IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff,

v.

PEDRO RANGEL, JR.,

Defendant.

S076785

Court of Appeal, Fifth Appellate District
Madera County Superior Court No. M13413
The Honorable John W. DeGroot, Judge

RESPONDENT'S BRIEF

EDMUND G. BROWN JR.
Attorney General of the State of California

DANE R. GILLETTE
Chief Assistant Attorney General

MICHAEL P. FARRELL
Senior Assistant Attorney General

WARD A. CAMPBELL
Supervising Deputy Attorney General

KATHLEEN A. MCKENNA
Deputy Attorney General

BRIAN ALVAREZ
Supervising Deputy Attorney General
State Bar No. 178036

2550 Mariposa Mall, Room 5090
Fresno, CA 93721
Telephone: (559) 477-1671
Fax: (559) 445-5106
Email: brian.alvarez@doj.ca.gov

Attorneys for Plaintiff

TABLE OF CONTENTS

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

Constitutional Provisions

Statutes

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

Court Rules

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, **v.** **PEDRO RANGEL, JR.,** Defendant.	S076785

STATEMENT OF THE CASE

On August 13, 1996, the Madera County District Attorney filed an information charging appellant with two counts of murder (Pen. Code, § 187, subd. (a)),[1/] in counts 1 (Chuck Durbin) and 2 (Juan Uribe); two counts of premeditated attempted murder (§§ 664/187, subd. (a)), in counts 3 (Richard Fitzsimmons) and 4 (Cindy Durbin), and willfully discharging a firearm into an inhabited dwelling (§ 246), in count 5. As to counts 1 and 2, the information alleged a multiple murder special circumstance (§ 190.2, subd. (a)(3)). The information alleged appellant personally used a firearm during the commission of the offenses (§ 12022.5, subd. (a)). (7 CT 1602-1605.)

---

1. All further statutory references are to the Penal Code unless otherwise indicated. "CT," "RT," and "AOB," refer respectively to the Clerk's and Reporter's Transcripts on Appeal, and to Appellant's Opening Brief. "SCT" refers to the Supplemental Clerk's Transcripts on Appeal. Numbers preceding and succeeding RT and CT refer respectively to the volume and page numbers, in accordance with California Rules of Court, rule 8.204(a)(1)(C). Appellant's son, Pedro Enriquez Rangel III, was originally charged in the information, however their cases were severed for trial. (9 CT 1878.) By stipulation, appellant's case was tried first. (9 CT 1939.) Pedro Enriquez Rangel III's case was heard before the California Court of Appeal, Fifth Appellate District, in case number F035206.

On August 15, 1996, appellant denied all charges and allegations. (7 CT 1606.)

On February 3, 1997, the trial court granted the prosecution's motion to dismiss count 5. (8 CT 1762, 1765; 11 CT 2354.)

On August 18, 1998, trial commenced with jury selection. (2 RT 297; 11 CT 2346.)

On September 8, 1998, the trial court granted the prosecution's motion to amend the information to strike count 3 (attempted murder of Richard Fitzsimmons), and renumber count 4 (attempted murder of Cindy Durbin) as count 3. (4 RT 847-848; 11 CT 2354.)

On September 9, the presentation of trial evidence commenced. (11 CT 2357.)

On October 1, 1998, the jury found appellant guilty in counts 1 and 2, and they found true the arming allegation in count 2 and the special circumstance. The jury acquitted appellant in count 3, and they found the arming allegation in count 1 to be not true. (10 RT 2297-2299; 11 CT 2385-2388.)

On October 6, 1998, the penalty phase commenced, and culminated on October 13, 1998, with the jury fixing appellant's penalty at death. (11 CT 2428-2434; 13 CT 2803.)

On February 8, 1999, the trial court denied appellant's motion to modify the death penalty verdict and imposed a judgment of death as to both murder counts. The court stayed the arming allegation in count 2. (13 CT 2855, 2865-2869, 2901-2920.)

This appeal is automatic (§ 1239, subd. (b)).

STATEMENT OF FACTS

Introduction

A Madera County jury convicted appellant of the home invasion murders of Chuck Durbin ("Chuck") and Juan Uribe. Trial evidence showed Chuck was shot to death in front of his three minor children by appellant and his son, Pedro Enriquez Rangel, III. Juan Uribe, Chuck's houseguest, was likewise shot to death, and Chuck's wife, Cindy, was wounded. Appellant and his son were both initially charged as codefendants, but their cases were severed for trial. (9 CT 1878.)

Many of the witnesses referred to appellant and his son, respectively, as "Big Pete" and "Little Pete." For ease of reference and to avoid confusion, respondent will adopt this nomenclature for Pedro Enriquez Rangel III, and throughout this brief refer to him as "Little Pete." Some of the witnesses share a surname, so respondent will refer to them by their first name, or in some instances by their full name for clarity.

The prosecution contended that appellant and Little Pete murdered Uribe in retaliation for a prior altercation and shooting incident where Little Pete was wounded. Appellant and Little Pete, according to the prosecution, hunted down Uribe to the Durbin household, where the murders occurred. Chuck, unfortunately, "got in the way, and they killed him." (9 RT 2128.)

GUILT PHASE

PROSECUTION CASE

I. An Altercation At A Party Escalates And Little Pete Is Shot

On September 24, 1995, Juan Uribe attended a baptism party with his girlfriend, Martha Melgoza ("Martha"). Little Pete also attended. Later, Martha saw Little Pete outside of the reception hall arguing with David Varela[2/]

---

2. Melgoza referred to Varela as "David Scott" in her testimony. (4 RT 1025-1026.)

and Carlos Romero. Martha summoned Jesse Candia, Sr. ("Candia") to quell the escalating confrontation. Carlos Romero punched Little Pete in the face. (4 RT 1008-1011.) Candia then told Little Pete to leave. Uribe was standing nearby. According to Martha, Little Pete threw up his hands and stated to Uribe "what's up?" Uribe shook his head and stated "no." Up to that point, Uribe and Little Pete had been good friends. (4 RT 1012.)

David Varela explained that Little Pete confronted Abraham Salazar outside of the reception hall and started saying "stuff" to Salazar. Varela confronted Little Pete and asked him why he was at the party. Little Pete became irate and told Varela, "You know who I am?" Little Pete wanted to fight Varela, but Candia separated them. (4 RT 1036-1038.) Varela explained that he did not want to fight Little Pete because he saw a handgun tucked in Little Pete's waistband. (4 RT 1039.) According to Varela, after Little Pete was punched, Little Pete asked Uribe, "Juan, why didn't you back me up?" Uribe replied that it was none of his business. Little Pete then angrily left in his car. (4 RT 1040-1042.)

Little Pete returned several minutes later in his car accompanied by Florentino Alvarez ("Tino"). Martha recalled that he drove slowly by the reception hall with Tino in the car. Varela's recollection was somewhat different. He recalled that Little Pete parked his car across the street from the reception hall. Tino and Richard Diaz where in the car. Varela was concerned so he reported the matter to security officers at the reception hall. (4 RT 1043.)

Richard Diaz[3/] also attended the baptism party, but left earlier. After Little Pete was punched, Diaz and Tino accompanied Little Pete back to the reception hall. Little Pete was upset and wanted to "get even." (5 RT 1292-1295.) As

---

3. Diaz, a Rangel family friend, entered a plea agreement with the district attorney. Diaz pled to a felony violation of section 32, accessory after the fact, in exchange for his testimony. (5 RT 1285-1286.)

the three drove up in Little Pete's car, "everybody started running around" and "they shut the front doors." (5 RT 1296.) Little Pete was upset with Uribe because Uribe did not intervene when he was punched. (5 RT 1298.)

Little Pete then drove Diaz back to Diaz's car. Little Pete followed Diaz in his car to Diaz's girlfriend's house, and while driving they spotted Uribe and Martha. Little Pete cornered Uribe's car in a dead end street. Diaz parked his car behind Uribe's car.[4/] Little Pete and Tino approached Uribe's car. Tino punched Uribe as Uribe sat in his car. (4 RT 1014-1015, 5 RT 1317; 5 RT 1299-1300, 1317-1318.) Uribe was upset and he drove Martha to his friend Chris Castaneda's house on Central Avenue. (4 RT 1026-1028, 1030.) Little Pete, Tino, and Diaz drove away. Diaz dropped off his car at his girlfriend's home, and then Little Pete and Tino picked Diaz up in Little Pete's car. (5 RT 1320-1321.)

At about 11:30 p.m., Varela left the baptism party to take Abraham Salazar home. Uribe, Carlos Romero, and several others were present at Salazar's home as Varela arrived. Varela saw Little Pete and Tino drive by in Little Pete's car and make a U-turn.[5/] Varela then heard about four gunshots and saw muzzle flash come from the passenger side of the Little Pete's car. Varela drove onto another street as he heard another volley of gunshots. Little Pete followed him. Varela heard a third volley of gunshots as he made a sharp turn on an intersecting street. (4 RT 1044-1048.) Varela denied shooting at anyone or possessing a gun that evening. (4 RT 1065.)

Little Pete suffered a grazing gunshot wound to his scalp as a result of this

---

4. Martha testified that Diaz was holding a handgun when he parked his car behind Uribe's car. Diaz was tapping the handgun on his passenger seat as Tino confronted Uribe. (4 RT 1026-1028, 1030.) Diaz denied doing this. (5 RT 1299-1300, 1317-1318.)

5. Diaz testified that he was in Little Pete's car with Little Pete and Tino at this time. (5 RT 1320-1322.)

incident. Madera Police Officer John Markle responded to the hospital and saw Little Pete's injury. The officer inspected Little Pete's car and noted that it sustained three bullet holes; one in the driver's side door frame, another in the front windshield, and another in the right rear bumper below the taillight. There was blood spatter throughout the car's interior. (4 RT 1068-1071.) Tino and Diaz were present at the hospital with Little Pete. Little Pete was discharged after his wound was treated. (4 RT 1077-1078; 5 RT 1322.)

II. Jesse Rangel And Others Retaliate The Following Day By Shooting Uribe's Car

The next day, Jesse Rangel ("Jesse") learned that his cousin, Little Pete, had been shot. Jesse had a close relationship with appellant and Little Pete. Jesse visited Little Pete at his apartment in Madera but did not talk to him because he was medicated and sleeping. Appellant, his wife Mary, Tino, Damian Alatorre, and their children were present. The group, including Jesse, were upset that Little Pete had been shot. (4 RT 1079-1083.)

Tino told Jesse about the confrontation at the baptism party and that Uribe shot Little Pete. Jesse, Tino, and Alatorre eventually left Little Pete's apartment to pick up Tino's cousin, Valentine Padilla ("Bingo"). The men picked up Bingo and drove to another friend's home to drink and discuss Little Pete's shooting. They were all angry and talked about retaliating against Uribe, who they blamed for the shooting. (4 RT 1083-1084, 1091, 1097.) The group decided to do a drive-by shooting. Jesse, armed with a nine-millimeter hand gun, drove Tino, Alatorre, and Bingo to Uribe's house. They saw Uribe's car. According to Jesse, Tino, the front passenger, retrieved a gun and shot up Uribe's car. (4 RT 1086.)

III. Appellant, Little Pete, Diaz, And Rafael Avila Decide To Kill Uribe

Appellant hosted a barbecue at his home during the evening of Saturday, October 7, 1995. Angela Chapa, Little Pete's girlfriend, recalled that appellant

and Little Pete remained outside in the front yard during the event. Chapa and appellant's wife Mary remained inside the house watching television. Later in the evening, which Chapa estimated to be about 8:30 p.m., she went outside to look for them, but they were gone. (4 RT 1114-1121.)

Diaz testified that he arrived at appellant's home at about 10:00 p.m. for the barbecue. Appellant, Little Pete, Rafael Avila ("Rafael"), and Sanjeevinder Singh ("Romi") were in front of appellant's home. Romi dated appellant's step-daughter, Carmina Garza ("Carmina"). According to Diaz, appellant was drinking brandy and was angry that Little Pete had been shot. Appellant believed Uribe was responsible for his son's shooting. Appellant said, "he wasn't going to let anyone get away with shooting his son in the head." (5 RT 1260-1263.) Appellant wanted to go look for Uribe.[6] (5 RT 1263-1264.)

Appellant asked Rafael to borrow his car, but Rafael offered to drive appellant because appellant appeared intoxicated. Little Pete retrieved a .22 caliber rifle from his truck. Appellant had a .380 caliber semiautomatic handgun. Diaz retrieved his .38 caliber revolver from his car. Appellant and Diaz sat in the rear seat of Rafael's car; Little Pete sat in the front passenger seat. The four men then drove to Uribe's home. (5 RT 1264-1271.)

The group drove to Uribe's home and noticed his car was not there. They then decided to drive to Chris Castaneda's home, on Central Avenue, to look for Uribe. While driving they saw Uribe's car parked on Central Avenue, across the street from a home that was later identified by Diaz as the Durbin residence. Diaz saw children watching television in the front room.[7] Little

---

6. Jesse Rangel did not attend this barbecue. Nor did he travel to Madera that evening. Instead, he was in Fresno with this family. (6 RT 1489-1491, 1586-1589, 1604-1605; 7 RT 1732-1735.)

7. Diaz testified that he did not tell his confederates that he saw children in the home because "[t]here wasn't enough time." (5 RT 1345-1346.) Moreover, Diaz claimed that he went along armed to the Durbin residence, but

Pete told Rafael to stop the car. (5 RT 1267-1268.)

Rafael turned on a side street and stopped the car. Little Pete exited the car with his rifle and ran toward the Durbin residence. Appellant and Diaz also exited the car. Appellant tripped and fell, so Diaz assisted him up. Appellant asked Diaz where Little Pete was and Diaz replied that he ran toward the Durbin residence. Appellant then ran toward the home with the .380 handgun in his hand. Diaz remained standing across the street from the residence. (5 RT 1270-1271, 1288-1289.)

IV. Appellant And Little Pete Murder Chuck Durbin And Juan Uribe

Appellant followed Little Pete into the Durbin residence after Little Pete opened the unlocked front screen door. (5 RT 1273) Alvin Ariezaga, Richard Fitzsimmons, and Uribe were all in the house assisting Chuck Durbin ("Chuck") with a plumbing problem. The four men were washing themselves in the kitchen while Cindy Durbin folded laundry. (6 RT 1376-1378.) Cindy heard a sound, "like a big bang up against the wall or something." (6 RT 1377-1378.) She went to the living room to investigate because her children were there. (6 RT 1379.)

Cindy looked toward her front door and saw two Hispanic men standing in her doorway.[8/] Each carried a gun. One gun was about 16 to 18 inches. The other gun was a smaller handgun. (6 RT 1378-1385.) The men raised their guns and fired them at Cindy. (6 RT 1383, 1430.) She ran to the kitchen. Chuck told her to hide so she crawled under a shelf in the kitchen. One or both of the assailants were screaming for Uribe. Chuck ran into the livingroom

---

he did not believe appellant would kill anyone. (5 RT 1344-1345.)

8. Cindy testified that she was "80 to 90 percent sure" that appellant was the taller of the two assailants. (6 RT 1391, 1401.) However, her identification of the assailants was highly contested at trial. This recitation of facts will not further detail her identification of her assailants.

because the children were there. From the kitchen, Cindy yelled for her children to hide under their blankets. (6 RT 1378-1388.)

From outside, Diaz heard Little Pete ask for Juan Uribe. Uribe stepped into the living room, and Little Pete told him, "what's up, Juan Uribe? What's up now?" (5 RT 1273.) Chuck ran into the living room because his children were there. Ariezaga heard Chuck yell out, "Hey what the F-U-C-K." Through the open screen door, Diaz saw Chuck run into the living room. Chuck grabbed appellant. Appellant placed his free hand on Chuck's back and with his other hand put the gun in Chuck's chest. Appellant shot Chuck at close range. (5 RT 1273-1274.) Ariezaga also heard four or five more gunshots. (5 RT 1172.)

One or both of the assailants came into the kitchen and starting shooting Uribe, who was standing in front of Cindy. She heard an assailant tell Uribe he was a traitor, and that "now he was going to die." Cindy recalled that it "seemed like there was [sic] bullets everywhere." The assailant shot her once in her stomach. She also suffered grazing bullet wounds to her legs. (6 RT 1388, 1400-1401.)

Uribe fell and died while on top of Cindy. After the shooting stopped, Cindy crawled out from under his body. She saw that Uribe had bullet holes in his neck and down his torso. She yelled for her children. Two of her children ran to the kitchen doorway. Her daughter Savannah remained sitting next to her mortally wounded father. Cindy recalled that her husband's "face was all bloody. And he had a bullet hole in his head, and one in his neck." (6 RT 1388-1389, 1391.) Chuck "raised his hands up to his face, was trying to talk, but [Cindy] couldn't understand him." (6 RT 1389.)

Diaz testified that he saw appellant point his gun toward the living room floor in the vicinity of the children. In response, Diaz twice fired his .38 caliber revolver at the house to get Little Pete and appellant to leave the residence. After Diaz shot at the Durbin residence, appellant and Little Pete cam running

out. (5 RT 1275-1276.)

Ariezaga left the bedroom about 30 seconds after the final volley of gunshots and saw that Cindy was shot. Chuck was on the living room floor mortally wounded and bleeding. Ariezaga ran to the restroom for a towel to clean Chuck, who was choking. Ariezaga saw that Uribe was dead in the kitchen in a "squatted position." (5 RT 1173-1175.) Cindy asked Ariezaga to take her children to their bedrooms and call 9-1-1. The police arrived within minutes. (6 RT 390.)

As appellant and Little Pete ran out of the Durbin home, Diaz stopped Rafael who had just driven by. Appellant, Little Pete, and Diaz entered the car and the four men drove away. Little Pete told the group that he shot Uribe and believed that he killed him. Appellant told the group that he shot Chuck because he believed Chuck was going to get a gun. The group drove back to appellant's home. On the way back, appellant accidently fired two rounds into the floorboard of Rafael's car as he was unloading his gun. After the group arrived at appellant's home, Little Pete told Diaz "that he [Little Pete] wasn't there that night." Diaz replied "all right," and then left in his car. (5 RT 1276-1280.)

Delores Cervacio lived two houses away from the Durbin residence. She heard about three gunshots in the neighborhood in close proximity to her home. Alarmed, she grabbed her granddaughter to hide. She then heard another volley of gunshots which she believed was from a bigger gun. She dropped the child and then ran to turn off the lights in her living room. As she went toward her front door to do so, she saw two males walking along the outside wall of her neighbor's home. (4 RT 1102-1104, 1106, 1108.)

Cervacio believed both assailants were young Hispanic men with short hair. One man wore a baseball cap. The other wore a hooded sweatshirt that he pulled over his head as he walked away. Cervacio did not see either man

carrying a gun. The men walked to a small car that made a U-turn and pulled up in front of her home. The car was occupied by two other men. The two men got into the car and it drove away. (4 RT 1104-1106.)

Another neighbor, Cindy Burciaga, was in bed when she heard about three gunshots and then children screaming. She looked out of her second story apartment window and saw two people running across Central Avenue toward a small red hatchback car.[9] The car ran a stop sign, and then backed up after a motion sensor light near the intersection was activated. After the people entered the car, it drove southbound. (5 RT 1125-1130.)

Endora Avila ("Endora") is appellant's step-daughter and Rafael's wife. Little Pete is her brother. On the night of the murders, Endora was out of town for a church revival. As she was traveling home with her congregation in the church van, she saw Rafael Avila's car "flying by." (5 RT 1195-1198.) She could not see who was driving her husband's car, but she saw two people in the backseat. Endora then saw Romi Singh drive by slowly through the intersection. Little Pete, was in the car, "crouched over." (5 RT 1199-1200.)

When she got home, Rafael was not there, which annoyed her. She noticed that their closet was in disarray, as "if he was looking for something to wear." (5 RT 1201.) She then went to appellant's home to see if her minor son and Rafael were there. She explained that she left their son with Rafael while she attended the church revival. When she arrived at appellant's home, she noticed the front door was locked and the house was quiet, which was unusual. Endora's mother Mary answered the door. Endora picked up her son, and quickly left without going into the residence. (5 RT 1200-1203.)

Endora testified that her husband Rafael arrived at their residence later that evening. When he arrived, he banged on their front door "like a cop." (5 RT

---

9. Trial evidence later established that Rafael Avila drove a red 1989 Dodge Colt, which was seized by the police. (7 RT 1717.)

1204.) After she opened the door, he entered and appeared nervous. He was pulling at his hair and his pants were wet below his knees. He removed his clothing and threw them away. (5 RT 1204-1205.) Little Pete arrived later, banging on their front door. Rafael answered it, and the two began arguing loudly. Little Pete left shortly thereafter. (5 RT 1204-1206.)

According to Endora, Rafael quit his job and disappeared after the murders, leaving his family behind. She only saw him one more time for about 15 minutes. (5 RT 1206-1207.) Rafael's employer, Phillip Janzen, testified that Rafael took a leave of absence from work on October 15, 1995, and never returned. (6 RT 1447-1452.)

Diaz visited appellant at appellant's home two days after the murders. Appellant, Little Pete, Tino and Romi were present. Little Pete told the group they had killed Uribe and Chuck. Diaz claimed he lost his gun to Tino in a game of dice at appellant's home. (5 RT 1281-1282.)

V. Appellant And Little Pete Make A False Alibi Videotape

Diaz visited appellant again several days after the murders. Appellant, Little Pete, Tino, and Romi were again present. In the group's presence, Little Pete told Diaz that they had made an alibi video at Romi's convenience store showing appellant and Little Pete working at the store at the time of the murders. (5 RT 1283-1284.)

Romi owned a convenience store in Madera. Carmina, appellant's step-daughter, was Romi's fiancé and store manager. The tape purportedly showed appellant and Little Pete in Romi's convenience store at the time of the murder. Subsequent investigation revealed that Carmina or Romi or both had mislabeled a tape of the convenience store from the night after the murder (October 8, 1995) with the date of the murder (October 7, 1995). The false label was in Carmina's handwriting. Moreover, a convenience store employee Robert Williams is not in the tape although he was actually working at the store on the

night of the murder, but was not working there on the next night. Appellant and Little Pete had not been at the store when Williams was working there on the night of the murder.[10] (7 RT 1744-1745, 1815-1819, 1821, 1826, 1839-1841, 1845-1857, 1867, 1874-1875; 8 RT 1917-1918.)

