory challenges "violates the right of a criminal defendant to trial by a jury drawn from a representative cross-section of the community under article I, section 16 of the California Constitution . . . [and] the defendant's right to equal protection under the Fourteenth Amendment to the United States Constitution." (*People v. Avila* (2006) 38 Cal.4th 491, 541.)

It is presumed that a prosecutor who uses a peremptory challenge does so for a purpose other than to discriminate. (*People v. Griffin* (2004) 33 Cal.4th 536, 554; *People v. Wheeler*, *supra*, 22 Cal.3d at pp. 278-282.) The first step in a *Batson/Wheeler* analysis requires a defendant to make a prima facie case of discrimination. (*Johnson v. California* (2005) 545 U.S. 162, 168; *Batson v. Kentucky*, *supra*, 476 U.S. at pp. 93-94; *People v. Bonilla* (2007) 41 Cal.4th 313, 341; *People v. Wheeler*, *supra*, 22 Cal.3d at p. 280.) Second, if a defendant has made a prima facie case of purposeful discrimination, a prosecutor must then provide race-neutral reasons explaining his or her use of peremptory challenges as to the excluded jurors in question. (*Johnson v. California*, *supra*, at p. 168; *People v. Bonilla*, *supra*, at p. 341; *People v. Wheeler*, *supra*, at pp. 281-282.) Third, a trial court must then determine whether the defendant proved purposeful discrimination. (*Johnson v. California*, *supra*, at p. 168; *People v. Bonilla*, *supra*, at p. 341; *People v. Wheeler*, *supra*, at p. 282.) The same three-step procedure applies to state constitutional claims. (*People v. Bell* (2007) 40 Cal.4th 582, 596.)

Where, as here, the prosecutor offered race-neutral explanations for his peremptory challenges without any prompting from the trial court, and the court ruled on the question of whether the prosecutor was intentionally discriminating, the issue of whether appellant made a prima facie showing

below is moot. (*Hernandez v. New York* (1991) 500 U.S. 352, 358.) Thus, this Court must review the justifications proffered by the prosecutor, and the trial court's ultimate ruling.

As to the prosecutor's justifications, or the second-stage of the *Batson/Wheeler* review, "[t]he party seeking to justify a suspect excusal need only offer a genuine, reasonably specific race-or-group neutral explanation related to the particular case being tried." (*People v. Arias* (1996) 13 Cal.4th 92, 136.)

The trial court's ruling on the question of purposeful racial discrimination is reviewed for substantial evidence, and the trial court's conclusions are entitled to deference on appeal as long as the trial "court makes 'a sincere and reasoned effort to evaluate the nondiscriminatory justifications offered." (*People v. Avila*, *supra*, 38 Cal.4th at p. 541, quoting *People v. Burgener* (2003) 29 Cal.4th 833, 864.) This deference extends to the trial court's "ability to distinguish 'bona fide reasons from sham excuses'" (*ibid*; see also *People v. Huggins* (2006) 38 Cal.4th 175, 227) and its evaluation of the prosecutor's state of mind based on demeanor and credibility. (*People v. Stevens* (2007) 41 Cal.4th 182, 198.) "It is the trial court which is best able to place jurors' answers in context and draw meaning from all circumstances, including matters not discernable from the cold record." (*People v. Lenix* (2008) 44 Cal.4th 602, 626.) Even trivial reasons, if genuine and neutral, will suffice to justify the peremptory challenges. (*People v. Arias*, *supra*, 13 Cal.4th at p. 136.)

C. Substantial Evidence Supports the Trial Court's Conclusion that the Prosecutor Did Not Exclude Prospective Jurors Carey and Allen Based on Race

1. Prospective juror Donald Carey

As noted *ante*, the prosecutor first noted that Mr. Carey was "a 33-year-old black male, married, three kids, renting." The prosecutor then mentioned certain answers contained in Carey's questionnaire; one as to his father being a police officer in the 60's, and another in which Carey noted he had been cited for an expired license tag. (13 RT 2658.) Last, the prosecutor proffered his reasons for discharging Carey as being his answers to questions 58B and 55J on the questionnaire. (13 RT 2658-2659.)[40] First, that Carey had noted in response to question 58B that someone who bragged "could simply be joking about something." (13 RT 2658-2659.) The prosecutor explained that he took issue with this response given that part of appellant's defense in this case was that he was bragging when he confessed to various people that he committed the instant murders. (13 RT 2659.) Appellant does not claim that the prosecutor's reason was not race-neutral; rather, he suggests that a comparative analysis reveals that there were white seated jurors who, like Carey, "strongly disagreed" with the statement in 58B. According to appellant, the prosecutor's explanation was therefore implausible and thus served as "a pretext for discrimination." (AOB 65-67.)

"[E]vidence of comparative analysis must be considered in the trial court and even for the first time on appeal if relied upon by the defendant and the record is adequate to permit the urged comparisons." (*People v. Lenix*, *supra*, 44 Cal.4th at p. 622.) "[C]omparative juror analysis on a cold

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[40] Question 58B read: "If someone brags about doing something wrong, he should be punished—whether or not he actually did it." (See e.g., ACT 3076.)

appellate record has inherent limitations" because "[t]here is more to human communication than mere linguistic content." (*Ibid.*) The way in which an answer is delivered, including attitude, attention, interest, body language, facial expression, and eye contact, can make a difference in the meaning. (*Ibid.*) A transcript cannot convey the different ways in which answers are given. (*Id.* at p. 623.) "Moreover, the selection of a jury is a fluid process, with challenges for cause and peremptory strikes continually changing the composition of the jury before it is finally empanelled." (*Ibid.*) "It may be acceptable, for example, to have one juror with a particular point of view but unacceptable to have more than one with that view." (*Ibid.*) "These realities, and the complexity of human nature, make a formulaic comparison of isolated responses an exceptionally poor medium to overturn a trial court's factual finding." (*Id.* at p. 624.) Two prospective jurors who give similar answers are not necessarily similarly situated for purposes of comparative juror analysis. "Advocates do not evaluate panelists based on a single answer. Likewise, reviewing courts should not do so." (*Id.* at p. 631, footnote omitted.)

Unlike most of the white seated jurors who answered "strongly disagree" to question number 58B (see e.g., 6586, 6300, 6352, 6404, 6430), Carey added an explanation to his standard response: "someone could be joking around how do you know if they are telling the truth." (ACT 3076.) This explanation distinguished his response from the other jurors who simply checked "strongly disagree." Thus, Carey is not similarly situated to those jurors. To the contrary, as compared with the others, Carey's additional response to the question indicates he had more than a passing interest in the issue. This explanation likely accounted for the prosecutor's concern given appellant's defense.

There were, however, two other seated jurors who, like Carey, checked "strongly disagree" to question 58B and added a qualifying

explanation. (See ACT 6326, 6560.) First, juror number two, Linda Rosco, noted that "bragging is just talking, not committing crime." (ACT 6326.) Likewise, seated juror number 11, Mary Ann Snedeker added, "people say a lot of things that they often don't mean or to show off for others." (ACT 6559.) Carey and these two seated jurors, however, were not similarly situated given their differing responses to several other questions. In fact, each of the seated jurors provided information indicating they were more prosecution-minded than Carey. For instance, in response to question 55J, also singled out by the prosecutor in connection with Carey,[41] Linda Rosco answered, "somewhat disagree" while Carey answered, "somewhat agree." (ACT 3075, 6325.) Also different were Carey's and Rosco's responses to the questions regarding the death penalty. For instance, Carey merely noted that the death penalty was "fair according to the case in which it is involved[,]" and that the adage "'[a]n eye for an eye'" "is not one" he lives by." (ACT 3078.) Rosco's responses to the same questions revealed a more emphatic view on the subject. To question 60, which asked about her general feelings regarding the death penalty, Rosco responded in part that where "the defendant is proved definitely guilty," she believed that the death penalty should be imposed. (ACT 6328.) As to the adage, "'[a]n eye for an eye,'" she stated that the death penalty was appropriate for those people unable to "live in society without hurting others." (ACT 6328.) Rosco also noted in connection with the adage, "thou shalt not kill" that imposing the death penalty would be doing "society and the [defendant] a favor[.]" (ACT 6328.)

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[41] Question 55J asked prospective jurors to respond to the following proposition: "'I think that I would require that the prosecution prove its case not only beyond a reasonable doubt as the law requires, but beyond all possible doubt and to an absolute certainty before I would convict anyone of a serious crime.'" (See e.g., ACT 3075.)

Like Carey, Mary Ann Snedeker checked "strongly disagree" in response to question 58B, and included an additional explanation, however, she also noted on her questionnaire that her father served as the Fresno County District Attorney for 17 years, her son was then seeking employment with "federal law enforcement agencies[,]" and several family friends had served as deputy district attorneys. (See ACT 6553-6554.) These close ties to numerous people employed in law enforcement not only distinguished Snedeker from Carey, but likely indicated to the prosecutor that Snedeker would have more of a prosecutorial inclination, thus making her a more attractive candidate to sit on the jury.

The second reason proffered by the prosecutor for discharging Carey was that in response to question 55J on the questionnaire, Carey checked "somewhat agree." (See fn. 41, *ante*.) Again, appellant acknowledges that the prosecutor's reliance on this factor was race-neutral, but claims that because this factor was equally applicable to white seated jurors, the prosecutor's explanation was "a pretext for discrimination." (AOB 60, 65-67.)

As noted by appellant, there were two seated jurors, Doreen Rellamas and Frances Sherrell, who checked "strongly agree" to question 55J, responses more emphatic than Carey's, and when questioned by the prosecutor, all three indicated they would follow the law as provided by the court. (5 RT 1039, 1041; 6 RT 1152-1153, 1336; AOB 60.) There was ample information on the record, however, to indicate to the prosecutor that these two jurors differed in key ways from Carey, thus showing they were not only not similarly situated to Carey, but were more prosecution-minded than he.

First, on her questionnaire, seated juror four, Doreen Rellamas, checked "neutral" in response to question 58B (see *ante*), a question which Carey checked "strongly disagree." As to question 58C, which stated,

"'[m]embers of motorcycle clubs . . . tend to be very violent[,]'" Rellamas checked "strongly agree" while Carey checked "somewhat agree." (ACT 3077, 6379.) In response to the question, "[w]hat is the first thing that comes to your mind when you think of 'tattoos'?" (see question # 57a), Rellamas answered, "rough people" while Carey answered "not much." (ACT 3076, 6378.) Last, Rellamas noted on her questionnaire that her cousin was married to a police officer who was scheduled to testify in this case, William Santos. (See ACT 6384.)

Likewise, seated juror seven, Frances Sherrell, who checked "strongly agree" to question 55J, was not similarly situated to appellant. In response to the question, "[h]ow do you feel about the adage: 'Thou shalt not kill'?" Sherrell emphatically stated, "if someone commits first degree murder, they should be put to death." (ACT 6458.) In contrast, Carey benignly responded, "[i]t is an adage or commandment that I live by[.]" (ACT 3078.) When asked if the death penalty was used too often, Sherrell responded that it was used "[t]oo seldom, for . . . first degree murderers." (ACT 6458.) Carey merely stated that he did not know much about the death penalty. (ACT 3078.) On question 66, Sherrell stated that she believed the death penalty should be mandatory for first-degree murderers (ACT 6459; but see 6 RT 1148 [during voir dire, defense counsel clarified that Sherrell meant that the death penalty was appropriate for someone convicted of first-degree murder]); in contrast, Carey answered that it should not be mandatory, and that "some people who murder are different than others, some do more horrific murders than others[.]" (ACT 3079.)

As noted by the foregoing, seated jurors four and seven responded differently from Carey on several questions on their questionnaire. Importantly, their answers to these questions indicated that these two jurors appeared to be more prosecution-minded than Carey. Thus, they were not

only not similarly situated to Carey, they were also more obvious choices for the prosecutor to empanel.

To the extent that appellant claims the prosecutor relied on factors such as Carey's age, marital and family status, and his status as a renter to discharge him (see AOB 56-57), respondent disagrees with appellant's characterization of the record. As noted by the foregoing colloquy, the prosecutor noted these factors as a means of ensuring that the court and counsel were "on the same page" with regards to which juror they were discussing. The prosecutor then mentioned that Carey's father had been a police officer, that Carey "recalled and spoke of the prejudice" and that Carey had mentioned in his questionnaire and voir dire that he had been cited for an expired license tag. (13 RT 2658.) Following this descriptive "lead-in," the prosecutor expressly noted that in discharging Carey, he "primarily" relied on Carey's answers to questions 55J and 58B. (13 RT 2658-2659.) Thus, the record shows that the prosecutor's reasons for discharging Carey were his answers to those questions and not his personal status.

As to appellant's claim that the prosecutor improperly relied on facts unsupported by the record; e.g., Carey's non-existent discussion of prejudice encountered by his father (see AOB 57), this mistake by the prosecutor appears to be nothing more than an inaccurate recollection of the record. As such, it cannot serve as evidence of his discriminatory intent.

> First, a "mistake" is, at the very least, a "reason," that is a coherent explanation for the peremptory challenge. It is self-evidently possible for counsel to err when exercising peremptory challenges. Second, a genuine "mistake" is a race-neutral reason. Faulty memory, clerical errors, and similar conditions that might engender a "mistake" of the type the prosecutor proffered to explain his peremptory challenge are not necessarily associations with impermissible reliance on presumed group bias. [Citation.] Third, a "mistake" may be a reason based on 'specific bias' [citation]. . . . Finally, a "mistake" is a reason

> "related to the particular case to be tried" [citation] to the extent the possibility that genuine errors of this sort will be made exists in every case.

(*People v. Williams* (1997) 16 Cal.4th 153, 188-189, emphasis omitted.)

As to appellant's claim that the trial court erred by not questioning the prosecutor as to his explanations (see AOB 61), the claim is misplaced. The trial court is not required to make specific comments for the record to justify its acceptance of the prosecutor's race-neutral reasons for the subject peremptory challenges, nor is inquiry by the trial court into the prosecutor's reasons required. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1101-1102; see also *People v. McDermott* (2002) 28 Cal.4th 946, 980 [when prosecutor's reasons are inherently plausible and supported by record, trial court need not question prosecutor or make detailed findings]). Here, the trial court was aware of all the answers provided by Carey and the seated jurors (see Evid. Code, § 664), and was in a position to judge the credibility and demeanor of the prosecutor to determine whether his justifications were "sham excuses." No doubt the court also considered the fact that the defendant and all three murder victims in this case were white, and that given the prosecutor's introductory comment, e.g., that he believed that because appellant was a white supremacist, appellant would not want any African Americans on the jury (see 13 RT 2658), the prosecutor genuinely believed that African-American jurors would be beneficial to the prosecution in this case, and that he excused Carey in spite of this belief. Under these circumstances and the court's firsthand observations of the prospective jurors and the prosecutor, there was no need for the court to further question the prosecutor as to his justifications.

The prosecutor clearly and reasonably provided the trial court with race-neutral explanations for excusing prospective juror Carey from the panel. Thus, the second stage of the *Batson/Wheeler* inquiry was satisfied

in this case. As to the third stage, a review of the record shows that the trial court's finding of no intentional discrimination was supported by substantial evidence. As noted *ante*, the prosecutor provided race-neutral explanations for discharging Carey. The only evidence appellant presents to undermine these explanations is that Carey was similarly situated to white jurors who were not stricken. As explained above, however, these white jurors were not similarly situated to Carey in respects which indicated they would likely be better jurors for the prosecution than Carey. In light of this fact, the other relevant circumstances (see *People v. Lenix*, *supra*, 44 Cal.4th at p. 626 [question of purposeful discrimination includes examination of all relevant circumstances]), here, in particular, the fact that the defendant and victims in this case were white (see e.g., *People v. Turner* (1986) 42 Cal.3d 711, 719 [this Court considered fact that defendant was African-American and victims were Caucasian in its evaluation of whether defendant had made out a prima facie case of discrimination]), there was evidence that appellant was a white supremacist (see 13 RT 2658), and the deference afforded the trial court's determination regarding the prosecutor's justifications, appellant has failed to sustain his burden of showing that the prosecutor's reasons for discharging Carey were not subjectively genuine. (See *People v. Reynoso* (2003) 31 Cal.4th 903, 924, [proper focus in *Batson/Wheeler* inquiry is on subjective genuineness of race-neutral reasons, not on objective reasonableness of reasons]; see also *People v. Huggins*, *supra*, 38 Cal.4th at p. 233 [question is not whether reviewing court finds challenged juror similarly situated to those accepted, but whether record shows that party making peremptory challenge honestly believed they were not "similarly situated in legitimate respects"].) His claim as to Carey must therefore be rejected.

2. Prospective juror Allen

As to prospective juror Richard Allen, the prosecutor first noted his personal status, that he was 59 years old, "divorced with two kids," and a renter. (13 RT 2659.) The record is vague as to whether the prosecutor relied on Allen's status as a renter to discharge him, but it is clear that the factors he did rely on were: (1) Allen's answer to question 11 on the questionnaire;[42] (2) his "hobby as an amateur magician," (3) Allen's view as to the burden of proof he would personally require in this case, and (4) Allen's views on the death penalty. (13 RT 2659.)

Appellant does not contest reasons 1, 3, or 4, but argues that the prosecutor's reliance on Allen's hobby as an amateur magician was "patently implausible[,]" "given that this case has nothing at all to do with magic[.]" (AOB 70.) Appellant's claim ignores that even trivial reasons justify the use of a peremptory challenge. (*People v. Arias*, *supra*, 13 Cal.4th at p. 136.) If a prosecutor may fear bias on the part of a juror because of the length of his hair or his unconventional clothing (see *People v. Wheeler*, *supra*, 22 Cal.3d at p. 275), certainly a juror's interest and/or participation in creating illusion and using sleight-of-hand is a proper basis for excusal. As noted *ante*, the reviewing court looks at whether the prosecutor's explanations are race-neutral and genuine (see *People v. Arias*, *supra*, at p. 136), not whether they relate to the facts of the particular case being tried.

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[42] Question 11 asked in relevant part, the names, ages, gender, and education of the prospective juror's children. (See e.g., ACT 2463.) As to his son, Allen noted that he "has lived with me since my divorce[,]" With respect to either his son's age or education, Allen stated, "unknown." (ACT 2463.) Allen did not include any information regarding his second child. (ACT 2463.)

Appellant also claims that the prosecutor improperly relied on Allen's status as a renter to discharge him, because "the prosecutor had no concern at all with white jurors that were renters." (AOB 69.) First, as noted *ante*, it is unclear whether the prosecutor did in fact rely on Allen's status as a renter to discharge him. Even assuming arguendo this is the case, appellant's failure to show that Allen was similarly situated to the other white jurors who rented, e.g., at a minimum that any of these jurors listed magic as a hobby, precludes his claim of error.

Appellant's reliance on a comparative analysis fails to demonstrate that the prosecutor's explanations were a pretext for racially motivated challenges to prospective jurors Carey and Allen. As noted by the foregoing, the prosecutor proffered race-neutral explanations for discharging prospective jurors Carey and Allen. Moreover, there was ample evidence on the record to indicate to the trial court that the prosecutor's reasons were genuine. Substantial evidence supported the trial court's conclusion that the prosecutor did not discharge these jurors based on race.

II. THE TRIAL COURT'S EXCLUSION OF PROSPECTIVE JUROR NISHIURA FOR CAUSE WAS NOT AN ABUSE OF DISCRETION

Appellant contends that the trial court's exclusion of prospective juror Nishiura for cause violated his constitutional right to due process and to trial by an impartial jury. (AOB 72-83.) The trial court properly excluded Mrs. Nishiura for cause.

A. Relevant Proceedings

Although not generally opposed to the death penalty, on her juror questionnaire in answer to question 64, Mrs. Nishiura stated that she "would not . . . personally . . . be able to live with" imposing the death penalty. (ACT 5185-5186.) She also claimed (in response to question 71) that she would not be able to put aside her personal feelings, "and follow

the law" as provided by the court, and that "the serious nature of this trial . . . [was] beyond what" she wanted "to deal with." (ACT 5187.) In response to question 79a, which asked whether there was any reason she "should not be asked to be a judge of the facts in this case[,]" she responded, "I believe in the death penalty but would not want to be involved in the decision to apply it to another." (ACT 5188-5189.)

During voir dire, the trial court questioned Mrs. Nishiura in relevant part as follows:

> [THE COURT]: All right. If you were a juror in this case and we did get to the second phase, that is, the penalty phase, if it should come to that, would you be able to consider both penalties?
>
> A. I would have a really hard time with it. I'm sorry. You know, I understand the principle behind the whole thing, but I would have a hard time making that decision.
>
> [THE COURT]: Okay. It's not an easy decision to make and I don't think anybody is going to quarrel with that. But the question is would you be able to consider both penalties? In other words, would you automatically vote for one penalty simply because you favor that penalty as opposed to the other?
>
> A. I don't really know. I'm sorry.
>
> [THE COURT]: Would you automatically vote for one penalty simply because you disliked the other one, the other option?
>
> A. I guess I might lean more towards one than the other even though I realize that capital punishment is something that's been approved and whatever. To me it's like the better of the two evils given - - I don't know.
>
> [THE COURT]: So right now you're leaning one way as opposed to the other, is that what you're saying, based on your personal beliefs?
>
> A. I believe in capital punishment. I really, really do. But when I think about it at this level with my having to make a

decision all of a sudden it's like a different picture. Maybe I'm a little hypocritical, but, unfortunately, that's how I feel.

[THE COURT]: And we appreciate your honesty. It's very important and it's not an easy thing to consider. Most of us do not throughout our lives consider this from this perspective. Would you automatically vote against the death penalty despite what any evidence may show during the course of the trial?

A. Probably not.

[THE COURT:] And the "automatic" is really the key word in this.

A. Probably not.

[THE COURT]: So you would be able - - even though you may be leaning one way at this point, you would be able to consider both penalties?

A. Probably.

[THE COURT]: Again, we are talking in a vacuum. We don't know any of the facts in this case and we're not supposed to at this point.

A. Yes.

[THE COURT]: And we're talking somewhat on a philosophical level, if you want to call it that.

A. Right.

[THE COURT]: What we need to know is whether or not the jurors would be able to consider and conscientiously consider both penalties and then based on what the evidence showed vote what they believed to be appropriate. [¶] Now, the Court will be giving you certain instructions to guide you during the penalty phase, if it should come to that. And let me kind of capsulize that for you. The jurors will be told to—first of all, they would weigh the various circumstances in mitigation, which are the positive things about the defendant or the case, and then also then weigh the circumstances in aggravation, which are the negative things about the defendant and the case.

And then the final instruction basically is that the jury can return the verdict of death only if the circumstances in aggravation substantially outweigh those of mitigation. That's generally in a nutshell the instructions. [¶] would you be able to follow those instructions?

A. On an intellectual level I probably would be able to.

[THE COURT]: Now, the weight to be given the various circumstances, that's up to the jury. And whether or not one substantially outweighs the other, that's also up to the jury whether or not—an individual juror, you know, whether the substantial test is met.

A. I understand what you're asking and I understand the whole principle, you know, on an intellectual level. But, unfortunately, I get kind of tied up in the emotional part of it. [¶] And I know what you're asking me and I probably should say yes, but I can't—you know, I should be able to look at everything very objective because that's what you're asking. But what I'm trying to say is the emotional part of me, which is unfortunately the way I am, would probably give me a hard time.

THE COURT: When you say—I probably should say this: You should say whatever you believe and whatever you're feeling. That's what we want to know and we do appreciate that.

(4 RT 926-930.)

The trial court then allowed defense counsel and the prosecutor to further question Mrs. Nishiura. (4 RT 930-948.) During this question and answer session, Mrs. Nishiura reiterated that she was "having a hard time with" the idea of imposing the death penalty, and was "very uncomfortable about it[,]" and about serving on the jury. (4 RT 943-948.) After excusing Mrs. Nishiura, the prosecutor made a challenge for cause, which was denied by the trial court as follows:

THE COURT: Well, it's extremely difficult for her to impose the death penalty and sitting on this jury would be extremely difficult for her. But she did indicate that she would not demand proof beyond all doubt to absolute certainty. And when she was asked the question "under any possible

circumstances could you impose the death penalty," she said "I suppose there are some circumstances."

She doesn't want to have anything to do with a death penalty case, but that has not prevented her from at least some outside possibility of imposing it. And she would appear to the Court somebody that, obviously, doesn't want to be here. But if she was here she would to the best of her ability follow the Court's instructions on the law. [¶] So I will deny your challenge for cause at this time.

(4 RT 950.)

The court then informed Mrs. Nishiura that she was to return to court for the start of trial, and that there was a "ten to fifteen percent chance" she "would wind up on [the] jury[.]" (4 RT 951.) The next morning, the following colloquy took place regarding a telephone call the court clerk received from Mrs. Nishiura:

THE CLERK: [Mrs. Nishiura] indicated that she had a very stressful night and that she realizes she should have just asked to be removed from this panel and that's what she is asking. And she said that she feels as if she is being punished for being a good citizen. That's pretty much what she said.

THE COURT: Apparently, I think she is still very upset.

[PROSECUTOR]: This is the potential juror that when she left yesterday slammed the door?

THE COURT: She went out of here quite upset, obviously, and I would say mad, the way she walked out of here. [¶] And I don't know if counsel wants to stipulate or not. She, in my opinion, would not be a good juror if she was chosen, I don't know, for either side. I know she is very much—I know she is very much against the death penalty, but whether or not it rises to a challenge for cause, even with her call this morning, I don't know.

[DEFENSE COUNSEL]: Well, as far as the defendant is concerned, your honor, there's no—there's no challenge for cause for her. That was passed on yesterday.

. . . .

. . . .

THE COURT: Her views on the death penalty would not, in the court's mind, be a valid basis for a challenge for cause, because she did, basically, she was, I don't remember her exact words, maybe I do, she indicated she would, she is really having a hard time with it, she would have an extremely difficult time imposing the death penalty, but she's not saying never. [¶] She was asked under—are there any possible circumstances could she vote for the death penalty. She indicated, "I suppose," but she doesn't want to have anything to do with this case, because the death penalty being involved with it. The fact is that she is still having a hard time with it, even though she wouldn't have to come back to the court for a month, basically.

THE CLERK: Your honor?

THE COURT: Go ahead.

THE CLERK: I just want to say she also told me she would be happy to serve on another jury, another case.

THE COURT: Apparently, it was bothering her quite a bit last night. I am going to find cause.

. . . .

. . . .

THE COURT: Let's me [*sic*] put on the record what I'm going to do. That's what the appellate courts are for. But what I'm going to do is, it may not be appropriate, I'm not excusing her because of her views at all on the death penalty whatsoever, I'm only excusing her and finding cause to excuse her because her attitude, her feelings, her emotional state, in the court's mind, would prevent or substantially impair her in the performance of her duties as a juror in accordance with the instructions.

(5 RT 972-974.)

After a suggestion by the prosecutor to invite Mrs. Nishiura back to discuss the matter further, the court reconsidered: "[h]old off on that, that excuse for cause. Let me think about having her come back. (5 RT 975.)

Two days later, Mrs. Nishiura returned and explained her feelings on the matter as follows:

MRS. NISHIURA: Okay. Um, after a rather restless Monday night, you know, I realized I probably should have asked on Tuesday to be dismissed from this jury. I'm like more than willing to serve on another, but clearly, you know, I'm not able to make a decision here.

THE COURT: Were you emotionally upset Monday night?

MRS. NISHIURA: Well, I couldn't sleep.

THE COURT: Okay. Was it because of the prospect of possibly sitting on this jury?

MRS. NISHIURA: Absolutely.

THE COURT: All right. If you were to sit on this jury, would your emotional state, because of the—of the nature of the case, make it difficult for you to pay attention to what was going on?

MRS. NISHIURA: Well, if Monday night was any indication, I probably slept about four hours, you know, I probably will be extremely exhausted.