VI. Appellant Asks His Son-In-Law Juan Ramirez To Discard The Murder Weapons

Appellant visited his son-in-law Juan Ramirez ("Juan") after the murders. Juan is married to appellant's step-daughter, Deanna Ramirez ("Deanna"). At the time, Juan was separated from Deanna, but he happened to be at her home when appellant visited. Deanna found the visit unusual because appellant seldom visited her, and because she was estranged from her family at the time. (6 RT 1477-1480.) Appellant brought a basket covered with plastic garbage bags and clothing. Appellant asked Juan to discard the items in the basket. Appellant added that "they had resolved their problem." Juan agreed to discard the basket, claiming that he did not know what was in it. (6 RT 1466-1469.)

After appellant left, Deanna tried looking into the covered basket because she believed appellant brought over Juan's clothing so that Juan could move back in with Deanna. Juan, however, prevented her from looking into it. (6 RT

---

10. Both Carmina and Romi were charged by the district attorney as accessories to this case. (7 RT 1867-1868, 1904.) Carmina obliquely blamed Romi for creating or switching the alibi videotape or its label, which she acknowledged was in her handwriting. (7 RT 1902-1903.) The district attorney compelled Carmina's testimony under a grant of use immunity. (11 CT 2373-2374.) Romi, however, testified without a grant of immunity. Nor did he obtain any plea deal with the district attorney in exchange for his testimony. (7 RT 1867-1869.) Romi acknowledged being afraid to come to court and he told the prosecutor that he planned on leaving for India to avoid testifying. As a result, Romi was arrested on an attendance bond. (7RT 1858-1864.)

In addition, Madera Police Detective Fabian Benabente monitored a police pretext phone call made by Jesse to Carmina about the alibi videotape. During the phone conversation, Carmina told Jesse that she did not trust Richard Diaz. She laughingly told Jesse that Diaz did not know that he was not on the alibi videotape. (8 RT 1909-1913.)

1473, 1480-1481.) Juan explained that he eventually looked in the basket after appellant left and saw two guns, "one small and one big." (6 RT 1470.) Juan took the basket to the San Joaquin River, but there were too many people there to discretely discard it. He then took the basket to an irrigation canal near a vineyard, where he discarded it. Juan later took detectives to the location where the detectives retrieved the guns. (6 RT 1472.)

VII. Appellant, Little Pete, And Jesse Flee Madera

At the time of the murders Jesse Rangel lived in Fresno with his wife Erica, and their children. (6 RT 1488-1489.) Jesse recalled that he was at home when he received a phone call from Little Pete late in the evening of October 7, 1995. During the brief phone conversation, Little Pete told Jesse that "he got Juan." (6 RT 1491.) Little Pete called again later, after Jesse had gone to bed. He sounded drunk and was laughing. Little Pete told Jesse that he (Little Pete), appellant, Diaz, and Rafael were involved in the murders. Appellant got on the phone line and laughingly told Jesse that "he put those motherfuckers on ice." (6 RT 1493.) Jesse was shocked by appellant's comment. (6 RT 1526.)

Jesse called Little Pete at home the next day. Jesse was concerned because he was being threatened by people who believed he was involved in the murders. (6 RT 1494.) Jesse asked Little Pete to come and get him.[11/] Little Pete sent Rafael to pick up Jesse and his family in Fresno. Rafael took them back to appellant's home. Jesse recalled that appellant, Romi, Carmina, and Endora and their children were present at appellant's home. Little Pete was at work. (6 RT 1494-1496.)

Jesse remained at appellant's home for several hours, but "[e]verybody started getting paranoid and decided to leave." (6 RT 1496.) Appellant and

---

11. Jesse apparently did not have a car at the time because he borrowed his mother's car to go to the grocery store the night before. (See 6 RT 1490-1491, 1588-1589; 7 RT 1732-1734.)

Jesse left to pick up Little Pete at work. The three then went to Little Pete's apartment to get clothing. They then drove to Fresno to visit appellant's brother, Frank Rangel, Sr. ("Frank Sr."). (6 RT 1497-1498.)

Frank Sr. was surprised to see them.[12] Frank Sr. allowed them to stay in a tent in his backyard for two nights. (7 RT 1638.) During their stay, Jesse claimed he heard appellant tell Frank Sr. that he and Little Pete "had went and done a shooting." (6 RT 1498-1500.) According to Frank Sr., appellant claimed that someone was trying to kill Little Pete and appellant needed someplace to stay to "get his senses together." (7 RT 1635-1636, 1638-1639, 1645-1646.) Appellant also told Frank Sr. that people were blaming Jesse for the murders, so Jesse needed to accompany them. (6 RT 1499.)

Appellant failed to report to work on October 10, 1995, prompting his supervisor Jerry Smith to call appellant's wife to find him. Appellant later called Smith asking for a leave of absence. Appellant, however, never returned to work. He was terminated on October 16, 1995, after working at FMC for 15 years. (6 RT 1453-1458, 1465.)

During their stay at Frank Sr.'s home, Little Pete discussed the murders in more detail with Jesse. Little Pete told Jesse that Raphael dropped him off near the Durbin's home. "They had walked to the house. He opened the door. They walked in. He went off in the house looking for Juan while Richard [Diaz] stayed outside. He found Juan. He shot Juan." (6 RT 1500-1501.)

Little Pete added that appellant stood by the front door. Uribe ran away, but Chuck came into the room. Appellant then shot Chuck in the head. Little Pete followed Uribe into the kitchen, and as Uribe was on the ground, "he just unloaded the rest of the bullets on him." (6 RT 1501.) Little Pete told Jesse

---

12. In fact, Frank Sr., and his son Frank Rangel, Jr., where both surprised by the visit because the visit was unannounced and because appellant rarely visited them. (7 RT 1635-1639.)

that he used a .22 caliber rifle, appellant used a .380 caliber handgun, and Diaz had a .38 caliber gun. Appellant later gave the guns to Juan Ramirez to discard. (6 RT 1502.) Little Pete also told Jesse about the false alibi videotape. Little Pete explained that Romi switched the dates on a videotape so that it appeared appellant and Little Pete were mopping Romi's store during the murders. (6 RT 1503.)

During their stay, appellant gave his nephew Frank Rangel, Jr. ("Frank Jr.") a .38 caliber revolver and he told Frank Jr. to hold it for him. (7 RT 1655-1658.) Frank Jr. claimed he did not know the gun was used in the homicides. Frank Jr. hid the gun in a pile of discarded tires in his backyard. (7 RT 1669-1671.) Appellant told Frank Jr. that "they" went to the Durbin home "and shot the house up."[13/] (7 RT 1654.)

Appellant, Little Pete and Jesse stayed in a series of motels in Fresno after leaving Frank Sr.'s home. (6 RT 1503-1505.) Jesse's wife Erica testified that appellant's wife Mary took Erica and her children to visit Jesse, appellant, and Little Pete at a motel in Fresno. Erica recalled an incident where Mary angrily confronted appellant in a motel room. Erica heard Mary angrily tell appellant, "[y]ou're a murderer. And now my son is one, too." (6 RT 1593-1595, 1610-1611.) Appellant did not respond. (6 RT 1596.)

Mary told Jesse that he needed to change his appearance and leave town. Mary gave Jesse several hundred dollars and her car. (6 RT 1517-1518.) Jesse left appellant and Little Pete at the motel, and drove to Santa Maria with Erica

---

13. Frank Sr. testified, however, that appellant did not state that he was involved in the murders. (7 RT 1643.) Frank Jr. likewise denied telling detectives that appellant told him he was involved in the murders. He was impeached with his prior statement to detectives. (7 RT 1677, 1686, 1691 [exhibit nos. 64 & 65].) Frank Jr. also testified that his memory was affected by pain and seizure medication he was taking. Moreover, he claimed he had binged on alcohol during the appellant's visit, which likewise affected his recollection of what appellant told him. (7 RT 1672-1677.)

and their children. Jesse met up with Erica's cousin in Santa Maria, stayed several days, and then they all drove to New Mexico. (6 RT 1518-1519.) Jesse and Erica were arrested in New Mexico after Jesse's telephone interview to a detective was traced to their location. (6 RT 1520, 1597-1598.) They were released from custody the next day. Jesse voluntarily returned to California "to clear his name." (6 RT 1520-1521.)

VIII. The Investigation

Madera Police Corporal Brian Ciapessoni, the first responding officer, was dispatched to the Durbin residence at about 10:14 p.m. Fitzsimmons walked out of the home and directed the officer inside. (4 RT 911-912.)

Corporal Ciapessoni saw Chuck deceased on the living room floor. The officer walked into the kitchen and saw Cindy sitting in a chair suffering from a gunshot wound to her stomach. Her three children surrounded her. Areizaga was also present in the kitchen. Uribe was deceased. His torso and head were in a trash can between the stove and sink, with the remainder of his body protruding out. (4 RT 914-917.)

Madera Police Officers Bennie Munoz and Damon Wasson retrieved and documented evidence from the crime scene. They retrieved a spent .380 caliber bullet projectile (exhibit no. 15) next to Chuck's head. (4 RT 928.) The officers found a .380 shell casing (exhibit no. 14) next to Chuck's body. (4 RT 957.) They found a .22 caliber shell casing (exhibit no. 16) near the right side of Chuck's body. (4 RT 930.) A spent .22 caliber bullet projectile (exhibit no. 28) was found under Chuck's body. (4 RT 946.)

The officers located another .22 caliber shell casing (exhibit no. 17) under a chair in the living room. (4 RT 931-932.) Another .380 caliber shell casing (exhibit no. 18) was found in the living room next to a wood chair. (4 RT 932-933, 941.) Three .22 shell casings were found in two sofas in the living room, and another was found between a sofa and coffee table. (4 RT 954-955; exhibit

nos. 10-13.) A .22 shell casing (exhibit no. 9) was found in the front doorway next to a sofa. (4 RT 951-952.)

The officers found a .22 caliber shell casing (exhibit no. 19) in the entry area to the kitchen. (4 RT 933-934.) They found seven more spent .22 shell casings (exhibit nos. 20, 22-25, 30-31) in the kitchen. (4 RT 935-940.) Another .22 shell casing (exhibit no. 21) was found near a hallway to the bedroom area of the home. (4 RT 936.) They found a bullet fragment (exhibit no. 26) next to Uribe's body. (4 RT 945-946.)

The officers found a spent .38 caliber bullet in a blanket in front of an entertainment center in the livingroom. (4 RT 958-959, 961; exhibit no. 27.) They found another .38 caliber bullet in a front rain gutter on the Durbin residence. (4 RT 459; exhibit no. 29.) In all, the officers collected 16 spent .22 caliber casings, one spent .22 caliber bullet projectile, a bullet fragment, two spent .380 caliber casings, one spent .380 caliber bullet projectile, and two spent .38 caliber bullet projectiles from the crime scene. (7 RT 1707; see 2 SCT 344-345 [Exhibit List].)

The 16 spent .22 caliber casings were fired from the .22 caliber Marlin rifle appellant gave to Juan Ramirez to discard. The spent .22 caliber projectiles were also consistent with being fired by the Marlin rifle. The .380 caliber casings recovered from the murder scene and Rafael's red Dodge Colt were "probably" fired from the .380 Jennings semiautomatic handgun appellant had also given to Juan Ramirez to dispose. The two .38 caliber bullet projectiles were fired from the .38 Rossi revolver hidden in the stack of tires at Frank Sr.'s home. (7 RT 1699-1712, 1715-1720, 1722-1723, 1760-1764; 2 SCT 345.)

Dr. Stephen Avalos performed autopsies on Chuck and Uribe. Durbin suffered seven distinct gunshot wounds: five smaller-caliber wounds to his torso, and two larger-caliber wounds to his head and neck. Bullets were not recovered from his head and neck wounds, but his head wound was consistent

with the .380 caliber bullet found next to his head. His neck wound was also consistent with a .380 caliber bullet. Fiber-like material was found in his head wound. (4 RT 966-973.) Dr. Avalos opined that Chuck suffered his torso wounds before his neck and head wounds based on his aspiration and ingestion of a "considerable amount" of blood found in his stomach and lungs. (4 RT 975-976.)

Uribe suffered six smaller-caliber gunshot wounds: two to his head, one to his jaw, two to his right shoulder area, and one to the right side of his lower chest. His head and chest wounds were the cause of death. (4 RT 982-986.)

The parties stipulated that Rafael's car was taken from police impound on November 1, 1995, to the California Department of Justice's (DOJ) Fresno Regional Laboratory, for examination. (8 RT 1918-1919.) The car was a red 1989 Dodge Colt. (7 RT 1717.)

IX. Appellant's Interview

Before his arrest, appellant voluntarily went to the Madera Police Department with an attorney for an interview with Detective Ciapessoni. The prosecution played the audio recording of appellant's interview. A transcript of the interview was provided to the jury. (8 RT 1905-1906; see 2 SCT 387-455 [exhibit no. 89].) Appellant told the detective about Little Pete's shooting and his hospital visit to see his son. While there, he saw that Little Pete's car had been shot up. (2 SCT 402-406.)

Appellant claimed that he abruptly quit his job to care for Little Pete after the shooting. According to appellant, Little Pete had been receiving threats and he wanted to protect his son. However, he acknowledged quitting his job after the murders, not immediately after Little Pete had been shot some two weeks earlier. Appellant claimed things were "getting heavier" in Madera at that time so he quit. (2 SCT 410-412.)

Appellant acknowledged that he and Little Pete left Madera and stayed in

a series of motel rooms for two or three weeks after the murders to escape further violence. His wife, Mary, and daughter Carmina eventually left their house because they were afraid to stay there. (2 SCT 419-422.)

Appellant told Detective Ciapessoni about the October 7, 1995, barbecue at his house. It started at about 8:00 p.m. Appellant recalled that his wife, his step-daughters, Little Pete, Romi, Rafael, and some neighbors attended. Romi and Rafael arrived separately sometime between 8:30 and 9:30 p.m. (2 SCT 423.)

Appellant claimed he and Little Pete left the party to shop at Romi's convenience store. Romi was already there when they arrived. Romi asked appellant and Little Pete to help him move merchandise in the store. Appellant claimed they remained for about 35 to 40 minutes helping Romi. This activity was caught, according to appellant, on the alibi videotape. They left and returned to the barbecue at about 10:30 p.m. (2 SCT 428-435.) When confronted with the revelation that the alibi videotape was false because it was created the day *after* the barbecue, on October 8, 1995, appellant claimed to be shocked and surprised. He denied being at Romi's convenience store at all on October 8, 1995. (2 SCT 445-446.)

Detective Ciapessoni confronted appellant about giving the murder weapons to Juan Ramirez. Appellant initially denied possessing or returning any guns to Juan. He then added "[t]hose guns were his." (2 SCT 438-439.) Appellant next claimed that he indeed returned the guns to Juan after Juan left them in appellant's garage. Appellant denied asking Juan to do him "a favor" and discard the guns. (2 SCT 439-440, 454.)

Appellant denied buying the guns from anyone, claiming "[o]n the contrary, I don't, I don't believe in guns." (2 SCT 441.) Appellant then claimed that the .22 caliber rifle that he "returned" to Juan "belonged to Chewy [Jesse Rangel] or something like that." (2 SCT 443.) Appellant claimed he learned the guns

belonged to Juan after "asking around." According to appellant, Juan asked appellant to return the guns, so he did. (2 SCT 444, 453.)

When asked by Detective Ciapessoni about Richard Diaz, appellant claimed he only "kn[e]w a guy named Richard" who was acquainted with his son, Little Pete. (2 SCT 436.)

When confronted by Detective Ciapessoni that he was not being truthful, appellant denied he and Little Pete were involved in the murders. (2 SCT 447.) He maintained that Little Pete did not want revenge for his shooting. (2 SCT 455.) He also denied knowing Uribe or Chuck, or going into the Durbin residence. (2 SCT 447.)

DEFENSE CASE

Appellant contended that he was not one of the shooters, but instead Jesse Rangel and Juan Ramirez were the actual shooters. In that vein, he presented evidence of conflicting statements given by Cindy regarding her identification of her assailants. Ultimately, he acknowledged helping others cover up the murders, and he contended, at most, he was culpable for being an accessory after the fact. (9 RT 2165.)

Detective Ciapessoni interviewed Cindy at the police department on October 21, 1995. At the recorded interview, Cindy told the detective that she could not recall the taller assailant's face, other than to say that he had "big lips." She added that he was about six feet tall. (8 RT 1929-1932.) Cynthia stated she got a better view of the shorter assailant because they made eye contact. She believed the assailants were in their late teens or early twenties. (8 RT 1935-1936.) At this interview, Cynthia identified Jesse Rangel, from a photographic lineup (exhibit no. 52), as the shorter of her two assailants. She told the detective that she was positive of her identification of Jesse.[14/] (8 RT 1947; see

---

14. Detective Ciapessoni opined that Little Pete and Jesse Rangel, his cousin, "looked very similar." (8 RT 1979.)

2 SCT 363-383 [exhibit no. 79; transcribed interview].) She was not shown a police photographic lineup bearing appellant's photograph. (8 RT 1949, 1980.)

Tino testified about the shooting of Juan Uribe's car after Little Pete had been shot. In late September 1995, Tino was in a car with Jesse Rangel, Valentine Padilla ("Bingo"), and Damian Alatorre, when Jesse shot at Uribe's car. Tino denied shooting Uribe's car, but admitted shooting into the air after Jesse shot the car. (8 RT 1984-1987, 1994.) Tino also denied telling anyone that Jesse and Juan Ramirez committed the murders. (8 RT 1988.) Detective Ciapessoni testified that Tino told him in an interview that Diaz identified Juan Ramirez and Jesse Rangel as the murderers. (8 RT 1996.)

The parties conducted a conditional examination of Jose Enriquez, appellant's terminally ill father-in-law, at his home in March 1998. The conditional examination was videotaped and played for the jury (exhibit no. 92). (8 RT 2075.) Its transcription was provided to the jury (exhibit no. 92A). (2 SCT 456-516.) Enriquez testified that he was talking with appellant at appellant's home about Little Pete's recent shooting, when Jesse Rangel ("Chewy") arrived. Jesse lifted his shirt to display a gun in his waistband and told appellant, "Don't worry Tio. I'm going to take care of everything."[15] (2 SCT 466-468, 469-471, 475, 479.) Enriquez left because he was afraid of guns. (2 SCT 469.)

Christina Bowles, appellant's step-daughter, saw Jesse Rangel and Richard Diaz together on October 6, 1995, the day before the murders. She explained that she went walking with her daughter to Diaz's house to buy methamphetamine from him. As she was walking, she saw Diaz and Jesse driving down the road. She flagged them down and got into the car. As she

---

15. "Tio" is the Spanish word for uncle. (2 SCT 468.) The parties also stipulated that Enriquez reported the incident to defense investigator Micki Hitchcock in July 1996. (8 RT 2084.)

was buying methamphetamine from Diaz, she noticed a gun under Jesse's seat. She asked Jesse whether it was real and he replied that it was. Diaz also had a gun in the car. She asked both why they had guns, and Diaz replied to "Go get even" with Juan Uribe. She told them they were crazy, and got out of the car with her daughter. (8 RT 2085-2089, 2097.) Bowles claimed she tried to report the incident to Detective Benabente during the preliminary hearing, but "he brushed [her] off."[16] (8 RT 2089-2091.)

Richard Fitzsimmons told investigating officers that the assailants were two Hispanic men, not older than 30 years old. (8 RT 1999-2001, 2028-2030.) However, he acknowledged that his recollection might have been impaired because he used methamphetamine about 15 minutes before the shooting and had consumed several beers. He added that he only saw the assailants for a "milli second." (8 RT 2031-2032.) He was also shot in the knee.[17] (8 RT 2008, 2031.)

The defense attacked Jesse Rangel's alibi that he was grocery shopping in Fresno with his family during the murders. Diane Salas, Jesse Rangel's mother, denied fabricating an alibi for him. (8 RT 2039-2043.) She acknowledged not immediately telling the police that she was with Jesse in Fresno during part of

---

16. Bowles admitted her dislike for the prosecutor because he seemed to have "a personal vendetta" in the case. (8 RT 2092.) On cross-examination, the prosecutor impeached her with her prior theft-related conduct. (8 RT 2095-2096.)

17. Detective Ciapessoni was the first officer to respond to the Durbin residence. Fitzsimmons initially told the officer that he had arrived *after* the shootings. (8 RT 2066-2067.) Detective Benabente interviewed Fitzsimmons later that evening at the police station. The detective had to clarify questions for him which led the detective to opine either Fitzsimmons was being evasive, or he was under the influence of alcohol. (8 RT 2071-2073.) Detective Ciapessoni, however, did not notice whether Fitzsimmons appeared under the influence of any substance when he briefly interviewed him at the crime scene. (8 RT 2067-2069.)

the evening of the murders. She explained that she distrusted Detective Benabente and she did not know that Jesse was a suspect in the murders. (8 RT 2047-2052.)

Appellant elected not to testify.

REBUTTAL

Seeking to rebut the evidence that Juan Ramirez was one of the shooters, Deanna Ramirez testified that she had never known her husband to own or possess guns prior to the date that appellant gave him the guns to discard. (8 RT 2099-2100.)

Detective Benabente testified that Tino told him during an interview that he (Tino) grabbed the gun from Jesse after Jesse shot up Uribe's car. Tino then fired the gun too. Tino also told the detective that after he won the .38 caliber revolver from Diaz in a dice game, he sold it to appellant because appellant wanted it "for protection." Detective Benabente denied that Christina Bowles ever approached him with information on the case. (8 RT 2101-2104.)

Romi Singh reiterated that he attended the barbecue at appellant's house before the murders. Jesse Rangel was not at the barbecue that evening. (8 RT 2107-2108.) Singh denied being present during the conversation where appellant wanted to find and kill Uribe. (8 RT 2108.)

SURREBUTAL

Defense Investigator Micki Hitchcock testified that she saw Detective Benabente seated outside of the courtroom with Juan Uribe's girlfriend, Martha Melgoza, during the preliminary hearing. (8 RT 2112-2114.)

PENALTY PHASE

PROSECUTION CASE

The prosecution relied on victim impact testimony and the circumstances of the murder in advocating for the death penalty.

Maria Guzman, Uribe's mother, testified that he was her first-born child.

As such, he assisted her with family matters and cared for his three younger sisters. The siblings were close and Uribe loved them as if they were his own children. Uribe, his mother, his three sisters, and his girlfriend Martha, and their child all lived together at the time he was murdered. (10 RT 2380-2383.)

Guzman was called to the crime scene after the murders, but the officers would not let her cross the police line. When she eventually found out that Uribe had been murdered, she "wanted to die [her]self." Her daughters went to counseling after his murder. They still cry for him. Guzman and her daughters left Madera for Tennessee after the murders. (10 RT 2380-2387.)

Martha, Uribe's girlfriend, testified that they had a daughter together. She learned that someone had been shot on Central Avenue. Worried, she unsuccessfully tried to page Uribe. When she received no response, she took a taxi to the crime scene. She tried to cross the police line, but was prevented from doing so. They eventually informed her that Uribe was dead. Uribe's death affected their daughter who still cries for, and misses him. Martha likewise still misses Uribe. (10 RT 2404-2408.)

Randy Durbin, Chuck's younger brother, was close to Chuck and depended on him for some of his life decisions. Their mother was a single parent, so Chuck played a prominent male-figure role for Randy while they were growing up. (10 RT 2391-2393.)

On the night of the murders, Randy called his mother to tell her that Chuck had been shot. He then went to Chuck's home, but the police would not let him into the home. He was still able to see Chuck's body on the living room floor, and was told that Chuck was dead. Randy then had the difficult task of telling his mother and grandmother that Chuck was dead. (10 RT 2394-2403.)

Detective Ciapessoni, the first responding officer at the shooting, testified that when he arrived the three Durbin children were crying and huddling around their mother, Cindy, in the kitchen. He interviewed six-year-old Natasha in a

bedroom.[18] She was crying and upset. The child told the officer that she recalled two men came into her home and told Uribe, "Juan, you disappointed us." (10 RT 2388-2389.)

Cindy initially recounted the circumstances of the murders. She testified that her daughters were asleep in the livingroom when the shooting started. Her son, Brett, was awake at the time. She ran back into the kitchen and Chuck told her to hide because the men were firing "real bullets." She screamed for her children and dove into a small cabinet space as Chuck ran into the living room. (10 RT 2425-2426.)

Cindy believed her children were going to be shot or killed. Uribe was standing against the kitchen wall during the shooting. She hid as bullets were flying "everywhere." (10 RT 2426.) She felt a bullet strike her stomach. She initially believed she had been shot twice because there was a burning sensation at the entry and exit wounds. She then applied pressure to her stomach so that she would not bleed to death. Uribe fell on top of her and did not move. She realized he was dead and crawled out from under him and yelled for her children. (10 RT 2426-2427.)

Two children ran into the kitchen, but Savannah remained next to her dying father in the livingroom. Chuck's "face was all bloody," so Cindy made her children go into a bedroom. Cindy screamed at Chuck not to die and she told him that she loved him. He raised his hands and tried to talk, but it "was all gurgly." She then yelled for Areizaga to call 9-1-1. (10 RT 2427-2429.)

An ambulance driver told Cindy that Chuck died. She was "numb" and her body was shaking. She called Chuck's mother, Ginger Colwell, to come and get the children. Cindy was taken to the hospital by ambulance and released about six hours later. After Chuck's murder, Cindy and her children stayed

---

18. The child died from influenza one year before the trial. (10 RT 2433.)

with her parents. Cindy told her children the next day that their father had been killed. She testified that this was the most difficult thing that she has had to do. Her slightly autistic son, Brett, is fearful when the doorbell rings and he runs and hides under the coffee table. Savannah still won't sleep alone. They all received counseling. (10 RT 2429-2432.)

Cindy recently remarried and had a baby. She is still affected by Chuck's murder, but her new husband is patient with her. She is sometimes depressed and sad and wakes up crying. Her new husband feels bad because he cannot assuage her pain. (10 RT 2432.)

Ginger Colwell, Chuck's mother, had a very close relationship with him as he was her oldest son. Chuck visited or called her everyday. Colwell recalled receiving a phone call from Cindy to pick up the children. When she arrived, there were police cars everywhere and officers told her she could not go into the home. The police, Randy, and Cindy initially told Colwell that Chuck was fine. (10 RT 2435-2436.)

Someone eventually brought out the terrified children to Colwell. She took them home. She later learned from her son, Randy, that Chuck had been killed. "[She] felt as if [she] was dead." Dealing with this death has gotten "only worse." (10 RT 2437.) She is still depressed about his murder. (10 RT 2438.)

On the night of the murders, Natasha revealed some of the circumstances of her ordeal to Colwell. Natasha told Colwell that "they were calling Juan a traitor." Natasha added that Chuck told her to run and hide during the shooting. The child put pillows over her siblings' heads and pulled the blankets over them to protect them. (10 RT 2439-2340.)

DEFENSE CASE

Michael Percy knew appellant since 1980 when Percy came to Madera from San Jose with the FMC Corporation. FMC hired appellant as a mechanic's assistant to work on an assembly line creating cannery and farm equipment.

Percy and appellant worked "side by side" for 15 years. (10 RT 2443-2444, 2446.)

Appellant introduced Percy to the community. Appellant frequently invited Percy to his home for barbecues and they became good friends. Appellant eventually became a lead worker due to his aptitude and experience in mechanics and his positive attitude. (10 RT 2446.)

Percy and appellant traveled together for work which sometimes required appellant to have direct contact with customers. Appellant dealt well with the customers, even the angry ones. Percy admired appellant for his patience and he considered appellant a "team player" in the company. Appellant trained new employees, and he did so well because he spoke Spanish and because he was friendly and open to them. Percy recalled one incident where he and appellant were called into work on SuperBowl Sunday. Percy was upset, but appellant "kind of settled [Percy] down" by impressing on him the need to timely complete the task. (10 RT 2447-2452.) In his spare time, appellant repaired small engines for his friends and fellow employees. He also advised others on making repairs. (10 RT 2453, 2460-61.)

Jerry Smith, who testified during the guilt phase, testified that he worked with appellant at FMC Corporation for 15 years before appellant's arrest. Smith eventually befriended appellant and described him as a "nice guy," "[q]uiet most of the time." (10 RT 2456-2457.) Smith became appellant's supervisor. He always gave appellant "real good reviews" and a "high score" in getting along with others. (10 RT 2459, 2462.)

Ronald Edwards worked with, and lived across the street from, appellant. He described appellant as a good neighbor. When Edwards' home was burglarized, appellant assisted him in cleaning up the mess and finding possible witnesses for the police. Appellant once mediated an escalating neighborhood dispute between Edwards and a neighbor. (10 RT 2463-2465.)

Edwards testified that appellant appeared to treat his children well. Appellant took in his nieces and nephews when his sister-in-law passed away. Appellant told Edwards about Little Pete's shooting. According to Edwards, appellant did not want things to escalate so he told his son to "let bygones be bygones." (10 RT 2368.)

Joe Rangel ("Joe"), appellant's youngest brother, testified about their difficult upbringing. The family were itinerant farm workers that followed the crops. The family moved to Madera where their father contracted tuberculosis and was sent to a sanitarium. Appellant quit school and, without complaining, assisted their mother in providing for the family by working in the fields. Appellant's sacrifices kept the family together and enabled his younger siblings to continue their education. (10 RT 2469-2472, 2476.)

Appellant joined the Navy. Joe admired appellant for this decision and Joe likewise joined the military in appellant's footsteps. When appellant returned from military service he met and married Mary, who already had three small daughters. Appellant assumed responsibility for providing for Mary's children. After the marriage, Joe's contact with appellant became "kind of sparse." (10 RT 2472-2476.) Their families did not interact much. (10 RT 2477.)

Deanna testified that she was about two years old when appellant came into her life. Appellant treated Deanna and her two sisters as if they were his own children, and she considered him her true father. Appellant also took in Deanna's four cousins after their mother died. Appellant frequently took the family on camping trips and to amusement parks for vacation. (10 RT 2481-2484.)

Deanna never met her biological father, but when he died appellant took her, her sister, and her mother to the funeral in Mexico. When Deanna's biological family in Mexico shunned her, appellant told her not to worry because that would not change appellant's love for her as his daughter. (10 RT

2485-2487.)

Deanna became pregnant at 16 years old, and the baby's father left her. Faced with the prospect of being a single mother, she considered abortion, but appellant talked her out of it because "it was wrong and life was very important." (10 RT 2488.) Mary kicked Deanna out of the home for becoming pregnant, but appellant coaxed her back. He encouraged Deanna to pursue her education and he assisted her in her home schooling during her pregnancy. (10 RT 2484.) Appellant is now very close to Deanna's 12-year-old daughter. (10 RT 2491-2492.)

Deanna testified about how appellant took in her developmentally disabled aunt, Yolanda. He also took in another developmentally disabled adult, Roy, after Roy's family was unable to care for him. Roy lived with the Rangel Family for 15 years. (10 RT 2489-2491.)

Jesse MacChrone grew up with appellant as their families were both farm worker families. Like appellant, MacChrone did not finish high school because as the oldest children they were expected to financially help their families. MacChrone worked at an employment office and assisted appellant in obtaining a job at FMC Corporation when it came to Madera. MacChrone recommended him to FMC because appellant was a "good person. Never been in trouble. He took care of his family." (10 RT 2506-2509.)

George Helton, Jr., knew appellant for 20 years, beginning when appellant worked as a small engine repairman. Helton also lived next door to appellant and he considered appellant to be a good neighbor. Appellant sometimes assisted Helton with small engine repairs. Helton also saw appellant interact with his developmentally-disabled sister-in-law, Yolanda. When Yolanda was upset and crying, he would console her. (10 RT 2511-2512.)

Angela Chapa is Little Pete's girlfriend and the mother of his child. She considered appellant to be her father-in-law. She first met appellant when she

became pregnant. She moved in with the Rangel Family. Appellant treated her well and was supportive, even when her own parents were upset that she got pregnant. (10 RT 2514-2515.)

Little Pete and Chapa eventually moved into an apartment. When Little Pete lost his job, appellant financially supported them for two months by paying their rent. Appellant was present at the hospital when she gave birth. Appellant often spent time visiting Little Pete and Chapa. Appellant treated Chapa as if she was his own daughter. (10 RT 2516-2518.)

Chapa recalled that appellant, like the rest of the family, was crying and upset when Little Pete was shot. She recalled a specific instance where she saw appellant crying alone in a stairwell after the shooting. (10 RT 2518.)

Josephine Reyes, appellant's niece, testified about how appellant took her and her siblings in after their mother died. She explained that she lived with him sporadically before her mother died, because her mother was not stable. Appellant treated Josephine as his daughter. He was always supportive, especially after her mother's death. (10 RT 2520-2521.)

Josephine recalled that Deanna and Carmina were concerned about their weight while growing up because they were heavy. Appellant was supportive of his daughters, telling them not to worry about their weight. When Carmina fell ill and was hospitalized in Stanford, appellant constantly traveled back and forth from Madera to visit her. (10 RT 2523-2524.)

ARGUMENT

I.

APPELLANT'S CONTENTIONS ARE FORFEITED FOR FAILURE TO CONTEST THE JURY SELECTION PROCEDURE OR TO CHALLENGE THE VENIRE; REGARDLESS, THE TRIAL COURT'S JURY SELECTION PROCESS WAS PROPER

Appellant contends the trial court's jury selection process violated his statutory guarantee of randomness and his state and federal constitutional guarantees of a trial by a fair cross-representation of the community. (AOB 55-65.) Respondent contends the claims are forfeited for failure to challenge the selection process below. Nevertheless, even if reviewable, the claims lack merit.

A. Legal Principles

The Sixth Amendment right to a trial by jury includes a right to a jury venire that is "representative [of a] cross section of the community." (*Taylor v. Louisiana* (1975) 419 U.S. 522, 528 (*Taylor*).) To show a prima facie case of a Sixth Amendment cross section violation, a defendant must establish: (1) the exclusion of a "distinctive" group in the community; (2) the group's representation in the venire from which juries are selected is not fair and reasonable in relation to the number of such persons in the community, and (3) underrepresentation is due to systematic exclusion of the group in the jury-selection process. (*Duren v. Missouri* (1979) 439 U.S. 357, 364 (*Duren*).) The analogous state constitutional right is engendered in article 1, section 16 of the California Constitution. (*Williams v. Superior Court* (1989) 49 Cal.3d 736, 740.) In deciding a claim of a fair cross-section violation, the federal and state jury-trial guarantees are coextensive and the analysis is the same. (*People v. Bell* (1989) 49 Cal.3d 502, 525, fn. 10.) A defendant, however, forfeits his

constitutional claims if he fails to raise them in the trial court. (*People v. Seaton* (2001) 26 Cal.4th 598, 638, citing *People v. Davenport* (1995) 11 Cal.4th 1171, 1195.)

By statute "[i]t is the policy of the State of California that all persons selected for jury service shall be selected at random from the population of the area served by the court; . . .." (Code Civ. Proc., § 191.) The statutory requirement for randomness is also reflected in Code of Civil Procedure sections 197, subdivision (a) ("All persons selected for jury service shall be selected at random, from a source or sources inclusive of a representative cross section of the population of the area served by the court."), 198, subdivision (a) ("Random selection shall be utilized in creating master and qualified juror lists, . . ."), 194, subdivision (l) (defining the term "random"), and 222 ("when an action is called for trial by jury, the clerk, . . . shall randomly select the names of the jurors for voir dire . . .."). A defendant, however, forfeits his right to challenge statutory randomness requirements if he fails to object or challenge the procedure used in the selection process in the trial court. (*People v. Seaton, supra,* 26 Cal.4th at p. 638, citing *People v. Visciotti* (1992) 2 Cal.4th 1, 37-38; *People v. Mayfield* (1997) 14 Cal.4th 668, 728.)

Moreover, not every departure from the statutory requirement of randomness in jury selection constitutes reversible error. (*People v. Visciotti, supra*, 2 Cal.4th at p. 38.) Minor deviations from the randomness requirement are not grounds for reversal. (*Ibid.*) "[A] defendant may not claim error on appeal if the procedure utilized in jury selection did not depart materially from the statutory procedures established to further the purpose of random selection." (*Ibid.*) While random selection serves to ensure the jury trial rights granted by the state and federal Constitutions, "[n]ot every departure from the state statutory procedure, even if deemed material, necessarily denies a defendant the constitutional right to a jury selected from a representative cross-section of the

populace . . .." (*Id.* at p 41.) "To warrant reversal . . . the defendant must demonstrate that the departure affected his ability to select a jury drawn from a representative cross-section of the populace. [fn.]" (*Ibid.*, fn. omitted.)

B. The Trial Court's Jury Selection Process

The jury selection process was essentially conducted in two phases. During the first phase, the trial court examined prospective jurors from six groups for hardship. After this initial examination, the court asked the remaining prospective jurors to complete a lengthy questionnaire and return the following week for further examination. (See 1 RT 289.)

The first phase occurred over the course of three judicial days where the trial court called six randomly selected groups for hardship examination. The court called the first group on the morning of August 18, 1998, and the second group that afternoon. It did the same the next day, August 19, calling the third group in the morning, and the fourth group that afternoon. On the morning of August 20, the court called the fifth group, and the sixth random group that afternoon. (11 CT 2346-2348.) After excusing them for hardship, the court directed the remaining prospective jurors on groups one through three to fill out written questionnaires and return on the morning of August 25. As for groups four through six, the court ordered these remaining prospective jurors to fill out questionnaires and return on the morning of August 26. (2 RT 298, 301, 331, 334-335, 385, 388, 421-422, 466, 505.)

The second phase of jury selection resumed on August 25, 1998. At this phase, the court and counsel examined prospective jurors on their questionnaires to determine their qualifications to sit as a capital juror.[19] Jurors

---

19. The record is unclear about whether these prospective jurors were comprised entirely from the first randomly selected group from the morning of August 18, or from the second group from that afternoon, or the third group from the morning of August 19, or a combination of all three. This ambiguity

were also examined for cause, and counsel began exercising peremptory challenges. (3 RT 555-721; 11 CT 2350.) Jury selection resumed on August 26, with the court and counsel examining the same group of prospective jurors from the preceding day.[20] Trial jurors and four alternates were selected that morning. (3 RT 724- 773; 11 CT 2351.) At no time did appellant object to the trial court's jury selection process, or make a motion to quash the petit jury, or otherwise assert the claims he makes here.

C. The Statutory And Constitutional Contentions Are Not Preserved; Regardless, There Was No Error In The Jury Selection Process

As a threshold matter, respondent contends appellant's statutory and constitutional claims are forfeited for failure to raise them in the trial court either by objection to the jury panel or by a motion to quash the petit jury or venire. (*People v. Ramirez* (2006) 39 Cal.4th 398, 443; *People v. Rogers* (2006) 39 Cal.4th 826, 858; *People v. Seaton, supra*, 26 Cal.4th at p. 638.) Regardless, even if reviewable, appellant's constitutional claims lack merit because he fails to show that the representation of Hispanics in the venire or juror pool from which his jury was selected is not fair and reasonable in relationship to the number of Hispanics *in the community* from which the venire is drawn.[21] (*Duren, supra*, 439 U.S. at p. 364.)

---

is compounded by appellant's failure to cite to the record to support his contention that this group is comprised of the first 84 names ordered to return on August 25, 1998. (See AOB 57.)

20. Because jury selection took longer than anticipated on August 25, the court postponed the panels originally ordered to return on August 26, by ordering them to return on August 27. (3 RT 696.)

21. Appellant satisfied *Duren's* first prong, because Hispanics are a "distinctive" or cognizable group. (*People v. Ramirez, supra*, 39 Cal.4th at p. 445)

Appellant provides no statistics, nor any other evidence to show that the venire was not a reasonable and fair representation of the eligible Hispanic prospective jurors in the community based on census or other demographic data that reflect adult population figures in that judicial district. (See *People v. Bell*, *supra*, 49 Cal.3d at p. 526, fn. 12; *Williams v. Superior Court, supra,* 49 Cal.3d at p. 743.) He instead maintains that "three quarters of the Hispanic prospective jurors were excluded from consideration, as a result of calling prospective jurors in the order they were assigned to the trial department." (AOB 61.) This conclusion misapplies both *Taylor* and *Duren* by focusing on the jury panels sent to the courtroom, instead of focusing on the jury venire summoned to the courthouse.

In *Taylor* and *Duren*, the Supreme Court held that the fair-cross-section rule of the Sixth Amendment applies to *the community* from which the venire is drawn. *Duren* held: "Initially, the defendant must demonstrate the percentage of the community made up of the group alleged to be underrepresented, for this is the conceptual benchmark of the Sixth Amendment." (*Duren, supra*, 439 U.S. at p. 364.) *Taylor* likewise defined the Sixth Amendment's fair-cross-section rule in terms of the community eligible for jury service. (See *Taylor, supra*, 419 U.S. at pp. 528-530 ["the selection of a petit jury from a representative cross section of the community is an essential component of the Sixth Amendment right to a jury trial"]; p. 538 ["juries must be drawn from a source fai[r]ly representative of the community . . ."].)

The relevant point of reference is the Hispanic representation in the jury venire summoned to the courthouse. This is because

> a defendant does not establish the underrepresentation requirement by showing a disparity on the particular jury panel assigned to the court in which his or her jury is to be selected. Underrepresentation on the defendant's particular panel is not relevant.

(*People v. De Rosans* (1994) 27 Cal.App.4th 611, 618, citing *People v. Bell,*

supra, 49 Cal.3d at p. 525.) Because appellant makes no showing, as required, that he was denied a fair cross-section of eligible Hispanic jurors from *the community* from which the venire was drawn, his Sixth Amendment claim must be rejected.

Appellant's statutory randomness claim also fails on the merits because the trial court did not materially deviate from the statutory randomness requirements during its jury selection process. Stated somewhat differently, the trial court substantially, if not wholly, complied with statutory randomness requirements. The Code of Civil Procedure requires people selected for jury service be selected, "at random, from a source or sources inclusive of a representative cross section of the population of the area served by the court." (Code Civ. Proc., § 197, subd. (a).) Thereafter, "[r]andom selection shall be utilized in creating master and qualified juror lists, commencing from source lists, and continuing through selection of prospective jurors for voir dire." (*Id.*, § 198, subd. (a).) "When the jury commissioner has provided the court with a listing of the trial jury panel in random order, the court shall seat prospective jurors for voir dire in the order provided by the panel list."[22/] (*Id.*, § 222, subd. (b).)

Appellant provides no evidence or other showing that the source list of potential jurors was not randomly picked from a representative cross-section of the community or area serviced by the court. (Code Civ. Proc., § 197, subd. (a).) Appellant also provides no evidence or showing that the jury commissioner did not provide the trial court with a randomly ordered listing of

---

22. Appellant's claim that a number of "Hispanic prospective jurors were excluded from consideration, as a result of calling prospective jurors in the order they were assigned to the trial department" (AOB 61) misses the point. Even if true this procedure follows Code of Civil Procedure section 222, subdivision (b)'s requirement that "the court shall seat prospective jurors for voir dire in the order provided by the panel list" when listed in random order as provided by the jury commissioner.

trial jury panels or that the court deviated from this listing while seating prospective jurors during voir dire. (*Id.*, §§ 198, subd. (b); 222, subd (b).) As such, this Court should presume the trial court's entire procedure for questioning the prospective jurors substantially, if not wholly, complied with the statutory randomness requirements of the Code of Civil Procedure.[23] (Evid. Code, § 664; *People v. Coddington* (2000) 23 Cal.4th 529, 644 [a judicial officer is presumed to know and follow the law].)

> [A] defendant may not claim error on appeal if the procedure utilized in jury selection did not depart materially from the statutory procedures established to further the purpose of random selection.

(*People v. Visciotti, supra*, 2 Cal.4th at p. 38.)

Appellant nevertheless maintains that the "trial jury panel" consisted of all "initial panels" called, and the court's process was nonrandom because it did not draw from the entire "trial jury panel" which violated his fair cross-representation rights. (AOB 60.) Respondent disagrees and contends this conclusion is not consistent with this Court's observation in *People v. Bell, supra*, 49 Cal.3d 502, noting the propriety of using multiple panels in lengthy capital cases. This Court specifically noted that

> in many trials, particularly lengthy capital prosecutions, several panels are assigned to a courtroom during the selection of the trial jury, and those panels in turn may have been selected from several weekly venires. [fn.] As the Supreme Court explained in *Duren*, the defendant's burden is to show that "the representation of [the] group in venires from juries are selected is not fair and reasonable in relation to the number of persons in the community . . .." [Citations.]

(*Id.* at pp. 525-526, italics omitted.)

Moreover, respondent contends appellant's definition of a "trial jury panel as a whole" (AOB 59) is over-inclusive and requires another unnecessary juror

---

23. Indeed, appellant assumes there was "racial balance" in the master jury list, in the venire summoned, and in the trial jury panel remaining after hardship excuses and challenges for cause. (AOB 63.)

shuffle of all "initial panels." A "trial jury panel" simply "means a group of prospective jurors assigned to a courtroom for the purpose of voir dire." (Code Civ. Proc., § 194, subd. (q).) Respondent submits that under this straightforward statutory definition, a trial court may properly call several "trial jury panels" if they are randomly selected from a source list, master list, or qualified juror list. (*Id.*, §§ 194, subds. (g) & (m); 198, subd. (a); cf. *People v. Bell, supra*, 49 Cal.3d at pp. 525-526.) The court then may seat, in order, the prospective jurors from the jury commissioner's randomly selected trial jury panel list. (*Id.*, § 222, subd. (b).) As this is what happened here, the trial court substantially, if not wholly, complied with the statutory randomness requirements of the applicable statutes.