THE COURT: All right. All right. I'm going to find cause to excuse you, and maybe your name will go back into the hopper or however they do it and maybe come back on another case.

(6 RT 1295-1296.)

The court explained its ruling as follows:

THE COURT: For the record, based on the juror's responses, she obviously is emotionally upset and has grave concerns about sitting on this type of case. Also her shaky voice Monday afternoon when she was being examined, especially when we were talking about the death penalty phase of the trial, or penalty phase of the trial, and her statements this morning about a sleepless night and so on, the court finds that the juror's emotional state would prevent her or substantially impair her

performance and duty as a juror in accordance with the instructions and oath.

Also, the court finds that service on this particular jury in this particular case would be detrimental to the mental and/or physical well-being of the juror and would be detrimental to a fair trial to both sides as the court feels and finds her emotional state would prevent her from hearing all the evidence and giving the proceedings the proper attention required, and we'll note this is over the objection of the defense.

(6 RT 1296-1297.)

B. Applicable Legal Principles

The relevant legal principles are well settled: "In *Wainright v. Witt* [(1985)] 469 U.S. 412, the United States Supreme Court set forth the proper procedures for choosing jurors in capital cases. That case 'requires a trial court to determine "whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." [Citation.] "Under *Witt*, therefore, our duty is to 'examine the context surrounding [the juror's] exclusion to determine whether the trial court's decision that [the juror's] beliefs would "substantially impair the performance of [the juror's] duties. . ." was fairly supported by the record.'" [Citations.] [¶] In many cases a prospective juror's responses to questions on voir dire will be halting, equivocal, or even conflicting. Given the juror's probable unfamiliarity with the complexity of the law, coupled with the stress and anxiety of being a prospective juror in a capital case, such equivocation should be expected. Under such circumstances, we defer to the trial court's evaluation of a prospective juror's state of mind, and such evaluation is binding on appellate courts. [Citations.]

(*People v. Bunyard* (2009) 45 Cal.4th 836, 845.)

C. The Trial Court's Finding that Prospective Juror Nishiura's Emotions Would Substantially Impair Her Performance As a Juror Was Supported by the Record

Appellant contends that nothing elicited in the questioning of Mrs. Nishiura "supported a finding that [her] emotional state would impair her

ability to follow her oath and instructions[.]" (AOB 80.) Respondent disagrees.

In her questionnaire, Mrs. Nishiura indicated she would not "be able to live with" imposing the death penalty, and that "the serious nature of this trial . . . [was] beyond what" she wanted "to deal with." (ACT 5185, 5187.) During the trial court's initial questioning, Mrs. Nishiura consistently maintained her extreme discomfort with the idea of having to be personally involved in imposing the death penalty, and being "tied up in the emotional part of it." (See 4 RT 926, 929, 935, 937-938, 943-944, 946-948.) During her exchange with the court and counsel, Mrs. Nishiura appeared "extremely uncomfortable," and her voice shook when discussing the penalty phase of the trial. (4 RT 946, 6 RT 1296-1297.) After the discussion, she appeared "quite upset" and "slammed the door" on her way out of the courtroom. (4 RT 972.) That night, Mrs. Nishiura had "a very stressful" night during which she was only able to sleep about four hours. (6 RT 1296.) When the court questioned Mrs. Nishiura a couple of days later regarding her emotional state, Mrs. Nishiura admitted that the stress of sitting on the jury in this case would likely affect her ability to serve as a juror. (6 RT 1296.) Under these circumstances, the trial court properly found that Mrs. Nishiura's emotions would substantially impair her ability to serve as an impartial juror.

> . . . It is true that the mere expression by a prospective juror that he or she anticipates that a juror's duties will be difficult is not by itself grounds for discharging a juror. [Citation.] On the other hand, [the prospective juror here] expressed great reluctance in undertaking her duties under the particular circumstance, and such reluctance, "taken into account with the juror's hesitancy, vocal inflection, and demeanor, can justify a trial court's conclusion regarding the juror's mental state that the juror's views would '"prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath."'" [Citation.] The trial court made a

> determination, based on his judgment about [her] credibility and demeanor, that her attitude toward serving on the penalty phase jury without having determined defendant's guilt would in fact substantially impair the performance of her duty as a juror in the present case. Under these circumstances, we defer to the trial court's determination. [Citation.]
>
> Defendant further contends that [the prospective juror] should not have been disqualified because she expressed support for the death penalty. There is no dispute that [she] was death qualified in the conventional sense. The reason for her exclusion was not her lack of support for the death penalty but, as discussed, her resistance toward serving on a penalty phase jury when she had not determined guilt. As explained above, the trial court did not abuse its discretion in concluding that the attitude disabled her from serving on this particular jury.

(*People v. Bunyard* (2009) 45 Cal.4th 836, 887-888.)

The trial court here examined Mrs. Nishiura at great length regarding her views on the death penalty in general and on her personal feelings regarding the prospect of imposing the death penalty. The court then called Mrs. Nishiura back into court and investigated her request to be excluded from the instant jury. During these exchanges, the trial court saw, heard, and evaluated Mrs. Nishiura's facial expressions, tone of voice, and demeanor. It was thus in a better position to judge her state of mind more reliably than a reviewing court on a cold record. The trial court properly concluded that based on her personal feelings and emotional instability with regard to the instant case, Mrs. Nishiura would have been essentially disabled from serving on appellant's jury. (See e.g., *People v. Bunyard*, *supra*, 45 Cal.4th at p. 888.) Given the deference accorded the trial court's ruling, it cannot be said that the court's exclusion of Mrs. Nishiura for cause was not supported by the record. (See *Wainright v. Witt*, *supra*, 469 U.S. at p. 428, fn. 9, quoting *Reynolds v. United States* (1879) 98 U.S. 145, 156-157 ["'[T]he manner of the juror while testifying is oftentimes more indicative of the real character of his opinion than his words. That is seen

below, but cannot always be spread upon the record. Care should, therefore, be taken in the reviewing court not to reverse the ruling below upon such a questions of fact, except in a clear case'"]; *People v. Stewart* (2004) 33 Cal.4th 425, 451 ["In according deference on appeal to trial court rulings on motions to exclude for cause, appellate courts recognize that a trial judge who observes and speaks with a prospective juror and hears that person's responses (noting, among other things, the person's tone of voice, apparent level of confidence, and demeanor), gleans valuable information that simply does not appear on the record. [Citation.]"]; *People v. Howard* (1998) 44 Cal.3d 375, 418 ["In the final analysis, the question is not whether a reviewing court might disagree with the trial court's findings, but whether those findings are fairly supported by the record, and ambiguities are to be resolved in favor of the trial court's assessment. [Citation.]"].)

D. The Trial Court's Finding that Serving on the Jury Would Be Detrimental to Mrs. Nishiura's Physical and Mental Well Being Was Supported by the Record

In addition to finding that Mrs. Nishiura's ability to serve as a juror would be substantially impaired by her emotions, the trial court concluded that serving on the jury would be detrimental to Mrs. Nishiura's physical and mental well being, a finding that appellant challenges. (6 RT 1296-1297; AOB 80.)

> An occasional venireman, though not averse to voting in favor of death, may anticipate such a physical or emotional reaction from his participation in a capital vote that his service on the jury should not be compelled. Before a challenge for cause can be sustained, however, the venireman must explain in his own words why he would expect such a reaction. If he sets forth reasons based on his background and medical history, and these reasons are deemed persuasive, the court can dismiss him for cause pursuant to the statutory provision allowing such dismissal for "Unsoundness of mind, or such defect in the faculties of the mind or organs of the body as renders him incapable of performing the duties of a juror." [Citation.] Unless the record

> plainly shows the venireman was found to be thus incapacitated, however, we cannot assume on appeal that he was disqualified on that ground.

(*People v. Bradford* (1969) 70 Cal.2d 333, 346.)

In *Bradford*, the challenged venireman told the trial court she would not be able to vote for the death penalty "'[w]ithout being very nervous[.]" (*Ibid.*) This Court held that such a response, in addition to the venireman's agreement "with the trial court's suggestion that such a vote might have a 'great physical effect' on her[,]" was insufficient to show that she "was physically 'incapable of performing the duties of a juror.'" (*Id.* at pp. 346-347.)

Appellant compares this case to *Bradford*, arguing that there was insufficient evidence here to show that "Mrs. Nishiura's emotional state would impair her performance as a jury," or that she would be unable to give appellant's case the requisite attention. (AOB 75.) The instant case is distinguishable from *Bradford*. Unlike the challenged juror in *Bradford*, Mrs. Nishiura did more than simply state she was nervous and that voting for the death penalty would affect her physically. She had a physical reaction while discussing the death penalty with the court, which caused her voice to shake. (6 RT 1296-1297.) In addition, she was unable to sleep at the prospect of serving on the jury and was exhausted as a result; there was thus concrete evidence that serving on the jury would in fact affect her physically. Under these circumstances, the court's conclusion that serving as a juror on the instant case would have a detrimental effect on Mrs. Nishiura's physical and mental well-being was proper.[43]

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[43] Appellant's reliance on *People v. Fain* (1969) 70 Cal.2d 588, is also misplaced. *Fain* involved the dismissal of a prospective juror because she held a "strong distaste at the prospect of imposing a death sentence. [Citation]." (*Id.* at p. 602.) Because the trial court here excluded Mrs.

(continued...)

Given the circumstances outlined above, and the deference that must be accorded the trial court's evaluation of a prospective juror's state of mind, the court's conclusion that Mrs. Nishiura's emotional state would substantially impair her ability to serve as a juror in this case was supported by the record. Appellant's claim to the contrary should be rejected.

III. THE TRIAL COURT'S DENIAL OF APPELLANT'S SEVERANCE MOTION WAS NOT AN ABUSE OF DISCRETION

Before trial, appellant moved, inter alia, to sever each of the three counts of murder. (See ACT 565; 3/5/91 RT 1-157.) Appellant contends the trial court erroneously denied this motion. (AOB 84-109.)[44] All three murders were properly joined.

A. Relevant Proceedings

In his severance motion, and in oral argument before the trial court, appellant argued that the three charged murders were so distinct and unconnected as to require severance. (See 3 CT 568-569; 3/5/91 RT 69-70.) According to counsel, the German murder was totally unconnected to the Parr and Robertson killings. (3/5/91 RT 69-70, 74, 78-79.) As to the Parr and Robertson homicides, counsel argued that severance was required based on the lack of cross-admissible evidence, with "no conceivable rationale" for joining the two cases. (3/5/91 RT 70-71.)[45] Alternatively,

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(...continued)
Nishiura because of her emotional state and physical reaction to serving on the jury, and not because of her views on the death penalty, *Fain* is not controlling.

[44] The trial court granted appellant's motion to sever his trial from co-defendant Sheffield's. (3/5/91 RT 147.)

[45] Counsel did at one point concede, however, that there was "some commonality" "in the nature of the players" involved in these two homicides. (3/5/91 RT 81.)

counsel asked the trial court to try appellant on the Parr and Robertson killings separate from the German killing. (3/5/91 RT 82-83.)

The prosecutor argued that all three homicides were "so inextricably and integrally related that they should be tried together." (22 CT 4826.) Specifically, the prosecutor argued the following links between the three murders: one, that the German and Parr homicides involved financial gain as a motive (22 CT 4833; 3/5/91 RT 102), two, that Robertson and German were killed in the same manner, e.g., both stabbed and shot, and that the bullet recovered from Robertson's body was fired from Gail Sheffield's gun, which was obtained by police when investigating the German murder. (22 CT 4834; 3/5/91 RT 92-93, 96.)[46] Three, that both Parr and Robertson were "on the outs" with appellant and Sheffield before being "welcomed into the fold" and taken from a relatively safe place to a more isolated location without any means of support, before being killed. (22 CT 4839, 4846-4847; 3/5/91 RT 88-90.) Four, appellant enlisted Robertson's aid to help remove traces of the smell of Parr's remains, thus providing a possible motive for appellant to kill Robertson; e.g., that Robertson "knew too much" and could thus inculpate appellant. (22 CT 4834, 4847; 3/5/91 RT 90-92.)

The prosecutor also argued that the boots worn by appellant when he killed Parr were worn by Robertson when he was killed and that appellant was concerned police could use this evidence to connect him with both murders. (3/5/91 RT 90.) Last, the prosecutor reiterated that the evidence in the three cases was "interwoven to a degree," pointing to the fact that

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[46] The prosecutor also pointed out that appellant had compared the two killings by claiming that Robertson had died more easily than German. (See 22 CT 4847.)

some of the witnesses, e.g., Brandi Hohman, would be rendering testimony relevant to all three cases. (3/4/91 RT 95, 3/5/91 RT 107.)

Before ruling, the trial court read the preliminary hearing transcript. (3/5/91 RT 122, 140-141.) For purposes of the severance motion, the court assumed that the evidence presented at that hearing was true. (3/5/91 RT 144.)

The court denied appellant's motion to sever the three murder counts as follows:

> The joinder of all [three murders is] proper because all counts are the same class and are joined together in the commission. They are related factually to some extent and in some respects the circumstances of each case are similar in various ways and some of the evidence of one count are cross-admissible and are interwoven with the others. ¶ Because the defendants are themselves severed almost all prejudicial elements regarding the joinder of counts disappeared. The only real possibility of prejudice that would remain would be from the jury adding up counts against a defendant and letting the evidence of one murder eliminate the possible reasonable doubt as to another murder and vice versa.
>
> But because of the jury instructions to the contrary and the fact that this court will pre-instruct the jury as to adding up each count separately and without regard to the verdicts on the other counts, prejudice will be so diminished as to guarantee each defendant a fair and separate trial on all counts charged against him.

(3/5/91 RT 147-148.)

B. Applicable Legal Principles

Section 954 provides that,

> An accusatory pleading may charge . . . two or more different offenses of the same class of crimes or offenses, under separate counts, . . . provided, that the court in which a case is triable, in the interests of justice and for good cause shown, may in its discretion order that the different offenses or counts set forth in

> the accusatory pleading be tried separately or divided into two or more groups and each of said groups tried separately.

(See *People v. Bradford* (1997) 15 Cal.4th 1229, 1315.)

Appellant was charged, inter alia, with three counts of murder. Because these were the same class of crimes, the statutory requirements for joinder were satisfied. (See *People v. Bradford*, *supra*, 15 Cal.4th at p. 1315.) Accordingly, appellant can establish error only upon a clear showing of potential prejudice. (*Ibid.*; see also *People v. Osband* (1996) 13 Cal.4th 622, 666.) The trial court's ruling on a motion to sever is judged by the information available to the court at the time it heard the motion, and is reviewed for abuse of discretion. (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1244; *People v. Ochoa* (1998) 19 Cal.4th 353, 409.) It is a defendant's burden to show prejudice; when, as here, the counts are properly joined, "'the difficulty of showing prejudice from denial of severance is so great that courts almost invariably reject the claim of abuse of discretion.'" (*People v. Matson* (1974) 13 Cal.3d 35, 39, quoting Witkin, Cal. Criminal Procedure, p. 288.)

> Refusal to sever may be an abuse of discretion where: (1) evidence on the crimes to be jointly tried would not be cross-admissible in separate trials; (2) certain of the charges are unusually likely to inflame the jury against the defendant; (3) a "weak" case has been jointed with a "strong" case, or with another "weak" case, so that the "spillover" effect of aggregate evidence on several charges might well alter the outcome of some or all of the charges; and (4) any one of the charges carries the death penalty or joinder of them turns the matter into a capital case. [Citation.]

(*People v. Sandoval* (1992) 4 Cal.4th 155, 172-173.)

"[T]he first step in assessing whether a combined trial was prejudicial is to determine whether evidence on each of the joined charges would have been admissible, under Evidence Code section 1101, in separate trials on the others. If so, any inference of prejudice is dispelled. [Citation.]"

(*People v. Balderas* (1985) 41 Cal.3d 144, 171-172.) Complete, or "two-way" cross-admissibility is not required. (See *Alcala v. Superior Court* (2008) 43 Cal.4th 1205, 1221.) Moreover,

> even the complete absence of cross-admissibility does not, by itself, demonstrate prejudice from a failure to order a requested severance. We repeatedly have found a trial court's denial of a motion to sever charged offenses to be a proper exercise of discretion *even when the evidence underlying the charges would not have been cross-admissible in separate trials*. [Citations.]

(*Ibid*, emphasis in original.)

C. The Trial Court's Denial of Appellant's Severance Motion Was Not an Abuse of Discretion

Applying the four factors noted *ante* supports the trial court's denial of appellant's severance motion. First, evidence of the German murder would have been admissible at a trial on the Parr murder given that the motive for both murders was financial; German's was a "murder for hire," while Parr was killed for his motorcycle. (See Evid. Code, § 1101, subd. (b); 4 CT 57, 98-107; 5 CT 131 .) Likewise, the German murder was cross-admissible with the Robertson murder because the two victims were killed in the same manner; e.g., both were shot in the head with a .25-caliber gun, and stabbed in the neck. (2 CT 234; 16 CT 11, 13-14, 16, 20-22.) Both victims were also friends of appellant's and were lulled into believing they were safe before appellant killed them. (See 1 CT 52-53; 5 CT 133-134; 5 CT 11-12, 5 CT 45-47.) In addition, as noted by the prosecutor in his argument to the court, appellant actually compared the two killings to Brandi Hohman, telling her that Robertson died more easily than German. (5 CT 134-135.) Under Evidence Code section 1101, subdivision (b), this evidence was thus cross-admissible as part of a common design or plan. "To establish the existence of a common design or plan, the common features must indicate the existence of a plan rather than a series of similar

spontaneous acts, but the plan thus revealed need not be distinctive or unusual." (*Alcala v. Superior Court*, *supra*, 43 Cal.4th at p. 1223, fn. 3.)

Evidence of the Parr and Robertson murders were also cross-admissible as part of a common design or plan. Both victims were known to appellant, and were "on the outs" with him and/or members of the Freedom Riders. (See e.g., 3 CT 87, 90; 4 CT 33, 5 CT 15-18, 28-29, 36; 9 CT 24-25, 30-33.) Appellant made them feel safe by "welcoming them into the fold" before he took them from a place of relative safety to a more isolated location without any means of support before killing them. (4 CT 64; 5 CT 45-46.) Additionally, because appellant enlisted Robertson's help to clean out the trunk of his car and remove the smell of Parr's dead body, appellant may have believed Robertson "knew too much," thus providing a motive for appellant to kill Robertson. (See Evid. Code, § 1101, subd. (b); see also 12 CT 29-31.)

Regardless, even assuming arguendo the evidence underlying the murders was not cross-admissible, the evidence promised to be so closely interwoven as to warrant the trial court's denial of appellant's severance motion. (See *People v. Balderas*, *supra*,41 Cal.3d at p. 171 [where prosecutor below only argued that joined cases shared numerous witnesses, this Court held that trial court had not abused its discretion by permitting consolidated trial][47]; see also *People v. Johnson* (1988) 47 Cal.3d 576, 590 [where trial court denied severance motion based on "circumstantial cross-linking of the evidence," court "was correct in its determination"]; see also

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[47] This Court noted, however, that pursuant to its decision in *Williams v. Superior Court* (1984) 36 Cal.3d 441, 447-449, decided after the trial court in *Balderas* heard the severance motion, the relevant factors should be evaluated when considering such a motion. (*People v. Balderas*, *supra*, 41 Cal.3d at pp. 171-172.)

ibid. [where evidentiary connections "rendered severance an 'idle act,'" possibility of prejudice from consolidation of charges dispelled].)

For instance, appellant told Brandi Hohman he tried to take Robertson's boots off his body after killing him because appellant had worn the boots when killing Parr, and feared they would link him to Parr's murder. (5 CT 96-97.) Also, the bullet recovered from Robertson's body was fired from Gail Sheffield's gun, which was confiscated and tested as a result of the police investigation into the German murder. (15 CT 186.) Further, at least two witnesses, Brandi Hohman and Laurel Bieling, testified at the preliminary hearing that appellant had either confessed and/or admitted to them a part in all three murders. (4 CT 111; 5 CT 87-89, 95, 130; 11 CT 199-200; 12 CT 38-40; 16 CT 116-117.) There also promised to be common police department witnesses testifying at trial given that all three murders were investigated by the San Jose Police Department. (See e.g., 15 CT 151-154; see also *People v. Balderas*, *supra*, 41 Cal.3d at p. 174 [where common police investigation of two incidents was conducted, "it was reasonable to assume that there would be common police witnesses" at trial].) Trying the three cases together in light of this common evidence was expeditious. (See *People v. Grant* (1988) 45 Cal.3d 829, 865.) "In weighing its discretionary power to order separate trials, the trial court could consider this interplay of evidence between the [various] occurrences." (*People v. Johnson*, *supra*, 47 Cal.3d at p. 590.)

Even assuming there was insufficient evidence presented that evidence was cross-admissible and/or cross-linked, joinder was not an abuse of discretion since none of the remaining factors favored severance. None of the charges were more likely to inflame the jury than the others. All three were murders committed with a knife and/or a gun, all of the victims were known to appellant, and none of them were children or involved molestation or gang warfare, or were particularly brutal or

gruesome. (See *People v. Balderas*, *supra*, 41 Cal.3d at p. 174 [this Court noting that where charged crimes did not include "'gang warfare' evidence" or charges of child molestation, "there was no charge or evidence particularly calculated to inflame or prejudice a jury"]; see also *People v. Macklem* (2007) 149 Cal.App.4th 674, 700 [court noting that a case involving "a predatory adult charged with a child molestation" qualified as inflammatory offense for purposes of joinder or severance].) Likewise, none of the killings were particularly brutal or gruesome. (See *People v. Rogers* (2006) 39 Cal.4th 826, 852 [even where facts underlying one murder were "sordid," they were not unduly inflammatory].)

Nor was a weak case joined with a stronger case; rather, strong evidence pointing to appellant's guilt supported each count. As to the Parr murder, evidence at the preliminary hearing showed that appellant had admitted killing Parr to Brandi Hohman, and had told Laurel Bieling he had stabbed someone in her backyard, including acting out the killing. (4 CT 111, 113; 11 CT 199-200; 14 CT 18-23, 56-57.) Parr's remains were also found buried in appellant's backyard. (See 13 CT 99-100; 14 CT 29.) With respect to the Robertson murder, appellant admitted the killing to Brandi Hohman, and Camolyn Ransfield told police that the morning before Robertson was killed, appellant told her he was going "to take out [Robertson]." (5 CT 94-95; 14 CT 164-165.) While appellant claims that the evidence against him in the German murder was weak (see AOB 100), appellant ignores the fact that Brandi Hohman testified at the preliminary hearing that appellant admitted killing German. (See 5 CT 131; 15 CT 71.) There was also evidence at the hearing that Laurel Bieling told police appellant had "bought a contract" to kill "Easy's" wife, and that he had killed her (12 CT 38; 16 CT 116-117), and that Ted Grandstedt told police appellant had admitted killing German, as a "murder for hire." (15 CT 152, 154-156.) This constitutes strong evidence of appellant's guilt. (See

People v. Balderas, *supra*, 41 Cal.3d at p. 173 [where evidence against defendant included his admissions to two acquaintances, who "agreed on all essential details," evidence connecting him to crime "was very convincing"]; see also *People v. Mendoza* (2000) 24 Cal.4th 130, 161-162 [fact that evidence on some counts was circumstantial, and on other counts consisted of eyewitness statements "does not establish improper consolidation of charges. Direct evidence is neither inherently stronger nor inherently weaker than circumstantial evidence."].)

There was no "extreme disparity" between the strength of the evidence supporting the three murder charges here. Appellant has thus failed "to demonstrate the potential for prejudicial 'spillover' from one case to the other[.]" (*Belton v. Superior Court of Los Angeles* (1993) 19 Cal.App.4th 1279,1284.)

Finally, joinder of these charges did turn this into a capital case. Counts one and two were charged with their own attendant special circumstance; one, that the German killing was a murder for hire, and two, that Parr was killed during the course of a robbery and was thus a felony murder. Last, a multiple murder special circumstance was alleged, which would have turned the Robertson murder into a capital crime with only one other murder conviction. Given the strength of the evidence presented at the preliminary hearing as to appellant's guilt, this was likely on both counts. Regardless, as noted *ante*, there was strong evidence presented at the preliminary hearing that appellant killed Robertson. Thus consolidation was not likely to affect the verdict on this count. (See *People v. Manriquez* (2005) 37 Cal.4th 547, 634.)

The joinder of charges ordinarily promotes efficiency; thus, the law prefers this course of action. (See *Alcala v. Superior Court*, *supra*, 43 Cal.4th at p. 1220.) Joinder

> ordinarily avoids needless harassment of the defendant and the waste of public funds which may result if the same general facts were to be tried in two or more separate trials [citation], and in several respects separate trials would result in the same factual issues being presented in both trials.' [Citation.]

(*People v. Macklem*, *supra*, 149 Cal.App.4th at pp. 697-698.) "In addition to preventing harassment, joinder avoids needless repetition of evidence and saves the state and the defendant time and money. [Citations.]" (*Kellett v. Superior Court of Sacramento County* (1966) 63 Cal.2d 822, 826.)

Considering the factors set forth above, and the benefits of joinder, appellant fails to demonstrate that the trial court's denial of his severance motion was an abuse of discretion.

D. Appellant's Federal Right to Due Process Was Not Violated

To the extent appellant claims his due process rights were violated by the joinder of the three murder charges (see e.g., AOB 106-108), his claim must fail.

Even if the trial court's ruling was proper when made, the reviewing court must reverse if the defendant "shows that joinder actually resulted in 'gross unfairness,' amounting to a denial of due process. [Citation.]" (*People v. Arias*, *supra*, 13 Cal.4th at p. 127.) "Gross unfairness" in violation of due process is an error of federal constitutional proportion. (See *People v. Rogers*, *supra*, 39 Cal.4th at p. 850; *People v. Mendoza*, *supra*, 24 Cal.4th at p. 162.) To make such a showing, the defendant must show there were no permissible inferences the jury could draw from the challenged evidence. (*People v. Albarran* (2007) 149 Cal.App.4th 214, 229; *Jammal v. Van de Kamp* (9th Cir. 1991) 926 F.2d 918, 920; see also *People v. Rogers*, at p. 853 [rejecting defendant's claim of gross unfairness because introducing evidence of charged offenses as cross admissible "did

not encourage the jury to prejudge defendant's case based on extraneous or irrelevant considerations"].) "'The dispositive issue is . . . whether the trial court committed an error which rendered the trial so arbitrary and fundamentally unfair that it violated federal due process.'" (*People v. Albarran*, at pp. 229-230, quoting *Reiger v. Christensen* (9th Cir. 1986) 789 F.2d 1425, 1430, internal quotations omitted].)

This is not one of those "rare and unusual occasions" where gross unfairness occurred. (See *People v. Albarran*, *supra*, 149 Cal.App.4th at p. 232.) As previously illustrated, evidence of the murders was cross admissible to prove motive and/or common scheme or plan. In addition, more than ten witnesses testified at trial proffering evidence relevant to two or more of the murders, including Brandi Hohman, Laurel Bieling, Camolyn Ramsfield, medical examiner Massoud Vameghi, investigator James Gillespie, Pacific Bell custodian of telephone records Sally Varao, criminalist Henry Inami, Karen O'Malley, Danny Payne, and San Jose police officers Rand Parker, David Harrison, and Santiago Trejo. (See e.g., 19 RT 3701-3702, 3785, 3791; 22 RT 4484, 4489, 4496, 4504, 4543-4544, 4548; 23 RT 4653-4654, 4660-4661, 4728, 4815; 26 RT 5415, 5417, 5517, 5573; 27 RT 5631, 5784; 31 RT 6506-6512, 6533-6537, 6543, 6579, 6605; 33 RT 6989, 7082; 34 RT 7372-7373, 7378; 35 RT 7496, 7532, 7570-7572, 7575.)