Assuming arguendo this Court finds the trial court materially deviated from statutory randomness requirements, reversal is not required. "To warrant reversal of a judgment of conviction, the defendant must demonstrate that the departure affected his ability to select a jury drawn from a representative cross-section of the population. [fn.]" (*People v. Visciotti, supra*, 2 Cal.4th at p. 41, footnote omitted.) Appellant's attempts to do so (AOB 61-63) fail because he has not shown that the representation of Hispanics in venires from which his jury was selected was not fair and reasonable in relation to the number of eligible Hispanic prospective jurors *in the community* that the Madera County Superior Court serves. (*Duren, supra*, 439 U.S. at p. 364; *Williams v. Superior Court, supra*, 49 Cal.3d at pp. 743-746.) As shown above, his reliance on percentages from other panels of prospective jurors is misplaced because "[i]nitially, the defendant must demonstrate *the percentage of the community* made up of the group alleged to be underrepresented, for this is the conceptual benchmark of the Sixth Amendment." (*Ibid.*, italics added; see *People v. De Rosans, supra*, 27 Cal.App.4th at pp. 618, 621.) As such, appellant fails to demonstrate prejudice, even if any error occurred.

II.

APPELLANT'S CONTENTION THAT THE TRIAL COURT ERRONEOUSLY DENIED HIS CHALLENGE OF A JUROR FOR CAUSE IS BARRED FOR FAILURE TO EXHAUST HIS PEREMPTORY CHALLENGES; REGARDLESS, THE TRIAL COURT DID NOT ABUSE ITS DISCRETION FOR DECLINING TO EXCUSE A JUROR FOR CAUSE

Appellant maintains the trial court denied him due process of law by refusing his request to excuse Juror No. 180007014 (seat no. nine) for cause. (AOB 66-76.) Respondent contends the claim is barred because he failed to exhaust his peremptory challenges. Regardless, even if reviewable, the trial court did not abuse its discretion by declining to excuse the juror for cause.

A. Legal Principles

> "It has long been the rule in California that exhaustion of peremptory challenges is a 'condition precedent' to an appeal based on the composition of the jury. [Citation.]" [Citation.] "Defendant's right to a fair and impartial jury is not compromised as long [as] he could have secured the juror's removal through the exercise of a peremptory challenge." [Citations.] Accordingly, "California courts hold that the defendant must exercise his peremptory challenges to remove prospective jurors who should have been excluded for cause, and that to complain on appeal of the composition of the jury, the defendant must have exhausted those challenges. [Citation.]" [Citations.]

(*People v. Bolin* (1998) 18 Cal.4th 297, 315.)

"Assessing the qualifications of jurors challenged for cause is a matter falling within the broad discretion of the trial court. [Citation.]" (*People v. Boyette* (2002) 29 Cal.4th 381, 416.) "The legal standard for evaluating the propriety of the exclusion or inclusion of a prospective juror is the same." (*People v. Mincey* (1992) 2 Cal.4th 408, 456.)

> A "for cause" challenge to a prospective juror should be sustained when the juror's views would "prevent or substantially impair" the juror's ability to perform his or her duties in accordance with the instructions

> and oath. [Citations.] A reviewing court examines the context in which the trial court ruled to determine if its decision is fairly supported by the record. [Citation.] If a prospective juror's responses to voir dire questions are halting, equivocal, or even conflicting, "we defer to the trial court's evaluation of a prospective juror's state of mind, and such evaluation is binding on appellate courts." [Citation.]

(*People v. Mendoza* (2000) 24 Cal.4th 130, 169.)

B. Background

Juror No. 180007014 filled out a questionnaire, and in doing so expressed her strong support for the death penalty. (15 CT 3271-3272.) In her questionnaire, she felt that the death penalty was not used enough, and explained "If there is proof without a doubt that a person has viciously killed another their life should not be spared." (15 CT 3271.) On August 25, 1998, the court and counsel examined her on her questionnaire after she was seated as prospective juror number one. On initial questioning by defense counsel, she stated that she would not consider life without the possibility of parole as a sentence if one of the murders was premeditated. Defense counsel immediately challenged her for cause. (3 RT 606.)

The trial court allowed the prosecutor to examine the prospective juror. The prosecutor explained to her that the guilt and penalty phases were distinct, and that a juror should listen to the evidence in mitigation and aggravation during the penalty phase to make a determination of the proper penalty. When asked upon listening to the evidence, if she found that mitigation outweighed aggravation evidence could she render a life without the possibility of parole finding, she replied, "Yes, I would think so. I have never been in this situation before where I had to make a choice, but I would certainly hope so." (3 RT 609.) She reiterated that she could listen to the mitigating evidence and then weigh it before rendering a decision. (3 RT 610.)

The trial court then examined the prospective juror, generally explaining the

penalty phase process. The court explained:

> You are making judgments about what's good and bad and having to make a decision on what the penalty is. Now, there's only two choices, the death penalty or life without parole. If you find more mitigating weight, then by law you vote for life in prison. Or if they kind of balance out, you would vote for life in prison. But if the aggravating factors, you know, outweigh those in mitigation, then you may but are not required to vote for the death penalty. Do you understand that?

(3 RT 610.) She responded, "Yes, I do." (3 RT 610.) She added that she believed she could weigh the factors and render a fair and just decision regardless of the consequences. The court then denied the challenge for cause. (3 RT 611.)

Defense counsel then resumed questioning Juror No. 180007014, asking her whether she could "seriously consider" life without the possibility of parole as an alternate to the death penalty if the jury found the special circumstance true. She replied, "Yes. I think I could if I listened to all the evidence." (3 RT 611.) Counsel's next question about what circumstances might make her feel life without the possibility of parole would be proper instead of the death penalty, drew an objection from the prosecutor so the court took up the matter in chambers. (3 RT 612.)

After discussing and considering counsel's last question (3 RT 612-620), the trial court overruled the objection, but warned that it would curtail further "hypothetical" questioning if it did not prove to be productive. (3 RT 621-622.) When defense counsel asked Juror No. 180007014 what kinds of factors she would consider, she responded:

> I have never been in this position before. And I just would have to hear all the evidence. I really – I don't know how to answer that because I don't know all the evidence. And it would be just dependent upon the evidence.

(3 RT 623.)

Counsel then asked the prospective juror "what kind of individuals in your

mind would deserve the death penalty versus . . . something other than the death penalty." The prospective juror replied:

> Well I think if the person had – like I said before – a self-defense type reason for killing *or maybe something to do with a family member, something snapped in their mind or something was affecting one of their loved ones, or something of that sort. I certainly wouldn't impose death on something like that, I don't believe.* . . . [¶] It just depends on the evidence. It's hard to just come right out and say why you would do it, but I think if the evidence is there, and that I could – if it was all proven to me, the evidence and everything that I could go that way. But it just depends upon what the evidence is.

(3 RT 623-624, italics added.) She added that she would consider a person's background and lack of criminal history in rendering a decision, although she did not believe that this was a particularly "legitimate consideration." (3 RT 624-625.)

Defense counsel then returned to examining the prospective juror on her questionnaire, focusing on her answer that she did not believe the death penalty was imposed enough. She explained her answer was based on her assumptions after reading news stories, without regard to hearing the particular facts of the case. (3 RT 627-628.) She reiterated that she generally supported the death penalty. (3 RT 628.) Appellant did not renew his challenge for cause.

Juror No. 180007014 was sworn as Juror No. 1 after the defense exercised three peremptory challenges on other prospective jurors. (3 RT 697, 707, 721, 748.)

C. Appellant's Failure To Exhaust His Peremptory Challenges Bars His Challenge Here; Regardless, The Trial Court Did Not Err

Appellant's failure to exhaust his peremptory challenges bars his appellate challenge to the jury's composition because "exhaustion of peremptory challenges is a 'condition precedent'" to such a claim on appeal. (*People v. Bolin, supra*, 18 Cal.4th at p. 315.) Because appellant left Juror No. 180007014 on the jury after exercising only three of his twenty challenges, his claim should

be barred on review. Indeed, respondent submits that the record supports a fair assumption that defense counsel chose to keep her on the jury despite her initial answers in her questionnaire. The prospective juror told defense counsel that she "certainly wouldn't impose death" in situations involving "something to do with a family member, something snapped in their mind or something was affecting one of their loved ones, or something of that sort." (3 RT 623-624.) In light of the prosecutor's theory that the murders were retaliatory for Little Pete's shooting, respondent submits that trial counsel decided to keep her on the jury as a tactical matter.

Regardless, even if reviewable, the trial court did not err in denying the challenge for cause. In context, the record fairly supports the trial court's determination that the prospective juror's views would not "prevent or substantially impair" the performance of her duties. (*Wainwright v. Witt* (1985) 469 U.S. 412, 424; *People v. Boyette, supra*, 29 Cal.4th at p. 416; *People v. Mendoza, supra*, 24 Cal.4th at p. 169.) While she generally supported the death penalty, she repeatedly asserted that she would in good faith listen to the evidence, consider it, and follow the law before rendering a decision. (3 RT 610-611, 623.) The trial court was in the best position to listen to her answers and gauge her demeanor and credibility when she explained how she could perform her duties as a juror. As such, deference should be afforded to the trial court's determination that she could faithfully perform her duties. (*People v. Moon* (2005) 37 Cal.4th 1, 14.)

To the extent that the prospective juror's answers might seem halting, equivocal, or conflicting (see, e.g., 3 RT 609 ["I have never been in this situation before where I had to make a choice, but I would certainly hope so"]), such responses "should be expected" "[g]iven 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." (*People v. Fudge* (1994) 7 Cal.4th 1075,

1094.) Because her fairness and impartiality is supported by substantial evidence, the trial court's resolution of the issue is binding on the reviewing court. (*People v. Boyette, supra*, 29 Cal.4th at p. 416.) The trial court did not err for denying appellant's for cause challenge.[24/]

III.

THE TRIAL COURT DID NOT ERR BY RETAINING JUROR NUMBER 9

Appellant contends the trial court abused its discretion for failure to discharge Juror No. 9 because she was acquainted with Chuck Durbin's brother, Randy. (AOB 77-84.) In a perfunctory manner, appellant also contends that the court erred by retaining Juror No. 12, who was formerly related by marriage to Chuck Durbin's mother, Ginger Colwell. (AOB 77.) As to Juror No. 12, the contention should be deemed not properly raised and hence be denied on this procedural basis. Moreover, as to Juror No. 12, respondent contends because appellant actually failed to challenge her, it was tantamount to his concurrence that she was a fit juror.

A. Legal Principles

The Sixth Amendment guarantees "trial, by an impartial jury..." in federal criminal prosecutions. Because "trial by jury in criminal cases is fundamental to the American scheme of justice," the Due Process Clause of the Fourteenth Amendment guarantees the same right in state criminal prosecutions. (*Duncan v. Louisiana* (1968) 391 U.S. 145, 149.) "In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors. . . . 'A fair trial in a fair tribunal is a basic requirement of

---

24. Her succeeding answers after the court denied appellant's challenge further support the correctness of the trial court's ruling. Indeed, appellant did not renew his challenge.

due process.' [Citation.]" (*Irvin v. Dowd* (1961) 366 U.S. 717, 722.)

In a criminal trial, a court has the authority to discharge a sworn juror, if upon good cause, it is shown that a juror is unable to perform his or her duty. (§ 1089; Code Civ. Proc., §§ 233, 234.) A trial court's decision whether to discharge a juror for good cause is reviewed for abuse of discretion. (*People v. Williams* (2001) 25 Cal.4th 441, 448; *People v. Lucas* (1995) 12 Cal.4th 415, 489.) A trial court must make whatever inquiry is reasonably necessary to determine whether good cause exists to discharge a juror. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1029.) Before an appellate court will find error in the exercise of the court's discretion of whether to discharge a seated juror, the "juror's inability to perform as a juror must "'appear in the record as a demonstrable reality." [Citation.]' [Citation.]" (*Williams, supra*, 25 Cal.4th at p. 448.)

B. Background

During the second phase of jury selection, on the morning of August 25, 1998, the prosecutor informed the prospective jurors of potential witness names. (4 RT 556-558.) The prosecutor then added "there's one more name that I notice wasn't listed and would not be for the guilt phase of the trial, but for the penalty phase. That would be Randy Durbin." (4 RT 563-564.) The court asked prospective jurors in the jury box whether anyone knew Randy Durbin. Prospective Juror Number 2 (No. 180019771) advised the court that she knew Randy Durbin "very well" and based on her friendship with him, and her religious beliefs, she would be unable to fairly hear the case. The court excused her. (4 RT 564.)

Later, after several prospective jurors were excused from seat number nine, Juror No. 180002598 was called to the jury box. The court then asked her whether she knew "anybody involved in this case." She replied "No." (3 RT 582.) The trial court examined her on her questionnaire. (3 RT 598-600.)

Oddly, the record reflects that defense counsel did not examine her and instead appeared to skip over her by examining only the other jurors. (See 3 RT 625-632, 633-675.) She was eventually seated as Juror No. 9. (3 RT 747.) After the alternates were selected, the court ordered the jurors and alternates to return on the morning of September 8, 1998. (3 RT 773-776.)

Court resumed the morning of September 8, and outside the jury's presence the court noted that Juror No. 9 "called last week, indicated she is acquainted with Randy Durbin. And I advised her that we would bring her in and discuss that issue this morning also." The court also noted that Juror No. 12 had announced that she had been related by marriage to Ginger Colwell, Chuck's mother. (4 RT 846-847.) The court questioned each juror alone. Juror No. 12 told the court that her sister-in-law's brother had been married to Colwell. The juror had not spoken to Colwell in 15 to 20 years. (4 RT 849.) Defense counsel did not make any challenge to the continued service of this juror.

The court then questioned Juror No. 9 about her acquaintance with Randy Durbin, asking how she knew him. (4 T 849-850.) The juror responded:

> Probably about four years ago I was at the Madera Athletic Club. And every now and then he would come in and substitute water aerobics. And then my husband is taking a class right now at Madera College. And he is the instructor there, and I attended a few of the classes.

(4 RT 850.) When asked by the court whether this acquaintanceship would have any effect on her ability to be fair and impartial, she replied, "No, I don't think so. I just wanted everybody to be aware of that." (4 RT 850.)

Defense counsel advised Juror No. 9 that Randy Durbin would likely be a penalty phase witness only, and then he asked her whether her acquaintance with Randy Durbin "would affect [her] in any way in the penalty phase?" The juror replied, "No, I don't think so. We are not personal friends or anything. And I am not going to go to class anymore because of that. So nothing comes of it." (4 RT 851.) Counsel then turned to the court and asked that it be

allowed "to reopen the issue of jury selection" due to the juror's revelation. Counsel asked to replace her with an alternate. Counsel informed the court that it previously declined to exercise a peremptory challenge against her, "even though it was a very close question." Counsel added that with this new information, he would have exercised a challenge to the juror.[25/] (4 RT 852.)

The trial court responded that it could "disqualify her, and replace her with an alternate." The court felt that "disqualification" was not appropriate, however, because:

> She is not personal friends with this Randy Durbin. Apparently he went to the same gym [as] she did four years ago. And apparently this Randy Durbin teaches her husband. And she had gone to class a couple of times with him. There's no relationship there whatsoever. Doesn't appear to the court she should be disqualified as a witness [sic: juror]. And she has indicated it would have no effect. I can understand why she would bring it up. There could have been an appearance of impropriety if there was anymore of a relationship other than as stated here in open court.

(4 RT 853-854.)

Defense counsel then asked the court to exercise its discretion to reopen to allow for a challenge for cause to the juror and to replace her with an alternate. Counsel noted that the juror failed to bring up her acquaintance with Randy Durbin during the jury selection process. (4 RT 854.) The court declined to do so, and found the juror did not intentionally mislead counsel because Randy Durbin "was not somebody that she is so well acquainted with she would necessarily recall that she knew who he was." (4 RT 855.) The court went on to find and rule:

> And there's no evidence of any personal relationship, there [sic] being a member of the same club four years ago. And this person is a[n] instructor for her husband. And she went to a couple of classes with him. So I see no bias or prejudice. She seems to be forthright in

---

25. As noted, however, the record reflects that counsel passed over Juror No. 9 during voir dire, and did not examine her.

> bringing that to our attention. [¶] It seems to me there's no prejudice to the defendant. She was properly on this jury. And I do not find evidence sufficient to disqualify her at this point in time. That's not without prejudice to renewing your motion upon looking further into her background or upon research of the law. We can revisit this area later.

(4 RT 854-855.) Appellant did not renew his motion or provide the trial court with any authority or further information on the juror.

Randy Durbin testified during the penalty phase of the trial. (10 RT 2391-2403.)

C. Appellant's Claim Of Error As To Juror No. 12 Is Not Properly Raised; Regardless, His Acquiescence To Her Continued Service Means He Concurred She Was A Fit Juror; The Trial Court Did Not Err By Retaining Juror No. 9

As to Juror No. 12, appellant's claim of error is not properly raised on review because it is presented in an offhand manner unsupported by any argument. (*People v. Roberts* (1992) 2 Cal.4th 271, 340-341; *People v. Clair* (1992) 2 Cal.4th 629, 653, fn. 2.) Perfunctory assertions of error, without development or a clear indication they are intended to be discrete intentions, are not properly presented and will be rejected on that basis. (*People v. Turner* (1994) 8 Cal.4th 137, 214, fn. 19.) The sole mention of error as to Juror No. 12 is in the heading of appellant's argument (AOB 77), which is insufficient under the Rules of Court, rule 8.204(a)(1)(B). (*People v. Gray* (2005) 37 Cal.4th 168, 198, citing former rule 14(a)(1)(B), and *People v. Stanley* (1995) 10 Cal.4th 764, 793.) As such, his claim as to her is not properly raised and should be rejected on that basis. Regardless, even if properly raised, his failure to object and acquiescence in her continued service means he most likely concurred in the assessment that she was properly seated. (See *People v. Schmeck* (2007) 37 Cal.4th 240, 263, quoting *Wainwright v. Witt, supra*, 469 U.S. at pp. 425-426; *People v. Memro* (1995) 11 Cal.4th 786, 818.)

As to Juror No. 9, the trial court did not abuse its discretion by retaining her.

Substantial evidence supports the court's finding that the juror would remain fair and impartial despite her casual familiarity with Randy Durbin. The juror informed the court that she felt she could be fair and impartial. (4 RT 850.) She again advised defense counsel that she believed she could be fair and impartial as "[w]e are not personal friends or anything. . . . So nothing comes of it." (4 RT 851.) The court's finding that she had "no relationship there whatsoever" (4 RT 853) with Randy Durbin, and its finding of "no bias or prejudice" and insufficient evidence "to disqualify her at this point" (4 RT 855) is supported by substantial evidence. (*People v. Williams, supra*, 25 Cal.4th at p. 448 ["If there is any substantial evidence supporting the trial court's ruling, we will uphold it."].)

Moreover, there is nothing in the record, let alone "a demonstrable reality," to suggest that the juror was unable to perform as a fair and impartial juror. (See *People v. Williams, supra*, 25 Cal.4th at p. 448.) The juror explained that she revealed her acquaintanceship with Randy Durbin because she "just wanted everybody to be aware of that." (4 RT 850.) They were "not personal friends or anything," and "nothing comes of" her casual familiarity with him. (4 RT 851.) There was no evidence that she could not listen impartially to the evidence, follow the law, and deliberate. Instead, she twice explained that she could be fair and impartial. (4 RT 850-851.)

While a criminal defendant has a Sixth Amendment right to "trial, by an impartial jury..." (see *Irvin v. Dowd, supra*, 366 U.S. at p. 722 ["In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors"]; see also *id.* at p. 723 ["It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court"]), there was no constitutional violation here because the trial court undertook reasonable and necessary steps to ensure appellant's fair trial rights were not violated. The court first examined the juror,

and then made a credibility judgment that she would be fair and impartial, based on her statements and her demeanor, notwithstanding her acquaintanceship with Randy Durbin. These findings are entitled to deference on review and supported by substantial evidence. (See *Uttecht v. Brown* (2007) __ U.S. __, 127 S.Ct. 2218, 2223-2224 [concluding that "[d]eference to the trial court is appropriate because it is in a position to assess the demeanor of the venire, and of the individuals who compose it . . ."]; cf. *People v. Williams, supra*, 25 Cal.4th at p. 448 ["If there is any substantial evidence supporting the trial court's ruling, [this Court] will uphold it"].)

Moreover, as noted earlier, appellant did not renew his motion despite the trial court's invitation to revisit the issue, even after Randy Durbin testified in the penalty phase. (4 RT 855.) Appellant's failure to revisit the motion should mean that counsel conceded the propriety of the court's ruling on it after further reflection. Moreover, respondent submits the court's ruling on the motion was not final where it was denied without prejudice so that appellant could further develop the issue, brief it, and educate the court about Randy Durbin's testimony. (4 RT 855.) The failure to reassert the motion should preclude review for the contention raised here. (E.g., *People v. Hunt* (1982) 133 Cal.App.3d 543, 556 [objection abandoned when defendant refrained from producing requesting points and authorities].)

Appellant nevertheless cites *Williams v. Taylor* (2006) 529 U.S. 420 (*Williams*), and *Conaway v. Polk* (2006) 453 F.3d 567 (*Conaway*), for the proposition that a juror's failure to disclose information indicating bias may result in a denial of due process for failure to remove the juror when the information later comes to light. (AOB 77, 81-82.) This contention misses the mark because there is no indication that the juror hid her acquaintanceship with Randy Durbin, thereby raising the specter of misconduct. To the contrary, she was forthright and explained she was "not personal friends or anything" with

him. (4 RT 851.) The court thus found that Randy Durbin "was not somebody that she is so well acquainted with she would necessarily recall that she knew who he was." (4 RT 855.) The court found she was "forthright in bringing that to our attention." (4 RT 855.) Indeed, while defense counsel found it "rather incredible" that her familiarity with Randy Durbin did not come out during voir dire, he added, "I am not saying [she] intentionally kept from us this information." (4 RT 852.)

In contrast, in *Williams v. Taylor*, a juror did not divulge that she was previously married to a lead investigating officer in the capital case, despite being asked whether she was related to anyone in the case. She also did not reveal that the trial prosecutor had represented her during her divorce proceedings, despite being asked whether she was previously represented by either of the attorneys in the case. This information came out only on habeas review to the state supreme court. (*Williams v. Taylor, supra*, 529 U.S. at pp. 440-442.) Based on this revelation, the Supreme Court found that Williams should be allowed a federal evidentiary hearing to develop his claims of juror bias and misconduct. (*Id.* at p. 443, citing *Smith v. Phillips* (1982) 455 U.S. 209, 217.)

Similarly, *Conaway* involved a claim of juror bias based on misconduct where the juror failed to reveal he was the co-defendant's "double first cousin, once removed." (*Conaway, supra*, 453 F.3d at p. 585.) The federal habeas court concluded that Conaway was entitled to an evidentiary hearing on his claim of juror bias because (1) the challenged juror failed to answer honestly a material question on voir dire, (2) had the juror truthfully responded at voir dire, his answers would have provided a valid basis for a challenge for cause, and (3) the juror's motives for concealment might affect the fairness of the trial. (*Id.* at pp. 585-589, applying test articulated in *McDonough Power Equipment, Inc. v. Greenwood* (1984) 464 U.S. 548, 556.) The court found implied bias

based on the juror's kinship with Conaway's co-defendant. (*Id.* at p. 586-587.)

Here, by contrast, there was no claim of juror misconduct. Moreover, prior to the presentation of evidence, the juror actually revealed her acquaintanceship with Randy Durbin as she "just wanted everybody to be aware of that." (4 RT 850.) She called the trial court the week prior to her examination on the issue, to advise it. (See 4 RT 846 [the juror "called last week, indicated she is acquainted with Randy Durbin."].) Unlike *Williams* and *Conaway*, the juror did not hide her acquaintanceship with the witness. Further, unlike *Williams* involving an ex-spouse, and *Conaway* involving a double first cousin once removed, Juror No. 9 was only casually acquainted with Randy Durbin, she was "not personal friends or anything" with him. (4 RT 851.) Thus, the degree of the juror's relationship with Randy Durbin is qualitatively different than that involved with the juror and witness in *Williams* or the juror and co-defendant in *Conaway*. As such, the court found that Juror No. 9 would not necessarily recall Randy Durbin and she "seems to be forthright in bringing that to our attention." (4 RT 855.)

Moreover, to the extent that appellant maintains the trial court should have implied juror bias based on Juror No. 9's acquaintance with Randy Durbin (AOB 77, 82, citing *Smith v. Phillips, supra*, 455 U.S. 209 and *Andrews v. Collins* (5th Cir. 1994) 21 F.3d 612), the contention should be rejected. The facts here do not merit a finding of implied juror bias. In her concurring opinion, Justice O'Connor explained in *Smith* that the opinion should not be read to foreclose the use of implied bias, because there are

> some *extreme situations* that would justify a finding of implied bias. Some examples might include a revelation that the juror is an actual employee of the prosecuting agency, that the juror is a close relative of one of the participants in the trial or the criminal transaction, or that the juror was a witness or somehow involved in the criminal transaction.

(*Smith v. Phillips, supra*, 455 U.S. at p. 222 (O'Connor, J., concurring, italics added.) The situation here does not involve an "extreme" one reflecting the

type of relationship that might give rise to a judicial finding of implied bias.

As such, the trial court did not err for not discharging the jurors.

IV.

SUBSTANTIAL EVIDENCE SUPPORTS THE JURY'S FINDING THAT APPELLANT PREMEDITATED CHUCK DURBIN'S MURDER

Appellant contends there is insufficient evidence for the jury to find that he premeditated Chuck Durbin's murder. (AOB 85-96.) Respondent disagrees.

A. Legal Principles

On a sufficiency-of-the-evidence challenge, an appellate court reviews the entire record in the light most favorable to the prosecution to determine whether it contains evidence that is reasonable, credible, and of solid value, from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Tafoya* (2007) 42 Cal.4th 147, 170.) The salient inquiry is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11; accord *Jackson v. Virginia* (1979) 443 U.S. 307, 319.)

Because it is the jury, not an appellate court, which must be convinced of the defendant's guilt beyond a reasonable doubt, the appellate court will not substitute its judgment for that of the jury. (*People v. Ceja* (1993) 4 Cal.4th 1134, 1139.)

> If the circumstances reasonably justify the jury's findings, the reviewing court may not reverse the judgment merely because it believes that the circumstances might also support a contrary finding.

(*Ibid.*) The standard is the same when the People rely primarily on circumstantial evidence. (*People v. Perez* (1992) 2 Cal.4th 1117, 1124.)

First degree murder, in salient part, is defined to include "any . . . willful,

deliberate, and premeditated killing." (§ 189.) "The test on appeal is whether a rational juror could, on the evidence presented, find the essential elements of the crime — here including premeditation and deliberation — beyond a reasonable doubt." (*People v. Stewart* (2004) 33 Cal.4th 425, 495.) Evidence of motive, planning, and the manner of killing are pertinent to the determination of premeditation and deliberation, but these factors are not exclusive nor are they invariably determinative. (*People v. Horning* (2004) 34 Cal.4th 871, 902; *People v. Perez, supra*, 2 Cal.4th at pp. 1124-1125 ["[W]hile helpful for purposes of review, [these factors] are not a sine qua non to finding first degree premeditated murder.") The process of premeditation and deliberation does not require any extended period of time; indeed it can occur within a brief period. (*People v. Horning, supra,* 34 Cal.4th at p. 902; *People v. Bolin* (1998) 18 Cal.4th 297, 332.)

B. Appellant's First Degree Murder Conviction Of Chuck Durbin Is Supported By Substantial Evidence

There is overwhelming evidence that appellant and others engaged in many acts toward killing Uribe, including going into the Durbin home which they knew was occupied by others. Appellant was angry that his son had been shot, so he enlisted the help of friends and family to find and kill Uribe. To this end, they retrieved guns and went hunting for Uribe. Avila drove appellant, Little Pete, and Diaz to Uribe's home. After finding Uribe's car gone, they drove to Central Avenue to look for him at Chris Castaneda's home. They saw Uribe's car parked in front of the Durbin home. Diaz saw others, besides Uribe, in the home. Avila parked his car around the corner and appellant, Little Pete, and Diaz got out of it. Little Pete and appellant ran into the home armed with their guns. (5 RT 1263-1271, 1288-1289.)

Trial evidence established appellant and Little Pete shot Chuck after Chuck ran out of the kitchen and confronted them in his living room. (5 RT 1170-

1172, 1273-1275; 6 RT 1387-1388.) Little Pete then walked into the kitchen and shot Uribe to death. (5 RT 1273; 6 RT 1387-1388.) Diaz testified that he saw appellant shoot Chuck after a confrontation in the living room. (5 RT 1273-1275.) Afterward, while driving away from the shooting, appellant stated that he shot Chuck because he believed Chuck was going to get a gun. (5 RT 1278.) From this evidence, the jury could reasonably conclude that appellant killed Chuck to facilitate Uribe's murder as Chuck confronted the assailants and interfered in that endeavor. (See 9 RT 2128 [prosecutor's summation "Chuck Durbin got in the way and they killed him."].) Chuck's conduct of confronting appellant and Little Pete in the living room, and appellant's statement about why he shot Chuck supports this contention. This evidence tends to establish a motive for the murder.

Moreover, the execution-style manner in which appellant shot Chuck reflects premeditation and deliberation. Appellant shot Chuck in the head and neck at close range after Little Pete repeatedly shot Chuck in the torso and seriously wounded him. (5 RT 1265-1266, 1270-1271, 1288-1289.) Richard Diaz testified that he saw appellant shoot Chuck at close range with the .38 caliber gun in the livingroom after a brief struggle. (5 RT 1273-1275.) Police later found a spent .38 caliber bullet projectile (exhibit no. 15) near Chuck's head. (4 RT 928.) Dr. Avalos opined that Chuck was shot in the head and neck with a larger caliber gun, after first being shot in the torso with a smaller caliber gun. He also opined that Chuck's head and neck wounds were consistent with the .38 caliber bullet found next to his head. (4 RT 966-976.) Based on this evidence a jury could reasonably conclude that appellant's particular manner of shooting Chuck in the head and again in his neck evinced his premeditation.

While there was no evidence that appellant knew Chuck before he murdered him, and that the murder occurred during a brief confrontation, the process of premeditation and deliberation "can occur in a brief period of time." (*People*

v. Perez, supra, 2 Cal.4th at p. 1127; see *People v. Bolin, supra*, 18 Cal.4th at p. 332.) The evidence was subject to the reasonable interpretation that appellant weighed and considered his act – albeit briefly – instead of acting rashly. Because the circumstances reasonably justify the jury's findings, substantial evidence supports the jury's finding of premeditation in count 1.

Appellant nevertheless contends that all planning activity was directed toward killing Uribe, not an innocent bystander. (AOB 90.) Not so, because as shown above, a jury could reasonably conclude that the murderous plan, which included running into the occupied residence of strangers, also involved killing anyone who interfered in their efforts to kill Uribe. Indeed, the law recognizes that the invasion of one's home is likely to result in a violent confrontation. (E.g., *People v. Hughes* (2002) 27 Cal.4th 287, 355 [recognizing "the danger that the intruder will harm the occupants in attempting to perpetrate the intended crime or to escape and the danger that the occupants will in anger or panic react violently to the invasion, thereby inviting more violence"]; *People v. Lewis* (1969) 274 Cal.App.2d 912, 920 [same].)

Appellant next contends that his statement of why he shot Chuck does not establish premeditation because it indicates a response to Chuck's actions, not a planned assault. In his view, this statement was consistent with imperfect self-defense or defense of others. (AOB 91.) This is nonsense.[26/] The jury could reasonably conclude that he killed Chuck to facilitate Uribe's murder, instead of acting rashly. If Chuck had retrieved a gun, as appellant apparently believed, Chuck could have thwarted their efforts to kill Uribe. Unfortunately, Chuck got in the way so appellant murdered him. Because the circumstances reasonably justify the jury's finding of premeditation, appellant's claim must be rejected.

---

26. As shown in Argument VIII, post, appellant had no right to claim imperfect or perfect self-defense.

Even if appellant's statement somehow raised an inference that he felt the need to defend himself or Little Pete against Chuck (which was not asserted at trial), the jury could reject it in favor of the reasonable inference that he killed Chuck to facilitate Uribe's murder. The standard of review requires that if the circumstances reasonably justify the trier of fact's finding, the reviewing court's opinion that the circumstances might also be reasonably reconciled with a contrary finding does not warrant reversal. (*People v. Perez, supra*, 2 Cal.4th at p. 1124.)

Appellant next contends that Chuck's head and neck wounds were not particular and exacting to raise an inference of a premeditated murder. (AOB 91-93.) Respondent disagrees and contends the contrary is true. Appellant shot Chuck, at close range, in particularly lethal areas after Little Pete repeatedly shot him in the torso. This compelling evidence, in conjunction with evidence of appellant's and Little Pete's plan to find and kill Uribe, provides substantial evidence of a preconceived design to kill anyone who tried to thwart their plan. In sum, there is substantial evidence that appellant premeditated Chuck's murder to support the jury's finding of first degree murder.

V.

SUBSTANTIAL EVIDENCE SUPPORTS APPELLANT'S ARMING ALLEGATION

Appellant contends that insufficient evidence supports the jury's firearm finding because he did not personally use a firearm on Juan Uribe. (AOB 97-103.) Respondent disagrees and contends that appellant personally used a firearm in the commission of the murders, even though he did not personally discharge the gun that killed Uribe.

A. Legal Principles

The standard of review for a sufficiency-of-the-evidence claim requires the

reviewing court to view "'the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence – that is, evidence which is reasonable, credible, and of solid value – such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citation.]" (*People v. Horning, supra,* 34 Cal.4th at p. 901, citing *People v. Johnson,* (1980) 26 Cal.3d 557, 578.)

Section 12022.5, subdivision (a) provides in pertinent part: "[A]ny person who personally uses a firearm in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment . . . unless the use of a firearm is an element of that offense." "The intent of the enhancement provision is to 'deter persons from creating a potential for death or injury resulting from the very presence of a firearm at the scene of a crime [citation],' and to 'deter the use of firearms in the commission of violent crimes by prescribing additional punishment for each use.' [Citation.]" (*In re Tameka C.* (2000) 22 Cal.4th 190, 196.)

"The obvious legislative intent to deter the use of firearms in the commission of the specified felonies requires that 'uses' be broadly construed." (*In re Tameka C., supra*, 22 Cal.4th at p. 197, citing *People v. Chambers* (1972) 7 Cal.3d 666, 672.) Moreover, "[w]hether a gun is 'used' in the commission of an offense – 'at least as an aid' – is broadly construed within the factual context of each case." (*Alvarado v. Superior Court* (2007) 146 Cal.App.4th 993, 1002, citing *Chambers, supra,* 7 Cal.3d at p. 672.)

B. Appellant Personally Used A Firearm In The Commission Of Uribe's Murder

Appellant personally used a firearm in the commission of Uribe's murder, even though he did not personally discharge his gun at Uribe. Respondent recognizes there was no evidence that appellant fired his gun at Uribe. Indeed, the prosecutor acknowledged this point in arguing appellant aided and abetted

Little Pete in murdering Uribe. (9 RT 2127.) Trial evidence showed that appellant personally shot Chuck to death in the living room, not Uribe in the kitchen. (5 RT 1273; 6 RT 1386-1387, 1389.)

The lack of evidence that appellant personally shot Uribe, however, does not mean that appellant did not personally use a firearm in the commission of Uribe's murder because "a gun may be used 'in the commission of' a given crime even if the use is directed toward someone other than the victim of that crime." (*People v. Granado* (1996) 49 Cal.App.4th 317, 330.) The jury was free to reasonably conclude that appellant killed Chuck to facilitate Uribe's murder.[27] (See, e.g., *People v. Berry* (1993) 17 Cal.App.4th 332, 335-340, and cases cited therein.)

Trial evidence showed appellant, Little Pete, Diaz, and Avila hatched a plan to find and kill Uribe. (5 RT 1262-1265.) Appellant and Little Pete followed through with that plan by arming themselves and running into the Durbin residence. (5 RT 1265-1273.) They rushed the Durbin home with their guns as part of their plan to murder Uribe. During the home-invasion fray, Chuck confronted appellant in his living room and appellant shot him. (5 RT 1273; 6 RT 1386-1387, 1389.) Appellant claimed that he shot Chuck because he believed Chuck was going to get a gun. (5 RT 1278.) Little Pete followed through with their plan and shot Uribe to death in the kitchen. (4 RT 916; 6 RT 1388.) Under this evidence, a reasonable jury could conclude that appellant's firearm use facilitated or furthered Uribe's murder. As such, substantial evidence supports the personal firearm use allegation in count 2.

---

27. Anomalously, the jury did not find true appellant's personal arming allegation in Chuck's murder, in count 1 (11 CT 2389), even though the evidence showed otherwise and even though they were properly instructed that the term "personally used a firearm" meant that "the defendant must have intentionally displayed a firearm in a menacing manner, intentionally fired it, or intentionally struck or hit a human being with it." (9 RT 2276.)

Appellant nevertheless maintains that there was an insufficient "nexus or causation" between his possession of the gun and Uribe's shooting. (AOB 102-103.) Respondent disagrees because, as shown above, a reasonable inference from the evidence is that appellant shot Chuck to facilitate Uribe's murder. (See Argument IV, *ante*.) Chuck confronted the armed home invaders and was shot to death; Uribe was then shot to death in the kitchen. On this evidence a jury could reasonably conclude that appellant's gun use facilitated Uribe's murder. Thus, despite appellant's contention to the contrary, there was substantial evidence of a "facilitative nexus" between his gun use and Uribe's murder. (See *In re Tameka, supra*, 22 Cal.4th at p. 197.)

This contention is consistent with the intent of section 12022.5, subdivision (a), and this Court's broad interpretation of the gun enhancement statute. This Court has stated that the intent of the statute is to deter the use of firearms in the use of violent crimes and to deter people from creating a potential for death or injury resulting from the presence of a firearm at the scene of a crime. (*In re Tameka C., supra*, 22 Cal.4th at p. 196.) To facilitate this intent, this Court has broadly construed the statute "'to check the magnified risk of serious injury which accompanies any deployment of a gun in a criminal endeavor' [Citation.]" (*Ibid.*, citing *People v. Granados, supra*, 49 Cal.App.4th at p. 322.) Appellant's conduct is precisely the type the Legislature sought to deter. Hence, because there is substantial evidence that appellant personally used a firearm during the commission of Uribe's murder, and because his conduct was the type the Legislature sought to deter, his enhancement is proper.

C. Assuming Arguendo This Court Finds Insufficient Evidence, Reduction Of The Allegation To Reflect A Violation Of Section 12022, Subdivision (a) Is The Proper Remedy

Should this Court find that there is insufficient evidence that appellant *personally used* a firearm in the commission of Uribe's murder, then reduction

of that allegation to a lesser included allegation under section 12022, subdivision (a), is proper. (§ 1260; *People v. Allen* (1985) 165 Cal.App.3d 616, 627; see *People v. Dixon* (2007) 153 Cal.App.4th 985, 1001-1002 [recognizing that arming allegations are subject to the analysis of lesser included offenses]; *People v. Turner* (1983) 145 Cal.App.3d 658, 684 [same], overruled on other grounds in *People v. Newman* (1999) 21 Cal.4th 413, 422-423, fn. 6.)

Section 12022, subdivision (a), provides that "any person who is armed with a firearm in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment . . ." One who "personally uses a firearm in the commission" of an offense (§ 12022.5, subd. (a)) necessarily "is armed with a firearm in the commission of" (§ 12022, subd. (a)) that offense. (*People v. Allen*, *supra*, 165 Cal.App.3d at p. 627 ["Every gun use within the meaning of section 12022.5 necessarily includes a violation of section 12022, subd. (a)"]; see *People v. Turner, supra*, 145 Cal.App.3d at p. 684 ["An enhancement of being armed with a firearm is necessarily included in a charging allegation of firearm use because the latter cannot be committed without committing the former"].)

Moreover, appellant should not be heard to complain that modification of the arming allegation violates his constitutional rights to due process, jury trial, or notice because he was charged with the greater allegation in the information. (*People v. Dixon, supra*, 153 Cal.App.4th at pp. 1001-1002; see § 1159.) Any successful challenge to the personal use firearm allegation does not undermine appellant's death judgment (AOB 103) because there is still overwhelming evidence that he was personally armed with a firearm in the commission of the murders. As such, if this Court determines that there is insufficient evidence of personal use of a firearm, then reduction of the allegation to an arming violation under section 12022, subdivision (a), is warranted. (§ 1260; *People v. Turner, supra,* 145 Cal.App.3d at p. 627.)

VI.

APPELLANT'S CONFRONTATION RIGHT WAS NOT IMPLICATED BECAUSE THE CHALLENGED STATEMENTS WERE NOT TESTIMONIAL

Relying on *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*), appellant contends the trial court violated his federal constitutional right to confrontation by admitting: (1) Little Pete's statements about the murders to Jesse Rangel as a declaration against penal interest; and (2) Mary Rangel's statement accusing appellant of being a murderer through Erica Rangel, as an adoptive admission. He also maintains assuming these statements fall outside of *Crawford*, then they were unreliable and violated the confrontation clause as explained in *Ohio v. Roberts* (1980) 448 U.S. 56, 65 (*Roberts*). (AOB 104-126.) Respondent disagrees and contends appellant's confrontation clause right was not implicated because the statements were not testimonial. Moreover, the court did not abuse its discretion in admitting the evidence because the statements were reliable and properly admitted under an applicable hearsay exception.

A. Legal Principles

In *Crawford*, the high court held that the confrontation clause of the Sixth Amendment to the federal Constitution prohibits

> admission of testimonial statements of . . . witness[es] who did not appear at trial unless [the witness] was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.

(*Crawford, supra*, 541 U.S. at pp. 53-54.) The rationale for this rule is that the Sixth Amendment

> applies to "witnesses" against the accused – in other words, *those who "bear testimony."* . . . "Testimony," in turn, is typically "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." . . . An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes

a casual remark to an acquaintance does not.

(*Id.* at p. 51, citations omitted, italics added; see *People v. Cage* (2007) 40 Cal.4th 965, 984 (*Cage*) [to be testimonial, a statement "must have occurred under circumstances that imparted, to some degree, the formality and solemnity characteristic of testimony."]; *People v. Geier* (2007) 41 Cal.4th 555, 605 ["it is the 'involvement of government officers in the production of testimonial evidence' that implicates confrontation clause concerns"].)

As to nontestimonial statements, *Crawford* observed

> it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law – as does [*Roberts, supra*, 448 U.S. 56], and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether.

(*Crawford, supra*, 541 U.S. at p. 68.) Thus, *Crawford* rejected the premise that the confrontation clause was dependent on "the vagaries of the rules of evidence" (*Id.*, at p. 61) because each offers entirely different protections. Conforming to the rules of evidence regarding hearsay will not satisfy the confrontation clause. (*Id.* at pp. 61-62.) Likewise, if a hearsay statement is nontestimonial, the confrontation clause offers no protection. (See *People v. Cage, supra*, 40 Cal.4th at p. 982, fn. 10 ["[t]here is no basis for an inference that, even if a hearsay statement is nontestimonial, it must nonetheless undergo a *Roberts* analysis before it may be admitted under the Constitution"].)

Thereafter, in *Davis v. Washington* (2006) 547 U.S. 813 (*Davis*), the Court explained:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that *the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.*

(*Id.*, at p. 822, italics added.)

As shown below, the confrontation clause does not apply to the challenged statements here because they were not "formal statement[s] to government officers," and not made with the view to establish acts possibly relevant later for criminal prosecution. Thus, they were not "testimonial." Because there was no confrontation clause violation, contrary to appellant's claim (AOB 116-117),[28] "[t]here is no basis for an inference that, even if a hearsay statement is nontestimonial, it must nonetheless undergo a *Roberts* analysis before it may be admitted under the Constitution." (*Cage, supra*, 40 Cal.4th at p. 982, fn. 10.) Simply put, the trial court did not abuse its discretion in admitting the statements after making the requisite hearsay foundational findings.

B. Little Pete's Inculpatory Statements To Jesse Rangel Were Nontestimonial and Reliable

1. Background

Appellant filed motions in limine to exclude three statements by Little Pete to Jesse Rangel that inculpated appellant. Two statements involved two phone calls purportedly made by Little Pete to Jesse on the night of the murders. The third purported statement involved a conversation between Little Pete and Jesse while the three were staying at Frank Rangel, Sr.'s home.