Aside from the cross-admissibility of the murders and the cross-linking of the evidence underlying the charges, the evidence developed in each case was independently sufficient to support the jury's verdicts. As to the German murder, four witnesses, including Brandi Hohman, Marlene and Robert Fulton, and Ted Grandstedt testified at trial that appellant admitted killing Sharley Ann as a contract killing for Geary German. (16 RT 3331-3333, 3437; 17 RT 3352; 28 RT 5860-5861.) Laurel Bieling testified that appellant told her that German's was a contract killing, and

that others had told her that appellant had killed German "for the money." (23 RT 4660-4662.) The testimony of these witnesses was supported by other evidence presented at trial. For instance, several witnesses testified that Sharley Ann's and Geary's marriage was "going downhill" and/or that Geary was having an affair and was afraid Sharley Ann would ruin him financially in a divorce. (See 14 RT 2884-2889, 3009, 3011, 3046, 3141; 15 RT 3178; 18 RT 3587-3588.) Tom McNeel testified that the front door of the German house was unlocked when he came home the day of the murder, from which the jury could infer that Sharley Ann had opened the door to her killer, a fact inconsistent with the killer being Connie Ramos (see 14 RT 2872 [McNeel testifying that fact that door was unlocked when he arrived home was unusual]; 15 RT 3062 [Joan Whitworth testifying that after Frank Ramos was killed, German was concerned for her well-being; 3170-3171 [Diane Orvino testifying that Sharley Ann was intimidated by the Ramos's and thus took extra security precautions while at home, such as keeping doors locked]; 3174 [according to Orvino, German would allow people into her home who she "trusted and had no reason to suspect"]), and consistent with the killer being appellant, given that appellant was a friend of Sharley Ann and her husband. The fact that the German's dogs were not heard barking on April 25, 1986, by the German's neighbor Reni Jensen (see 27 RT 2927), is also consistent with the killer being a friend of Sharley Ann's.

Geary German's reaction to his wife's death was inconsistent with that of a grieving spouse, including the fact that he gave Sharley Ann's car to appellant right after the killing, presumably as partial payment for appellant fulfilling the contract. (See e.g., 14 RT 2880, 2954-2956, 2963, 2974-2975; 15 RT 3156; 18 RT 3614-3617.)

Robert Fulton's testimony that appellant told him he had knocked on the German's door and visited with Sharley Ann in one room before going

into another room of the house, where he stabbed her twice in the neck and then shot her (see 17 RT 3438-3439), was also supported by the evidence. Sharley Ann's neighbor Reni Jensen testified that when Sharley Ann was working at home on Fridays, she was generally seated in the room by the front window. (14 RT 2928.) It was from this room that German presumably greeted her killer. When Tom McNeel found his mother's dead body, though, it was located in his bedroom. (14 RT 2874.) According to the pathologist who performed the autopsy on German, she was stabbed twice in the neck and shot once in the head. (15 RT 3104-3105.)

Brandi Hohman testified that appellant told her he went to see Sharley Ann with two beers, and that after they drank them, "he shot her in the head and then cut her throat." (28 RT 5861.) Tom McNeel told Reni Jensen he had found a receipt for beer purchased at around 10:00 the morning Sharley Ann was killed, which supports Brandi's version of events, as did the pathologist's testimony that Sharley Ann's blood alcohol level was consistent with her having one beer or a glass of wine within the 30 minutes before she was killed. (14 RT 2938-2939; 15 RT 3120.)

Moreover, appellant's defense to the German murder was incredible. According to appellant, he was on the east coast at the time Sharley Ann was killed. (See e.g., 54 RT 11173-11180, 11189.) None of the witnesses he presented to support this claim, however, could definitively testify to this fact. (See e.g., 31 RT 6680-6681; 32 RT 6785, 6808-6809, 6811-6812; 33 RT 6925-6929.) The prosecution also presented evidence to the contrary in the form of telephone records showing that given appellant's pattern of calling home when he was away, and/or charging his calls to his home telephone number, the likely inference was that appellant left the east coast approximately two weeks before Sharley Ann was killed, and in fact arrived home on April 10, 1996. (See 51 RT 10525-10528, 10555-10556.) Also, although appellant claimed he knew he was wanted by police for the

German murder because his mother had learned as much from talking to police and had told him so while he was "on the run" in 1987 (see 45 RT 9323), all the police officers who talked to appellant's mother around that time period testified they never gave her such information. (See 51 RT 10564-10565, 10568.) Thus, the only logical conclusion is that appellant knew about the German murder because he committed it.

The evidence supporting the Parr and Robertson murders was equally compelling. Appellant told Brandi Hohman that he killed both men and at trial admitted being at the scene of both murders with Rex Sheffield, and helping him cover up the crimes. (26 RT 5573; 27 RT 5631, 5784; 40 RT 8400-8451, 8576-8588.) As to the Parr murder, Parr's body was found buried in appellant's backyard based on information provided by Brandi Hohman, and Laurel Bieling testified that appellant told her he killed Parr, and that he acted out the killing for her. (23 RT 4730-4732; 31 RT 6537, 6579, 6589.)[48]

Appellant claimed at trial that Sheffield killed Parr, and he was merely an accessory after the fact to help Sheffield clean up the mess. (See 54 RT 11205-11207.) This defense, however, was incredible in light of other evidence. For instance, with respect to the Parr killing, appellant and Sheffield loaded Parr's body into appellant's car, and appellant drove around with the body until other club members came to his house to help him bury it. (See 26 RT 5603; 40 RT 8412-8413; 46 RT 9632.) Sheffield had nothing to do with Parr's body after he was killed, and did not assist in burying it. (See 26 RT 5600-5608; 46 RT 8650, 9682.) The fact that appellant and not Sheffield is the one who drove around with the body, and

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[48] According to Bieling, while appellant had provided her with other versions of the Parr killing, the one in which appellant was the killer was more "specific" and "detailed." (23 RT 4728-4730.)

who buried it in his own backyard is entirely consistent with appellant being the killer and is inconsistent with Sheffield committing the crime. Appellant's claim that he was simply "going along with what other people wanted" was incredible in light of the overwhelming testimony that appellant was a leader who called the shots, was not a "lackey," and was not afraid of anyone else. (See 16 RT 3245; 17 RT 3381, 3476, 3496; 18 RT 3535, 3538.)

As to the Robertson murder, Camolyn Ransfield told police that appellant called her the morning before Robertson was killed, and that he told her he was "going to take Hostage out." (22 RT 4552.) Notes written by appellant were admitted at trial in which appellant made such statements regarding his intent to kill Robertson, like, "the serious mother fucker has to go[,]'" and "'possums die too'." (28 RT 5724.)

As with the Parr murder, appellant's defense to the Robertson murder was incredible. According to appellant, while he, Sheffield, and Robertson were driving to Santa Cruz to buy "crank," the car ran out of gas. (49 RT 10121, 10132.) After Sheffield "fiddled" under the hood of the car, he came around to the passenger side of the car where Robertson was seated,[49] "squatted down" and then reached up and shot Robertson. (49 RT 10133-10134.) Instead of leaving the car and body there, Sheffield then got back into the car to "steer" and appellant pushed the car off the freeway exit onto a narrow road and then unto a U-turn before pulling Robertson's body out of the car and dumping it nearby. (49 RT 10142-10144.) As the prosecutor argued, appellant's version of the facts was simply a means of trying to "fit" the blood patterns in the car, and the location and position in which the car was found. (See 53 RT 11067 [appellant's version of Robertson's

[49] Appellant claimed he was seated to Robertson's left. (49 RT 10130-10131.)

murder was "nothing but his best attempt to create a story that fits the evidence"].) Appellant's version of the facts not only strains common sense, but in light of the evidence of appellant's intent to kill Robertson was incredible.

The trial court also instructed the jury on the elements of murder, the burden of proof to convict appellant, and that each count charged a distinct offense it must decide separately. (CALJIC Nos 2.90 [Presumption of Innocence—Reasonable Doubt—Burden of Proof], 8.10 [Murder—Defined], 17.02 Several Counts—Different Occurrences—Jury Must Find On Each]; 25 CT 5620, 5628, 5674.) These instructions mitigated the risk of any prejudicial spillover from one case to the other; the jury is presumed to have understood and followed them (*People v. Coffman* (2004) 34 Cal.4th 1, 83.)[50] In his closing argument, defense counsel also reminded the jury of its duty to consider and decide the counts separately. (54 RT ["The tendency is to say he must have done something because you look at these accusations, and that's normal and natural. ¶ *You have to separate each one*"], emphasis added.) Likewise, the prosecutor noted the separateness of the three murders. (54 RT 11298 [arguing that appellant "can think and plan like any other intelligent human being, but the

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[50] To the extent appellant argues that the trial court should have pre-instructed the jury on the limited use of cross-admissible evidence to prevent a "spillover effect" (see AOB 106), the trial court had no sua sponte duty to do so. (See *People v. New* (2008) 163 Cal.App.4th 442, 471-471.) Even assuming the trial court's promise to do so triggered such a duty, because the evidence underlying each murder charge "was not a 'dominant part' of the evidence concerning" the remaining charges, appellant's claim of instructional error fails. (See *People v. Rogers*, *supra*, 39 Cal.4th at p. 854.) The evidence was highly relevant and not prejudicial in any event. (See *ibid.*) Most important, as noted *ante*, the trial court instructed the jury with CALJIC No. 17.02, and defense counsel and the prosecutor reiterated the point that each of the counts should be considered separately. (25 CT 5674; 54 RT 11232, 11298.)

difference is, he is not restrained by any human - - or human impulse when he does decide to act and act as he did here *in three separate cases*"], emphasis added.)

Finally, while the jury here convicted appellant of three counts of murder, robbery, and conspiracy to commit murder in connection with the Robertson killing, it acquitted appellant of conspiring to commit murder in connection with the Parr killing, showing that the jury was capable of differentiating between the charges. (See e.g., *People v. Ruiz* (1988) 44 Cal.3d 589, 607 [jury's verdict of first degree murder on two charges and second degree murder on third charge supported finding that joinder did not prejudice the defendant because verdicts showed "jury was capable of differentiating between defendant's various murders"]; *People v. Miranda* (1987) 44 Cal.3d 57, 78 [fact that jury ultimately acquitted defendant of robbery offense shows it was able to evaluate evidence on each charge separately]; see also *U.S. v. Unruh* (9th Cir. 1987) 855 F.2d 1363, 1374 ["The best evidence of the jury's ability to compartmentalize the evidence is its failure to convict all defendants on all counts"].)

For these reasons, appellant simply cannot demonstrate that joinder of the three murder charges actually prejudiced the outcome of the case; thus, their joinder did not rise "to the level of a constitutional violation." (See *People v. Sapp* (2003) 31 Cal.4th 240, 259-260 ["Having concluded that defendant suffered no prejudice from the joint trial of the three murder counts, we also reject his contention that the joint trial violated his due process rights"].)

E. Even If the Trial Court Erroneously Denied Appellant's Severance Motion, the Error Was Harmless

Even assuming arguendo that the trial court erroneously denied appellant's severance motion, it is not reasonably probable appellant's

verdict would have been more favorable given the trial court's instructions to the jury and the overwhelming evidence presented at trial to support each murder charge as noted *ante* in section D; see also *People v. Grant*, *supra*, 45 Cal.3d at pp. 865-866 [utilizing *Watson* harmless error standard in connection with likelihood of success of severance motion].)

The trial court's denial of appellant's severance motion was not an abuse of discretion, nor did joinder of these charges violate appellant's due process rights. Appellant's contrary claims should be rejected.

IV. THE TRIAL COURT WAS NOT OBLIGATED TO SUA SPONTE INSTRUCT THE JURY ON ASSAULT

Appellant contends that the trial court erred in failing to sua sponte instruct the jury on assault as a lesser included offense to the charged robbery in count three. (AOB 110-122.) At trial, defense counsel noted that as a tactical matter, he was not asking for any lesser included offenses in connection with the robbery charge. (52 RT 10765; 54 RT 11124-11125.) Thus, any alleged error was invited. (See *People v. Prince* (2007) 40 Cal.4th 1179, 1265 [despite circumstance that it is trial court "that is vested with authority to determine whether to instruct on a lesser included offense, the doctrine of invited error still applies if the court accedes to a defense attorney's tactical decision to request that lesser included offense instructions not be given"].) Regardless, appellant's claim must be rejected on the merits.

A. Applicable Legal Principles

The trial court has a sua sponte duty to instruct the jury on "lesser included offenses if the evidence 'raises a question as to whether all of the elements of the charged offense are present and there is evidence that would justify a conviction of such a lesser offense. [Citations.]'" (*People v. Lopez* (1998) 19 Cal.4th 282, 287-288.) The two tests used to determine whether a lesser offense is necessarily included in a charged offense are the

"statutory elements" test and the "accusatory pleading" test. (*Id.* at pp. 288-289.) Under the statutory elements test, "[i]f a crime cannot be committed without also necessarily committing a lesser offense, the latter is a lesser included offense within the former. [Citation.]" (*People v. Reed* (2006) 38 Cal.4th 1224, 1227.) Under the accusatory pleading test, a lesser offense is included within the greater charged offense if "the facts actually alleged in the accusatory pleading, include all the elements of the lesser offense such that the greater cannot be committed without also committing the lesser. [Citations.]" (*People v. Birks* (1998) 19 Cal.4th 108, 117.) There is no obligation to instruct sua sponte on a lesser included offense when there is no evidence "the offense was less than that charged." (*People v. Breverman* (1998) 19 Cal.4th 142, 154.)

A "trial court must instruct the jury sua sponte on" a lesser included offense where "there is substantial evidence that, if accepted, would absolve the defendant from guilt of the greater offense but not the lesser" offense. (*People v. Waidla* (2000) 22 Cal.4th 690, 737.)

B. Assault Is Not a Lesser Included Offense of Robbery under Either the Statutory Elements Test Or the Accusatory Pleading Test

Assault is not a lesser included offense of robbery under the statutory elements test. (See *People v. Sakarias* (2000) 22 Cal.4th 596, 622, fn. 4; see also *People v. Wright* (1996) 52 Cal.App.4th 203, 209.) Appellant claims, however, that where as here, the information charges robbery in the conjunctive (that it was accomplished by means of force and fear), and there was evidence that appellant was intoxicated at the time of the robbery, thus possibly negating the specific intent to steal required for robbery, the trial court had a sua sponte duty to instruct the jury on assault as a lesser-

included offense of robbery. (AOB 116-117.)[51] This claim was directly addressed and rejected in *People v. Wright*, *supra*, at p. 211.

In *Wright* the prosecution charged the defendants with robbery in the conjunctive. (*People v. Wright*, *supra*, 52 Cal.App.4th at pp. 209-210.) There was also substantial evidence presented at trial that the defendants were intoxicated when they committed the charged offenses. (*Id.* at p. 209.) Like appellant, the defendants argued that the trial court was required to sua sponte instruct the jury "of the option of convicting them of assault as a lesser-included offense of robbery[.]" (*Id.* at p. 208.) The court rejected their claims as follows:

> As we have noted, "force" is not an element of robbery independent of "fear"; there is an equivalency between the two. "'[T]he coercive effect of fear induced by threats . . . is in itself a form of force, so that either factor may normally be considered as attended by the other.'" [Citation.]
>
> . . . .
>
> Since the element of force can be satisfied by evidence of fear, it is possible to commit a robbery by force without necessarily committing an assault. Consequently, under the "accusatory pleading" test, assault is not necessarily included when the pleading alleges a robbery by force. As a result, the trial court had no duty to instruct sua sponte on assault as a lesser-included offense of robbery even though there was evidence of intoxication.

(*People v. Wright*, *supra*, 52 Cal.App. 4th at p. 211.)

Based on the *Wright* court's reasoning, respondent maintains that under the accusatory pleading test, assault is not a lesser included offense of robbery.

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[51] As to robbery, the trier of fact must find that the defendant possesses the requisite intent at the time he uses force and/or fear to take the property. (See CALCRIM No. 1600.)

Appellant relies on *People v. Barrick* (1982) 33 Cal.3d 115, superseded by statute as stated in *People v. Collins* (1986) 42 Cal.3d 378, 393, claiming it is "analytically identical" to his case. (AOB 113.) The defendant in *Barrick* was convicted of unlawfully driving or taking a vehicle in violation of Vehicle Code section 10851. (*Id.* at p. 120). That section provides that a person who "drives or takes" a car without the owner's permission, and with the intent to steal, is guilty of vehicle theft. Another statute, section 499b (joyriding), outlaws driving another's vehicle without their consent, but without an intent to steal. The prosecutor charged the defendant with "driving and taking" the car rather than "driving or taking" the car. (*Id.* at pp. 134-135.) This Court held that under these circumstances, the pleadings "necessarily charged both a violation of Vehicle Code section 10851 and Penal Code section 499b." (*Id.* at p. 133.) The Court explained:

> As we have seen, a person can take a vehicle without having the purpose of using or operating it. However, one cannot *drive* a vehicle without the purpose of using or operating it, because to drive an automobile is to operate it. [Citation.] Thus, a complaint which charges a defendant with "driving and taking" an automobile necessarily charges that he took the automobile "for the purpose of temporarily using or operating the same" and thus violated section 499b. Thus, . . . we conclude that the charging allegation in this case does allege facts that necessarily include the former section within the latter.

(*Id.* at p. 135, emphasis in original, footnote omitted.)

As explained in *Wright*, assault is not a necessarily included offense of robbery even where the robbery is charged in the conjunctive because "it is possible to commit a robbery by force without necessarily committing an assault." (*People v. Wright*, *supra*, 52 Cal.App. 4th at p. 211.) The instant case is distinguishable from *Barrick* which involves different offenses; thus, it is not controlling here. Regardless, because there was no substantial

evidence of intoxication presented at trial, the trial court had no duty to instruct the jury on assault in any event.

C. There Was No Substantial Evidence of Intoxication to Negate the Specific Intent Required for Robbery; an Assault Instruction Was Not Required

Appellant argues that because evidence was presented that he drank tequila and ingested methamphetamine shortly before Herb Parr was robbed and killed, there was substantial evidence he was intoxicated and thus was unable to form the intent to rob Parr.[52] The evidence presented did not constitute substantial evidence that appellant was intoxicated or under the influence of drugs and/or alcohol when the relevant crimes were committed.

Before appellant went to David Parr's party, he told Brandi he wanted Parr's motorcycle. (26 RT 5487.) At the party, appellant and Rex Sheffield discussed how to get the keys to the bike from Parr, so they could take it for a ride. (26 RT 5510-5511.) Appellant later decided to move the party to Laurel Bieling's house, presumably as a way of luring Parr to a more isolated location where appellant and Rex could rob and hurt Parr. Appellant instructed Brandi on how to drive to Bieling's house so that Parr would be able to follow them, and on the way there told Brandi "he was going to beat Herb up and take his motorcycle." (26 RT 5525, 5527.) Once appellant, Brandi, Parr, and the Sheffields arrived at Bieling's house, appellant told Gail and Brandi to "go to the front of the house" and then

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[52] Appellant actually claims there was evidence through his and Brandi Hohman's testimony that he drank tequila and ingested crack cocaine and methamphetamine. (AOB 110.) Appellant did testify that he drank tequila and ingested methamphetamine, however, Brandi did not testify that appellant ingested crack cocaine, but that he ingested "crank," which is apparently another name for methamphetamine. (See 26 RT 5528.)

asked Parr "if he wanted his last cigarette" before appellant, Parr and Rex headed into the backyard where appellant killed Parr. (26 RT 5533-5534.)

After Parr was dead, appellant instructed Brandi to take Bieling's roommate to the store and "keep him there for awhile." (26 RT 5541.) While the pair was gone, appellant and Rex covered up Parr's body and loaded it into the trunk of appellant's car. (See 40 RT 8412-8413.) The evidence thus shows that appellant was not intoxicated when he killed Parr, but that he and Rex conceived a plan to rob and at a minimum beat Parr, and that they methodically implemented the plan, including socializing with Parr, and "making nice" with him in an effort to lure him to a location where they could effectuate their plan. "On this record, the trial court had no sua sponte duty to instruct on the lesser offense of assault." (*People v. Parson* (2008) 44 Cal.4th 332, 351 [where defendant made same claim as appellant, this Court held that even assuming assault is lesser included offense of robbery, there was no substantial evidence defendant was intoxicated when he committed charged offense].)

> To the contrary, the evidence showed that defendant acted in accordance with a preconceived plan to rob or steal money from [the victim], that he successfully convinced her to let him into her apartment, and that he socialized with her until he decided to attack her with a hammer that he brought with him. On this record, the trial court had no sua sponte duty to instruct on the lesser offense of assault.

(*People v. Parson*, *supra*, 44 Cal.4th at p. 351.)

Given this Court's holding in *Parson*, respondent submits that even assuming arguendo that assault is a lesser-included offense of robbery under the accusatory pleading test, under the facts of the instant case, the trial court was not required to sua sponte instruct the jury on assault.

To the extent appellant claims that the trial court's instruction with CALJIC No. 4.21 that evidence of intoxication could negate the requisite intent to rob, "compels a conclusion [that] assault instructions were

required" here (see AOB 118), respondent disagrees.[53] "'It is *elementary* that the court should instruct the jury upon every material question upon which there *is any evidence deserving of any consideration whatsoever.* [Citations.]" (*People v. Castillo* (1969) 70 Cal.2d 264, 270, emphasis in original.) There was evidence presented that appellant drank alcohol and ingested drugs before the murder. Thus, it was reasonable for the court to instruct on intoxication and let the jury decide whether there was sufficient evidence of intoxication to impair appellant's ability to form the requisite intent to commit the charged crimes. Indeed, where there is "any evidence on that issue deserving of any consideration whatsoever, that failure to so instruct on every material question presented by the evidence is error[.]" (*People v. Vasquez* (1972) 29 Cal.App.3d 264, 81, 88.)

D. Even Assuming Arguendo that the Trial Court Erred by Failing to Sua Sponte Instruct the Jury on Assault As a Lesser Included Offense of Robbery, any Error Was Harmless

Even assuming arguendo that the trial court's failure to instruct the jury on assault was erroneous, any error was harmless under state law. First, defense counsel did not argue that appellant was intoxicated the night

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[53] The trial court instructed the jury with CALJIC No. 4.21 as follows:

> In the crime of murder of which the defendant is accused in count 4 of the information, a necessary element is the existence in the mind of the defendant of the specific intent to commit robbery and/or mental state of malice aforethought.
>
> If the evidence shows that the defendant was intoxicated at the time of the alleged crime, you should consider that fact in determining whether defendant had such specific intent or mental state.

(25 CT 5671; 53 RT 10824-10825.)

Parr was killed, or rely in closing on appellant's drug and/or alcohol use to mitigate the charged offenses. (See e.g., 54 RT 11199-11207.) Second, the jury was instructed that if reasonable doubt existed as to whether appellant was intoxicated to the extent he was unable to form the specific intent to commit robbery, it should find he did not possess the requisite intent. (25 CT 5671; 53 RT 10824-10825; see also CALJIC No. 4.21.) By convicting appellant of robbery, the jury necessarily determined that insufficient evidence was presented that alcohol and/or drugs affected appellant's ability to form the necessary specific intent. It is not reasonably probable appellant's verdict would have been more favorable with the instruction. (*People v. Watson* (1956) 46 Cal.2d 818, 836-837; see also *People v. Prince*, *supra*, 40 Cal.4th at p. 1267 [in capital case, this Court noted that "erroneous failure to instruct on a lesser included offense generally is subject to harmless error review under" *Watson* standard].)[54]

To the extent appellant claims that the trial court's failure to instruct on assault violated his federal constitutional rights (see AOB 120-121), this claim must fail. The federal constitutional right to instruction on lesser included offenses prohibits "only in capital cases those situations in which the state has created an 'artificial barrier' preventing the jury from considering a noncapital verdict other than a complete acquittal and thereby calling into question the reliability of the outcome. [Citations.]" (*People v. Rundle* (2008) 43 Cal.4th 76, 143, overruled on another point in *People v. Doolin* (2009) 45 Cal.4th 390, 421.) The jury here was not forced to choose between convicting appellant of robbery under the felony-murder rule and acquitting him. Per a request by defense counsel, the trial court

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[54] For the reasons detailed above, respondent notes that even if analyzed under the more stringent standard set forth in *Chapman v. California* (1967) 386 U.S. 18, 24, any alleged error was harmless.

instructed the jury on the lesser related offense of receiving stolen property in connection with the robbery charge in count three. (52 RT 10765; 54 RT 11124-11125.) Thus, the jury had the option of finding appellant not guilty of this lesser charge, which did not render him eligible for the death penalty. Moreover, consistent with California law the jury here was not required to automatically set appellant's sentence at death. "[T]here is no likelihood the lack of an instruction on assault as a lesser included offense of [robbery] affected the reliability of the jury's verdict in violation of defendant's federal constitutional rights. [Citation.]" (*People v. Rundle*, *supra*, at p. 143.)

Given that appellant did not want the jury instructed on any lesser included offenses in connection with the robbery charge, any claim that the trial court erred in not instructing the jury on assault is invited. Regardless, assault is not a lesser included offense of robbery; thus, the court was not required to so instruct the jury on that charge in any event.

V. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY WITH CALJIC NO. 2.11.5

Appellant next challenges the trial court's instruction of the jury with CALJIC No. 2.11.5.[55] According to appellant, this instruction undercut his

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[55] CALJIC No. 2.11.5, as given in this case, provides:

> There has been evidence in this case indicating that a person or persons other than defendant was or may have been involved in the crime for which defendant is on trial. ¶ There may be many reasons why such person or persons is not here on trial. Therefore, do not discuss or give any considerations as to why the other person or persons is not being prosecuted in this trial or whether he or she has been or will be prosecuted. Your sole duty is to decide whether the People have proved the guilt of the defendant on trial.

(25 CT 5598; 53 RT 10790.)

defense by preventing the jury from evaluating prosecution witness Brandi Hohman's bias. (AOB 123-132.) Appellant has waived his claim; it is without merit in any event.

During a discussion regarding jury instructions, defense counsel objected to the giving of CALJIC No. 2.11.5, as follows:

> Our objection is, this basically appears to single out for the jury the fact that Mr. O'Malley indicated a potential other perpetrator for the Sharley Ann German case, being that of Connie Ramos, and also that he has, in fact, indicated through his own testimony that the actual killer of Mr. Parr and Mr. Robertson was that of Mr. Sheffield, and then the Court basically is telling the jury, as a matter of law, do not give any consideration to why other people are not being prosecuted in this trial for that or whether they will be prosecuted for it.
>
> It seems to just cut away at Mr. O'Malley's defense that he was not the actual perpetrator of the substantive crime when the Court gives its instruction ¶ I understand the nature of the instruction, but in this particular case, I think to give it would potentially be misleading and confusing to the jury. Submitted.

(52 RT 10757-10758.)

Thus, while counsel objected to the giving of CALJIC No. 2.11.5 with regards to his third-party culpability defense, he did not do so with respect to Brandi Hohman's testimony and/or her credibility. Nor did counsel ask the court to modify the instruction to address her testimony. Thus, he may not now complain of the court's instruction. (See *People v. Lewis* (2008) 43 Cal.4th 415, 503; *People v. Daya* (1994) 29 Cal.App.4th 697, 714.) Regardless, appellant's claim fails on the merits.

The purpose of CALJIC No. 2.11.5 "'is to discourage the jury from irrelevant speculation about the prosecution's reasons for not jointly prosecuting all those shown by the evidence to have participated in the perpetration of the charged offenses, and also to discourage speculation about the eventual fates of unjoined perpetrators' [Citation.]" (*People v.*

Lawley (2002) 27 Cal.4th 102, 162.) This instruction "should not be given when a nonprosecuted participant testifies because the jury is entitled to consider the lack of prosecution in assessing the witness's credibility.' [Citations.]" (*People v. Williams*, *supra*, 16 Cal.4th at p. 226.)