The first two statements were purportedly made on the night of the murders. Little Pete called Jesse to tell him "he got them." Little Pete called Jesse again later that night, and sounding intoxicated, he laughingly explained how he, appellant, Diaz, and Rafael had been involved in the murders. Appellant then got on the phone and laughingly told Jesse "he put those motherfuckers on ice." Several days later, Little Pete provided more details of the shootings to Jesse

---

28. Appellant recognizes that the nontestimonial statements he challenges here have been exempted from constitutional clause scrutiny. (AOB 116, fn. 69, citing federal cases; cf. *Cage, supra*, 40 Cal.4th at p. 982, fn. 10; but see *People v. Corella* (2004) 122 Cal.App.4th 461, 467.)

while staying at Frank Sr.'s home. Seeking their exclusion, appellant maintained the statements were unreliable and their admission would violate his constitutional right to confront witnesses against him. (10 CT 2205-2208.)

The prosecutor filed an opposition, arguing that the statements qualified as statements against penal interest under Evidence Code section 1230, if Little Pete refused to testify, thus making him unavailable. Citing *Ohio v. Roberts, supra,* 448 U.S. at p. 56, *People v. Fuentes* (1998) 61 Cal.App.4th 956 (*Fuentes*), and *People v. Greenberger* (1997) 58 Cal.App.4th 298 (*Greenberger*), the prosecutor also contended there was no violation of the right to confrontation because the statements were reliable where Little Pete confessed to the crimes and inculpated his father, without any apparent benefit to himself for doing so. (10 CT 2235-2237.)

After argument during the hearing, the trial court citing *Greenberger* and *Fuentes,* noted that the statements bore sufficient indicia of reliability because there was corroboration of the statements with other evidence. As such, the court felt the statements were "perfectly admissible" because they qualified as declarations against penal interest, and because they were made to a relative, not to a police officer. (1 RT 237.)

The court reasoned, "[t]he real issue is the reliability of the testimony of the person who is going to testify as to the hearsay statements." (1 RT 239.) It added,

> [t]he real key to me -- whether, you know, foundational wise these statements are such that the trier of fact could rely on them and find them to be otherwise trustworthy given the facts and circumstances surrounding the giving of the statement.

(1 RT 241.)

The court then allowed counsel an opportunity "to delve into that further" in an Evidence Code section 402, subdivision (b), hearing. (1 RT 240, 242.) The court noted that it needed to hear from Jesse Rangel and make factual

findings about the evidence. (1 RT 243-245.) The court then ordered a later evidentiary hearing to address the issues raised by counsel. (1 RT 251.)

The hearing occurred after the jury was selected. (3 RT 783.) The court started by noting "[t]he issue is whether from the totality of the circumstances the court can find the declarant's statement is reliable." (3 RT 786.) It clarified that the issue is whether

> that statement is reliable or trustworthy. [¶] And the court in Greenberger is told to look at the totality of the circumstances. And these are -- and these are things the court should look at, you know. Who the statement was made to. Was it made to an operative of the state or was it made to somebody else. In this case it's made to a relative. . . ."

(3 RT 788.)

Jesse testified and explained the circumstances surrounding the statements. During the first phone call, Little Pete sounded calm. Jesse was later awakened by Little Pete's second phone call. Little Pete slurred his words, and sounded intoxicated in the second phone call. (3 RT 792-793.) Rafael picked up Jesse the next day and drove him to appellant's home in Madera. Appellant and Jesse eventually left appellant's home to pick up Little Pete at work. After obtaining clothing for Little Pete, the three drove to Frank Sr.'s home in Fresno. (3 RT 794-796.)

After the three arrived at Frank Sr.'s home, everyone consumed beer. Little Pete also snorted "a lot" of methamphetamine. Little Pete was acting "normal," but paranoid. Jesse did not use the drug. (3 RT 797-800.) That night, appellant let "Frank and his sons know what was going on." (3 RT 803.) The next day, Little Pete told Jesse about details of the murders "at a point when we had gotten away from everybody." Little Pete had not yet consumed any alcohol or methamphetamine that day. (3 RT 803-805.)

The trial court then ruled

> Well, the circumstances are such that the statement is reliable, that

somebody could rely on that statement because it was made at a time of the circumstances where you would think the declarant would be comfortable with – he is with relatives. And obviously, he trusted his confidence. So in reading Greenberger that's the kind of statement under the circumstances that would be admissible. And therefore it will be admissible at trial.

(3 RT 807.) Defense counsel lamented that the plural pronoun "we" was ambiguous and that the court's ruling denied appellant his confrontational right. The court noted that appellant had made his record on the issue for appeal. (3 RT 809-810.)

Jesse later testified at trial about Little Pete's statements. (6 RT 1488-1493, 1500-1502.)

2. The Statements Were Reliable And Nontestimonial

Appellant now complains that the admission of Little Pete's statements through Jesse violated his federal confrontation clause right; and if not, then they were unreliable under state law. (AOB 115-120.) Not so. First, Little Pete's statements made to his cousin in the days after the murders were not testimonial, i.e., not formal statements made to government officials. (*Crawford, supra*, 541 U.S. at p. 51 ["An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not"].) Little Pete never intended to speak to anyone connected to the government. Instead, he was confiding in his cousin about his involvement in the murders.

Appellant recognizes that no police questioning occurred, but he nevertheless maintains that the statements were made as part of information gathering by Jesse, who had an interest in the outcome. (AOB 115-116.) Respondent disagrees and contends the record does not support this speculative characterization. Under *Crawford*, testimonial statements are ones made under circumstances which, viewed objectively, are for the primary purpose of

proving facts for possible use in a later criminal trial. (*People v. Cage, supra*, 40 Cal.4th at p. 984 & fn. 14.) Objectively viewed, the statements were not made for the purpose of establishing or proving past events for a future trial (*ibid.*) because Little Pete's statements were made in confidence to Jesse, his cousin. They trusted each other; Jesse testified about the closeness between them. (6 RT 1489.) There is evidence that Jesse was acting as some sort of "police agent." Thus, objectively viewed, the intent of the participants in the conversation are inconsistent with the formality and solemnity characteristic of testimony. There was no *Crawford* problem with Little Pete's statements to Jesse.

This conclusion is consistent with *Crawford* which discussed the prosecutorial abuses the Sixth Amendment was meant to curtail.

> Involvement in government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse – a fact borne out time and again throughout a history with which the Framers were keenly familiar.

(*Crawford, supra*, 541 U.S. at p. 56, fn. 7; see *Davis, supra*, 547 U.S. at p. 822; *People v. Cage, supra*, 40 Cal.4th at p. 984.)

Appellant next maintains that even if the challenged statements are not testimonial, then they should be tested for reliability under the *Roberts* standard. (AOB 116-117, 120, citing *People v. Corella, supra*, 122 Cal.App.4th at p. 467 (*Corella*).) This analysis is flawed because "[t]here is no basis for an inference that, even if a hearsay statement is nontestimonial, it must nonetheless undergo a *Roberts* analysis before it may be admitted under the Constitution." (*Cage, supra*, 40 Cal.4th at p. 982, fn. 10; see *People v. Saracoglu* (2007) 152 Cal.App.4th 1584, 1590, fn. 3.) To the extent that *Corella* and other cases following it engage in a *Roberts'* reliability analysis for nontestimonial hearsay statements (e.g., *People v. Cervantes* (2004) 118 Cal.App.4th 162, 171-177), they are contrary to this Court's observation in *Cage*. (*Ibid.*; cf. *Crawford,*

supra, 541 U.S. at pp. 61-62; *Davis, supra*, 547 U.S. at p. 821.) Simply put, the confrontation clause inquiry ends if this Court determines the challenged statements are nontestimonial.

To the extent that appellant contends that the challenged statements were unreliable for purposes of state evidentiary rules, i.e., under non-constitutional statutory grounds, the claim fails. A trial court's ruling to admit or exclude relevant evidence is reviewed under the abuse of discretion standard and will not be disturbed except on a showing that the court exercised its judgment in arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice. (*People v. Brown* (2003) 31 Cal.4th 518, 534-535.)

In California,

> [e]vidence of a statement by a declarant having sufficient knowledge of the subject is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and the statement, when made, . . . so far subjected him to the risk of . . . criminal liability . . . that a reasonable man in his position would not have made the statement unless he believed it to be true.

(Evid. Code, § 1230.) To qualify as a declaration against penal interest, the proponent "must show that the declarant is unavailable, that the declaration was against the declarant's penal interest when made and that the declaration was sufficiently reliable to warrant admission despite its hearsay character." (*People v. Duarte* (2000) 24 Cal.4th 603, 610-611.)

In determining whether a statement is sufficiently trustworthy to be admissible, the court may take into account not just the words but the circumstances under which they were uttered, the possible motivation of the declarant, and the declarant's relationship to the defendant. (*People v. Frierson* (1991) 53 Cal.3d 730, 745.) "A reviewing court may overturn the trial court's finding regarding trustworthiness only if there is an abuse of discretion." (*Ibid*; see *People v. Gordon* (1990) 50 Cal.3d 1223, 1251.)

Here, the trial court did not abuse its discretion in finding Little Pete's

statements to Jesse were reliable because a totality of the circumstances supports that conclusion. Little Pete twice phoned Jesse after the murders to tell him about them. He essentially twice confessed his involvement in Juan's murder to Jesse. (6 RT 1491-1493.) Several days later at Frank Sr.'s home, Little Pete pulled Jesse aside and provided details of the murders. (6 RT 1500-1503.) These confessions subjected Little Pete to the risk of criminal liability thus ensuring their trustworthiness.

Moreover, Little Pete, the hearsay declarant, had no motivation to inculpate his father, the defendant, in this case. There was no evidence that Little Pete sought to cast blame on his father for the killings. Indeed the contrary is true because Little Pete confessed his involvement in murdering Juan and then explained how each participant was involved in the murders. Little Pete confided in Jesse. This was not a situation where Little Pete sought to improve his situation with the authorities by deflecting criminal responsibility to others.

Further, during Little Pete's second phone call to Jesse, appellant got on the line and told Jesse that he "put those motherfuckers on ice." (6 RT 1493, 1526.) Appellant's confession itself bolstered the reliability surrounding Little Pete's statements to Jesse. The reliability of the statements were also corroborated by Diaz who testified about appellant's involvement in the murders, by appellant's creation of the false alibi tape, by appellant's possession and subsequent acts of discarding the murder weapons, and his flight after the murders. Hence, the trial court did not abuse its discretion because under a totality of the circumstances it could reasonably conclude Little Pete's statements to Jesse were reliable.

Appellant nevertheless dwells on *Jesse's* credibility to claim the statements made by Little Pete were unreliable. (AOB 119-120.) Appellant is mistaken because Little Pete was the hearsay declarant, not Jesse. Appellant had the opportunity to, and did, thoroughly cross-examine Jesse. Appellant seems to

confuse Jesse's credibility as a testifying witness with the trustworthiness of Little Pete's statement to him. Jesse's credibility as a testifying witness was an issue for the jury. The circumstances surrounding the trustworthiness of Little Pete's hearsay statements to Jesse was a foundational issue for the court. (See 3 RT 788 ["Issue is not the credibility of Jesse Rangel. That's for the jury to decide. Okay. What we are talking about is the declarant here which is Pedro Rangel the III"].)

C. Mary Rangel's Accusatory Statement Adopted By Appellant Was Nontestimonial And It Qualified As An Adoptive Admission

Appellant next maintains that his adoptive admission presented through Erica Rangel's testimony violated his constitutional confrontation right. This constitutional contention is forfeited for failure to raise it below. In any event, as appellant acknowledges, this Court has previously rejected this contention. (*People v. Roldan* (2005) 35 Cal.4th 646, 711, fn. 25; *People v. Combs* (2004) 34 Cal.4th 821, 842-843.) Moreover, the statement was not testimonial so the confrontation clause was not implicated. Appellant nevertheless maintains that the situation here did not properly involve his adoption of the statement under the circumstances. (AOB 120-126.) Not so.

1. Background

During trial the prosecutor advised the court and counsel that he intended to call Erica Rangel, Jesse's wife, to testify about a statement she overheard between appellant and his wife while they were all in a motel room after the murders. The court conducted an Evidence Code section 402 hearing to determine circumstances of the statement. (6 RT 1560-1561.)

Erica testified during the hearing that she and Mary Rangel, appellant's wife, visited appellant, Little Pete, and Jesse in a motel room in Fresno after the murders. Erica recalled that Mary was upset with appellant and "said a lot of things to him. Mostly out of anger." (6 RT 1563, 1564-1567.) While Mary

said many things to appellant, Erica specifically remembered overhearing Mary accuse appellant of being a murderer. Mary told appellant "he was a murderer and his – their son was, too." Appellant was silent in the face of this accusation. (6 RT 1563, 1573-1574.) Mary added that she did not care if appellant was drunk because "he was the adult, he should have taught his son better." She told appellant that she did not want to be married to him any longer. (6 RT 1574.)

The court ruled to admit the statement as an adoptive admission. It stated

> In this case there's sufficient foundation to show that the testimony, if believed – [appellant] was – if the testimony is believed, [appellant] was there. He heard the statement. And the kind of statement that it would give rise to immediate response or denial. And under those circumstances the jury can consider it as an adoptive admission.

(6 RT 1579.) The court excluded the statement where Mary told appellant that he was the adult and he should have taught their son better. (6 RT 1580.)

Erica testified before the jury about Mary's accusation of appellant. Erica testified that after the murders, Mary took Erica and her children to the Starlite Inn Motel where they stayed for several days. They eventually visited Jesse, appellant, and Little Pete at another motel in Fresno. (6 RT 1593-1594.) In the motel room, Erica heard Mary tell appellant, "You're a murderer. And now my son is one, too." (6 RT 1595.) Appellant did not make any reply to the accusation. (6 RT 1596.)

At no time did appellant raise a confrontation clause violation objection, or any other constitutional objection in his challenge to the adoptive admission evidence.

2. Analysis

As a threshold matter, respondent contends appellant's confrontation clause claim is forfeited for failure to raise it below. (*People v. Burgener* (2003) 29 Cal.4th 833, 869; *People v. Catlin* (2001) 26 Cal.4th 81, 138, fn. 14; *People*

v. Alvarez (1996) 14 Cal.4th 155, 186.) Nevertheless, even if reviewable, the statement was not testimonial for the reasons previously argued, namely, it was not a formalized statement made to government officers, or for purposes of recording a past event for later criminal prosecution. (*Davis, supra*, 547 U.S. at p. 822; *Cage, supra,* 40 Cal.4th at p. 984 [to be testimonial, a statement "must have occurred under circumstances that imparted, to some degree, the formality and solemnity characteristic of testimony"].) Moreover, an adoptive admission -- as occurred here -- does not implicate the Sixth Amendment's right to confrontation because the statement was adopted by appellant, and it thus became his statement. (*People v. Roldan, supra,* 35 Cal.4th at p. 711, fn. 25; *People v. Combs, supra*, 34 Cal.4th at p. 842.)

The trial court did not err in ruling the prosecutor mustered sufficient foundation to qualify the evidence as appellant's adoptive admission. As a general matter, a trial court's ruling to admit or exclude relevant evidence is reviewed under the abuse of discretion standard and will not be disturbed except on a showing that the court exercised its judgment in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice. (*People v. Brown, supra*, 31 Cal.4th at pp. 534-535.)

The adoptive admission hearsay exception as codified in Evidence Code section 1221 provides: "Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if the statement is one of which the party, with knowledge of the content thereof, has by words or other conduct manifested his adoption or his belief in its truth."

To determine if a statement is admissible as an adoptive admission, a trial court must first decide if there is sufficient evidence to sustain a finding that: (1) the defendant heard and understood the statement under circumstances that would normally call for a response, and (b) by words or conduct, the defendant adopted the admission as true. (*People v. Davis* (2005) 36 Cal.4th 510, 535.)

A defendant's silence, evasion, or equivocal reply in the face of an accusation may be properly offered as an implied or adoptive admission of guilt. (*People v. Roldan, supra*, 35 Cal.4th at p. 710.)

Moreover,

> To warrant admissibility, it is sufficient that the evidence supports a reasonable inference that an accusatory statement was made under circumstances affording a fair opportunity to deny the accusation; whether defendant's conduct actually constituted an adoptive admission becomes a question for the jury to decide. [Citation.]

(*People v. Edelbacher* (1989) 47 Cal.3d 983, 1011.)

Here, the trial court preliminarily heard evidence that Mary accused appellant of being a murderer and corrupting their son. There was no evidence that appellant did not hear the statement in the small motel room. To the contrary, Erica testified that Mary was upset and said "a lot" of angry things to appellant. (6 RT 1562-1563.) In addition, the court heard evidence that Mary chastised appellant for involving their son in the murders and not teaching him better. (6 RT 1574.)

Appellant nevertheless maintains that he was in a "Catch-22" position because he could not protest without accusing his son of the murders, and because he "would be guaranteed to launch a further domestic quarrel with his wife." (AOB 123-124.) Not so because appellant had a fair opportunity to refute her accusations without incriminating Little Pete. Appellant could have explicitly denied his and Little Pete's involvement in the face of Mary's accusations. Moreover, Mary was already berating appellant for his involvement in the murders. If anything, his denial of Little Pete's and his involvement would have eliminated the basis for the argument. Furthermore, multiple explanations for silence do not render an adoptive admission inadmissible.

Because the evidence supports a reasonable inference that appellant heard the comments, had the opportunity to respond or deny them, and the comments

were made under circumstances calling for his denial, there was sufficient foundation for the matter to go to the jury. (*People v. Edelbacher, supra*, 47 Cal.3d at p. 1011.) Accordingly, the court did not abuse its discretion.

D. Any Error Was Harmless

Assuming arguendo this Court finds error in the admission of Little Pete's statements to Jesse and Mary's accusation to appellant, it was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) Other compelling evidence showed appellant's involvement in the murders. Diaz testified that he saw appellant shoot Chuck to death in the Durbin residence. (5 RT 1273-1275.) Appellant later created a false alibi tape, which strongly suggests his involvement in the murders. (17 RT 1790-1853.) Appellant left the murder weapons with his son-in-law for disposal. (6 RT 1466-1472; 1476-1481.) After the murders, appellant abruptly left a job he held for 15 years and fled Madera. (6 RT 453-1458, 1497-1520, 1592-1598; 7 RT 1755-1759.) Under the circumstances of this case, it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." (*Neder v. United States* (1999) 527 U.S. 1, 18.) Accordingly, any error is harmless beyond a reasonable doubt.

VII.

THE TRIAL COURT WAS NOT REQUIRED TO GIVE THIRD-PARTY-SUSPECT FLIGHT INSTRUCTIONS AND APPELLANT'S CHALLENGE TO STANDARD CALJIC NO. 2.52 IS FORFEITED; IN ANY EVENT ANY ERROR IS HARMLESS

Appellant contends the trial court had a duty to instruct the jury that any third-party suspect's flight after the murders may be considered by them to raise reasonable doubt. He adds that then-standard CALJIC No. 2.52 was "unbalanced" and should not have been given because it unfairly "shifted"

attention to his flight alone. (AOB 127-138.) Respondent contends the trial court did not have any duty to so instruct. Moreover, his challenge to modify or forego giving standard CALJIC No. 2.52 is forfeited for failure to raise it below. Regardless, even if reviewable, an instruction pertaining to Jesse's flight tended to be argumentative, so the trial court was not required to give it; and Diaz himself was a self-admitted principal in the murders, so any inference of his guilt based on flight was a non-issue at trial.

A. Legal Principles

Section 1127c provides:

> In any criminal trial or proceeding where evidence of flight of a defendant is relied upon as tending to show guilt, the court shall instruct the jury substantially as follows: [¶] The flight of a person immediately after the commission of a crime, or after he is accused of a crime that has been committed, is not sufficient in itself to establish his guilt, but is a fact which, if proved, the jury may consider in deciding his guilt or innocence. [¶] The weight to which such circumstance is entitled is a matter for the jury to determine. [¶] No further instruction on the subject of flight need be given.

CALJIC No. 2.52, as given to the jury here (9 RT 2252), tracks the statutory language of section 1127c. The statutory language itself requires an instruction be given when defendant's flight is relied on as a circumstantial evidence of guilt. (§ 1127c ["the court shall instruct the jury"].)

As a general rule, a trial court must sua sponte instruct on general principles of law (*People v. Montoya* (1994) 7 Cal.4th 1027, 1047), and appellate courts can review instructions affecting substantial rights without an objection in the trial court. (§§ 1259, 1469.) However, a trial court has no sua sponte duty to modify or amplify a standard jury instruction which is a correct statement of law and supported by the evidence (e.g., *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1189-1190, 1191-1192), which includes the standard flight instruction. (*People v. Gutierrez* (1993) 14 Cal.App.4th 1425, 1439; *People v. Prysock*

(1982) 127 Cal.App.3d 972, 1001-1002.)

A party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate amplifying, clarifying, or limiting language. (*People v. Sully* (1991) 53 Cal.3d 1195, 1218; see *People v. Gutierrez, supra*, 14 Cal.App.4th at p. 1439 ["CALJIC No. 2.52 incorporates the instructional language of section 1127c which states 'No further instruction on the subject of flight need be given.' [Citation] If appellant sought a modification of a correct instruction it was his duty to request the modification."].) A criminal defendant may be entitled to a special instruction on evidence of flight by a third party if the instruction was properly prepared and submitted by the defense. (*People v. Henderson* (2003) 110 Cal.App.4th 737, 741-743 (*Henderson*).)

B. Analysis

Appellant's claim of error is based on *Henderson, supra*, 110 Cal.App.4th 737, which stated in dicta that:

> *In the abstract* we are inclined to agree with Henderson that evidence of flight by a third party after being accused of a crime or after acquiring knowledge of the crime, could be relevant to the jury's determination of whether the third party's conduct raises a reasonable doubt as to the identity of the perpetrator. Accordingly, we believe a defendant would be entitled to a special instruction, in the nature of a pinpoint instruction, if properly prepared and submitted by the defense.

(*Id.* at p. 741, emphasis added.) *Henderson* went on to actually hold that a trial court has no sua sponte duty to give such an instruction, so there was no error by the trial court for failure to give it without a defense request. (*Id.* at pp. 742, 743, 744.)