Appellant apparently claims that because Brandi Hohman was a participant in the perpetration of the instant murders, CALJIC No. 2.11.5 should not have been given, as it precluded the jury from properly assessing her credibility. (AOB 125.) To support his claim that Hohman was a participant in the instant offenses, appellant points to the fact that she was arrested in connection with this case and later offered immunity and enrolled in a witness protection program. (See AOB 130-131.) Appellant's reliance on these facts is misplaced.

Aside from the fact that appellant told Hohman he committed all three murders, the only evidence of Hohman's involvement in any of the murders was her concealment of the bloody clothes appellant and Rex Sheffield wore when they killed Robertson. (See 27 RT 5810; 28 RT 5880.) In fact, Hohman's agreement with the district attorney indicates that the prosecution did not believe Hohman was involved with the German and Parr murders. (Second Augmented CT 72 [Hohman's agreement indicating in relevant part that the prosecution anticipated that any crime Hohman may have committed was in connection with Robertson's death, and was peripheral].) Moreover, the evidence showed that Hohman's limited assistance in the Robertson murder was likely rendered because of her fear that appellant had "involved" her in his crimes, and that appellant would kill her and her family members. (See e.g., 28 RT 5878-5880; 32 RT 6886-

6887.) Appellant has failed to show this is sufficient to warrant Hohman's classification as a participant for purposes of CALJIC No. 2.11.5.[56]

To the extent appellant argues that the trial court's instruction with CALJIC No. 2.11.5 undercut his third-party culpability defense (see AOB 124, 134), appellant's claim also fails. Appellant presented evidence that Rex Sheffield killed Herbert Parr and Michael Robertson, and also presented the possibility that Connie Ramos killed Sharley Ann German. (See 33 RT 6989-6994, 6997, 7007, 7014, 7020-7022, 7027, 7035, 7049, 7066; 34 RT 7373-7374, 7377; 35 RT 7570, 7572; 36 RT 7776, 7799; 40 RT 8404, 8574; see also 14 RT 2867-2869; 15 RT 3062, 3170-3173, 3175; 19 RT 3734-3735 [several prosecution witnesses testifying regarding relationship between German and Ramos families around the time of Sharley Ann German's murder].) Defense counsel argued the points in closing. (54 RT 11190, 11205, 11217-11218, 11221-11222.) Nothing in the challenged instruction precluded the jury from considering this evidence. Because neither Ramos nor Sheffield testified at trial, the trial court properly instructed with CALJIC No. 2.11.5 in connection with their roles.

Regardless, given the entire charge of the court, even assuming the trial court mistakenly instructed the jury with CALJIC No. 2.11.5, there was no error.

> In determining whether an instruction interferes with the jury's consideration of evidence presented at trial, we must determine what a reasonable juror could have understood the charge as meaning. [Citation.] While the initial focus is on the specific instruction challenged [citation], we must also review the

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[56] Respondent notes that Hohman was not an accomplice in connection with any of the murders, given she was not "liable to prosecution for the identical" offenses charged against appellant. (§ 1111.)

> instructions as a whole to see if the entire charge delivered a correct interpretation of law. [Citation.]

(*People v. Price* (1991) 1 Cal.4th 321, 446, internal quotation marks omitted.)

> When [CALJIC No. 2.11.5] is given with the full panoply of witness credibility and accomplice instructions . . ., [jurors] will understand that although the separate prosecution or nonprosecution of coparticipants, and the reasons therefor, may not be considered on the issue of the charged defendant's guilt, a plea bargain or grant of immunity may be considered as evidence of interest or bias in assessing the credibility of prosecution witnesses. [Citation.]

(*Ibid.*)

The court here gave the "the full panoply" of witness credibility instructions. (See CALJIC Nos. 2.20 [believability of a witness], 2.23 [believability of a witness - conviction of a felony, 2.24 [character of a witness for truthfulness or honesty], 2.27 [sufficiency of testimony of one witness]; 25 CT 5600-5601, 5605-5607.) The jury thus understood it could consider Brandi Hohman's agreement with the prosecution and the conditions surrounding her testimony as evidence of her potential bias. The giving of CALJIC No. 2.11.5 was not error. (See *People v. Jones* (2003) 30 Cal.4th 1084, 1114 [citing *People v. Lawley*, *supra*, 27 Cal.4th at p. 162, for proposition that a mistake in instructing with CALJIC No. 2.11.5 is not error where "'the instruction is given with the full panoply of witness credibility and accomplice instructions'"]; *People v. Price*, *supra*, 1 Cal.4th at p. 446 [although CALJIC No. 2.11.5 "should have been clarified or omitted" no error where "full panoply of witness credibility and accomplice instructions" given].)[57]

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[57] As noted *ante*, there is no evidence that Brandi Hohman was liable as an accomplice to the three charged murders. Thus, the trial court was (continued...)

VI. THE TRIAL COURT WAS NOT REQUIRED TO INSTRUCT THE JURY ON PREDICATE OFFENSES WITH RESPECT TO THE CONSPIRACY CHARGES

Appellant points to the trial court's instruction with CALJIC No. 6.11 as to the conspiracy counts, and contends that given this instruction, the trial court was required to define the target offenses which served as the basis for the court's invocation of the natural and probable consequences doctrine. (AOB 136-140.)[58] Appellant's claim has been waived and is misplaced in any event.

(...continued)
not obligated to instruct the jury on how to consider accomplice testimony; none of the other witnesses qualified as accomplices.

[58] The jury here was instructed with CALJIC No. 6.11 as follows:

> Each member of a criminal conspiracy is liable for each act and bound by each declaration of every other member of the conspiracy if said act or said declaration is in furtherance of the object of the conspiracy. [¶] The act of one conspirator pursuant to or in furtherance of the common design of the conspiracy is the act of all conspirators.
>
> A member of a conspiracy is not only guilty of the particular crime that to his knowledge his confederates are contemplating committing, but is also liable for the natural and probable consequences of any act of a co-conspirator to further the object of the conspiracy, even though such act was not intended as part of the original plan and even though he was not present at the time of the commission of such act. [¶] You must determine whether the defendant is guilty as a member of a conspiracy to commit *the crime originally contemplated*, and if so, whether the crime alleged in counts four and six was a natural and probable consequence of *the originally contemplated criminal objective of the conspiracy*.

(53 RT 10817-10818, emphasis added.)

The natural and probable consequences doctrine applies in those cases where an act taken to commit an intended offense, or target crime, results in a different crime being committed. For instance, where an intended assault results in an unintended murder or attempted murder. (See e.g., *People v. Prettyman* (1996) 14 Cal.4th 248, 261-262.) To be convicted under this doctrine, the jury must find inter alia, that an offense other than the target crime was committed. (See *id.*, at pp. 262, 267, 271.) "It sometimes happens that an accomplice assists or encourages a confederate to commit one crime, and the confederate commits another, more serious crime (the nontarget offense)." (*Id.* at p. 259.)[59] "[W]hen the prosecution relies on the 'natural and probable consequences' doctrine to hold a defendant liable as an aider and abettor, the trial court must, *on its own initiative*, identify and describe for the jury any target offense allegedly aided and abetted by the defendant." (*Id.* at pp. 268-269, emphasis in original.)

Relying on *Prettyman*, appellant essentially argues that given the trial court's instruction with CALJIC No. 6.11, the last paragraph in particular, the court was required to define "which 'act of a co-conspirator" or which 'originally contemplated criminal objective' could serve as a predicate for application of the natural and probable consequence doctrine." (AOB 137.)[60]

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[59] The natural and probable consequences doctrine may be applied to determine the liability of aiders and abettors or conspirators. (See *People v. Prettyman*, *supra*, 14 Cal.4th at p. 261.)

[60] Respondent notes that CALJIC No. 6.11, the instruction relied on as the basis for appellant's claim, was rendered in connection with the two charged conspiracies, not the charged murders. (See 25 CT 5653-5654.) As such, respondent addresses appellant's claim in the context of those offenses.

As a threshold matter, respondent notes that appellant's failure to object to CALJIC No. 6.11, or request clarification or amplification of the challenged portion of the instruction waives his claim on appeal. (*People v. Hart* (1999) 20 Cal.4th 546, 522; see also 52 RT 10762-10763 [trial court noting that CALJIC No. 6.11 would be given as modified; no objection to instruction noted].) Regardless, his claim should be rejected on the merits.

In *Prettyman*, although neither the prosecution nor the defense mentioned or relied on the natural and probable consequences doctrine, the trial court instructed the jury on the doctrine with CALJIC No. 3.02. (*People v. Prettyman, supra*, 14 Cal.4th at pp. 257-258, 272.)[61] This Court concluded that although an instruction identifying and describing uncharged target offenses is not necessary when uncharged target offenses do not "form a part of the prosecution's theory of criminal liability" inter alia, once a trial court instructs "the jury on the 'natural and probable consequences' rule, it [has] a duty to issue instructions identifying and describing each potential target offense supported by the evidence." (*Id.* at pp. 267, 270.) When it fails to do so, the trial court errs. (*Id.* at p. 270.)

Unlike the situation in *Prettyman*, the trial court here did not instruct the jury with CALJIC No. 3.02 on the natural and probable consequences doctrine. Moreover, appellant was charged with two counts of murder and

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[61] The trial court in *Prettyman* instructed the jury with CALJIC No. 3.02 that,

> "One who aids and abets is not only guilty of the particular crime aided and abetted, but is also liable for the natural and probable consequences of the crimes they abet. You must determine whether the defendant is guilty of the crime originally contemplated, and, if so, whether any other crime charged was a natural and probable consequence of such originally contemplated crime."

(*People v. Prettyman, supra*, 14 Cal.4th at p. 272.)

two counts of conspiracy to commit murder, and the prosecutor did not argue that Parr or Robertson were killed as a result of appellant and/or Sheffield's plan to commit a lesser, or uncharged offense. No crime "other than" conspiracy to commit murder was invoked here. Given there was no evidence of a target offense and no invocation of the natural and probable consequences doctrine by the trial court or the prosecutor, the doctrine did not apply in this case; thus, the trial court was not obligated to define any predicate offenses with respect to the conspiracy charges.[62]

Even assuming arguendo that the wording of the last paragraph of CALJIC No. 6.11 rendered in connection with the two conspiracy charges invoked the natural and probable consequences doctrine, appellant was not prejudiced. The prosecutor argued at trial that appellant conspired with Rex Sheffield to murder Parr and Robertson, and that appellant killed both men. (See e.g., 53 RT 11001-11003, 11012, 11067, 11086, 11090; 54 RT 11148, 11274-11275.) He never mentioned the possibility that appellant conspired to commit a crime other than murder, nor did he or defense counsel reference the natural and probable consequences doctrine in argument.

As to the Robertson murder, the evidence at trial showed that the day of the murder, appellant indicated to Brandi Hohman that Robertson "has to go" and that "possums die too" referring to Robertson, and told Camolyn Ransfield the morning of the murder that he intended to "take out" Robertson. (22 RT 4548, 4552.) Shortly before the murder appellant spoke

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[62] Appellant focuses on the jury's questions as to whether it could find appellant guilty of conspiracy to assault Parr as a basis for his claim that assault was a predicate offense of the conspiracy to commit Parr's murder. (See AOB 138.) There is no support for his implicit claim that a jury's question rendered after the presentation of evidence and the trial court's final instruction to the jury is sufficient to invoke the natural and probable consequences doctrine.

with Sheffield on the telephone regarding Robertson being a "snitch," and met with him at J.W.'s Bar to "straighten everything out." After the murder he told Brandi he was angry at Sheffield because appellant "had wanted to [commit the murder] one way and [Sheffield] had wanted to do it the way they had done it." (27 RT 5706, 5724; 28 RT 5855.)[63] Given the overwhelming evidence of appellant's intent to kill Robertson, and his "meeting" with Sheffield at J.W.'s Bar before the murder, and statements after the murder regarding his and Sheffield's plan to kill Robertson, evidence that the two conspired to murder Robertson was overwhelming. There is no reasonable probability appellant's verdict as to the conspiracy to kill Robertson would have been more favorable with the court's definition of any alleged target offenses. (See *People v. Watson*, *supra*, 46 Cal.2d at pp. 836-837.) Nor was there a "reasonable likelihood" the jury misapplied the last paragraph of the court's instruction with CALJIC No. 6.11. There was no thus no prejudice under state law even assuming the trial court erred, and no federal constitutional error. (See *People v. Prettyman*, *supra*, 14 Cal.4th at pp. 272-275.)

Because the jury acquitted appellant of conspiring to kill Parr, appellant likewise cannot show prejudice under state law or federal constitutional error with respect to count two.

VII. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON UNCHARGED ACTS

At trial, the prosecution presented evidence that in December 1986, a Freedom Rider prospect named Christopher Walsh lived with appellant for

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[63] According to Brandi, Sheffield wanted to take Robertson "for a ride out to the Santa Cruz mountains." (28 RT 5855-5856.) Appellant told Brandi that if they had killed Robertson "his way, which would be to take him into a field nearby and just killed him and left him there, then everything would have been okay. But because they did it [Sheffield's] way, that they ran out of gas." (28 RT 5855.)

a time at the Moffett Motel in Mountain View. (19 RT 3824-3825.) Walsh moved out of the motel after an incident when appellant became upset with him for kicking appellant's dog. (19 RT 3829-3830.) Walsh later called appellant and asked if he could come and retrieve some equipment he had left behind. (19 RT 3832.) After Walsh arrived, he and appellant talked and drank a beer, and then appellant invited Walsh into another room to do " line of crank[.]" (19 RT 3833.) Once in the bedroom appellant beat and "pistol-whipped" Walsh, and then forced him to sign over his motorcycle by providing appellant with "a phony bill of sale." (19 RT 3832-3836.) Appellant told Walsh to obtain insurance for the vehicle "and then report it stolen." (19 RT 3836.) Before he allowed Walsh to leave, appellant told Walsh that if he "ever told anybody or went to the police about it, that he would hunt [Walsh] down and kill" him, and that "if he went to jail, he'd get out, hunt [him] down and kill [him]." (19 RT 3838.) In connection with this uncharged act, inter alia, the trial court instructed the jury with CALJIC No. 2.50 as follows:

> Evidence has been introduced for the purpose of showing that the defendant committed a crime or crimes other than that for which he is on trial.
>
> Such evidence, if believed, was not received and may not be considered by you to prove that defendant is a person of bad character or that he has a disposition to commit crimes. [¶] Such evidence was received and may be considered by you only for the limited purpose of determining if it tends to show:
>
> A motive for the commission of the crime; [¶] The crime charged is part of a larger continuing plan, scheme or conspiracy; [¶] *The existence of a conspiracy.*
>
> For the limited purpose for which you may consider such evidence, you must weigh it in the same manner as you do all other evidence in the case. [¶] You are not permitted to consider such evidence for any other purpose.

(53 RT 10793-10794; 25 CT 5608-5609, emphasis added.)

Appellant now argues that the italicized portion of the instruction erroneously allowed the jury to infer the existence of a conspiracy to kill Michael Robertson if it concluded that the prosecution had proven the Walsh incident by only a preponderance of the evidence. According to appellant, this instruction lessened the prosecution's burden of proof, thus violating his state and federal constitutional rights. (AOB 142-152.) Appellant's failure to object to the challenged portion of the court's instruction on the grounds now raised waives his claim on appeal. (See *People v. Hart*, *supra*, 20 Cal.4th at p. 522.) Regardless, the claim has no merit.

Evidence of the Walsh incident was relevant to appellant's motive to kill Herb Parr and to show that appellant robbed Parr and conspired to kill him as part of a common scheme or plan. (See Evid. Code, § 1101, subd. (b).) Thus, the trial court properly instructed the jury with CALJIC No. 2.50 that it could consider this evidence for this limited purpose. (See 25 CT 5608; see also *People v. Linkenauger* (1995) 32 Cal.App.4th 1603, 1615 [CALJIC No. 2.50 "was and is a correct statement of the law"].) Appellant claims, however, that the jury here "was told one of the elements of conspiracy which the state had to prove was the existence of the conspiracy." (AOB 145.) According to appellant, this, along with the court's instruction that "uncharged acts need only be proven by a preponderance of the evidence and" that "uncharged acts could be considered in determining the existence of the conspiracy[,]" essentially instructed the jury "it could find the conspiracy element true by relying on facts proven only by a preponderance of the evidence." (AOB 145-146.) Appellant's argument appears to be based on a flawed premise; that the existence of a conspiracy is one of the elements of the crime of conspiracy. This is not the case.

> The necessary elements of a criminal conspiracy are: (1) an agreement between two or more persons; (2) with the specific intent to agree to commit a public offense; (3) with the further specific intent to commit that offense; and (4) an overt act committed by one or more of the parties for the purpose of accomplishing the object of the agreement or conspiracy.

(*People v. Liu* (1996) 46 Cal.App.4th 1119, 1128.)

The jury here was instructed on these elements, and told that to find appellant guilty of the crime of conspiracy, it had to find all four elements. (25 CT 5653; 53 RT 10816-10817.) The jury was not told it could find appellant guilty of a conspiracy to kill if it found that the prosecution had proven by a preponderance of the evidence the facts underlying the Walsh incident.

To the extent appellant argues that the trial court's instruction permitted "the jury to infer an element of the conspiracy charge from predicate facts with no logical relationship to the fact to be inferred" (see AOB 148), this claim must be rejected. First, as noted *ante*, a conspiracy is not an element of the crime of conspiracy. Second, there was a relationship between evidence of the Walsh incident and the conspiracy to kill Parr; the Walsh incident was relevant to appellant's motive to kill Parr, and was part of a common scheme or plan.

Even assuming arguendo the trial court erroneously instructed the jury it could consider evidence of the Walsh incident to prove the existence of a conspiracy to kill Robertson, it is not reasonably probable appellant's verdict would have been more favorable absent the challenged portion of the instruction. (See *People v. Watson*, *supra*, 46 Cal.2d at p. 836; see also *People v. Garcia* (1981) 115 Cal.App.3d 85, 107 [using *Watson* standard to determine whether trial court's error in instructing jury it could consider other crimes evidence as part of common plan, scheme or design was harmless].) As noted *ante* (see Arg. VI), the prosecution presented

evidence that shortly before the Robertson murder appellant told Brandi Hohman that Robertson "has to go" and that "possums die too," and told Camolyn Ransfield the morning of the murder that he intended to "take out" Robertson. (22 RT 4548, 4552.) That same day, appellant spoke with Sheffield on the telephone regarding Robertson being a "snitch," and met with him at J.W.'s Bar to "straighten everything out. After the murder he told Brandi he was angry at Sheffield because appellant "had wanted to [commit the murder] one way and [Sheffield] had wanted to do it the way they had done it." (27 RT 5706, 5724; 28 RT 5855.) Given the overwhelming evidence of appellant's intent to kill Robertson, and his "meeting" with Sheffield at J.W.'s Bar before the murder, and statements after the murder regarding his and Sheffield's plan to kill Robertson, any error in instructing the jury it could consider whether the Walsh incident tended to prove the conspiracy to kill Robertson was harmless under state law.

Likewise, appellant's claim of federal constitutional error must be rejected. When reviewing a constitutional challenge to an instruction, this Court should "inquire 'whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the Constitution." (*Estelle v. McGuire* (1991) 502 U.S. 62, 72.)[64] This Court must keep in mind, however, that "'a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge. [Citation.]'" (*Boyde v. California* (1990) 494 U.S. 370, 378.)

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[64] The Court must also determine "whether there is a 'reasonable likelihood' that the jury understood the charge as the defendant asserts." (*People v. Kelly* (1992) 1 Cal.4th 495, 525.)

Both the prosecutor and defense counsel referred to the Walsh incident only in relation to the charges involving Parr, and never mentioned it in connection with the conspiracy to kill Robertson. (See 53 RT 10963, 10979, 10984, 11040; 54 RT 11170, 11270.) The jury was also instructed with CALJIC No. 2.01 that each fact necessary to establish appellant's guilt must be proved beyond a reasonable doubt (25 CT 5594; 53 RT 10788), and with CALJIC No. 2.90 that the prosecution had to prove appellant's guilt beyond a reasonable doubt. (25 CT 5620; 53 RT 10798-10799.) Moreover, as noted *ante* (see Arg. VI) , there was overwhelming evidence that appellant conspired to kill Robertson even without evidence of the Walsh incident. It is not reasonably likely the jury interpreted the challenged portion of CALJIC No. 2.50 "to authorize conviction of the [conspiracy to kill Robertson] based on a lowered standard of proof." (*People v. Reliford* (2003) 29 Cal.4th 1007, 1016.)

To the extent appellant argues that the murder conviction in count six was somehow predicated on the conspiracy to murder Robertson charge in count five (see AOB 152), there is no basis for appellant's claim. Unlike the example cited by appellant which involved a felony-murder conviction based on a robbery conviction which was reversed when the robbery conviction was reversed (AOB 152; see also *People v. Sanders* (1990) 51 Cal.3d 471, 517), conspiracy to commit murder and murder are two distinct charges; because the murder charge was not predicated on the conspiracy charge, *Sanders* does not apply here.

VIII. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON HOW TO CONSIDER DIRECT EVIDENCE

Appellant contends that the trial court's instruction with CALJIC No. 2.01[65] (1) essentially told the jury that proof beyond a reasonable doubt was not required where the prosecution relied on direct evidence, and (2) improperly suggested to the jury that the principle that the jury must acquit if there is a reasonable explanation of the evidence that points to innocence applies only to circumstantial evidence, and not direct evidence. (AOB 153-161.) Appellant's failure to object to this instruction or request

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[65] The trial court instructed the jury with CALJIC No. 2.01 as follows:

> However, a finding of guilt as to any crime may not be based on circumstantial evidence unless the proved circumstances are not only (1) consistent with the theory that the defendant is guilty of the crime, but (2) cannot be reconciled with any other rational conclusion.
>
> Further, each fact which is essential to complete a set of circumstances necessary to establish a defendant's guilt must be proved beyond a reasonable doubt. In other words, before an inference essential to establish guilt may be found to have been proved beyond a reasonable doubt, each fact or circumstance upon which such inference necessarily rests must be proved beyond a reasonable doubt.
>
> Also, if the circumstantial evidence as to any particular count is susceptible of two reasonable interpretations, one of which points to the defendant's guilt and the other to his innocence, you must adopt that interpretation which points to his innocence, and reject that interpretation which points to his guilt.
>
> If, on the other hand, one interpretation of such evidence appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable.

(25 CT 5594; 53 RT 10788.)

modification waives his claims on appeal. (See *People v. Hart*, *supra*, 20 Cal.4th at p. 522; *People v. Daya*, *supra*, 29 Cal.App.4th at p. 714.) Regardless, the claims have no merit.

In *People v. Anderson* (2007) 152 Cal.App.4th 919, the Third District Court of Appeal addressed and rejected the two claims made by appellant.[66] The court explained:

> CALCRIM No. 224 does not set out basic reasonable doubt and burden of proof principles; these are described elsewhere. Although the instruction reiterates that each fact necessary for conviction must be proved beyond a reasonable doubt, the obvious purpose of the instruction is to limit the use of circumstantial evidence in establishing such proof. It cautions the jury not to rely on circumstantial evidence to find the defendant guilty unless the only reasonable conclusion to be drawn from it points to the defendant's guilt. In other words, in determining whether a fact necessary for conviction has been proved beyond a reasonable doubt, circumstantial evidence may be relied on only if the only reasonable inference that may be drawn from it points to the defendant's guilt.
>
> The same limitation does not apply to direct evidence. Circumstantial evidence involves a two-step process: presentation of the evidence followed by a determination of what reasonable inference or inferences may be drawn from it. By contrast, direct evidence stands on its own. It is evidence that does not require an inference. Thus, as to direct evidence, there is no need to decide whether there is an opposing inference that suggests innocence.
>
> . . . [T]he question addressed by CALCRIM 224 is not how to consider the evidence *as a whole* but how to consider specific circumstantial evidence. The instruction concerns whether a necessary fact may reasonably be inferred from circumstantial

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[66] The claims in *Anderson* were made in the context of the trial court's instruction with CALCRIM No. 224 (see *People v. Anderson*, *supra*, 152 Cal.App.4th at pp. 929-931), CALJIC No. 2.01's successor. The differences in the two instructions are minimal, and in any event do not affect the relevance of the *Anderson* court's reasoning here.

> evidence when that evidence can be construed in a way that points to the defendant's innocence, not whether the evidence as a whole may reasonably be construed to point to the defendant's innocence.

(*Id.* at p. 931, emphasis in original; see also *People v. Ibarra* (2007) 156 Cal.App.4th 1174, 1186-1187 [rejecting defendant's claim that CALCRIM No. 224 intentionally omits "direct evidence from its scope"].)

Adopting the reasoning and holding in *Anderson*, respondent maintains that CALJIC No. 2.01 properly instructed the jury on how to consider circumstantial evidence.

Appellant attempts to distinguish his case by arguing that here, because appellant's defense was that he had "an entirely innocent explanation" for his admissions to the charged crimes, e.g., that he was simply "boasting," this was the "extremely rare case where direct evidence on which the state relies to prove its case has a reasonable explanation which does *not* point to guilt." (AOB 160-161, emphasis in original.) "[B]ecause there is a reasonable likelihood that the jury applied the instructions so as to permit it to return a guilty verdict based on direct evidence even if that evidence was reconcilable with innocence," his federal constitutional rights were violated. (AOB 161.) This reliance is misplaced. While evidence of appellant's admissions may be considered direct evidence (see e.g., *People v. McCullough* (1979) 100 Cal.App.3d 169, 179), evidence of appellant's motivation for making the admissions; e.g., whether he was boasting, was circumstantial evidence. (See *People v. Bloom* (1989) 48 Cal.3d 1194, 1208 ["Evidence of a defendant's state of mind is almost inevitably circumstantial"].) To illustrate, for the jury to conclude that appellant was boasting when he admitted committing the instant murders, it had to first consider the direct evidence of his admissions, and then take the second step of inferring from other facts presented, e.g., that he had boasted on other occasions, and that he wanted

to be perceived as "being tough," that his admissions were simply instances of him boasting and thus could not be taken as evidence of his guilt. They therefore came within the ambit of CALJIC No. 2.01.

Regardless, the trial court instructed the jury to consider whether the prosecution had proved its case beyond a reasonable doubt after considering "all the evidence" in the case (CALJIC No. 2.09; 25 CT 5620), and to consider the instructions as a whole and each in light of all the others. (CALJIC No. 1.01; 25 CT 5589.) Moreover, the court's instruction regarding the jury's consideration of circumstantial evidence did not suggest to the jury that it could convict appellant on less than proof beyond a reasonable doubt if it relied on direct evidence. There was no reasonable likelihood the jury misconstrued or misapplied CALJIC No. 2.01 to allow conviction based on proof less than beyond a reasonable doubt. (See *People v. Osband*, *supra*, 13 Cal.4th at p. 679 [appellate court reviews claim of instructional error by determining whether in light of all instructions given "'there is a reasonable likelihood that the jury construed or applied the challenged instruction in an objectionable fashion'"]; *People v. Cain* (1995) 10 Cal.4th 1, 36 [jury instructions reviewed as a whole to determine if there is reasonable likelihood jury understood instructions to permit conviction on improper basis].) Moreover, because it is not reasonably likely the jury applied CALJIC No. 2.01 "in a way that violates the Constitution" appellant's claim of federal constitutional error must also be rejected. (*Estelle v. McGuire*, *supra*, 502 U.S. at p. 72 [where defendant claims a potentially misleading or ambiguous instruction violated his federal constitutional rights, must review instructions as a whole and determine "'whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the Constitution. [Citation.])."

IX. THE TRIAL COURT PROPERLY EXCLUDED EVIDENCE OF THREATS TO ROBERT FURLAN AS IRRELEVANT

Appellant next challenges the trial court's exclusion of evidence that someone threatened defense investigator Robert Furlan while he was investigating appellant's case. (AOB 162-173.) The trial court's exclusion of this evidence was proper.

A. Relevant Proceedings

During the defense case-in-chief, Lonnie Garey testified that in February 1989, she received a "scary" telephone call in her capacity as a secretary at Immendorf Investigations. (33 RT 7140-7141.) After an objection by the prosecutor on hearsay grounds (see 33 RT 7141), appellant made an offer of proof. According to appellant, the witness would testify that someone called the investigations firm and said, "tell the guy in the Honda next to the BMW, the guy with the big nose, we saw him leave late in the Honda. Tell him he better fucking get off it. We are conveniently located in San Bruno[.]" (33 RT 7141-7142.) Defense counsel explained that the caller was referring to Robert Furlan, an investigator on appellant's case:

> [B]ecause of these kinds of threats, one of the investigators had to be removed because he was intimidated by people from this motorcycle club. [¶] They went down to the office and showed up down there, and, basically, we [*sic*] are just trying to intimidate them to back off and not to carry this case through, and this coincides with a number of threats that other witnesses received, and a number of people—of witnesses said they were in fear.
>
> Lady Hawk said she's fearful and said she's in fear of Jimmy, and the reality is, she's in fear of the club. This is a concerted effort on their part to place anybody that was going against them in helping O'Malley to intimidate him and harass them.

[PROSECUTOR]: People would have to object to this entire line of inquiry. I see no evidence coming forward or offered as to who, if anyone, is making these threats. You will hear—counsel is talking about the club. I didn't hear anything about Greg Hosac coming down and threatening or Rex Sheffield. [¶] We have allegations somehow this is, supposedly by inference, results of activity by the club, whatever that is. I don't think there has been a sufficient basis established it is connected to anybody here, and if the secretary gets an anonymous call from somebody who says, tell the guy with the big nose, tell the guy where he is, we are going to open up whole different areas.

I would need Mr. Furlan here to inquire as to what cases he was working on. Was he working on any other cases? What evidence does he have?

THE COURT: How do we know this came from somebody connected with the club?

[DEFENSE COUNSEL]: They were collectively dealing with Mr. Furlan because Furlan was investigating activities with the club. The night before this phone call comes, he is out talking to some people in the club, and he is going to come in and testify to this. He's on here for testimony on Monday.

[PROSECUTOR]: I think at this particular point, that this testimony is irrelevant, that state of mind of the secretary is irrelevant as to who called up and said what and how that affects her. [¶] I don't see any relevance at all. Not only isn't it established that this caller is a member of the club, let alone who he actually is, but there is an insufficient nexus here to establish any connection with this case, or, on the other hand—

[DEFENSE COUNSEL]: She will be able to connect it with this case because she knows who this Honda belongs to, and the reference about the man with the big nose, she knows what its connection is with this case.

[PROSECUTOR]: Well, what about—tell me about Mr. Furlan's private life. Does he have any other people that wouldn't like him? We are getting far afield.

[DEFENSE COUNSEL]: Ask him that. You can ask her and him that.

[PROSECUTOR]: There is no connection I see here. All counsel is saying is that his secretary and investigative firm receives a call from somebody she doesn't know who disguises his voice and makes some comment about, tell the guy with the big nose to back off.

. . . .

. . . .

[PROSECUTOR]: How do we know this isn't Mr. O'Malley calling to work his own defense? What I mean is—still, under 352, even if it is somehow tied into the club, it is so muddled there is no probative value of anything.

[DEFENSE COUNSEL]: The problem is somebody knows the kind of car he has. To follow him, they know where he lived. Now, that's real conspicuous the day after he gets this assignment. They know this.

THE COURT: I think the cart is before the horse. I think we need to get some sort of basis for threats of where they came from prior to this coming in.

[DEFENSE COUNSEL]: We will never be able to show where they came from. She knows they were connected with this case because after this came in, they had to get a whole new number for the O'Malley investigation and put a phone in to have witnesses call so they wouldn't be calling—dealing with the main number at the office. They know it is connected.

. . . .

. . . .

THE COURT: Have there been any more threats?

[DEFENSE COUNSEL]: I don't think that there has been anything recorded since sometime around the middle of '89.

. . . .

. . . .

[PROSECUTOR]: At this particular point, it doesn't seem—if I were to offer evidence somehow that an anonymous call threatening a witness was attributable to conduct on the behalf of the defendant, I would have to show that it was made at his direction or behest, somehow establish some kind of a nexus. [¶] What you are trying to establish is this anonymous phone call is made by people in the club. That even without specifying who, I assume you are talking about Hosac or somebody else, but I don't see any connection whatsoever by content in the threat or, anything to tie this in to anybody in this case.

What you are talking about is, he was working on this case, he talked to somebody, and the night before when he gets a call saying back off, somehow, one has to assume that it is in connection with this case.

THE COURT: Well, at this point, the relevancy hasn't been shown to get it in. You have to establish something more to make it relevant to this particular case. Right now, it is just a threat of some sort.

. . . .

. . . .

[PROSECUTOR]: When you say got threats in the O'Malley case, I don't hear a connection that it is in this case, because I don't hear anything coming forward that has to [do] with who was making the threats.

[DEFENSE COUNSEL]: We don't know who is making the threats.

[PROSECUTOR]: If you don't know who is making the threats, how can one assume it is the O'Malley case?

[DEFENSE COUNSEL]: Because it is directed to the investigator who is assigned to work the O'Malley case.

THE COURT: That the only case he was assigned to.

[DEFENSE COUNSEL]: I think he had some other things, but they were minor, little civil items.

THE COURT: You don't have enough yet.

(33 RT 7142-7148.)

The court then held an Evidence Code section 402 hearing to ascertain Ms. Garey's anticipated testimony. (33 RT 7149-7164.) At the hearing, the witness testified in part that the reference "to the guy with the big nose" was to Robert Furlan, who was "heavily involved" in appellant's case at the time the threat was made. (33 RT 7150-7151.) Other company employees received "these threatening or harassing phone calls." (33 RT 7154.) As a result of the telephone call she received on February 17, 1989, some security measures were taken at the company. (33 RT 7152, 7154.) After the hearing, the trial court concluded that its former ruling as to relevancy would "stand without prejudice." The court also noted that counsel was not foreclosed from revisiting the issue. (33 RT 7164.)

The trial court later held another Evidence Code section 402 hearing, this time as to Robert Furlan's anticipated testimony. (34 RT 7266-7286.) Furlan testified inter alia that as part of his investigation in appellant's case, and before Lonnie Garey received the threatening phone call in February 1989, he interviewed Joseph Martinez. (34 RT 7267, 7270.) Before the interview, Martinez "patted [him] down" for a weapon and/or a tape recorder, and while Furlan was at Martinez's residence, Gail Sheffield arrived, "accompanied by two large white male adults." (34 RT 7267-7268, 7273.) Their arrival caused Furlan to become anxious, given that he knew that Gail Sheffield was married to appellant's co-defendant, Rex Sheffield. (34 RT 7268-7269.) During the interview, Martinez "continually referred to the length of his criminal record" in what Furlan believed was an attempt "to make points . . . about how tough he was." (34

RT 7273.) Furlan could not be sure when the threatening telephone call came into Immendorf in relation to his interview of Martinez; likewise, he had no proof that either Martinez or any other member of the Freedom Riders made the call. (34 RT 7275-7277, 7282-7283, 7285.)

Furlan also testified that sometime around February 1989, he conducted an interview at a "biker bar" in Sunol, during which he talked with someone named Frank about Brandi Hohman. (34 RT 7277-7278.) After the interview, some patrons followed Furlan outside and copied down his license plate number. (34 RT 7270.) In February 1989, Furlan was working almost exclusively on appellant's case,[67] and that he drove a Honda and lived in San Bruno. (34 RT 7269-7270.)

After the hearing, the trial court held, "there is no relevancy as to this testimony as it relates to this case because there's no connection at all between any threats that may have been made as to who made those threats." (34 RT 7286.)

B. Applicable Legal Principles

In order to be admissible, evidence must be relevant, which means it must have some "tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) A trial court's ruling on the exclusion of evidence as irrelevant is reviewed for abuse of discretion. (*People v. Harrison* (2005) 35 Cal.4th 208, 230; see also *People v. Gutierrez* (2009) 45 Cal.4th 789, 827.) An abuse may be found if the court exercises its discretion in an arbitrary, capricious, or patently absurd manner. (*People v. Coddington* (2000) 23 Cal.4th 529, 587-588, overruled on other grounds in *Price v. Superior*

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[67] Furlan testified that he may have been working on a "civil case or worker's comp case. Something peripheral. Just a day or two here and there." (34 RT 7270.)

Court (2001) 25 Cal.4th 1046, 1069, fn. 13.) The trial court "has no discretion to admit irrelevant evidence. [Citation.]" (*People v. Babbit* (1988) 45 Cal.3d 660, 681.)

C. The Trial Court's Exclusion of Threats Made against the Defense Investigator Was Proper Given that the Evidence Was Irrelevant

Neither Lonnie Garey nor Robert Furlan knew who made the threatening telephone call to Immendorf Investigations. (33 RT 7158; 34 RT 7282-7283.) As the trial court noted, there was no evidence that the call "came from somebody connected with the" Freedom Riders. (See 33 RT 7142-7143.) Thus, any inference that one of the club members made the call in an attempt to impede appellant's defense, is entirely speculative. As such, it was not admissible. "'[E]vidence which produces only speculative inferences is irrelevant evidence.'" (*People v. Babbitt*, *supra*, 45 Cal.3d at p. 682, quoting *People v. De La Plane* (1979) 88 Cal.App.3d 223, 242, italics omitted.) "'Speculative inferences that are derived from evidence cannot be deemed to be relevant to establish the speculatively inferred fact in light of Evidence Code section 210[.]" (*People v. Babbitt*, *supra*, at p. 682, quoting, *People v. De La Plane*, *supra*, 88 Cal.App.3d at p. 244; see also *People v. Collins* (1975) 44 Cal.App.3d 617, 627-628, superseded by statute on other grounds as stated in *People v. Cole* (1982) 31 Cal.3d 568, 577 [finding insufficient evidence of telephone caller's identity to submit substance of call to jury for impeachment purposes where female caller identified herself to police officer but officer had only talked to her on one previous occasion, officer testified he would not recognize her voice again, and "that he had never seen the woman who phoned him"].) The trial court's exclusion of the evidence was not an abuse of discretion.

D. The Trial Court's Ruling Did Not Violate Appellant's Right to Present a Defense

Appellant also argues that the trial court's exclusion of evidence of the threatening telephone call deprived him of his constitutional right to present a defense. (AOB 169-170.) "'The state and federal Constitution's guarantee the defendant a meaningful opportunity to present a defense. . . .'" (*People v. Woods* (2004) 120 Cal.App.4th 929, 936.) Enforcing the ordinary rules of evidence, however, does not violate a defendant's due process rights. (*People v. Cunningham* (2001) 25 Cal.4th 926, 998; see also *People v. Cudjo* (1993) 6 Cal.4th 585, 610-611 [the exclusion of evidence generally do[es] not rise to level of constitutional error].) In particular, a defendant's right to present a defense "does not include a right to present to the jury a speculative, factually unfounded inference." (*People v. Mincey* (1992) 2 Cal.4th 408, 422.) Appellant's attempt to recast his evidentiary claim as one that violates the Constitution must be rejected. (See *People v. Lewis* (2006) 39 Cal.4th 970, 990, fn. 5 ["rejection on the merits of a claim that the trial court erred . . . necessarily leads to rejection of the newly applied constitutional 'gloss' as well. No separate constitutional discussion is required"].)

E. Even Assuming Arguendo that the Trial Court's Ruling Was Improper, any Error Was Harmless

Even assuming arguendo that the trial court erroneously excluded evidence of the threat(s) made to Immendorf Investigations and/or Robert Furlan, any such error was harmless under *People v. Watson*, *supra*, 46 Cal.2d at pp. 836-837. "Where a 'trial court's ruling did not constitute a refusal to allow defendant to present a defense, but merely rejected certain evidence concerning the defense,' the ruling does not constitute a violation of due process and the appropriate standard of review is whether it is reasonably probable that the admission of the evidence would have resulted

in a verdict more favorable to defendant." (*People v. Espinoza* (2002) 95 Cal.App.4th 1287, 1317.)

Given the overwhelming evidence of appellant's guilt on each of the murders (see Arg. III, §§ D & E, *ante*), and the fact that defense counsel presented evidence to support his theory that the Freedom Riders conspired to frame appellant for the three murders (see 32 RT 6823-6825, 6833; 34 RT 7380-7383, 7410; 35 RT 7433, 7449, 7451, 7553, 7555; 40 RT 8458, 8502-8503; 45 RT 9380-9381; 48 RT 9964-9967; 48 RT 10007; 49 RT 10059, 10189-10190, 10197), and argued the point to the jury (see 54 RT 11221, 11228), appellant's verdict would not have been more favorable even with the admission of this evidence. (*People v. Watson*, *supra*, 46 Cal.2d at pp. 836-837; see also *People v. Gutierrez*, *supra*, 45 Cal.4th at pp. 827-828 [using *Watson* standard to determine whether exclusion of evidence as irrelevant was harmless error].)

X. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY THAT A FINDING OF INTENT TO KILL WAS REQUIRED IF THE JURY FOUND THAT APPELLANT WAS AN AIDER AND ABETTOR

In connection with the murder charges in counts four and six, the trial court instructed the jury in relevant part as follows:

> If you find the defendant in this case guilty of murder in the first degree, you must then determine if one or more of the following special circumstances are true or not true: murder for financial gain, murder during the course of a robbery, or multiple murders. [¶] The People have the burden of proving the truth of a special circumstance. If you have a reasonable doubt as to whether a special circumstance is true, you must find it to be not true.
>
> If you find beyond a reasonable doubt that the defendant in counts four or six was either the actual killer or a co-conspirator or an aider or abettor, but you are unable to decide which, then you must also find beyond a reasonable doubt that the defendant with intent to kill participated as a co-conspirator with or aided

and abetted an actor in commission of the murder in the first degree, in order to find the special circumstance to be true.

(53 RT 10809; 25 CT 5632.)

Appellant now claims that "[b]y specifically telling the jury it needed to find an intent to kill only if it was 'unable to decide' whether [appellant] was the actual killer or an aider and abettor, the court plainly implied that no such intent finding was required if the jury *could* decide the question and found [appellant] was an accomplice." (AOB 175, emphasis in original.) According to appellant, the error was prejudicial with respect to the Parr murder charged in count four. (AOB 174-177.) Appellant's failure to request clarification or amplification of the challenged instruction waives his claim on appeal. (See *People v. Bolin* (1998) 18 Cal.4th 297, 327-328 [defendant's failure to object to special circumstance instruction as given to jury waives claim on appeal].) The instruction is proper in any event.

First, as noted by the trial court's instruction, the court did not instruct the jury that it had to find an intent to kill *only* if unable to decide that appellant was the actual killer or an aider and abettor. Second, the instruction clearly instructs the jury it must find that appellant had the intent to kill if it finds him guilty as an aider and abettor. Appellant's claim assumes that the jury understood it had to find intent to kill only where it was first unable to decide liability as an aider and abettor, and not if it decided as much in the first instance; in other words, that the jury suspended its use of common sense when applying the instruction. We must presume otherwise. (*People v. Bragg* (2008) 161 Cal.App.4th 1385, 1396 [we presume jurors use intelligence and common sense when applying an instruction].). There is no reasonable likelihood the jury would have parsed the challenged instruction so finely as to reach the conclusion urged by appellant. (See *People v. Thornton* (2007) 41 Cal.4th 391, 436

[when addressing a claim that an instruction created ambiguity, question is whether there is reasonable likelihood that instruction caused jury "to misconstrue or misapply the law"].) Regardless, even assuming the trial court's instruction was erroneous, any error was harmless beyond a reasonable doubt given the overwhelming evidence that appellant was Parr's actual killer, and that he had the intent to kill Parr.

Appellant told Brandi Hohman that he stabbed Parr (26 RT 5573), and Laurel Bieling testified that of the five versions appellant gave her of Parr's murder, the one in which appellant killed Parr was the most specific and detailed, and was only one appellant acted out for her (23 RT 4728-4731), thus supporting the conclusion that it was the actual scenario. As noted *ante* (see Arg. III, § D), while appellant claimed at trial that Sheffield killed Parr, and he was merely an accessory after the fact to help Sheffield clean up the mess (see 54 RT 11205-11207), this defense was incredible in light of other evidence. For instance, appellant and Sheffield loaded Parr's body into appellant's car, and appellant drove around with the body until other club members came to his house to help him bury it. (See 26 RT 5603; 40 RT 8412-8413; 46 RT 9632.) Sheffield had nothing to do with Parr's body after he was killed, and did not assist in burying it. (See 26 RT 5600-5608; 46 RT 9650, 9682.) The fact that appellant and not Sheffield is the one who drove around with the body, and who buried it in his own backyard is entirely consistent with appellant being the killer and is inconsistent with Sheffield committing the crime. Given this evidence that appellant was the one who killed Parr, the jury likely did not find appellant guilty as an aider and abettor. Thus, it did not need to find an intent to kill. Even assuming otherwise, there was ample evidence to find appellant had the intent to kill Parr.

Brandi testified that appellant had taken a dislike to Parr well before the night of the murder. (26 RT 5488-5489, 5492-5493.) On the way to the

party, he discussed intimidating Parr, and while at the party devised a plan to lure Parr from the party to Laurel Bieling's house, where Parr would have no means of support and where appellant and Sheffield could presumably take his motorcycle and, at a minimum beat him. (26 RT 5488, 5500-550, 5515.) Appellant discussed this plan with Brandi while driving from the party to Bieling's house. (26 RT 5525.) The pathologist testified that Parr had been stabbed 18 times (31 RT 6605), and appellant told Brandi that he had stepped on Parr's neck "to push the blood out of him" because Parr was not dying fast enough for appellant. (26 RT 5573.) Based on this evidence, there is no doubt that even if the jury found that appellant aided and abetted Sheffield in killing Parr, the jury also concluded appellant intended to kill Parr. Any error in the challenged instruction was harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.)

XI. THE ROBBERY SPECIAL CIRCUMSTANCE DOES NOT VIOLATE THE EIGHTH AMENDMENT

Appellant contends that because California's felony-murder rule allows the death penalty to be imposed when an accidental or unintended killing results during the course of a robbery, e.g., without the intent to kill, its application violates the Eighth Amendment. (AOB 178-189.) Appellant is mistaken.

In *People v. Anderson* (1987) 43 Cal.3d 1104, this Court held in relevant part that "intent to kill is not an element of the felony-murder special circumstance[.]" Quoting the United States Supreme Court, this Court noted that the Eighth Amendment is not violated by its ruling.

> "The Eighth Amendment is satisfied so long as the death penalty is not imposed upon a person ineligible under *Enmund* for such punishment. If a person sentenced to death *in fact killed*, attempted to kill, or intended to kill, the Eighth Amendment is not violated by his or her execution. . . ." [*Cabana v. Bullock* (1986) 474 U.S. 376, 386] In these words the court declared that

> the Eighth Amendment did not require intent to kill for the execution of the judgment of death—less still for the determination of death-eligibility.

(*Id.* at p. 1332, emphasis in original; see also *People v. Whitt* (1990) 51 Cal.3d 620, 637 ["we reject defendant's claim that a valid intent-to-kill determination was necessary to satisfy the Eighth Amendment"].)

Regardless, the felony-murder rule applied here for the robbery and murder of Herbert Parr. There is no evidence that Parr's killing was an accidental or unintended consequence of the robbery of his motorcycle. To the contrary, the evidence shows that appellant discussed hurting Parr with Brandi Hohman on the way to Laurel Bieling's house, and later told Hohman he stepped on Parr's chest to help him die faster. (26 RT 5488, 5525, 5573.) The pathologist also testified that Parr died as a result of 18 stab wounds to his body. (31 RT 6605.) Given this evidence, there is no possibility that appellant was death-eligible for accidentally killing Parr.

XII. APPELLANT'S REPRESENTATION AT THE PENALTY PHASE WAS CONFLICT-FREE

Appellant argues that his rights under the Sixth, Eighth and Fourteenth Amendments of the federal Constitution, and his rights under the California constitution were violated by a conflict of interest at the penalty phase. (AOB 190-214.) Appellant's representation at the penalty phase was conflict-free.

A. Relevant Proceedings

1. August 20, 2009

On August 20, 2009, while the jury was deliberating on the guilt phase charges, defense counsel James Campbell notified the trial court during an in camera hearing of the following:

> MR. CAMPBELL: Okay. Yesterday, after leaving court, after the conclusion of the case, I received word through

[paralegal] Ms. Calderon that if Mr. O'Malley is convicted of special circumstances that my wife's life will be in danger.

And I don't take the threat as anything serious for the simple reason I think it's ridiculous just by the nature of what has occurred, and I don't want to at this time indicate where this came from or from what nature. It did not come directly from Mr. O'Malley. I'll indicate that. But I don't know how it got to where it got, but I'm trying to find out.

But, in any event, after representing this guy for three years, and going through living hell, for something like this to be said to me is just beyond belief. I don't know what's going to happen. My attitude sitting through the jury deliberations and because there's nothing else I can do at this point, I have no input whatsoever in the case basically.

But if there is a finding of specials, it would almost be impossible, in my opinion, for me to say one—to do anything beneficial to help him in any way at this point. I don't know if we'll get to that, but I think that I had to tell the court that because of the nature of just what was said period.

THE COURT: I don't know if you want to answer this or not. Did it come from Mr. O'Malley through somebody else or—

MR. CAMPBELL: (Interrupting) No. The way it was related to me, it was from another individual. They didn't say Mr. O'Malley said this. They just said this individual just said this. And under those circumstances there's certainly no attorney/client privilege. And it's nothing to do directly with him, but I think because of the nature of it I think it impacts upon my looking upon him in a favorable light.

He may have absolutely nothing to do with that statement, I'm the first to admit that, but the problem is it's just very upsetting to even hear that, particularly after, you know, it seems to me you get to a certain point where you may be the only person in this guy's corner and to get this kind of a statement it's very difficult to rev up to go onward.

I don't know where I would be a week or two weeks or something from now. I don't know. But mentally if today is—

THE COURT: (Interrupting) If they do find specials, we will have to have something more on the record with Ms. Calderon here.

MR. CAMPBELL: At this time I would indicate all details to the court, but I think it's inappropriate to do it at this time. I want to memorialize the fact it was communicated to me yesterday by Ms. Calderon, and she knows the specific details which she related to me. I don't think I necessarily have to put that on at this time because I don't want to in any way compromise anything.

Like I said, it's not something that I believe, you know, actually came there from there, but I have doubts as to why in the world something like that was said. That's my only concern. I'm just putting that on for the reason it has to be. That's all.

THE COURT: All right. We can put more on the record if it's necessary. Also, I assume the precautions that you may think appropriate would be taken as far as—

MR. CAMPBELL: I don't think there's anything serious about it. I think it's more an emotional statement than anything else, but it's very unsettling to have somebody make that kind of statement for the simple reason that I have nothing to do with the facts here. I'm just—

(8/20/91 RT 11314-11316.)

2. August 27, 1991

A week later, while the jury was still deliberating, defense counsel and the trial court revisited the issue as follows:

THE COURT: Be on the record in People versus O'Malley. The record will show the jury is not present, they're deliberating, the District Attorney is not present, Mr. O'Malley is not present, just Mr. Campbell and Ms. Calderon are present.

The reason I asked you to come down here is that last Tuesday, I believe the 20th, you put a short matter on the record regarding a threat that had been made or you had some information about a threat.

I thought it would be appropriate to get more information on this alleged threat so if the jury came back with a verdict that the court would be able to decide what to do with the jury next, basically, and so I thought we ought to have a further in camera to get the further information on this especially while Ms. Calderon is still available.

MR. CAMPBELL: Right. As I did indicate to the court on the 20th, the day before, the 19th of August, the jury was charged and started deliberations. At that time Ms. Calderon took Mrs. O'Malley home, she was here for final argument, and we waited for her, with investigator Joe Jones, to return.

Upon returning, we went to lunch. And at that time Ms. Calderon did indicate to me upon leaving her vehicle Mrs. O'Malley extended a threat that, and I'm not sure of the exact words, but Ms. Calderon may remember the exact words, and it basically summed up to the point of saying, "If I lose my husband, James is going to lose Linda," referring to my wife.

And it was related to me by Ms. Calderon that she was crying when she said this and probably was very emotional, and then that statement was made in that vain [*sic*] I think as she was getting out of the car.

. . . .

And as I indicated to court on the 20th, it's my belief probably that this was probably not something that is serious or presents any real truth by Mrs. O'Malley, but being involved in the case we are involved in it certainly is something I think a prudent person would have to at least give some pause for concern over.

THE COURT: Right.

MR. CAMPBELL: And if it is just her in frustration or in some emotional occasion, which is certainly understandable under the circumstances, I would be very willing to write it off and dismiss it, and practicing law for some 16 years certainly you run across some things where people say some things where they really don't intend to do anything or really mean them, it's just an emotional outburst, but—and I have no knowledge whatsoever of whether or not anything like that was ever talked

to—about with Mr. O'Malley or if this was just her on her own. I have no knowledge of that. And I'm sure that if I asked Mr. O'Malley about that he would absolutely categorically deny it. I don't doubt that for a minute.

My concern was kind of into the point where after representing him for some three years plus and going through literally the death of his parents, both his mother and his father, I just felt that we were very close, and it's impossible not to become close to an individual doing this kind of a case, that that was very shocking to me to hear that kind of attitude from really his only family member now, his wife, outside of his children, small children, and that's kind of very disturbing.

It was very disheartening to think, despite the fact you feel you have done as best you could, this kind of thing is presented to you like—I mean, I have no control over the evidence that was brought into court and I just don't understand why that kind of attitude is displayed at this juncture of the case, and that presents a very serious problem for me in terms of continuing if, as I indicated, there was a special circumstances finding to present some kind of an argument. I just feel in my own mind and my own heart that's going to be very difficult for me now to not dismiss that from my mind if I had to continue as an advocate in the rest of the case. That's the thing that bothers me.

I certainly think that I would still be professional enough to try to mentally do that, but when things hit home like that they're often difficult to separate, and it's—that just presents a problem for me. I thought I should tell the court about that just because of the event and then secondly because of my concerns.

I was very upset about that and still am, and I find it also very unusual that since this occurred I've had no contact whatsoever with Mr. O'Malley and that's very unusual because he calls almost on a daily basis.

THE COURT: And he has not called since you last saw him in court?

MR. CAMPBELL: Has not communicated with me since. I think that shows they must have discussed that she said something like that and there's certainly a problem.

THE COURT: Was there any indication or is there any indication that this threat from Mrs. O'Malley came from Mr. O'Malley?

MR. CAMPBELL: No. I don't have any indication of that, and Ms. Calderon probably should put that on the record of what she heard, but basically just simply it was something that she was saying.

THE COURT: Not saying for him or he had anything to do with that?

MR. CAMPBELL: No. Didn't appear that way. And like I said, I'm—it's not the client making the threat to me, it's his wife, but the problem is that I don't know. It's hard to know whether she operates in a total vacuum or what.

THE COURT: This was made in the morning right after the jury went out? They went out about 11:30.

MR. CAMPBELL: This was around 12:00, little after 12:00 o'clock, as she was being taken from the courthouse back to her home in Sunnyvale.

THE COURT: You did not make any argument that morning because you had already finished your argument. The District Attorney made his for about an hour and a half.

MR. CAMPBELL: But the court will remember there was a discussion that morning that we did put on the record with Mr. O'Malley where he wanted me to reopen my closing and I indicated that I didn't think that was in—that was wise to do. The points he wanted to raise, although I think—thought they had some merit in the totality of schemes, I didn't think they were that significant to warrant reopening the case; I mean, reopening my closing argument.

THE COURT: Right.