Assuming without conceding that such an instruction is permissible, respondent submits that the trial court had no duty to sua sponte instruct on third party flight; instead, it was an instruction that appellant was required to

request. (*Henderson, supra*, 110 Cal.App.4th at pp. 743-744.) Moreover, to the extent that appellant maintains standard CALJIC No. 2.52, as given by the trial court, unfairly drew attention to his flight and "shifted" focus on him, instead of others (AOB 134-136), the claim is forfeited for failure to request a modifying instruction.[29] (*People v. Gutierrez, supra*, 14 Cal.App.4th at p. 1439; *People v. Prysock, supra*, 127 Cal.App.3d at pp. 1002-1003.) Standard CALJIC No. 2.52 has previously withstood constitutional scrutiny on "burden shifting" from this Court. (*People v. Mendoza, supra,* 24 Cal.4th at p. 179; *People v. Smithey* (1999) 20 Cal.4th 936, 983.) The trial court properly gave the standard instruction here.

Regardless, even if reviewable, respondent questions the propriety of giving a third-party-suspect flight instruction where the inference of a guilty mind from flight is a matter of common sense and best left to attorneys to argue. Trial courts should aspire to give instructions that do not invite jurors to draw inferences favorable to one of the parties from a specific piece of evidence, instead of a theory of a defense. (See *People v. Gordon, supra,* 50 Cal.3d at p. 1276 [refusing argumentative instructions].) Instructions that generally relate particular facts to a legal issue are generally objectionable as argumentative, and the effect of certain facts on identified theories is best left to argument by counsel. (*People v. Wharton* (1991) 53 Cal.3d 522, 570.)

Finally, any error for failure to instruct was harmless beyond a reasonable doubt. Diaz testified to his involvement in the murders and entered into a plea agreement with the district attorney in exchange for his testimony. (5 RT 1263-1276, 1285-1286.) The trial court instructed that Diaz was an accomplice as a

---

29. For this reason, appellant's contention against forfeiture (AOB 136) should be rejected. His argument for nonforfeiture is contrary to the axiom that a party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate amplifying, clarifying, or limiting language.

matter of law. (9 RT 2260-2261.) His guilt was thus firmly established so any further evidence of guilt from flight added nothing by way of "shifting" inferences.

Any failure to instruct as to either Jesse Rangel or Diaz was harmless also because overwhelming evidence supported appellant's guilt compared to the weak evidence of a third party's culpability, such that the failure to instruct as claimed here could not have contributed to the convictions obtained. While it is true that Jesse was initially a suspect in the murders due to his misidentification, Jesse's alibi evidence (6 RT 1489-1490, 1587-1694; 7 RT 1734-1735), and Diaz's testimony about the involved parties (5 RT 1262-1273), belied the defense claim of Jesse's involvement in the murders.

More fundamentally however, Jesse's misidentification by Cindy did not impact appellant, it impacted Little Pete. (See 9 RT 2132 [prosecutor notes this during opening argument].) Appellant was not excluded as one of the shooters. To the extent that Jesse was initially misidentified as one of the shooters (and there remained a lingering question as to that shooter's identity), the evidence still overwhelmingly showed appellant was the second shooter. That overwhelming evidence included strong motive evidence for a retaliatory killing (5 RT 1262-1264), Diaz's testimony detailing appellant's involvement in the murders (5 RT 1267-1276), evidence that appellant told his brother Frank that he and Little Pete were involved (6 RT 1599-1600), evidence that appellant gave and asked Juan Ramirez to discard the murder weapons (4 RT 1467-1472), evidence that appellant created a false alibi tape (6 RT 1503; 7 RT 1740-1747, 1791-1801, 1823-1834, 1846-1856) and testimony that appellant abruptly quit his 15-year job and fled Madera. (6 RT 1454-1458, 1464.)

Accordingly, any error was harmless beyond a reasonable doubt.

VIII.

THE TRIAL COURT WAS NOT REQUIRED TO INSTRUCT ON VOLUNTARY AND INVOLUNTARY MANSLAUGHTER AS LESSER INCLUDED OFFENSES

Appellant maintains the trial court was required to instruct on the lesser included offenses of voluntary and involuntary manslaughter. (AOB 139-154.) Respondent disagrees. Moreover, respondent contends that any error was harmless because the jury found appellant guilty of premeditated murder on properly given instructions, thereby necessarily rejecting any claim of lack of malice.

A. Legal Principles

The duty to instruct on lesser included offenses occurs when the evidence raises a question about whether all of the elements of the charged offense were present. (*People v. Breverman* (1998) 19 Cal.4th 142, 154.) However, the duty arises only when there is substantial evidence for the lesser offense, meaning evidence from which a jury composed of reasonable people could conclude the lesser offense, but not the greater offense, was committed. (*Ibid.*) Due process requires that the jury be instructed on all lesser included offenses *only* when the evidence warrants such an instruction. (*Hopper v. Evans* (1982) 456 U.S. 605, 611; *People v. Avena* (1996) 13 Cal.4th 394, 424.)

A defendant who commits an intentional and unlawful killing but who lacks malice under the "heat of passion" is guilty of voluntary manslaughter. (*People v. Barton* (1995) 12 Cal.4th 186, 201.) The passion for revenge, however, does not satisfy the requirement for instruction on heat of passion or provocation. (*People v. Valentine* (1949) 28 Cal.2d 121, 139; *People v. Fenenbock* (1988) 46 Cal.App.4th 1688, 1704.) Voluntary manslaughter is the unlawful killing of another, without malice, "upon a sudden quarrel or heat of passion" (§ 192), or by the unreasonable but good faith belief in the need for self defense (*In re*

Christian S. (1994) 7 Cal.4th 768, 773). These two types of voluntary manslaughter are considered lesser included offenses to murder. (*People v. Breverman, supra*, 19 Cal.4th at p. 154.)

Involuntary manslaughter is generally considered a lesser included offense to murder. (*People v. Ochoa* (1998) 19 Cal.4th 353, 423.) Regarding the offense of involuntary manslaughter due to voluntary intoxication, this Court has stated:

> When a person renders himself or herself unconscious through voluntary intoxication and kills in that state, the killing is attributed to his or her negligence in self-intoxicating to that point, and is treated as involuntary manslaughter. "Unconsciousness is ordinarily a complete defense to a charge of criminal homicide. (Pen. Code, § 26, subd. [Four].) If the state of unconsciousness results from intoxication voluntarily induced, however, it is not a complete defense. (Pen. Code, § 22.) . . . [I]f the intoxication is voluntarily induced, it can never excuse homicide. [Citation.] Thus, the requisite element of criminal negligence is deemed to exist irrespective of unconsciousness, and a defendant stands guilty of involuntary manslaughter if he voluntarily procured his own intoxication." [Citation.] Unconsciousness for this purpose need not mean that the actor lies still and unresponsive: section 26 describes as "[in]capable of committing crimes . . . [¶] . . . [¶] . . . [p]ersons who committed the act . . . without being conscious thereof." Thus unconsciousness "'can exist . . . where the subject physically acts in fact but is not, at the time, conscious of acting.'" [Citation].

(*Ibid.*, internal case citations and italics omitted.)

B. Analysis

1. Voluntary Manslaughter Instructions Were Not Required

Contrary to appellant's claim, insufficient evidence supports giving voluntary manslaughter instructions on either count of murder. As to Uribe's murder, the evidence only showed that appellant wanted to retaliate for Little Pete's shooting by finding and killing Uribe. There simply was no evidence that appellant acted under the heat of passion. The evidence showed that appellant, if anything, acted under the heat of revenge.

On the night of the murders appellant rallied his group to help find and kill Uribe in retaliation for his son's earlier shooting. After persuading his son, son-in-law, and family friend to kill Uribe, the four men undertook an armed hunting expedition through Madera that ultimately led them to the Durbin residence. There simply was no evidence for the jury to believe that appellant acted impulsively or rashly in Uribe's killing, even if he had been drinking. Instead, the evidence only showed that appellant was driven by the desire for revenge which itself is insufficient to warrant the provocation instruction. (*People v. Valentine, supra*, 28 Cal.2d at p. 139; *People v. Fenenbock, supra*, 46 Cal.App.4th at p. 1704.) The trial court had no duty to instruct on voluntary manslaughter as to Uribe's murder due to heat of passion.

Nor was the trial court required to instruct on voluntary manslaughter under an unreasonable belief in the need for self-defense in Chuck's killing because appellant created the unlawful circumstances leading up to the murders. This Court previously noted the limits of the defense as follows:

> It is well established that the ordinary self-defense doctrine--applicable when a defendant reasonably believes that his safety is endangered--may not be invoked by a defendant who, through his own wrongful conduct (e.g., the initiation of a physical assault or the commission of a felony), has created circumstances under which his adversary's attack or pursuit is legally justified. (See generally, 1 Witkin & Epstein, Cal. Criminal Law (2d ed. 1988) Defenses, § 245, p. 280; 2 Robinson, Criminal Law Defenses (1984) § 131(b)(2), pp. 74-75.) It follows, a fortiori, that the imperfect self-defense doctrine cannot be invoked in such circumstances. For example, the imperfect self-defense doctrine would not permit a fleeing felon who shoots a pursuing police officer to escape a murder conviction if the felon killed his pursuer with an actual belief in the need for self-defense.

(*In re Christian S., supra*, 7 Cal.4th at p. 773, fn. 1.)

Here, Chuck was legally justified in confronting the armed intruders in the protection of his family and home. Indeed, the law *presumed* that he could use deadly force in protection of his family and home against the armed intruders.

(See § 198.5 [Home Protection Bill of Rights]; *People v. Szadziewicz* (2008) 161 Cal.App.4th 823, 834 [defendant not entitled to imperfect self-defense instruction where he broke into victim's hotel room]; *People v. Hardin* (2000) 85 Cal.App.4th 625, 628-638 [same]; see § 197(2) [homicide is justified when committed in defense of habitation].) There was no evidence that Chuck acted unreasonably in protecting his home and children during this armed invasion. Instead, the evidence showed that appellant shot Chuck to death after Chuck ran into the livingroom to protect his children and confront the assailants. Appellant should not be allowed to invoke an imperfect self-defense claim, because Chuck did not exceed his legal justification in protecting his home and family when confronting the armed intruders. (Cf. *People v. Randle* (2005) 35 Cal.4th 987, 1002-1003.) As such, under the circumstances of this case the trial court was not required to instruct on voluntary manslaughter under an unreasonable belief in the need for self-defense or defense of others.

2. Involuntary Manslaughter Instructions Were Not Required

The trial court had no duty to instruct on involuntary manslaughter for both murders based on appellant's voluntary intoxication because "there was no evidence from which a jury composed of reasonable individuals could have concluded that he committed that crime." (*People v. Barton, supra*, 12 Cal.4th at p. 196, fn. 5.) While there was evidence that appellant had been drinking at the barbecue and may have felt its effects (5 RT 1262-1264, 1269-1270, 1278), there was no evidence that he was "unconscious" for purposes of warranting an involuntary manslaughter instruction. Little Pete had been shot two weeks prior and appellant believed Uribe was responsible. He harbored his need for revenge against Uribe – premeditation – well *before* his drinking episode at the barbecue.

Moreover, while at the barbecue appellant had the presence of mind to rally and enlist his family and friend to hunt and kill Uribe. (5 RT 1262-1264.) He

obtained a gun, as did the others, and rode through Madera with them looking for Uribe. (5 RT 1265-1268.) Upon spotting Uribe's car, he exited Avila's car, stumbled, and then ran after his son into the Durbin home. He shot Chuck dead when confronted by him, and later quipped to his companions that he did so because he believed Chuck was going for a gun. (5 RT 1269-1278.) The fact that appellant recalled *why* he shot Chuck alone undermines any claim of unconsciousness. All of these events show that appellant was conscious of his acts notwithstanding his alcohol consumption. He was thus not entitled to an involuntary manslaughter instruction because "[n]othing in these facts even hints that defendant was so grossly intoxicated as to have been considered unconscious." (*People v. Abilez* (2007) 41 Cal.4th 472, 516.)

In any event, appellant cannot show prejudice for the purported errors because the jury found he premeditated both murders. (§ 189.) "For a killing with malice aforethought to be first rather than second degree murder, the intent to kill must be formed upon a preexisting reflection and have been the subject of actual deliberation and forethought." (*People v. Whisenhunt* (2008) 44 Cal.4th 174, 201, citing *People v. Anderson* (1968) 70 Cal.2d 15, 26.) The fact that the jury rejected second degree murder charges and found appellant guilty of the premeditated murders precludes any possible prejudice for not giving voluntary and involuntary manslaughter instructions. (*People v. Abilez, supra,* 41 Cal.4th at p. 472; *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1145; see also *Arizona v. Schad* (1991) 501 U.S. 624, 645-648.) Because the factual question posed by the omitted manslaughter instructions was necessarily resolved adversely to appellant under other properly given ones, appellant suffered no prejudice. (*People v. Sedeno* (1974) 10 Cal.3d 703, 715.) Therefore, it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." (*Neder v. United States, supra,* 527 U.S. at p. 18.)

IX.

THE TRIAL COURT WAS NOT REQUIRED TO GIVE AN ACCOMPLICE TESTIMONY CAUTIONARY INSTRUCTION FOR LITTLE PETE'S HEARSAY STATEMENTS

Citing section 1111, appellant maintains the trial court was required to sua sponte instruct the jurors that they should view Little Pete's hearsay statements, made through Jesse and Frank Jr., with distrust. (AOB 155-163.) Respondent disagrees and contends because Little Pete's statements were made as a declaration against penal interest which required a judicial finding of reliability, corroboration was not necessary. (*People v. Brown* (2003) 31 Cal.4th 518, 555-556 (*Brown*).)

A. Legal Principles

Section 1111 provides

> A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof. An accomplice is hereby defined as one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given.[30/]

This Court has recently held

> accomplice testimony requires corroboration not because such evidence is factually insufficient to permit a reasonable trier of fact to find the accused guilty beyond a reasonable doubt, but because "[t]he Legislature has determined that because of the reliability questions posed by certain categories of evidence, evidence in those categories by itself is insufficient as a matter of law to support a conviction." [Citation.] That is, even though accomplice testimony would qualify as "substantial

---

30. Respondent does not dispute that Little Pete who likewise was prosecuted in a separate trial as a principal in the murders was also an accomplice under section 1111.

> evidence" to sustain a conviction within the meaning of *People v. Johnson* (1980) 26 Cal.3d 557, 578 [], the Legislature has for policy reasons created an "exception[]" to the substantial evidence test and requires accomplice testimony to be corroborated. [Citation.] In the absence of an instruction on the legal requirement that an accomplice be corroborated, there is a risk that a jury—especially a jury instructed in accordance with CALJIC No. 2.27 that the testimony of a single witness whose testimony is believed is sufficient for proof of any fact—might convict the defendant without finding the corroboration Penal Code section 1111 requires. [Citation.] The corroboration requirement for accomplices thus qualifies as a general principle of law vital to the jury's consideration of the evidence, and the jury must be so instructed even in the absence of a request. [Citation.]

(*People v. Najera* (2008) 43 Cal.4th 1132, 1136, internal and parallel citations omitted.)

In certain circumstances, an accomplice's hearsay statements may be treated as "testimony" under the accomplice-corroboration rule of section 1111 when used as substantive evidence of guilt. (*People v. Belton* (1979) 23 Cal.3d 516, 526.) However, where a hearsay statement is admitted as a declaration against penal interest the usual problems of unreliability, which section 1111 seeks to remedy, are not present. (*Brown, supra*, 31 Cal.4th at pp. 555-556.) "'The usual problem with accomplice testimony – that it is consciously self-interested and calculated – is not present in an out-of-court statement that is *itself sufficiently reliable* to be allowed in evidence.' [Citation.]"[31] (*Ibid.*, original italics.)

B. No Cautionary Instruction Was Needed For Little Pete's Hearsay Statements

Appellant acknowledges that *Brown* undermines his claim, but he nevertheless questions *Brown's* holding because, in his view, an accomplice

---

31. For this reason, and contrary to appellant's claim (AOB 159) the *Belton* and *Brown* lines of cases distinguishing the corroboration requirement are easy reconciled.

always has a motive to shift blame away from himself. (AOB 159.) Obviously, accomplices implicate themselves for reasons of braggadacio or to intimidate others or to provide information to their associates. Further, appellant fails to acknowledge that an accomplice-witness who testifies pursuant to a plea bargain or in hopes of leniency, is far different from an accomplice hearsay-declarant who inculpates himself and subjects himself to criminal liability. A declarant of a statement against penal interest who subjects himself to criminal liability is certainly not deflecting blame away from himself. Here, the trial court conducted an evidentiary hearing to determine the reliability of Little Pete's statements made to Jesse. (3 RT 807.) This judicial determination of reliability is supported by substantial evidence. This determination of reliability obviates the need for accomplice corroboration that concerned the Legislature when it enacted section 1111. (*Brown, supra*, 31 Cal.4th at pp. 555-556.)

Appellant also maintains that Little Pete's declarations against penal interest were unreliable because they were made through unreliable sources – Jesse and Frank Jr. (AOB 160.) This claim, however, is more one of witness credibility, instead of accomplice testimony which requires corroboration under section 1111. (See 3 RT 788 [trial court's statement to defense counsel about this distinction].) Both Jesse and Frank Jr. were subjected to the crucible of trial examination, so that the jury had an opportunity to hear and see their testimony in the face of vigorous cross-examination and impeachment evidence. The Constitution does not require more.

Moreover, contrary to appellant's assumption, and as shown in Argument XIV, *post*, Jesse was simply not an accomplice. An accomplice is "defined as one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given." (§ 1111.) While Jesse was an initial suspect due to misidentification

(6 RT 1397, 1437), and while there was evidence that he believed Uribe shot Little Pete and retaliated by shooting Uribe's car (4 RT 1083-1086), there was no evidence to show that he was liable for the murders.

Citing *Crawford, supra*, 541 U.S. 36, appellant maintains that Little Pete's hearsay statements must be viewed with distrust and caution because they are testimonial. (AOB 160.) He is mistaken because the corroboration requirement of section 1111 does not involve the confrontation clause concerns addressed in *Crawford*. Indeed, the federal Constitution does not require witness testimony be corroborated. (See *Laboa v. Calderon* (9th Cir. 2000) 224 F.3d 972, 979 ["As a state statutory rule, and to the extent that the uncorroborated testimony is not 'incredible or insubstantial on its face,' the rule is not required by the Constitution or federal law"].) Regardless, hypothetically even if *Crawford* somehow applied to the corroboration requirement in section 1111, as shown in Argument VI, *ante*, the statements simply are not testimonial.

Accordingly, the trial court was not required to give a cautionary instruction on Little Pete's out-of-court statements.

X.

THE TRIAL COURT DID NOT HAVE A DUTY TO INSTRUCT ON VOLUNTARY INTOXICATION REGARDING APPELLANT'S AIDING AND ABETTING JUAN URIBE'S MURDER; REGARDLESS, HE CANNOT SHOW PREJUDICE

Appellant contends the trial court failed its duty to instruct on the effect of his voluntary intoxication to aid and abet Little Pete in Uribe's murder. (AOB 165-177.) Respondent counters that the trial court had no duty to instruct; but, if it did, the error is harmless because the jury rejected evidence of his voluntary intoxication relating to his intent to kill and his ability to premeditate Chuck's murder. In other words, under other properly given instructions, the jury necessarily resolved the factual question posed by the omitted instruction

adversely to appellant.

A. Legal Principles

A trial court has a duty to instruct on all matters the jury sua sponte on general principles which are closely and openly connected with the facts before the court which includes defenses, so long as there is substantial evidence to support the defense instruction and the defense is not inconsistent with defendant's case theory. (*People v. Breverman, supra*, 19 Cal.4th at p. 157.) Voluntary intoxication, however, does not constitute a defense, but instead

> "is proffered in an attempt to raise a doubt on an element of a crime which the prosecution must prove beyond a reasonable doubt." [Citation.] As such, the burden falls on the defendant to request a "pinpoint" instruction. [Citation.] "[S]uch a pinpoint instruction does not involve a 'general principle of law' as that term is used in the cases that have imposed a sua sponte duty of instruction on the trial court." [Citation.]

(*People v. San Nicolas* (2004) 34 Cal.4th 614, 669, quoting *People v. Saille* (1991) 54 Cal.3d 1103, 1120.)

In *People v. Mendoza* (1998) 18 Cal.4th 1114 (*Mendoza II*), this Court "very narrow[ly]" held that a defendant may present evidence of, and receive instructions on, intoxication solely on the question of whether they are liable for criminal acts as aiders and abettors. (*Id.* at pp. 1129, 1133-1134.) *Mendoza II* interpreted the 1995 version of section 22, which is the same version of the statute here. (See *id.* at pp. 1132-1133.) The 1995 version of section 22, subdivision (b), provided:

> Evidence of voluntary intoxication is admissible solely on the issue of whether or not the defendant actually formed a required specific intent, premeditated, deliberated, or harbored malice aforethought, when a specific intent crime is charged.

Despite the Legislature's later changes to section 22 narrowing the use of voluntary intoxication evidence, "[s]ection 22 has always permitted evidence of the effect of intoxication as to any specific intent, including the intent of an

aider and abettor." (*Mendoza II, supra*, 18 Cal.4th at p. 1133.) However, this evidence is not permitted under the natural and probable consequences doctrine because "[i]ntoxication is irrelevant in deciding what is reasonably foreseeable." (*Ibid.*)

B. The Court Had No Duty To Instruct As Claimed

During summation, the prosecutor contended that appellant aided and abetted Uribe's murder, and directly perpetrated Chuck's murder. (9 RT 2127-2128.) On appellant's request he received CALJIC No. 4.21, the voluntary intoxication instruction bearing on the issue of his ability to premeditate the murders (12C T 2657; 9 RT 2262), and CALJIC No. 4.22, the definition of voluntary intoxication (12 CT 2658; 9 RT 2262-2263). No other guilt instructions on voluntary intoxication were given.

As a threshold matter, respondent does not contest whether there was evidence to support the voluntary intoxication instructions given because there was testimony that appellant was drinking at the barbecue. (See 5 RT 1263-1264, 1270.) Moreover, respondent recognizes appellant partly relied on evidence of his intoxication, even though he maintained he was not involved in the murders, because the record shows defense counsel was in a "terribly awkward situation" of having to briefly mention the voluntary intoxication instructions during summation. (See 9 RT 2200-2201.)

Respondent's contention is simply that a voluntary intoxication instruction bearing on appellant's liability as an aider and abettor is a pinpoint instruction because it addresses evidence presented, in an attempt to raise a doubt on the requisite mental state for aiding and abetting a crime. (See *People v. San Nicolas, supra*, 34 Cal.4th at p. 669; *People v. Saille, supra*, 43 Cal.3d at p. 1120.) Voluntary intoxication is not a defense so there is no sua sponte duty to instruct on it. (*Ibid.*) While *San Nicolas* and *Saille* both addressed evidence of voluntary intoxication to direct perpetrators rather than to aiders and abettors,

no reason exists to constrain their holdings to direct perpetrators. Put otherwise, there is no logical reason for not extending the *Saille* rule that a trial court is not required to sua sponte instruct on voluntary intoxication instructions to defendants tried solely as aiders and abettors.