MR. CAMPBELL: That's something I think he probably felt very strong about and that's something from what I understand was something he discussed with his wife over that preceding weekend and so that came to a head on Monday where I indicated to him I would not reopen the case, and

although he accepted it here in the courtroom there's no telling what his real attitude toward it is. I don't know.

THE COURT: All right. Ms. Calderon, why don't you recite, as best you can remember, word for word, as to what happened, for the court. You don't have to stand up unless you're more comfortable.

MS. CALDERON: I left the courtroom as soon as the jury went out, which was probably about ten to 12:00. I took Mrs. O'Malley home, which was about 15, 20 minutes away. She was crying the whole time. Very upset. And as she got out of the car, she said, "maybe that it would be, I think she used the word poetic justice, if I lose my husband then James is going to lose his wife." And I don't know if she used the word Linda or not. Linda is his wife's name, but she did say his wife.

THE COURT: Mr. Campbell is referred to as James and Mr. O'Malley as Jimmy, basically.

MS. CALDERON: Yes.

THE COURT: And you had sat with her during the entire—basically almost during the entire closing arguments in the audience section of the court?

MS. CALDERON: Yes.

THE COURT: And was she more upset, seemed to be more upset, that morning, that is of the 20th, the 19th rather, than she did the prior week during the closing arguments?

MS. CALDERON: Yes.

THE COURT: And did you—were you able to determine whether or not she was becoming more upset the more Mr. Rico argued or was she more upset from the start of court that morning?

MS. CALDERON: I believe she was more upset from the start of court that morning at the decision not to reopen. And in the car she basically babbled and cried a lot, you know, "my husband is going to go away, blah, blah," and then she, you know ended up saying, "if I lost my husband, then James will lose his wife," meaning James Campbell.

THE COURT: Right. Okay. All right. All right. Anything else?

MR. CAMPBELL: Yeah. I'd just like to indicate to the court, and there's been demonstrations previously in in camera proceedings, both in the municipal court and here throughout the case, where Mr. O'Malley and I have had disagreements on certain tactical things to do in this case, one of which, and most significant of which was calling Mrs. O'Malley to testify at the preliminary hearing which I very vehemently objected to and did not want to do.

And because of the fact he felt so strongly and believed in that so much and also because of the fact he put on the idea that it was a safety precaution that she do come forward and testify publicly as opposed to keep her story private and because of the fact it's a death penalty case I had to give great deference to what he wanted to do. I did that over my objection, and that's documented already.

And there's been a number of other situations where I believe I could foresee what was going to happen in this case and that it was going to turn totally on Mr. O'Malley's credibility and I felt that that was a big yoke for him to bear.

And there are other things that could have been done by way of admissions or certain tactical decisions in the case to soften a very big choice the jury is going to have to make in the case, but he refused to do those things, and I think the reason I'm saying it is because when Mr. Rico was giving his summations all of these things were being tied together and I think they were being tied together maybe for the first time in logical tones for Mr. O'Malley as he sat here in the courtoom hearing them, and it did present a very bad case against him.

And there were a lot of arguments that Mr. Rico made which were very logical and sensible which contradicted and seemed to make illogical conclusions that Mr. O'Malley wanted to draw from his testimony and I think because of that that did anger him and scare him to the realization that some of the things that he wanted to do may not be the way the case is going to work out.

And myself, as well as so many of the investigators who have been on the case for a long time, have tried to convince him and show him that some of these things are going to be very difficult for a jury to accept on the totality of all the circumstances presented and as a result he's taking very, very, very big risks.

Those are things he again felt absolutely positive and certain about, things he insisted, things no matter, despite our best efforts, we could not talk him out of, and I think that it became apparent during the closing argument that those things were not—the doors were being closed. I think that's what—became one of the reasons that emotions started to increase because I don't think he—I don't think he saw these as clearly and analytically as people who were trying to represent him did.

THE COURT: Well, not having the expertise to—

MR. CAMPBELL: Well, I mean, I say that because I think that's a reason for the emotional heightened crisis I think both he and his wife were presented with as they listened to the closing arguments.

THE COURT: I assume that you do—I assume—did you get the impression that Mrs. O'Malley had spoken on the phone over the weekend or had a jail visit or whatever from either one of you?

MR. CAMPBELL: I don't think there was a jail visit, but I find it impossible to believe they did not talk on the phone over the weekend because there was some conversation with my office on that preceding Friday, which would have been the 16th, which related to me that he was real upset with some of the things he felt like I missed in the closing, and that generated the discussion we had to have on the morning of the 19th . As I indicated, I listened to that, I understand those comments, but I don't think they're worth reopening for.

THE COURT: I thought one of the comments he had, one of his concerns, the court I think had already covered. I can't remember what it was. All right.

Well, as I indicated, because of what could happen in the case, depending on what the jury decides, the court would ask, if

we do have to go to the second phase to—we'll just schedule that, so on, and I need to know whether or not what would happen. We still don't know what's going to happen as far as obviously what the jury is going to do.

(8/27/91 RT 11327-11336.)

3. September 11, 1991

After the jury delivered the guilt-phase verdicts, defense counsel raised the issue of a possible conflict of interest.

MR. CAMPBELL: In that regard, your honor, I have spoken with Mr. O'Malley about the incident that has been related to the court. Of course, he has indicated, as I thought, that he had no knowledge of that taking place and feels that, as I originally indicated, that the statement was probably something that was made more out of frustration and emotional anger than anything in reality as a threat of any kind.

But nonetheless, in view of that and in view of the fact that the jury has come to the conclusion, beyond a reasonable doubt, that, in their minds anyway, Mr. O'Malley is convicted of three murders, cold-blooded, first degree murders, and evidently had seemed to adopt the prosecution's theory that in reality he is a master manipulator, that this is something that we could not just simply ignore as something that would not in any way impact on me.

So it seems that again, as I've kind—even though I think this threat and the statement was not something that is of substance really, I think that the very fact of it being made, considering our relationship and representation of Mr. O'Malley for many years, almost three years, over three years, is something that does interfere with the effectiveness of myself in terms of now going forward in the penalty phase and literally arguing and advocating for his life.

And it does place his advocate in a very unusual situation, because even though you know ethically you're supposed to disregard whether your client is guilty or innocent and anything else that might interfere with your ability to represent them, lawyers are still human beings and they still have these things that pry [*sic*] in the back of their minds.

I question myself whether or not in some way that would creep in and take away from my ability to present mitigating factors to the jury in the presentation stage of the case and then literally at the close of that somewhere stand up and argue for his life as opposed to life without possibility of parole.

So I'm just in a situation where I just feel that deep down inside that I just don't think this is a case I would be able to proceed on ethically at this point based on what has occurred. And I don't know any way possible that I could - - that I could remedy that and cure that.

THE COURT: All right. It sounds like you are convinced that Mr. O'Malley, himself, had nothing to do with this statement.

MR. CAMPBELL: Well, Mr. O'Malley indicated to me that he had nothing to do with this statement. I have no reason to doubt that. He's my client. He's been very truthful with me throughout the entire period of representation.

THE COURT: But it's not like it came at a time when Mrs. O'Malley was distraught, upset, frustrated?

MR. CAMPBELL: Well, that's my impression, that's what I want to think, but I'm only viewing that from that standpoint as someone close to Mr. O'Malley and his family through these years. And I may not be an objective observer of what takes place.

And the reason I brought it to the court's attention originally I think is for the simple reason that sometimes when you're close to things you do not see everything the same way.

And the prosecutor has presented a scenario of Mr. O'Malley to the jury that greatly differs from my perception of him. And twelve independent, hopefully impartial people, have saw [*sic*] fit, that seemed to be the evidence, that supported the kind of person he was. And you have to, as any human being, not as a lawyer, as a human being, you have to pause and take note of that kind of a finding.

. . . .

. . . .

THE COURT: . . . [¶] All right. What I propose to do, I would imagine, at this point take a short recess so Mr. O'Malley can read these transcripts.

MR. CAMPBELL: Okay.

THE COURT: I think it's appropriate.

MR. CAMPBELL: Yes. I indicated to him—I did talk to him about it. I told him what has occurred. He's aware of that. But he probably should be able to read it.

THE COURT: I would also indicate that, for whatever it's worth, the District Attorney this morning has given me a list of potential witnesses, and witnesses eight and nine are Neal Robertson and Sharon Robertson. I'm only presuming or assuming that these are relatives of Michael Craig Robertson's.

MR. CAMPBELL: I believe, your honor, that is his mother and father.

THE COURT: And whether or not the District Attorney is attempting to use these two witnesses in relation to victim impact statements I don't know. In the District Attorney's 190.3 notices, there is no—in the amended notice filed March 1, 1990, there is no notice of intent to use victim impact statements, because those had been ruled unconstitutional by the California Supreme Court.

. . . .

There has not been an attempt by the District Attorney to file an amended 190.3 notice. If one had been filed immediately after that case came down, the court would have considered allowing the District Attorney to use victim impact statements, but because he has not done so, at this point my inclination right now is very strongly against allowing the District Attorney to use victim impact statements.

If new counsel had to be brought in on this case, obviously it would take some time for that attorney to get up to speed, and then it would be a question of whether or not a new notice would be timely prior to the start of a second phase of the trial again to use the victim impact statements.

I'm just trying to layout [*sic*] all the possible things that could happen that I could think of. You might want to discuss that with him. But let's take a recess. Let me know when he's had a chance to read these. Make sure I get them back. Make sure I get them back because they have to remain sealed.

(9/11/91 RT 11364-11375.)

Later, the trial court, defense counsel, appellant, and the prosecutor discussed defense counsel's motion as follows:

MR. CAMPBELL: Yes, your honor, based on the information provided to the court in camera, both today and the other two occasions, which were placed under seal, and the reason is because it potentially may invade the attorney/client privilege, on that basis it's my opinion that I would not be able to continue as Mr. O'Malley's attorney during the penalty phase, presenting evidence on his behalf in mitigation of either of the two punishments; in other words, argue for life without the possibility of parole versus the death penalty.

And I would certainly not be able to participate as an effective advocate in literally arguing that his life be spared to this jury based upon the information that has been provided to the court, which I feel we cannot in any way release to the District Attorney so it would not in any way compromise Mr. O'Malley's position before the court.

But based on that, I feel, and I feel very strongly about it, and feel deep down inside, it would be an impediment, and as a result of that, I would ask the court to be relieved as attorney of record for the remainder of the trial.

THE COURT: All right. Mr. O'Malley, what was your—for the record, what is your desire?

MR. O'MALLEY: I am—I would like to have him as my attorney still.

The parties discussed the ramifications of defense counsel's motion as follows:

MR. RICO: The only thing that I can say would be the obvious, that we have here a trial that has been, in fact, going on for six months, we have presented 96 witnesses, gone through

all of that. Everything that I have seen is that Mr. Campbell has been an effective advocate for his client.

. . . .

. . . .

MR. RICO: . . . but I know the jury is planning on coming back on Monday, and if for some reason the court were to allow this, I don't know what that would do in terms of the penalty phase, what it would do in terms of Mr. O'Malley's subsequent representation, the delay, the time.

Basically, it would mean an entire new trial, to put on the entire case all over again, because the circumstances of the offense, of the offenses, are what would be brought before the jury, and the only reason—the only way to do that is to put everything on all over again. It would mean another six-month trial, in fact, for the penalty phase.

. . . .

. . . .

MR. CAMPBELL: I'm appreciative of the District Attorney's position, basically being in the dark regarding the reasons; however, I think his argument that this is, in effect, a motion for a new trial is very far-fetched and misplaced because we have a jury here.

THE COURT: Well, the court doesn't agree that this would be a motion for a new trial.

MR. CAMPBELL: It's just a matter of rearranging some time. I don't think it's going to be that kind of hardship. Everything is in place for the motion part, for the penalty phase. Witnesses and preparation has been done.

There's a few items that I do have to bring to the court's attention regarding that, but in the mean—when that is finished, it's a matter of another attorney reviewing that. I would be more than happy to meet with that attorney to provide whatever assistance is required, supplying all the information we have, and work around the clock with him in that regard to prepare him to basically present the evidence and make the argument.

I don't think it's something that is insurmountable, could not be done by a competent trial lawyer with some experience in this area, and I don't think we're talking about something starting all over again at all. It's a matter of a short period of time here, and I think this could be resumed and proceed in the normal course of affairs. That's what I just wanted to bring to the court's attention.

MR. RICO: My thought in that regard, I don't know how an attorney who was not up to speed on this case could step into it at this stage. What I would expect, or anticipate, is that if there were a new lawyer to step in, that lawyer would need to review everything that has gone before, the hundreds, if not thousands, of pages of police reports.

Now, we wouldn't be talking about a new guilt phase as such, but I would think that a lawyer would want to know everything that has been said and done before, and if Mr. Campbell's reason for asking to withdraw is that he feels he cannot effectively represent Mr. O'Malley, which conclusion I take issue with, for him to say that he could bring somebody else up to speed by briefing him on what he knows and what he should argue without that attorney having full opportunity, may create another hurdle.

I wouldn't want the defendant later on to say Mr. Campbell basically sold me down the river by what he's briefing him on without that lawyer reviewing everything and Mr. O'Malley stating on the record he wishes Mr. Campbell to represent him. Other than that, I can't respond in a vacuum.

(55 RT 11382-11386.)

The trial court later ruled on defense counsel's motion as follows:

. . . having viewed and witnessed Mr. Campbell and Mr. O'Malley for the last seven months, their interaction and their relationship, the court makes the following findings of fact, ruling and opinions:

Number one. Mr. Campbell has always been ready on this case and extremely well-prepared. He knows this case inside and out and has a better grasp of it than anyone else could in his situation or the defense could ever possibly have.

Number two. That Mr. Campbell has become closely associated with Mr. O'Malley and his family. No one knows more about Mr. O'Malley in this case than Mr. Campbell, with the exception, of course, of Mr. O'Malley himself. And that includes Mrs. Karen O'Malley based on her testimony that Mr. O'Malley did not discuss anything about the case with her basically. There's no one more qualified to argue for Mr. O'Malley's life than Mr. Campbell.

Number three. There's no evidence that the statement of Mrs. O'Malley was true or viable or had any substance or was uttered out of anything but frustration, current mental state, in light of the then existing circumstances, especially those set out on pages 11,327 to 11,338, which is basically the second in camera hearing in this particular issue. Further, it appears Mr. Campbell put little, if any, stock in Mrs. O'Malley's utterances.

Four. There is no evidence that Mrs. O'Malley's utterances can be attributed to Mr. O'Malley or in any way connected to him.

Five. Mr. Campbell, as an attorney, has an ethical duty to do as much for his client, whether it's Mr. O'Malley or anyone else, as possible, and has a duty to put personal feelings and beliefs aside.

While he might be upset and feel betrayed by Mrs. O'Malley's utterances, especially because of his long-standing relationship with the O'Malley family over the last three plus years, he must set these aside. Mr. Campbell has indicated at the in camera hearing that he can do this. This court has no reason to believe that he cannot do this; that is, set these aside and argue to the best of his ability that this jury spare the life of his client. He appears to be ready and prepared to do this when the penalty phase begins on Monday.

Every attorney knows that when they accept a case, or a client, it will not always be a bed of roses. There are going to be conflicts and disagreements. The attorney has to accept that as a fact of life and a profession. Lawyering is somewhat like marriage. You take the other party for better or for worse.

The court further finds that Mr. O'Malley is making—strike that.

> Six. The court further understands that Mr. Campbell is under an obligation to bring forth the facts, as he has done so, on the record in these in cameras, to notify the court of what has transpired, of his feelings in the matter, and that he has done so properly.
>
> Seven. The court further notes that Mr. O'Malley wishes to have Mr. Campbell remain as his attorney and it appears that he is still—rather, that he still has faith in Mr. Campbell and his abilities.
>
> The court further finds that Mr. O'Malley is making an informed, reasonable and proper choice in wanting Mr. Campbell to remain as his counsel and still has faith in him despite any prior disagreements, and, therefore, based on this, the court denies the motion to withdraw as attorney of record.

(55 RT 11402-11404.)

B. Applicable Legal Principles

Under both the state and federal Constitutions, a criminal defendant has the right to conflict-free counsel. (See *People v. Bonin* (1989) 47 Cal.3d 808, 833-834.) "When the trial court knows, or reasonably should know, of the possibility of a conflict of interest on the part of defense counsel, it is required to make inquiry into the matter. [Citations.]" (*Id.* at p. 836.)

> In *Mickens v. Taylor* (2002) 535 U.S. 162, (*Mickens*), the high court confirmed that claims of Sixth Amendment violation based on conflicts of interest are a category of ineffective assistance of counsel claims that, under *Strickland* [*v. Washington* (1984) 466 U.S. 668] . . . 694, generally require a defendant to show (1) counsel's deficient performance, and (2) a reasonable probability that, absent counsel's deficiencies, the result of the proceeding would have been different. [Citations.] In the context of a conflict of interest claim, deficient performance is demonstrated by a showing that defense counsel labored under an actual conflict of interest, "*that affected counsel's performance*, as opposed to a mere theoretical division of loyalties." [Citations.]

(*People v. Doolin*, *supra*, 45 Cal.4th at pp. 417-418, emphasis in original.)[68]

In determining whether a potential conflict adversely affected counsel's performance, the reviewing court must inquire "whether the record shows that counsel 'pulled his punches,' i.e., failed to represent defendant as vigorously as he might have had there been no conflict. [Citation.]" (*People v. Easley* (1988) 46 Cal.3d 712, 725, overruled on other grounds in *People v. Doolin*, *supra*, 45 Cal.4th at p. 421.)

C. There Is No Evidence of an Actual Conflict of Interest that Affected Defense Counsel's Performance at the Penalty Phase

The record here provides no evidence to support appellant's claim that defense counsel had an actual conflict of interest, e.g., a conflict that adversely affected his performance. Counsel repeatedly informed the trial court that he believed Mrs. O'Malley had made the relevant comments because she was emotionally charged and upset, and that counsel did not take the substance of the comments seriously. (See 8/20/91 RT 11314-11316; 8/27/91 RT 11327-11336; 9/11/91 RT 11364.) The issue as framed by defense counsel was that counsel was unsettled, disheartened, shocked and upset that the comments were made in the first instance given counsel's close relationship with appellant and his family, and the fact that counsel had "no control over the evidence" presented in court. (See e.g., 8/20/91 RT 11314; 8/27/91 RT 11329.)

While a criminal defense attorney is generally in the best position to determine whether a conflict of interest exists (*People v. Hardy* (1992) 2 Cal.4th 86, 137), the trial court may be in a better position to discern whether there is an actual conflict of interest. (See e.g., *People v. Roldan*

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[68] In *Doolin*, this Court adopted the federal constitutional standard enunciated in *Mickens* for analyzing Sixth Amendment conflict of interest claims. (*People v. Doolin*, *supra*, 45 Cal.4th at p. 421.)

(2005) 35 Cal.4th 646, 676-677, disapproved on other grounds in *People v. Doolin*, *supra*, 45 Cal.4th at p. 421, fn. 22 [where defendant claimed a conflict of interest due to his threat to kill defense counsel, this Court refused to reverse judgment, holding that in first instance, it is up to trial court to discern whether there was a true conflict, or whether defendant was attempting to manipulate proceedings; record supported trial court's conclusion that defense counsel was not burdened by "actual or potential conflict of interest"].)

Here, defense counsel informed the trial court that he felt it would be difficult to dismiss Mrs. O'Malley's comments from his mind and "continue as an advocate[,]" and that he questioned "whether or not in some way that would creep in and take away from [his] ability to present mitigating factors to the jury in the presentation stage of the case and then . . . argue for [appellant's] life[.]" Counsel did not, however, unequivocally inform the court that he would not be able to do so, and in fact told the court at one point that he believed he "would still be professional enough to try to mentally do that[.]" (8/27/91 RT 11330.) Given that defense counsel appeared to be merely uneasy with the fact that the comments were made, and that he believed he was "professional enough" to argue for appellant's life to the best of his ability, there is insufficient evidence that counsel was laboring under a conflict of interest.

Appellant argues that while the trial court entered into the proper inquiry regarding a possible conflict of interest, ultimately, the court's "inquiry was manifestly inadequate to assess the risk presented by the potential conflict." (AOB 192.) As noted by the foregoing, however, defense counsel discussed the issue with the court in detail on three occasions. Given that counsel had appeared in front of the court for over three years on this case, and the court had observed firsthand counsel's ability to represent appellant as well as counsel's long-standing relationship

with appellant, the trial court was in the perfect position to adequately assess any risk presented by Mrs. O'Malley's comments.

Regardless, there is no evidence that counsel did not represent appellant "as vigorously as he might have had there been no conflict." At the time defense counsel discussed the possible conflict of interest with the court, counsel told the court that "[e]verything [was] in place . . . for the penalty phase." (55 RT 11384.) Specifically, that counsel had subpoenaed and prepared his witnesses for testimony. (55 RT 11384.) Counsel then presented 18 witnesses during the penalty phase, and one more in rebuttal. (See 56 RT 11505-58 RT 12049, 12180-12194.) These witnesses testified on matters including appellant's life growing up in Massachusetts with an alcoholic mother and an abusive father, appellant being a "born again Christian," his exemplary adjustment to prison, including his pursuit of a high school diploma, the fact that appellant could remain a "constructive member" of the prison population should he be sentenced to life in prison without the possibility of parole, the possibility that appellant suffered from fetal alcohol syndrome, and that this could have caused him to become addicted to drugs and spiral "out of control," and the reasons underlying appellant's need to join a gang which might have steered him in a "criminal direction." (See e.g., 56 RT 11511, 11560, 11614-11617, 11621; 57 RT 11719-11720, 11731, 11743, 11752, 11785-11786, 11856-11857; 58 RT 11891, 11896-11897, 11905-11907, 11925-11932, 11938.)

Then, in closing, counsel argument, counsel argued all the relevant points raised by the evidence in the penalty phase. (See 59 RT 12264-12292, 12327-12335.) There was no violation of appellant's right to the effective assistance of counsel. Even assuming arguendo there was an actual conflict of interest, appellant's request to keep his attorney waived his claim.

D. Even Assuming Arguendo Defense Counsel Had a Conflict of Interest, Appellant Waived the Conflict and Was Not Prejudiced in any Event

"'[A] defendant may waive his right to the assistance of an attorney unhindered by a conflict of interests.' [Citations.]" (*People v. Bonin*, *supra*, 47 Cal.3d at p. 837.) A waiver of conflict-free counsel "'. . . need not be in any particular form, nor is it rendered inadequate simply because all the conceivable ramifications are not explained.' [Citation.]" (*People v. Roldan*, *supra*, 35 Cal.4th at p. 728.)

Appellant claims that the trial court failed to advise him about the ramifications of appointing new counsel, and also failed to obtain a knowing and intelligent waiver from appellant. (AOB 208-212.) Not so.

At the September 11, 1991, in camera hearing, at which appellant was present,[69] the trial court noted that if new counsel were appointed in Mr. Campbell's place, "it would take some time for that attorney to get up to speed," and that the court might allow into evidence victim impact evidence by the prosecution which would likely not be allowed into evidence if Mr. Campbell remained counsel. (9/11/91 RT 11375.) The court also advised Mr. Campbell to discuss "all the possible things that could happen" in the event that new counsel was appointed. (9/11/91 RT 11375.)

Later, after appellant had read the relevant transcripts, and presumably spoke with defense counsel about the ramifications of new counsel being appointed, the trial court asked appellant what he wanted to do; appellant

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[69] Although there is no express acknowledgement on the record that appellant was present during the first part of the September 11, 1991, in camera hearing (see e.g., 9/11/91 RT 11364), just before court and counsel convened to allow appellant to read the transcripts of the two prior in camera hearings, defense counsel indicated that appellant told him he needed 15 minutes to read the transcripts (9/11/91 RT 11375), indicating that appellant had in fact been present.

responded that he wanted Mr. Campbell "as [his] attorney still." (9/11/91 RT 11381.)

Under these circumstances, appellant's response must be understood as a waiver; in light of all that came before, including the trial court's and Mr. Campbell's general disclosure of the consequences of replacing counsel, appellant's waiver was knowing and intelligent.

> In determining whether a defendant understands the nature of a possible conflict of interest with counsel, a trial court need not separately explore each forseeable conflict and consequence. Nor does a defendant's waiver of conflict-free counsel extend only to matters discussed in detail on the record. [Citation.]

(*People v. Jones* (1991) 53 Cal.3d 1115, 1137.) Rather, the potential consequences of proceeding with counsel need only be "disclosed generally" to the defendant. (*Maxwell v. Superior Court* (1982) 30 Cal.3d 606, 619.)

Regardless, appellant cannot show prejudice. In fact, appellant does not point to any action his attorney would or should have taken had he not been subject to the alleged conflict. Given appellant's failure to do so, and in light of the strong evidence that defense counsel presented at the penalty phase, and his equally strong argument to spare appellant's life, there is no reasonable probability appellant's verdict would have been more favorable absent any alleged conflict of interest. (*Strickland v. Washington*, *supra*, 466 U.S. at p. 694; see also *Burger v. Kemp* (1987) 483 U.S. 776, 787-788 [even assuming actual conflict, reversal not required because record did not support claim that defense attorney's advocacy was harmed]; see also *People v. Belmontes* (1988) 45 Cal.3d 744, 777, fn. 7 [where no conflict exists and no evidence that an alleged conflict affected defense counsel's performance, court need not consider claim that defendant's waiver was not knowing and informed in first instance].)

XIII. APPELLANT DID NOT CLEARLY INDICATE THAT HE WANTED THE TRIAL COURT TO DISCHARGE HIS ATTORNEY, NOR DID HE INDICATE A DESIRE FOR NEW COUNSEL

Next, appellant contends that the trial court erroneously refused his request to discharge his retained lawyer. (AOB 215-223.) Appellant's claim is misplaced.

A. Relevant Proceedings

Before the commencement of the penalty phase, defense counsel raised the following relevant issue on behalf of appellant:

> MR. CAMPBELL: Mr. O'Malley has brought to my attention that he wants to make a statement to the court. He's written it out. He showed it to me, and I would have to classify it—I don't know if it really is a Marsden motion, but I think it's a quasi Marsden motion, at least approaches that.
>
> THE COURT: Out of an abundance of caution, we ask the courtroom to be cleared except for Mr. O'Malley, Mr. Cambpell and the court personnel for a short period.
>
> . . . .
>
> . . . .
>
> THE DEFENDANT: On Wednesday, September 11, 1991, there was a hearing in this court which my attorney filed a motion to be relieved from this case. [¶] All the circumstances and details of that motion are quite unusual. As the Court has stated, I must add, they are very suspicious. Anyway, I do not wish to address it in detail at this time.
>
> What I do wish to address are the statements made by this Court, and my response to a question asked of me by the Court. [¶] After my attorney made his request to be dismissed by the Court, the Court then asked me what I wanted, at which time I said I wanted to keep Mr. Campbell.
>
> When we returned in the afternoon and the Court ruled on this matter, it was put on the record by the Court that part of the ruling was based on my request and that I wanted to keep counsel and this showed I still had counsel. [¶] The Court

further stated in the Court's opinon that throughout trial Mr. Campbell seemed to be a highly effective and prepared attorney, not in these exact words, but this was the gist of the statement.

First, is that I would like to say that, I do not have confidence in my attorney, but I am more scared of getting someone I do not know at all. I also have complete trust in him since I have complete trust in Vincent Schiraldi, who has been hired by Mr. Campbell to prepare the penalty phase investigation. [¶] This does not mean, however, he will follow Mr. Shiraldi's advice, or even acknowledge or read all reports prepared by him which could be detrimental to me.

I also believe Mr. Campbell has at this time lost all credibility with the jury, but again, I am worried about who would be appointed in his place. [¶] From the beginning of trial, I have wanted Cheryl Mackell as second counsel, but this was denied by the Court—not this Court—but denied by the Court.

Furthermore, I can see how the Court—I can see how the Court can say for the record Mr. Campbell was well prepared and a highly effective attorney from the Court's view, but this statement, in reality, in my opinion is incorrect for the following reasons. [¶] The Court is not privy to witnesses or info we would have produced at trial or could have produced at trial, more so in rebuttal to the District Attorney's rebuttal.

Among other things, in the last week I have learned of reports and interviews of witnesses that were prepared by the defense team investigators that went ignored or not even read, which possibly could have been remedied with second counsel. [¶] There are numerous other issues and incidents that I will not name at this time because I do not believe or even know if this is the proper time, but at a later date I will produce and support these issues.

Numerous times my wishes or suggestions and those of others on the defense team would go ignored, or worse yet not listened to. In some instances, I would be told one thing, I feel to appease me, and then he would do the opposite. [¶] It has come to my attention the Appellate Court does not question attorney's trial tactics which, after learning this, makes me even more upset, because all of a sudden this word "tactic" is

frequently used in places where I strongly disagreed with what he chose to do.

These disagreements are not just in areas discussed prior to the doing of them, but many were not discussed at all, and worse yet, some were discussed, and I was told how they were going to be handled, and then the opposite was done, or nothing done at all, which left the situation irrevocable with no impact from myself or input from myself or others. [¶] Finally, I do not wish to insult the Court by saying their statements are incorrect, I only wish to say the Court has no knowledge except from preliminary hearing transcripts and the trial transcripts to judge how prepared Mr. Campbell was.

They did not have police—the court did not have police reports or reports from the defense team investigators and other sources; thus, in my opinion the Court can only know how prepared he appeared, now how prepared he was. [¶] I also wish to state I have no hard feelings toward Mr. Campbell. As a person, he's shown me great kindness, especially when my mother died during trial. My only problem is how I was represented. [¶] I also wanted to thank the court for your time and consideration. Thank you.

(56 RT 11533-11538.)

When the trial court invited defense counsel to respond, counsel explained several of the instances in which he and appellant had disagreed, for instance, on whether to call certain witnesses. Counsel also provided reasons underlying some of his decisions. (56 RT 11538-11540.) As to whether the defense would call certain witnesses during the penalty phase, the following discussion ensued:

THE DEFENDANT: At this point, we are still discussing that. I don't know. I was listening to what you had to say, and then we started this. I may agree with you, but I don't know all the facts yet.

THE COURT: That's on the three witnesses?

MR. CAMPBELL: Right.

THE COURT: And if what they testified to could cause rebuttal evidence, victim impact?

MR. CAMPBELL: One of them will for sure, and one of them, I feel, brings up old wounds we have already heard about here, I feel the probative value of which will be—I don't think this jury needs to hear about past violent conduct, despite how well Mr. O'Malley acted within the context. I don't want to bring the person in.

THE COURT: It's obvious you two have not finished discussing this yet. Is that correct, Mr. O'Malley.

THE DEFENDANT: Correct.

THE COURT: It would not appear that any disagreement that you may have had over trial tactics has caused a breakdown in the attorney-client relationship that would substantially, if in any way, impair the defendant's right to effective assistance of counsel.

It would not appear there has been a defense that wasn't presented or that Mr. Campbell did not sufficiently consult with Mr. O'Malley and adequately investigate the facts and the law involved in the case up to date, and as I indicated before, if there is any question, Mr. Campbell has, in fact, very adequately prepared the presentation of the case.

Whether or not this is a real Marsden type situation or not, is hard to say at this point, but Mr. Campbell is not going to be relieved at this point.

(56 RT 11533-11541.)

B. Applicable Legal Principles

A nonindigent criminal defendant has the right to discharge his retained attorney without having to show cause. (See *People v. Ortiz* (1990) 51 Cal.3d 975, 983.)

> A nonindigent defendant's right to discharge his retained counsel, however, is not absolute. The trial court, in its discretion, may deny such a motion if discharge will result in "significant prejudice" to the defendant [citation], or if it is not

> timely, i.e., if it will result in "disruption of the orderly processes of justice" [citations.]

(*Ibid.*)

> While we do require an *indigent* criminal defendant who is seeking to substitute one *appointed* attorney for another to demonstrate either that the first appointed attorney is providing inadequate representation [citations], or that he and the attorney are embroiled in irreconcilable conflict [citation], we have never required a *nonindigent* criminal defendant to make such a showing in order to discharge his *retained* counsel.

(*Id.* at p. 984, emphasis in original.)

In order to discharge counsel, a defendant must at least give the trial court "some clear indication . . . that he wants a substitute attorney." (*People v. Lucky* (1988) 45 Cal.3d 259, 281, fn. 8; see also *People v. Lara* (2001) 86 Cal.App.4th 139, 156-158 [when analyzing defendant's claim that trial court improperly relied on *People v. Marsden* (1970) 2 Cal.3d 118, to consider his request to discharge retained counsel, court first considered threshold question of whether defendant "actually requested to discharge his retained counsel"]; cf. *People v. Marshall* (1997) 15 Cal.4th 1, 22 ["requiring the defendant's request for self-representation to be unequivocal is necessary in order to protect the courts against clever defendants who attempt to build reversible error into the record by making an equivocal request for self-representation. Without a requirement that a request for self-representation be unequivocal, such a request could, whether granted or denied, provide a ground for reversal on appeal"].)

C. Appellant Did Not Clearly Indicate He Wanted to Discharge His Attorney or that He Desired New Counsel

Appellant argues that because he had retained, rather than appointed counsel, the trial court erroneously applied the *Marsden* standard rather than the *Ortiz* standard, thus violating his right to discharge counsel

guaranteed by the Sixth Amendment. (AOB 216-217, 220.) Appellant's claim is misplaced.

Although *defense counsel* told the court that appellant wanted to make a "quasi-Marsden motion," counsel introduced the matter to the court by stating simply that appellant wanted to "make a statement to the court." (56 RT 11533.) Appellant then used the opportunity to explain to the court why he had previously indicated he wanted to retain Mr. Campbell as counsel. (56 RT 11535.) Although appellant stated that he did "not have confidence in" Campbell, at no time did appellant clearly indicate to the court that he wanted to discharge him as counsel. To the contrary, appellant told the court that he had "complete trust in him since [he had] complete trust in Vincent Schiraldi, who [was] hired by Mr. Campbell to prepare the penalty phase investigation." (56 RT 11535.) Appellant also twice indicated he wanted to retain Campbell because he was more "worried about who would be appointed in his place[,]" and that he was afraid "of getting someone [he did] not know at all." (56 RT 11535-11536.)

It appears, then, that appellant's purpose in addressing the court was not to discharge Mr. Campbell and/or request new counsel, but to present his grievances to the court for other purposes. For instance, while going through his laundry list of complaints, appellant noted that he had "numerous other issues and incidents that I will not name at this time because I do not believe or even know if this is the proper time, but at a later date I will produce and support these issues." (56 RT 11537.) This, along with appellant's discussion of the fact that he had learned that appellate courts do "not question attorney's trial tactics" (see 56 RT 11537), provides support for the likelier conclusion that appellant's intent in making the statement was to set the stage for a future new trial motion and/or claim of ineffective assistance of counsel. Because appellant only

voiced his dissatisfaction with Mr. Campbell, and did not make a clear and unequivocal request to discharge his retained counsel, there was no basis for the trial court to rule on such a motion in the first instance.

While the trial court appeared to echo the standard enunciated by this Court in *Marsden* by noting that appellant and defense counsel did not have "a breakdown in the attorney-client relationship that would substantially . . . impair . . . [his] right to effective assistance of counsel[,]"[70] given the court's statement that it was "hard to say" in the first instance whether the situation constituted "a real Marsden type situation or not[,]" it appears the court was merely making the observation in an abundance of caution, rather than issuing a definitive ruling. (56 RT 11541.)

Appellant's reliance on *People v. Lara*, *supra*, 86 Cal.App.4th at p. 139, is misplaced. The defendant in *Lara* claimed the trial court erroneously handled his request to discharge retained counsel by holding a *Marsden* hearing. (*Id.* at p. 149.) The Fifth District Court of Appeal first addressed the "close question as to whether appellant wanted to discharge" his attorney. (*Id.* at pp. 156-157.) Relying on the defendant's complaints about his attorney, and the trial court's "factual interpretation of the situation as involving a request by appellant to discharge his defense attorney and obtain a new attorney[,]", the court held that the defendant had clearly indicated he wanted to discharge counsel. (*Id.* at pp. 157-158.) The court went on to reverse the defendant's conviction, finding, inter alia, that the request was not necessarily untimely. (*Id.* at p. 164; see also *People v. Ortiz*, *supra*, 51 Cal.3d at p. 983.)

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[70] In *People v. Marsden*, *supra*, 2 Cal.3d at pp. 123-125, this Court held that to discharge appointed counsel, a defendant must show that counsel is not providing adequate representation or that he and his attorney are embroiled in such an irreconcilable conflict that ineffective representation is likely to result.

While appellant, like the defendant in *Lara*, complained about his attorney, here, in contrast, appellant twice told the trial court that he did not want to discharge counsel, citing his fear that a new attorney would be less effective. (56 RT 11535-11536.) Moreover, the trial court here did not interpret appellant's statement as a request to discharge counsel and/or a request for new counsel, but invoked the *Marsden* standard in an abundance of caution. Last, unlike the situation in *Lara*, here it was clear that appellant shared his concerns with the court to perfect the record for a future claim, and to explain why he had previously told the court he wanted to retain Mr. Campbell as counsel. *Lara* is distinguishable.

Appellant's failure to clearly indicate that he wanted to discharge retained counsel or to request the appointment of new counsel precludes his claim that the trial court erroneously interpreted his statement as a request to discharge appointed counsel. Appellant's claim of error should be rejected.

XIV. THE TRIAL COURT PROPERLY EXCLUDED EVIDENCE ON HOW A DEATH SENTENCE WOULD BE CARRIED OUT

Appellant claims that the trial court improperly excluded evidence on how a death sentence would be carried out. According to appellant, this evidence was admissible under section 190.3 as evidence relating to mitigation and sentence. (AOB 229-249.) This claim has previously been rejected by this Court.

> Defendant's attempt to construe section 190.3 to require admission of [evidence as to how an execution would be carried out] is unconvincing. The relevant portion of the statute reads in full: "In the proceedings on the question of penalty, evidence may be presented by both the people and the defendant as to any matter relevant to aggravation, mitigation, and sentence including, but not limited to, the nature and circumstances of the present offense, any prior felony conviction or convictions whether or not such conviction or convictions involved a crime of violence, the presence or absence of other criminal activity by

> the defendant which involved the use or attempted use of force or violence or which involved the express or implied threat to use force or violence, and the defendant's character, background, history, mental condition and physical condition." Each of the specific items listed sheds light on the defendant himself and his particular actions. By contrast, an account of how an execution is conducted does not illuminate either the deeds or the character of the defendant before the court. Such an account, therefore, is irrelevant to aggravation, mitigation, or sentence, and as such is inadmissible.

(*People v. Grant*, *supra*, 45 Cal.3d at p. 860.)

Appellant's claim should likewise be rejected.

XV. NEITHER CALJIC NO. 8.85 NOR THE PROSECUTOR'S ARGUMENT DIRECTED THE JURY TO DOUBLE COUNT TWO OF THE SPECIAL CIRCUMSTANCES

Next, appellant contends that the trial court's instruction with CALJIC No. 8.85, combined with portions of the prosecutor's closing argument, improperly permitted the jury to double-count the financial gain and robbery special circumstances. (AB 250-255.) Appellant's claim is forfeited and is misplaced in any event.

The trial court instructed the jury with CALJIC No. 8.85 in relevant part as follows:

> In determining which penalty is to be imposed on the defendant, you shall consider all the evidence which has been received during any part of the trial of this case, except as you may be hereafter instructed. You shall consider, take into account and be guided by the following factors, if applicable:
>
> A. The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true.

(56 RT 11491; 59 RT 12204.)[71]

As a preliminary matter, appellant's failure to request modification or amplification of the instruction forfeits his challenge to the instruction on appeal. (See *People v. Daya, supra*, 29 Cal.App. 4th at p. 714; see also *People v. Monterroso* (2005) 34 Cal.4th 743, 789 [when requested, trial court should instruct jury against double-counting circumstances underlying murder and any attendant special circumstances]; *People v. Holt* (1997) 15 Cal.4th 619, 699 ["A defendant may request a clarifying instruction admonishing the jury not to double-count the circumstances of the crime and the special circumstances it found true as more than one aggravating factor"].) Regardless, this Court has repeatedly held that this instruction "does not inherently encourage . . . double-counting under section 190.3 [Citations.]" (*People v. Lewis* (2001) 25 Cal.4th 610, 669; see also *People v. San Nicolas* (2004) 34 Cal.4th 614, 671; *People v. Ayala* (2000) 24 Cal.4th 243, 289; *People v. Mayfield* (1997) 14 Cal.4th 668, 805.)

> "[E]ven without a clarifying instruction, the possibility that a jury would believe it could "'weigh' each special circumstance twice on the penalty 'scale'" is remote. [Citation.] Thus, "in the absence of any misleading argument by the prosecutor or an event demonstrating the substantial likelihood of 'double-counting,' reversal is not required." [Citation.]

(*People v. Lewis, supra*, at p. 790; see also *People v. Ramos* (2004) 34 Cal.4th 494, 504 [this Court noting it had previously held that "the possibility that the jury would double-count the aggravating factors is remote, in the absence of prosecutorial misconduct"].)

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[71] The trial court twice instructed the jury with CALJIC No. 8.85; once before the penalty phase evidence was introduced, and then again after closing arguments and before deliberations. (56 RT 11491; 59 RT 12204.)

According to appellant, the prosecutor's argument in closing misled the jury to double-count the circumstances underlying the German and Parr murders with their attendant special circumstances. (AOB 250-252.) As to the German murder, the prosecutor argued in relevant part:

> Now, so that's a bit different. You can consider, for example, as far as the Sharley Ann German murder is concerned, Sharley Ann German. Now, a 36-year-old mother of two. She had another son, Robert I believe, and Tom McNeel is the son that found her. You can consider the circumstances of her death.
>
> You can—again, the testimony. I'm not going to go through everything. Consider how she was killed, there's testimony from the coroner on that, and consider the evidence that you have here: the first crime, manner of the killing, and the motive for the killing.
>
> You have found this defendant, James Francis O'Malley, guilty of killing Sharley Ann German. She was—she had her throat cut, she was shot in the head. The coroner testified to the injuries. One was a neck wound. Was a superficial wound or incise wound. The other wound penetrated to a depth of three and one-eighth of an inch. And then she was shot behind, above the right ear.
>
> What was the motive? The motive was the special circumstance that you have found, financial gain. Now, consider that in and of itself under factor "A" evidence. Why did Mr. O'Malley take her life? Because it was a contract, it was, you have found, a killing for financial gain.
>
> Was there any remorse on his part in terms of that particular killing? You have heard the testimony of Robert Fulton. Robert Fulton testified around pages 3463 et. seq. of the trial transcript here that Mr. O'Malley told him that he had stabbed Sharley Ann in the neck a couple of times. Then he described it. He described the blood spurting out of her neck. He held his hand over the floor three feet and said, "it was that high."
>
> Any remorse on the part of that man who sits here in court today? What did he say? He said, "she was a tough bitch to kill," or "she was a tough bitch to die." [¶] Now, a killing done for a friend of his, Geary German, who, for his own reasons,

> wanted his wife dead. I submit to you that when you weigh the circumstances of that crime, again put your own moral value in, evaluation, for what it's worth. In terms of all of the other factors—and I submit that it is reasonable to believe that all murder is bad, that if you wonder in this particular case—and you can consider—and you can consider what did Sharley Ann think about in those seconds or minutes before she lost consciousness under these circumstances, because recall Jimmy O'Malley was a friend of hers, or at least somebody that she knew, somebody who had been in her house before and this is the man who turned on her to kill her, someone to whom she was vulnerable, because it wasn't somebody that she thought would do her harm, and he took advantage of that.
>
> Now, not only is that aggravating, but when you look at the special circumstance involved, financial gain, I submit that it is reasonable to believe that killing itself is wrong, but killing for money, taking someone else's life, a gift that is so great as to be beyond description, taking someone's life for money, and I submit that that is the most heinous, it's a circumstance you can consider, evaluate it, determine what you feel that is morally worth.
>
> Now, is that it? Consider anything else about the circumstances of the crime and the special circumstance there, the financial gain. And remember, we're talking about two different things, because you can consider the circumstances of the crime and the special circumstance.

(59 RT 12232-12234.)

As to the Parr murder, the prosecutor argued that the facts underlying Parr's murder during the course of the robbery were particularly heinous when compared to a typical murder resulting from a simple "robbery gone bad." In addition, that Parr's murder was all the more heinous given appellant's planning of the robbery and killing, the motorcycle being the motivation behind the murder, and Parr's vulnerability given his relationship with appellant. (59 RT 12235-12237.)

Appellant claims that because the prosecutor relied in argument on the financial gain and robbery special circumstances and on the circumstances

underlying the German and Parr murders, it is reasonably likely the jury "double counted the special circumstances in deciding to impose death." (AOB 253.)

As provided by CALJIC No. 8.85, the jury may properly consider the circumstances and facts underlying each murder in addition to the existence of the special circumstances. (See also *People v. Cain* (1995) 10 Cal.4th 1, 68 ["The facts underlying the special circumstance findings are among the circumstances the jury may consider. An instruction not to consider the special circumstances 'would defeat the manifest purpose of factor (a) to inform the jurors that they should consider, as one factor, the totality of the circumstances involved in the criminal episode that is on trial." [Citation.]].)

As noted by the foregoing, the prosecutor here urged the jury to rely on the circumstances underlying the murders as well as the existence of the attendant special circumstances. (See also 59 RT 12226 [before the challenged portion of the prosecutor's argument, the prosecutor explained to jury that under factor (a), it could consider "the circumstances of the crimes of which the defendant was convicted in the present proceeding and the existence of any special circumstances to be true"]; 59 RT 12231 [same].) The prosecutor did not ask the jury to double count those facts. (See *People v. Mincey*, *supra*, 2 Cal.4th at p. 474 ["the prosecutor merely asked the jury to consider the offenses, not that it consider them two or three times. The prosecutor's argument did not mislead the jury. Thus, the trial court did not err in giving CALJIC No. 8.84.1 (4th Ed.) in this case."].) In any event, the prosecutor here did not focus on the number of factors to be weighed; to the contrary, he told the jury at least three times that it was not to merely count the existing factors when determining appellant's penalty. (See 59 RT 12219-12220, 12228.) The prosecutor also repeatedly told the jury that its verdict should be based "upon a moral evaluation of the

relative importance of those factors[,]" that it was "a matter of quality, not quantity," and that the jury was to assign its own value to the relevant factors. (59 RT 12219-12220, 12223, 12225-12228, 12232, 12235, 12237, 12321.) Moreover, the trial court instructed the jury with CALJIC No. 8.88 that "[t]he weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side of an imaginary scale[.]" (59 RT 12213.)

Given the totality of the prosecutor's argument and the trial court's instruction to the jury, there is no possibility the jury would have understood that it could count the murders of Sharley Ann German and Herbert Parr and their attendant special circumstances more than once as aggravating factors. (See *People v. Welch* (1999) 20 Cal.4th 701, 766 ["When reviewing a supposedly ambiguous instruction jury instruction, '"we inquire 'whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the Constitution."'"])

> Nor does defendant point to anything in the record suggesting any possible confusion by the jury in his case. Here, the prosecutor's closing argument suggested how each piece of evidence fit under the specified statutory factors. He also told the jury, in language similar to CALJIC No. 8.88, also given to the jury, that it should not engage in a "mere mechanical counting of factors on each side of an imaginary scale" and that, in determining which penalty is justified, it should consider the totality of the aggravating circumstances with the totality of the mitigating circumstances. In light of the prosecutor's remarks and the standard instructions about the weighing of aggravating and mitigating circumstances given in this case, we find no reasonable likelihood the jurors were misled or confused in the manner defendant suggests. [Citation.]

(*People v. Lewis* (2001) 25 Cal.4th 610, 669.)

> Here, defendant's concern is undercut by the fact that the jury was instructed that weighing the aggravating and mitigating circumstances is not a mechanical counting of factors and that in

> determining the appropriate penalty it was to consider the totality of the aggravating and mitigating circumstances. This followed the prosecutor's admonition that the penalty determination did not call for a mechanical procedure, the jury was not to simply add up the factors on the aggravating and mitigating side, and that the aggravating "evidence" must substantially outweigh the mitigating "evidence" to support imposition of the death penalty."

(*People v. Holt*, *supra*, 15 Cal.4th at p. 699.)

To the extent appellant claims his federal constitutional rights were violated (see AOB 253), appellant's failure to object below on this basis waives the issue on appeal. (See e.g., *People v. McPeters* (1992) 2 Cal.4th 1148, 1174 [to preserve federal Sixth Amendment issue for appeal, appellant must make specific objection on that ground at trial].) Regardless, in light of the trial court's instruction with CALJIC No. 8.88, the prosecutor's reiteration of the instruction, and the overwhelming evidence presented by the prosecution regarding the heinous nature and facts underlying the three murders, and the existence of the remaining multiple murder special circumstance, any alleged error by the prosecutor was harmless under any standard. (See *Chapman v. California*, *supra*, 386 U.S. at p. 24; *People v. Watson*, *supra*, 46 Cal.2d at pp. 836-837.)

XVI. THE PROSECUTOR DID NOT COMMIT MISCONDUCT IN HIS PENALTY PHASE CLOSING ARGUMENT

Appellant claims the prosecutor committed six instances of misconduct in his penalty phase closing argument. (AOB 256-265.) Not so.

A prosecutor's conduct constitutes misconduct "if it amounts to 'the use of deceptive or reprehensible methods to attempt to persuade the jury' [citations] or 'is so egregious that it infects the trial with a degree of unfairness that makes the conviction a denial of due process. [Citation.]" (*People v. Silva* (2001) 25 Cal.4th 345, 373.) As to closing argument, there

is great latitude allowed "to urge whatever conclusions counsel believes can properly be drawn from the evidence. [Citation.]" (*People v. Cash* (2002) 28 Cal.4th 703, 732.) The prosecutor may make fair comment on and may argue reasonable inferences from the evidence. (*People v. Wharton* (1991) 53 Cal.3d 522, 567.) The prosecutor may also comment on apparent inconsistencies in the defendant's arguments (*People v. Bell* (1989) 49 Cal.3d 502, 537) and may refer to matters of common knowledge or illustrations drawn from common experience. (*People v. Wharton*, *supra*, 53 Cal.3d at pp. 567-568.)

A. The Prosecutor Did Not Ask the Jury to Double-Count Facts in Aggravation

First, appellant repeats his claim that the prosecutor misled the jury into double-counting the facts underlying the German and Parr murders and their attendant special circumstances. (AOB 258-259.) Appellant did not object to the challenged argument, nor did he request a curative admonition. Thus, his claim is waived unless he can show an objection would have been futile or that any harm would not have been cured by an admonition. (See *People v. Bradford*, *supra*, 15 Cal.4th at p. 1333.)[72] Appellant has not even attempted to do so. Regardless, there is no reason to believe the trial court would not have responded to an objection by appellant, nor is there evidence that a curative admonition would not have cured any harm. Only in extreme circumstances is a trial court unable to

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[72] The primary purpose of the requirement that a defendant object at trial to argument constituting prosecutorial misconduct is to give the trial court an opportunity, through admonition of the jury, to correct any error and mitigate any prejudice.

(*People v. Williams*, *supra*, 16 Cal.4th at p. 254.) Had appellant preserved his claim, the trial court would have had the opportunity to quickly remedy the situation with a curative admonition. (See *People v. Visciotti* (1992) 2 Cal.4th 1, 83; *People v. Hardy*, *supra*, 2 Cal.4th at p. 212.)

correct an improper remark by counsel by instructing the jury to disregard the comments. (See *People v. Fitzgerald* (1972) 29 Cal.App.3d 296, 312.) In any event, for the reasons enunciated *ante* in Argument XV, even assuming the prosecutor's remarks in closing were misleading, it is not reasonably probable appellant's penalty phase verdict would have been favorable absent the challenged remarks. (See *People v. Barnett* (1998) 17 Cal.4th 1044, 1133; see also *People v. Watson*, *supra*, 46 Cal.2d at p. 836.) No reversal is warranted here. (See *People v. Barnett*, *supra*, at p. 1133.)

B. The Prosecutor Did Not Commit Misconduct by Pointing out the Difference Between the Murders and the Imposition of the Death Penalty

Second, appellant argues that the prosecutor "inflame[d] the passions of the jury" by improperly comparing the fact that he was afforded the constitutional right to counsel and a jury trial to the fact that appellant's victims were not afforded such rights. (AOB 259.) Appellant's failure to object on this basis at trial and/or to request an admonition forfeits this claim on appeal. (See *People v. Bradford*, *supra*, 15 Cal.4th at p. 1333.) The challenged argument did not inflame the jury in any event.

Just before the first passage challenged by appellant, the prosecutor anticipated the jury's concern at imposing the death penalty. For instance, the prosecutor argued that given the length of trial and the testimony heard and considered, it could not "be said that the penalty to be given Mr. O'Malley, whatever you decide appropriate to do, will be something that was a decision of an angry mob." (59 RT 12215.) Just before the next challenged passage, the prosecutor addressed whether it was wrong for the State to take a life, "if it's wrong for the defendant to kill[.]" (59 RT 12217.) The prosecutor then highlighted the fact that the difference between the murders committed by appellant and the imposition of the death penalty was that if the jury decided to impose the death penalty, it

would only be after appellant had exercised his constitutional rights and after the jury had conducted a "lengthy and exhaustive consideration" of the appropriate penalty. (59 RT 12217.) Last, the prosecutor requested that the jury consider the mercy appellant showed his victims. (AOB 259.) The prosecutor followed this argument by noting that although the jury should consider mercy for appellant, based on the evidence presented, there was "not enough . . . to outweigh all of the other factors in aggravation." (59 RT 12259.)

In none of the instances challenged by appellant did the prosecutor "inflame the passions of the jury." To the contrary, the prosecutor's arguments were merely a means of highlighting the extensive evidence presented at both phases of the trial, and to compare the weight of the evidence presented on both sides of the issue. The common-sense interpretation of the prosecutor's argument was not that the jury should impose death because the victims here were denied the constitutional rights afforded appellant, but that given the weight of the evidence presented by the prosecution, death was an appropriate sentence and that after a consideration of the evidence, any conclusion would not be arrived at lightly. The challenged remarks did not involve the use of "deceptive or reprehensible methods" to persuade the jury, nor did they unfairly infect the trial so as to deny appellant his right to due process. The prosecutor did not commit misconduct.

Appellant's reliance on several out-of-state cases is misplaced. (See *Goodin v. State* (Miss. 2001) 787 So.2d 639, 653 [court found error where prosecutor argued that victim did not have a lawyer or the Constitution to protect him the night the defendant killed him; court ultimately found that reversal was not warranted in light of overwhelming evidence against defendant]; *People v. Johnson* (Ill.App. 1 Dist. 2000) 317 Ill.App.3d 666, 675-677 [court found prosecutor's argument that defendants were victims,

judge, jury, and executioner error because they urged jury to vindicate victim's rights; court only found prejudice when considering this error with a number of other errors]; *Griffith v. State* (Okla.Crim.App. 1987) 734 P.2d 303, 308 [while court found improper prosecutor's argument that defendant had rights to jury trial, inter alia, rights which the defendant did not allow his victim, error was harmless in light of significant evidence presented of defendant's guilt]; *State v. Pindale* (N.J.Super.Ct.App.Div. 1991) 249 N.J. Super. 266, 284-287 [while prosecutor noted that our justice system gives defendant rights that were honored, and the defendant gave no rights to his victims, court reversed defendant's conviction only after finding several other inflammatory arguments and other errors at trial].)

First, none of these cases are controlling here. (See *Moradi-Shalal v. Fireman's Fund Ins. Companies* (1998) 46 Cal.3d 287, 298.) Second, and most important, in only one of these cases did the court find reversible error, and in that case, it was only in combination with several other instances of prosecutorial misconduct *and* other errors at trial. (See *State v. Pindale*, *supra*, 249 N.J.Super. at pp. 286-287.) In contrast, here, as noted *ante*, the challenged comments did not constitute misconduct in the first instance. Moreover, as noted *ante* and *post*, there were no other instances of misconduct on which to predicate a finding of reversible error.

C. The Prosecutor Did Not Argue that the Jury Should Reject Sympathy And Remorse As Potential Mitigating Factors

Next, appellant claims the prosecutor improperly told the jury it could consider the mitigating evidence presented by appellant "as a reason to reject sympathy and remorse as potential mitigating factors." (AOB 260.) Appellant's interpretation of the challenged argument is misplaced.

The prosecutor argued in relevant part as follows:

> But I submit that you can make the finding that there is no fetal alcohol syndrome here. You can assess that testimony even if

there were. [*sic*] I submit it doesn't, it does not serve to out balance the substantial aggravating factors that we have here. So what I'm saying is that it's not there, but even if it were, it's not enough, it's far too little, too late to justify a life without parole as opposed to death.

And remember this: what we have to do during the guilt phase of this trial, what we are dealing with here is blame. We're dealing with the concept of blame. Think about it for a second. In the guilt phase of the trial, Mr. O'Malley took the stand and testified for 13 days and whatever, and indicated, "I didn't do the Sharley Ann German Killing," indicated that Rex Sheffield did the other two. Blame.

Guilt phase, blaming Rex Sheffield. Penalty phase, I submit blame again, finger of blame on bad father, finger of blame on drinking mother, finger of blame on Fetal Alcohol Syndrome. All right. There's no remorse there. There's no accepting of responsibility for terrible crimes, not one but three.

Now, when you consider all of this you get to a point where sympathy and mercy will make us so civilized that we will end up being automatic cheek turners with no defenses against the predators in our society and I submit to you that Mr. O'Malley is a predator in our society. No remorse in connection.

(59 RT 12256-12257.)

The prosecutor was clearly arguing that by presenting evidence in the guilt phase that he did not kill Sharley Ann German, and that Rex Sheffield killed Herbert Parr and Michael Robertson, and by essentially claiming in the penalty phase that he committed the three murders as a result of his father's abuse and his mother's consumption of alcohol while she was pregnant, appellant refused to accept responsibility, and that the jury should consider that. The prosecutor's inference was a reasonable one based on the evidence presented at trial; it was thus proper. (See *People v. Wharton*, *supra*, 53 Cal.3d at p. 567.) Moreover, contrary to appellant's claim, the prosecutor did not argue that the jury should "reject sympathy and remorse as potential mitigating factors." (See AOB 260.)

D. The Prosecutor Did Not Commit Misconduct by Asking for Justice for the Victims

Fourth, appellant contends that the prosecutor committed misconduct by asking the jury to impose the death penalty as "justice for the victims, justice in this case." (AOB 261-262; 59 RT 12259.) Appellant's failure to object to this comment and/or request an admonition waives his claim of error. (See *People v. Bradford*, *supra*, 15 Cal.4th at p. 1333.) Regardless, just before the challenged comment, the prosecutor asked the jury to "follow the law, consider the evidence, and render a just verdict. What we're asking for is justice[.]" (59 RT 12259.) The jury thus clearly understood that the prosecutor was saying that based on the evidence presented in this case, imposing the death penalty would be a just verdict. In any event, the challenged comment did not constitute misconduct. (See *People v. Medina* (1995) 11 Cal.4th 694, 777-778 [prosecutor's argument that imposing life without possibility of parole would not constitute justice for victims, and comment that "It is not justice, and that is what you are here for" did not exceed "bounds of propriety"].)

E. The Prosecutor Did Not Improperly Appeal to the Jury's Sense of Patriotism

Fifth, appellant challenges the italicized portions of the following passages from the prosecutor's closing argument:

> Guilt phase, blaming Rex Sheffield. Penalty phase, I submit blame again, finger of blame on bad father, finger of blame on drinking mother, finger of blame on Fetal Alcohol Syndrome. All right. There's no remorse there. There's no accepting of responsibility for terrible crimes, not one but three.
>
> Now, when you consider all of this you get to a point where sympathy and mercy will *make us so civilized that we will end up being automatic cheek turners with no defense against the predators in our society* and I submit to you that Mr. O'Malley is a predator in our society. No remorse in connection.

(59 RT 12256-12260, emphasis added.)

> And then,
>
> Every one of us has given up our right to take the law in [*sic*] our own hands, has entrusted the state to apply it. When you do that you fight against the greatest evil that man can commit and that's self help and people taking it upon themselves. Ladies and gentlemen, I say that *a free society requires of its citizens, of its jurors, vigilance, courage, the strength and resolve in making the hard decision that you're going to have to make.*

(59 RT 12259-12260, emphasis added.)

According to appellant, the italicized portions of the foregoing arguments constituted misconduct by improperly appealing to the jury's sense of patriotism as a means of urging it to impose death. (AOB 262.) Appellant's failure to object and/or request an admonition waives this claim on appeal. (See *People v. Bradford*, *supra*, 15 Cal.4th at p. 1333.) The remarks did not constitute misconduct in any event.

As noted *ante*, the first challenged remarks were directly preceded by the prosecutor's argument that based on the evidence and argument presented by appellant, he was casting blame on his parents rather than accept responsibility for his actions. The prosecutor then argued that relying on this evidence as a reason not to impose death would essentially constitute turning the other cheek to the fact that appellant, and others like him, are predators, and thus responsible for their actions. The challenged remarks were a reasonable inference based on the evidence presented by appellant and were thus proper.

The second challenged remarks were not, as urged by appellant, an appeal to the jury to impose death based on a sense of patriotism, but a means to underscoring that the jury would need courage and strength to make the decision in the first instance, without urging a particular result. This argument was not improper. (See *People v. Wash* (1993) 6 Cal.4th 215, 261-262 [where prosecutor urged "jury 'to make a statement,' to do

'the right thing,' and to restore 'confidence' in the criminal justice system by returning a verdict of death" no misconduct found]; see also *People v. Adanandus* (2007) 157 Cal.App.4th 496, where prosecutor's references to concept of restoring law and order to community were appeal for jury to take duty seriously instead of an effort to incite jury against defendant, comments did not constitute misconduct].)

The cases relied on by appellant are not controlling here, and in any event are distinguishable from the instant case. (See *Brooks v. Kemp* (11th Cir. 1985) 762 F.2d 1383, 1415-1416 [court found that "war on crime" comment by prosecutor suggested that the jury "should forego an individual consideration of" the defendant's case; court ultimately found no prejudice]; *Hance v. Zant* (11th Cir. 1983) 696 F.2d 940, 951-953 [while court found that prosecutor's comment asking jury "to join in the war against crime" by imposing death was a "dramatic appeal to gut emotion" the prosecutor also compared war on crime to wars fought by veterans who fought to protect our freedoms, and asked jury "to take the step to do something about this situation[;]" moreover, court only found error prejudicial in connection with several other instances of misconduct]; see also *Evans v. State* (Nev. 2001) 28 P.3d 498, 515 [prosecutor's comment as to whether jury had "intestinal fortitude" to do its "legal duty" was meant to distract jury from its job of being impartial, but court ultimately found prejudice, but only in combination with other instances of misconduct].)

Here, unlike the cases cited by appellant, the prosecutor did not urge the jury to impose death based on "gut emotion." Nor did the prosecutor here urge the jury to forego an individual consideration of appellant's case or to appeal to the jury's sense of partiality. To the contrary, the prosecutor repeatedly relied on and argued inferences from the evidence presented at both phases of trial to urge imposition of the death penalty. The challenged remarks did not involve the use of "deceptive or reprehensible methods" to

persuade the jury, nor did they unfairly infect the trial so as to deny appellant his right to due process. As such, they did not constitute misconduct.

F. The Prosecutor Did Not Misstate the Law Regarding Lingering Doubt

Last, appellant points to the italicized portion of the following argument as the basis for his claim that the prosecutor misstated the law as to lingering doubt. (AOB 263-264.)

> During the jury selection process, some of you expressed a concern about imposing the death penalty upon someone unless you knew the person was truly guilty. Now, let's be clear at this particular point. Your guilty verdict showed that the evidence convinced you beyond a reasonable doubt and to a moral certainty that the defendant, James Francis O'Malley, is guilty of these crimes. He is not innocent at this point. The presumption of innocence has evaporated and guilt has been determined. *You don't need to worry about executing an innocent man.* You have heard about his past, the things that he has done, you have heard about the circumstances of these crimes and now you need to make that decision, to reach that decision, as to what the appropriate penalty is.

(59 RT 12216, emphasis added.)

By addressing the concern voiced by some of the jurors during voir dire that they might have trouble imposing the death penalty unless the defendant was "truly guilty," the prosecutor was arguing that because the jury had found appellant guilty beyond a reasonable doubt of the three charged murders, the jury had no basis for such a concern at the penalty phase. This argument in no way urged the jury to ignore any lingering doubt as to appellant's guilt when it decided what penalty to impose. Appellant's claim to the contrary should be rejected.

As noted by the foregoing, none of the challenged remarks constituted prosecutorial misconduct, nor was appellant prejudiced. Given this lack of prejudice, appellant's claim of ineffective assistance of counsel for his

attorney's failure to object to the alleged instances of misconduct (AOB 264-265), must also fail. (See *Strickland v. Washington*, *supra*, 466 U.S. at p. 686.)

XVII. APPELLANT'S CONSTITUTIONAL ATTACKS ON CALIFORNIA'S SENTENCING SCHEME MUST BE REJECTED

Appellant next attacks California's sentencing scheme on various bases. (AOB 266-269.) As appellant recognizes, this Court has already considered and rejected each of these claims.

First, appellant attacks the trial court's instruction to the jury that it could consider his age as an aggravating factor. (AOB 266-267.) Relying on age as a factor in aggravation was permissible. (See *People v. Lucky*, *supra*, 45 Cal.3d at p. 302; see also *Tuilaepa v. California* (1994) 512 U.S. 967, 977 [rejecting vagueness challenge to factor (i) based on claim that it can be aggravating or mitigating].)

Second, appellant attacks California's capital punishment scheme, claiming it "violates the Eighth Amendment and fails to provide a meaningful and principled way to distinguish the few defendants who are sentenced to death from the vast majority who are not." (AOB 267.) This claim was rejected by this Court in *People v. Schmeck* (2005) 37 Cal.3d 240, 304.

Third, appellant claims that section 190.3, subdivision (a), is arbitrary and capricious because it improperly permits the jury "to sentence a defendant to death based on the 'circumstances of the crime'[.]" (AOB 267.) This Court rejected this claim in *People v. Schmeck*, *supra*, 37 Cal.4th at pp. 304-305.

Fourth, appellant attacks section 190.3, subdivision (c) , claiming it improperly allows the jury to rely on a prior conviction as an aggravating factor without unanimously agreeing that the defendant committed the prior

offense. (AOB 267.) Again, this Court rejected this claim in *People v. Schmeck*, *supra*, 37 Cal.4th at p. 304.

Fifth, appellant argues that section 190.3, subdivision (b) improperly allows the jury to rely on evidence of prior criminal acts involving the use of violence without unanimously agreeing that the conduct in fact occurred. (AOB 268.) This claim was rejected in *People v. Lewis*, *supra*, 39 Cal.4th at p. 1068.

Sixth, appellant attacks the trial court's failure to instruct the jury that it had to find that the aggravating circumstances outweighed the mitigating circumstances beyond a reasonable doubt. (AOB 268.) This Court rejected this claim in *People v. Schmeck*, *supra*, 37 Cal.4th at p. 304.

Seventh, appellant contends that CALJIC No. 8.85 is "constitutionally flawed in five ways: (1) it failed to delete inapplicable sentencing factors, (2) it failed to delineate between aggravating and mitigating factors, (3) it contained vague and ill-defined factors, (4) some mitigating factors were limited by adjectives such as 'extreme' or 'substantial,' and (5) failed to specify a burden of proof as to either mitigation or aggravation." (AOB 268.) Appellant recognizes that these claims were rejected in *People v. Schmeck*, *supra*, 37 Cal.4th at pp. 304-305.

Eighth, appellant argues that "the California death penalty scheme violates international law[.]" (AOB 269.) Again, this claim was rejected in *People v. Schmeck*, *supra*, 37 Cal.4th at p. 305.

Ninth, appellant points to the introduction at the penalty phase of evidence of appellant's prior conviction, claiming that the introduction of this evidence violated principles of double jeopardy. (AOB 269.) Not so. (See *People v. Bacigalupo* (1991) 1 Cal.4th 103, 134-135 (judg. vacated and cause remanded (1992) 506 U.S. 802, reaffd. (1993) 6 Cal.4th 457.)

Last, appellant claims that "[a]llowing a jury which has already convicted the defendant of first degree murder to decide if the defendant

has committed other criminal activity violated [his] Fifth Sixth, Eighth and Fourteenth Amendment rights to an unbiased decisionmaker." (AOB 269.) This claim was rejected in *People v. Hawthorne* (1992) 4 Cal.4th 43, 77.

As noted by the foregoing, the various claims raised by appellant have been considered and rejected by this Court. Appellant offers no persuasive reason why the result should differ in this case.

XVIII. THE TRIAL COURT PROPERLY DENIED APPELLANT'S NEW TRIAL MOTION

Next, appellant claims the trial court erroneously denied his new trial motion, thus violating his state and federal constitutional rights. (AOB 270-282.) Appellant's motion was properly denied.

A. Relevant Proceedings

After the conclusion of appellant's penalty phase trial, appellant filed a new trial motion under section 1181, subdivision 8, arguing that the discovery of new evidence warranted the granting of a new trial. (See 27 CT 194-209.) Appellant's written motion relied on the affidavits of Louis Lombardi and James Dolan III. (25 CT 6194-6209.) In his oral argument to the court, appellant also relied on information discovered relating to Richard Lillis and prosecution witness Karen O'Neal. (11/21/91 RT 4-15.) All the "new evidence" profferred by appellant related solely to the case involving Sharley Ann German's murder, and purportedly supported his contention that he was back east, and not in California at the time she was killed. (See 25 CT 6196.) After considering the evidence presented on the matter, the trial court denied appellant's motion as follows:

> Well, the court was given the motion for a new trial prior to coming out here this morning. So the court had a chance to review it as well as the declarations attached to it.
>
> First of all, the court finds the evidence overwhelming that at the time of the Sharley Ann German homicide the defendant was not back east. The credibility of Mr. Lombardi is extremely

questionable based on him changing his stories. The court does not find this to be newly discovered evidence, just an affirmation of one of Mr. Lombardi's versions of what his testimony may have been.

The other witnesses' testimony or declarations or statements is questionable. Whether or not that would even be newly discovered evidence under 1181, subsection 8, of the Penal Code on the motion for a new trial, and whether or not—it's extremely doubtful whether or not that would have in any way made any difference in the eventual verdict. If they had testified, or Mr. Lombardi had testified, in accordance with the affidavits, then, everything considered, no different result would have taken place, especially in light of the other evidence that was presented, especially the phone records. The motion for a new trial is hereby denied.

(11/21/91 RT 16-17.)

B. Applicable Legal Principles

The standard of review of an order denying a motion for a new trial based on newly discovered evidence was established by this Court in 1887:

> "To entitle a party to a new trial on the ground of newly discovered evidence, it must appear, '1. That the evidence, and not merely its materiality, be newly discovered; 2. That the evidence be not cumulative merely; 3. That it be such as to render a different result probable on a retrial of the cause; 4. That the party could not with reasonable diligence have discovered and produced it at the trial; and 5. That these facts be shown by the best evidence of which the case admits.' . . . (*People v. Sutton* (1887) 73 Cal. 243, 247, 248, quoting 1 Hayne on New Trial and Appeal, §§ 87-88.)

(*People v. Martinez* (1984) 36 Cal.3d 816, 821, footnote omitted.)

"A motion for a new trial on newly discovered evidence is looked upon with disfavor, and unless a clear abuse of discretion is shown, a denial of the motion will not be interfered with on appeal. [Citation.]" (*People v. McDaniel* (1976) 16 Cal.3d 156, 179.)

C. The Trial Court's Denial of Appellant's New Trial Motion Was Not an Abuse of Discretion

1. Proffered testimony of Louis Lombardi

According to defense counsel's oral argument, and an affidavit attached to appellant's new trial motion, appellant's former roommate Louis Lombardi was originally scheduled to testify at appellant's guilt phase trial that appellant attended a baseball game with him in California on April 29, 1986. (11/21/91 RT 4; 27 CT 6199-6200.) When counsel spoke to Lombardi outside the courtroom before he was to testify, however, Lombardi told him he was no longer sure "about those dates[.]" (11/21/91 RT 4.) According to defense counsel, Lombardi "seemed to be . . . taking the position that he could not testify to what he had previously told" the defense investigator. (11/21/91 RT 4.) When counsel further investigated, Lombardi "emphatically told [him] that he did remember going to that baseball game and it was his testimony at that time to [counsel] . . . that [appellant] was with him at the time he went to that baseball game[.]" (11/21/91 RT 5.) As a result of this information, counsel concluded "there was no purpose in calling Mr. Lombardi to impeach [appellant]." (11/21/91 RT 5.)

After appellant was convicted of the instant offenses and sentenced to death, Lombardi indicated in an affidavit that he had told defense counsel he was no longer "sure about those dates" because he had been afraid to testify, but that that had not been the truth. (27 CT 6200-6201.) According to Lombardi, he "did not know at the time, the importance of [his] testimony." (27 CT 6201.)

First, as the trial court noted, this evidence was not newly discovered, but was merely "an affirmation of one of Mr. Lombardi's versions of what his testimony may have been." (11/21/91 RT 16.) Second, even assuming Mr. Lombardi testified on retrial consistent with the statements contained in

his affidavit, this evidence would not have rendered a different result. As the trial court noted, Lombardi's credibility was "extremely questionable based on him changing his stories[.]" (11/21/91 RT 16; see also *id.* at p. 13 [prosecutor noting that on retrial, Lombardi "would be subject to impeachment with his statement" that he went to a baseball game in California with appellant]; see also *People v. Beyea* (1974) 38 Cal.App.3d 176, 202 ["the trial court may consider the credibility as well as materiality of the evidence in its determination [of] whether introduction of evidence in a new trial would render a different result reasonably probable"].) Lombardi's credibility was further damaged by the fact that he did not come forward until after appellant was sentenced to death. Last, the prosecution possessed overwhelming evidence of appellant's guilt as to the German murder (see Arg. III, § D *ante*), evidence which would presumably be presented to a future jury. Because appellant cannot satisfy at least two of the requisite factors, there is no basis for this Court to interfere with the denial of appellant's new trial motion based on Lombardi's post-trial declaration. (See *People v. Delgado* (1993) 5 Cal.4th 312, 329 & fn. 7 [where this Court found that evidence proffered by defendant would not render different result on retrial, was no need to reach remainder of five *Sutton* factors when determining whether denial of new trial motion was abuse of discretion].)

2. Proffered testimony of James Dolan III

Appellant also attached an affidavit to his new trial motion in which his father-in-law James Dolan III, stated in relevant part that while appellant was "on the run," he received a telephone call from inspector Dennis Clark.[73] (27 CT 6204-6205; see also 11/21/91 RT 6.) Clark

[73] Clark was an inspector for the Santa Cruz County District Attorney's Office. (31 RT 6471.)

allegedly told Dolan at that time that appellant had committed "three murders . . . one female and two males." (27 CT 5205.) According to defense counsel, this evidence contradicted testimony by several deputies from the sheriff's department that they never told "anybody that Mr. O'Malley was wanted" for two murders besides Robertson's. (11/21/91 RT 7.) First, there is no basis to believe that this evidence was newly discovered. Counsel provided no information as to why the information provided by James Dolan could not be obtained at an earlier time. Given the fact that James Dolan was Karen Dolan's father, and she was involved in appellant's case beginning with his preliminary hearing and on through both his guilt phase and penalty phase trials, it is unlikely he could not be located and/or he was unaware that the information provided could have been relevant. Additionally, given the late date on which Dolan came forward with this information, even if this evidence was presented in a retrial, his credibility would have been attacked by the prosecution, especially in light of his close family relationship with appellant and the effect a death sentence imposed on appellant would have on his daughter and his grandchildren. Moreover, in light of testimony by several police officers contradicting Dolan's statement, the testimony would likely have carried little weight.

In any event, this evidence was presumably relevant to show that the reason appellant knew he was wanted for Sharley Ann's murder was that Dolan informed him of this fact. Appellant testified at trial, however, that his mother gave him this information while he was on the run in Reno. (45 RT 9323.) Given Brandi Hohman's testimony that appellant told her he killed Sharley Ann while they were in San Francisco, before they ever left for Reno, including details of the murder that she could only have obtained from the actual killer; e.g., that Sharley Ann was killed with a .25 caliber gun, and that appellant had killed her because "her husband had wanted

him to do it[]" (28 RT 5860), it is unlikely that presentation of Dolan's testimony on the matter would help appellant. In fact, given its implausibility, it would likely have hurt his case. Again, because appellant cannot satisfy at least two of the requisite *Sutton* factors, there is no basis for this Court to conclude that the trial court's denial of appellant's new trial motion based on Dolan's post-trial declaration was an abuse of discretion.

3. Proffered testimony of Richard Lillis

Next, defense counsel orally represented that his investigator had located appellant's high school hockey coach Richard Lillis, who indicated that he remembered seeing appellant in the Boston area on April 20, 1986. (11/21/91 RT 7-8.) "Present with Mr. Lillis was his wife, who is presently trying to see if she can locate a diary she normally keeps to see if there was any notation about running into [appellant] on that specific date." (11/21/91 RT 8.)

Even assuming arguendo the remaining four *Sutton* factors are met here, it is not likely that admission of this evidence at a retrial would have rendered a different result. First, Lillis's proposed testimony was presented orally by defense counsel rather than in the form of testimony or an affidavit under penalty of perjury,[74] thus, detracting from the force of the evidence. Second, the fact that Lillis's wife was trying to confirm the date that she and Lillis saw appellant back east (see 11/21/91 RT), indicates that Lillis was not sure of the date in the first instance. Last, in light of the overwhelming evidence presented at trial to support the murder as to Sharley Ann German (see Arg. III, § D *ante*), "especially the phone

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[74]The prosecutor here did not object to the presentation of this evidence without an affidavit, and in fact noted he believed the court could consider it. (11/21/91 RT 15.)

records[,]" (see 11/21/91 RT 16-17), there is no reason to believe that if Lillis testified at a retrial, his testimony would effect a different result.

Because it is "extremely doubtful" (see 11/21/91 RT 16) that Richard Lillis's proposed testimony would make a difference on retrial, this Court cannot say that the trial court's denial of appellant's new trial motion based on this testimony was an abuse of discretion.

4. Proffered Impeachment of Karen O'Neal

Last, defense counsel orally represented that pursuant to an investigation by a defense investigator into Karen O'Neal's divorce records, the defense learned that O'Neal's attorney wrote a letter to the court dated May 7, 1986, indicating that she wanted to settle her case. (11/21/91 RT 8.) Counsel explained that this information was significant because O'Neal had testified that during a telephone conversation with appellant on April 14, 1986, which was confirmed to have been made while appellant was in California, appellant threatened her, and that immediately after the call she "started to make arrangements to . . . settle the case[.]" (11/21/91 RT 8.) Counsel further explained that documents in the court file showed that O'Neal had executed something akin to a property settlement statement on April 19, 1986, indicating that at that point she was still hoping to retain some assets. This information, counsel asserted, was also inconsistent with O'Neal's testimony that right after being threatened by appellant she told her attorney to settle her case. According to counsel, this evidence led to the conclusion that O'Neal talked to appellant later than April 14, 1986, much closer to the May 7, 1986 date her attorney wrote a letter to the court. (See 11/21/91 RT 8-9.)

The trial court's denial of appellant's new trial motion on the basis of this alleged impeachment evidence was warranted. First, appellant has made no showing that this was newly discovered evidence. Presumably if the evidence was filed in court in May 1986, it was available at that time.

Appellant has not shown he "could not with reasonable diligence have discovered and produced it at" or before his guilt phase trial and then used it to impeach O'Neal while she testified during the prosecutor's rebuttal. Second, even assuming this evidence was new and that appellant was reasonably diligent in obtaining it, it was not likely "to render a different result" on retrial. The evidence was not presented in any official capacity, e.g., the court was not provided court documents supporting the proposed evidence, but was only presented with defense counsel's oral representations. Moreover, the fact that O'Neal's attorney filed the letter dated May 7, 1986, says nothing to when O'Neal advised him she wanted to settle the case. Likewise, the fact that a property settlement statement was executed on April 19, 1986, does not indicate when and what O'Neal conveyed to her attorney about the case. If, for instance, the settlement statement was filed with the court on April 19, 1986, it could have been, and probably was drafted quite a bit earlier. Presumably O'Neal's attorney executed the document sometime after a discussion with O'Neal on whether she wanted to settle the case. In theory, O'Neal could have given her attorney the "go ahead" to execute it before she was threatened by appellant, and simply failed to notify him that she wanted to withdraw it. In any event, given the evidence presented by the prosecution to support appellant's commission of Sharley Ann's murder (see Arg. III, § D *ante*), and the flimsy nature of the proposed evidence, it cannot be said that the trial court's denial of appellant's new trial motion on the basis of this evidence was an abuse of discretion.

As noted by the foregoing, at a minimum, the evidence presented by appellant at his new trial motion would likely not have affected his verdict had he been retried in light of the overwhelming evidence presented of appellant's guilt as to the German murder, and the fact that the evidence presented by appellant would presumably be used to merely discredit the

prosecution's evidence that appellant was in California when German was killed. (See e.g., 6 Witkin & Epstein, Cal.Criminal Law (3d ed. 2000) Criminal Judgment, § 96, pp. 128-129 ["New evidence calculated merely to discredit a witness at the trial is considered of slight importance" unless case was weak and evidence "completely discredit(s)" principal witness]). Given the deference afforded the trial court's ruling, appellant cannot show that the court's denial of his motion for a new trial was "a manifest and unmistakable abuse of discretion." (See *People v. Williams* (1988) 45 Cal.3d 1268, 1318.) The trial court's finding should not be disturbed.

XIX. THE JUDGMENT AND SENTENCE NEED NOT BE REVERSED FOR CUMULATIVE ERROR

Appellant argues that the cumulative effect of the guilt and penalty phase errors require reversal of his convictions and death sentence even if no single error compels reversal. (AOB 268-269.) For the reasons explained in the preceding arguments, all of appellant's claims should be rejected as forfeited, not error, or harmless error. Respondent further submits, "'none of the errors, individually or cumulatively, "significantly influence[d] the fairness of [defendant's] trial or detrimentally affect[ed] the jury's determination of the appropriate penalty."'" (*People v. Coffman*, *supra*, 34 Cal.4th at p. 128.)

CONCLUSION

Accordingly, respondent respectfully requests that the judgment be affirmed.

Dated: September 1, 2009

Respectfully submitted,

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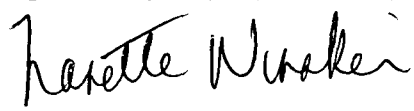

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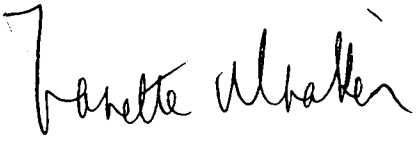
CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 57,837 words.

Dated: September 1, 2009

EDMUND G. BROWN JR.
Attorney General of California



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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. O'Malley** (CAPITAL CASE) No.: **S024046**

I declare:

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

On September 1, 2009, I served the attached **RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on September 1, 2009, at San Francisco, California.

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Declarant

E. Rios
Signature

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