In *People v. Rundle* (2008) 43 Cal.4th 76 (*Rundle*), this Court held:

> If the defendant in a particular case believes voluntary intoxication is an issue that could affect the jury's determination of the mental state elements of the charged crimes, he or she must request an instruction on that subject. Any lack of clarity regarding the consideration, if any, the jury should give to evidence of voluntary intoxication, in the absence of a request for an instruction on this subject, is of the defendant's own doing, and on appeal he cannot avail himself of his own inaction.

(*Id.* at p. 145.)

Respondent recognizes that this Court noted in *Mendoza II* that if a trial court does instruct on voluntary intoxication (as occurred here relating to direct perpetration in the crimes), "it has to do so correctly." (*Mendoza II, supra*, 18 Cal.4th at p. 1134.) Respondent understands this statement in context to mean that if a trial court instructs on voluntary intoxication bearing on a particular liability theory *as requested by the defense* (here direct perpetrator liability), it must do so correctly.[32/] As that happened here with standard CALJIC Nos. 4.21

---

32. This Court's opinion in *Mendoza* was published several days before the start of appellant's trial in August 1998. As a result of the opinion, in 1999, The Committee On Standard Jury Instructions added CALJIC No. 4.21.2 which provided:

> In deciding whether a defendant is guilty as an aider or abettor, you may consider voluntary intoxication in determining whether a defendant tried as an aider and abettor had the required mental state. [However, intoxication evidence is irrelevant on the question of whether a charged crime was a natural and probable consequence of the [target][originally contemplated] crime.

This instruction is now encompassed in CALCRIM No. 404, which provides in salient part:

and 4.22 (12 CT 2657-2658; 9 RT 2262-2263), the trial court did not fail any instructional duty. Because the trial court had no sua sponte duty to instruct as appellant maintains, his claim of error must be rejected.

Appellant nevertheless maintains that his liability under the natural and probable consequences "perhaps inadvertently" might have been "triggered" in Uribe's murder based on the trial court's instruction with CALJIC No. 3.02. (AOB 170-171.) Not so. There is no reasonable likelihood the jury could misconstrue CALJIC No. 3.02 to mean that appellant might be liable for Uribe's murder under the natural and probable consequences doctrine, especially where the instruction itself as given by the court (12 CT 2648) limited its application to the attempted murder charge against Cindy Durbin. (*Mendoza II, supra*, 18 Cal.4th at p. 1134 [An appellate court should review the instructions as a whole to determine whether it is reasonably likely the jury misconstrued the instructions; cf. *Estelle v. McGuire* (1991) 502 U.S. 62, 72 [is there "'reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the Constitution."].)

Moreover, appellant cannot show prejudice because the question of his voluntary intoxication posed in other properly given instructions was necessarily resolved against him when the jury found him guilty of premeditated murder. "For a killing with malice aforethought to be first rather

---

> If you conclude that the defendant was intoxicated at the time of the alleged crime, you may consider this evidence in deciding whether the defendant: [¶] A. Knew that ____ [insert name of perpetrator] intended to commit ___ [insert target offense]; AND B. Intended to aid and abet — [insert name of perpetrator] in committing ___ [insert target offense]. [¶] Someone is intoxicated if he or she (took[,]/ [or] used[,]/ [or] was given) any drug, drink, or other substance that caused an intoxicating effect. [¶] [Do not consider evidence of intoxication in deciding whether ___ [insert charged nontarget offense] is a natural and probable consequence of ____ [insert target offense]].

than second degree murder, the intent to kill must be formed upon a preexisting reflection and have been the subject of actual deliberation and forethought." (*People v. Whisenhunt, supra,* 44 Cal.4th at p. 201.) Similarly, to convict a defendant under an aiding and abetting liability theory, the jury has to find that he acted with (1) knowledge of the direct perpetrator's criminal purpose, and he (2) had the intent to facilitate the purpose. (*Mendoza II, supra*, 18 Cal.4th at p. 1123.) "The intent requirement for an aider and abettor fits within the [*People v. Hood* (1969) 1 Cal.3d 444, 458] definition of specific intent." (*Id.*, at p. 1129.)

Respondent recognizes that this Court held the mental state required of an aider and abettor "is different from the mental state necessary for conviction as the actual perpetrator." (*Mendoza II, supra*, 18 Cal.4th at p. 1122.) Regardless of the differing mental states, the voluntary intoxication instructions given here, as it relates to a direct perpetrator, necessarily resolved the issue adversely to appellant on his liability as an aider and abettor in Uribe's murder. As noted, the trial court gave standard CALJIC Nos. 4.21 and 4.22 (9 RT 2262-2263; 12 CT 2657-2658), and the jury still found appellant guilty of first degree premeditated murder despite evidence of his alcohol consumption. To find him guilty of premeditated murder, the jury had to find that his mental state was such that he intended to kill upon a preexisting reflection amounting to actual deliberation. In making this finding, the jury necessarily rejected any claim that intoxication affected his ability to know and to assist Little Pete in shooting Uribe to death, even if the mental state for aiding and abetting is different from that of a direct perpetrator. As such instructional error, if any, is harmless. (*People v. Wright* (2006) 40 Cal.4th 81, 98 [applying the rule in *People v. Sedeno, supra,* 10 Cal.3d at p. 721].) It is thus "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error" (*Neder v. United States, supra,* 527 U.S. at p. 18), which is the harmless

error inquiry under *Chapman v. California, supra,* 383 U.S. at page 24. (*Neder, supra*, at pp. 15, 18.)

XI.

THE TRIAL COURT DID NOT HAVE A DUTY TO INSTRUCT ON ACCESSORY AS A LESSER-RELATED OFFENSE TO MURDER

Appellant contends the trial court erred by denying the defense's request for an instruction on accessory as a lesser-related offense to murder. In his view, this Court's opinion in *People v. Birks* (1998) 19 Cal.4th 108 (*Birks*), merely held such an instruction was not mandatory, and instead a trial court still retains discretion to consider and give an accessory instruction. (AOB 178-197.) Respondent disagrees and contends, under the principles of *stare decisis*, the trial court would have acted in excess of its jurisdiction had it done so. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

On the People's objection, the trial court rejected appellant's request for lesser-related instructions relying on this Court's opinion in *Birks*. (See 8 RT 1921-1922, 2021; 12 CT 2526, 2544.) The jury was not instructed that accessory after the fact was a lesser related offense to the charged offenses. During summation, defense counsel maintained the evidence did not prove appellant was a murderer, but instead, at best, an accessory after the fact. (9 RT 2164-2165; see 9 RT 2196-2197.)

First, in light of this Court's opinion in *Birks*, the trial court was constrained to reject appellant's accessory instructions. (*Auto Equity Sales, Inc. v. Superior Court, supra*, 57 Cal.2d at p. 455.) No rule of law is more settled than the rule that "[u]nder the doctrine of *stare decisis*, all tribunals exercising inferior jurisdiction are required to follow decisions of courts exercising superior jurisdiction." (*Ibid.*) Had the trial court instructed as appellant claims here, it would have acted in excess of its jurisdiction. For this reason, the courts of

appeal likewise are bound by *Birks* (see AOB 188-189 & fn. 98) as "[t]he decisions of this court are binding upon and must be followed by all the state courts of California." (*Auto Equity Sales, Inc., supra*, at p. 455.)

Second, appellant's reasoning for his claim that a trial court retains authority to give lesser-related offenses (AOB 192-194) has been rejected by this Court in *Birks*. He simply recasts arguments previously rejected in *Birks*. His argument does not raise any new issue not considered in *Birks* so the claim should be denied. Moreover, contrary to his claim (AOB 192-193), this Court fully addressed the separation of powers argument raised in *Birks*, and has not since disavowed it even if some members of this Court felt the discussion unnecessary to the result. The trial court was bound by the opinion rendered in *Birks* and the reasoning adopted by a majority of this Court.

In any event, *Birks* "overruled the holding of [*People v. Geiger* (1984) 35 Cal.3d 510] that a defendant's unilateral request for a related-offense instruction must be honored over the prosecution's objection." (*People v. Rundle, supra*, 43 Cal.4th at p. 147.) A trial court's refusal to give such an instruction does not violate a defendant's federal constitutional rights. (*Id.* at pp. 147-148.) Indeed, there is no federal constitutional right to instructions on *lesser included offenses*, "except for the limited situation in a capital case in which the state has created an artificial barrier to the jury's consideration of an otherwise available noncapital verdict. (*Id.* at p. 148, citing *People v. Breverman, supra*, 19 Cal.4th at pp. 165-169.)

Because there was no error and because no federal constitutional right was implicated, appellant's claim of prejudice (AOB 195-197) must be rejected.

XII.

APPELLANT'S PROSECUTORIAL MISCONDUCT CLAIM FOR MISSTATING THE LAW OF IMPLIED MALICE DURING SUMMATION IS BARRED; REGARDLESS, THERE WAS NEITHER MISCONDUCT NOR PREJUDICE

Appellant contends the prosecutor committed misconduct during summation by arguing implied malice murder required an "implied intent to kill." He maintains the argument denied him his constitutional right to the jury's determination of lesser included offenses supported by the evidence. (AOB 198-211.) Respondent initially contends the claim is forfeited for failure to raise an objection and request an admonition from the trial court. Even if reviewable, the prosecutor's comment did not amount to misconduct and it was not prejudicial.

A. Applicable Legal Principles

As a general rule, to preserve a claim of prosecutorial misconduct during summation, the defense must timely object and request an admonition to cure any harm. (*People v. Frye* (1998) 18 Cal.4th 894, 969.) To prevail on a claim of misconduct based on a prosecutor's statement to a jury, a defendant must show a reasonable likelihood that the jury understood and applied the disputed statements in an improper or erroneous manner. (*Id.* at p. 970.) When conducting this inquiry, reviewing courts consider the prosecutor's contested statements in context with the argument as a whole (*People v. Dennis* (1998) 17 Cal.4th 468, 522), and "'do not lightly infer' that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements." (*Frye, supra*, at p. 970.)

Under state law a prosecutor who uses reprehensible or deceptive methods to persuade the court or jury has committed misconduct, even if the action does not render the trial fundamentally unfair. (*People v. Frye, supra*, 18 Cal.4th

969.) Federal constitutional error occurs when the prosecutor's remarks "'so infect[s] the trial with unfairness as to make the resulting conviction a denial of due process.' [Citations]." (*Ibid*, citing *Darden v. Wainright* (1986) 477 U.S. 168, 181; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642.)

B. The Prosecutorial Misconduct Claim Is Meritless, If Reviewable

Appellant's prosecutorial misconduct claim is barred for failure to timely object and request an admonition. (*People v. Frye, supra*, 18 Cal.4th at p. 970.) Contrary to appellant's claim against forfeiture (AOB 200-201), an objection and request for admonition would have cured the alleged misstatement without conceding his identity as a perpetrator. Holding a prosecutor accountable in front of the jury -- the jury which the prosecutor seeks to persuade -- for purported misstatements of law on the elements of offenses in no manner concedes identity. Because "the record fails to disclose grounds for applying any exception to the general rule requiring both an objection and a request for a curative instruction [citations] . . . [Appellant's] claim of prosecutorial misconduct is barred in its entirety." (*Ibid.*)

Even if reviewable, in context with the prosecutor's argument as a whole, it was not reasonably likely the jury understood the law of implied malice, as appellant maintains. The prosecutor initially explained the law of express malice, intent to kill, and premeditation relating to first degree murder as it was charged in the information. (9 RT 2123-2124.) The argument was as follows:

> And at first [I would] like to go over the information and exactly what the defendant is charged with. In Count 1, he is charged with the first degree murder of Chuck Durbin. In Count 2, he is charged with the first degree murder of Juan Uribe. In count – there's a special allegation following these counts in that this is a multiple murder. There's Count 3 which is the attempted murder of Cindy Durbin. And finally there's a special allegation which refers to all of these counts that he personally used a firearm in the commission of these crimes.
>
> At first I would like to go over the elements of first degree murder. And you will be instructed on this. Judge is going to give you detailed

instructions. First degree murder is the unlawful killing of a human being with expressed [sic] malice aforethought. What is malice aforethought? *Malice aforethought is an intent to kill.* And the law determines that there are two types of malice aforethought, express and implied. And in first degree murder, there has to be an express intent to kill. And does that mean the individual has to say I am going to kill him? No. It has to be manifested through their actions or through their words that at the time the act was committed there was an intent to kill. The law is not going to imply anything from the actions. It has to be shown by what the defendant did and what the defendant said.

(9 RT 2123-2124, italics added.)

Drawing on the italicized portion of this argument, appellant initially maintains the prosecutor improperly argued to the jury that "[m]alice aforethought is an intent to kill," foreclosing implied malice murder as a possible verdict. (AOB 204, citing 9R T 2123.) Not so. Appellant takes this statement out of context. The record makes clear that the prosecutor was discussing the elements of first-degree premeditated murder, as charged in the information. (See 9 RT 2123 ["And at first [I would] like to go over the information and exactly what the defendant is charged with."; "At first I would like to go over the elements of first degree murder."].) In context, the prosecutor was limiting this challenged statement to first degree murder and not discussing second degree murder. (See *People v. Dennis, supra*, 18 Cal.4th at p. 522 [reviewing courts consider the prosecutor's contested statements in context with the argument as a whole].) There was no misstatement.

The prosecutor later argued the lesser included offenses of second degree murder:

> Now, you are going to be instructed on a lesser included with respect to first degree murder and that [is] second degree murder. And second degree murder is an unlawful killing of a human being with malice aforethought. No premeditation or deliberation is required. But malice aforethought means two different things when it comes to second degree murder. It can either be express malice aforethought or the express intent to kill that I referred to earlier or it can be implied.
>
> *The law will in certain cases imply an intent to kill.* And the judge

will instruct you that it's going to be implied when the killing resulted from an intentional act, the natural consequences of that act were dangerous to human life. And the act was deliberately performed with knowledge of the danger, and with conscious disregard for human life.

So even if you were not to find an intent to kill, and express intent to kill, the actions of the defendant and his son in that house definitely were, intentional. They knew the consequences of a danger, that danger to human life. They had knowledge of the danger and the conscious disregard for human life at the time they committed those acts. *The law is going imply an intent to kill in that case, second degree murder. You just have to have an unlawful killing and either express or implied intent to kill.* And you don't need premeditation and deliberation.

It's our position that they have been proved in both murders, the murders of Juan Uribe and Chuck Durbin. But you would only find attempted murder if you find the defendant not guilty. I mean, you would only find second degree murder if you find the defendant not guilty of first degree murder.

(9 RT 2130-2131, italics added.)

Pointing to the italicized portion of this argument, appellant next maintains the prosecutor argued the "fictional doctrine of 'implied intent,'" which eliminated the jury's consideration of implied-malice second-degree murder. (AOB 205.) Not so. Respondent recognizes generally it is misconduct for a prosecutor to misstate the law, particularly in an attempt to absolve the prosecution from its obligation to overcome reasonable doubt on all elements (*People v. Hill* (1998) 17 Cal.4th 800, 829), but that situation did not happen here. The prosecutor's argument on implied malice, at points, is not the epitome of clarity, but the context of what he was arguing shows no misconduct occurred. It appears the prosecutor confused his words when stating an implied "intent to kill" instead of stating implied "malice."

The prosecutor's argument overall shows that he was correctly arguing malice can be either implied or express meaning the intent to kill. He clarified that

the judge will instruct you that it's going to be implied when the killing resulted from an intentional act, the natural consequences of that act

were dangerous to human life. And that act was deliberately performed with knowledge of the danger, and with conscious disregard for human life.

(9 RT 2130.) Overall, there is no reasonable likelihood that the jurors understood the prosecutor to be arguing that second degree murder required an "implied intent to kill," especially where he also argued the correct definition of implied malice and told them that the judge would later instruct them with that concept too. (*Ibid.*)

To the extent the prosecutor confused his terms, this Court will not "'lightly infer' that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements. [Citation.]" (*People v. Frye, supra*, 18 Cal.4th at p. 970.) In convicting appellant of two counts of murder, the jury found that he premeditated them, meaning that they found he harbored a preexisting *express* intent to kill with actual deliberation and forethought. (See *People v. Whisenhunt, supra,* 44 Cal.4th at p. 201.) Because there is no reasonable likelihood the jury understood or applied the challenged comments in an improper or erroneous manner (*ibid.*), appellant's misconduct claim should be rejected.

Moreover, appellant cannot show prejudice because the trial court told the jury that its instructions controlled. In other words, the trial court told the jury that if the argument of counsel conflicted with its instructions, the jury was to disregard counsel's argument and follow the court's instructions. (9 RT 2241-2242; 12 CT 2599-2600.) A jury is presumed to understand and follow the court's instruction. (*Weeks v. Angelone* (2000) 528 U.S. 225, 234; *People v. Welch* (1999) 20 Cal.4th 701, 773.) As there is no evidence to the contrary, this Court should presume the jury followed the court's proper instruction on implied malice to find that the purported misconduct was harmless.

XIII.

APPELLANT'S PROSECUTORIAL MISCONDUCT CLAIM FOR MISSTATING THE LAW OF PREMEDITATION DURING SUMMATION IS BARRED; REGARDLESS, THERE WAS NO MISCONDUCT

For the first time on appeal, appellant contends the prosecutor committed misconduct for misstating the law of premeditation by conflating it with the intent to kill. (AOB 212-216.) His failure to object to the alleged misconduct and request a curative admonition in the trial court bars his claim on appeal where the record fails to provide exceptions to the forfeiture rule. (*People v. Frye, supra*, 18 Cal.4th at p. 970.) Even if reviewable, it is not reasonably likely the jury understood or applied the challenged statement in an improper or erroneous manner. (*Ibid.*)

Appellant's claim hones in on, and parses out, the following italicized portion of the prosecutor's argument:

> And then the final [element] is the willful, deliberate, and premeditated that's required in first degree murder. And with respect to willful, deliberate, and premeditated does that mean there has to be a certain amount of planning ahead of time? They get together and they draw diagrams and everything? No. It does not mean that at all. *It means that the intent to kill, that the killing was accompanied by clear and deliberate intent to kill.* That this intent to kill was formed upon pre-existing reflection and that the slayer must have weighed and considered the question of killing, the reasons for and against killing, and having in mind the consequences of killing, he chooses to kill and he does kill.

(9 RT 2124, italics added.)

When conducting a prosecutorial misconduct inquiry during summation, reviewing courts consider the prosecutor's contested statements in context with the argument as a whole (*People v. Dennis, supra,* 17 Cal.4th at p. 522), and "'do not lightly infer' that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements." (*People v. Frye, supra*,

18 Cal.4th at p. 970.) Taken in context with the entire argument, the prosecutor's statement does not conflate premeditation with express malice or the intent to kill. The prosecutor's challenged statement is clarified in his next sentence,

> That this intent to kill was formed upon pre-existing reflection and that the slayer must have weighed and considered the question of killing, the reasons for and against killing, and having in mind the consequences of killing, he chooses to kill and he does kill.

(9 RT 2124.)

The prosecutor's clarifying statement is a proper statement of the law, which was reiterated to the jury in the trial court's instruction with CALJIC No. 8.20. (9 RT 2264-2265; 12 CT 2662-2263.) On this record, it is not reasonably likely the jury applied the challenged statement in an improper or erroneous manner.

In any event, appellant cannot demonstrate prejudice because the trial court told the jury its instruction controlled in the event that counsel's argument conflicted with its instructions. (9 RT 2241-2242; 12 CT 2599-2600.) This Court should presume the jury followed the trial court's proper instruction on premeditation and intent to kill to hold the purported error in the prosecutor's argument harmless. (*Weeks v. Angelone, supra*, 528 U.S. at p. 234; *People v. Welch, supra*, 20 Cal.4th at p. 773.)

XIV.

IF NOT BARRED FROM REVIEW, THE PROSECUTOR DID NOT COMMIT MISCONDUCT DURING SUMMATION BECAUSE JESSE RANGEL COULD PROPERLY CORROBORATE RICHARD DIAZ'S TESTIMONY

For the first time on appeal, appellant contends the prosecutor committed misconduct during summation by arguing that Diaz's testimony could be corroborated by Jesse's testimony. In appellant's view, Jesse was an accomplice who could not corroborate Diaz, another accomplice. (AOB 217-

223.) Respondent maintains the misconduct claim is barred for failure to raise it below and request an admonition. (*People v. Frye, supra*, 18 Cal.4th at p. 970.) Regardless, even if reviewable, the argument was not misconduct because Jesse was not an accomplice to the murders.

During summation, the prosecutor told the jury that Jesse could corroborate the testimony of Diaz, an accomplice. (9 RT 2151.) The Penal Code defines an accomplice as "one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given." (§ 1111.) A trial court can determine as a matter of law whether a witness is or is not an accomplice "only when the facts regarding the witness's criminal culpability are 'clear and undisputed.' [Citation.]" (*People v. Avila* (2006) 38 Cal.4th 491, 565.) Ironically, the trial court did not instruct with CALJIC No. 3.19, which would have told the jury that they must determine whether Jesse was an accomplice, because appellant strongly opposed it and did not want to shoulder his burden of providing evidence to show Jesse was an accomplice.[33] (8 RT 2017; 9 RT 2119-2120.)

To be chargeable as an accomplice, Jesse must have been a principal under section 31. That section defines principals as "[a]ll persons concerned in the commission of a crime, whether ... they directly commit the act constituting the offense, or aid and abet in its commission ... ." (§ 31.) To be liable as an aider and abettor there must be evidence that Jesse acted with both knowledge of the direct perpetrators' criminal purpose and the intent of encouraging or facilitating commission of Uribe's murder. (*People v. Avila, supra*, 38 Cal.4th

---

33. The court did instruct the jury with CALJIC Nos. 3.10 (definition of accomplice), 3.11 (corroboration requirement of testifying accomplice), 3.12 (sufficiency of evidence for corroboration), 3.13 (an accomplice may not corroborate another), 3.14 (criminal intent needed to be an accomplice), modified 3.16 (Diaz was an accomplice as a matter of law), and 3.18 (testimony of accomplice viewed with distrust). (9 RT 2259-2261; 12 CT 2515-2521.)

at p. 564.) "[A]n aider and abettor is guilty not only of the offense he intended to encourage or facilitate, but also of any reasonably foreseeable offense committed by the perpetrator he aids and abets." (*Ibid.*)

Jesse was not a principal, i.e., an accomplice to the murders because there was no evidence to make him subject to prosecution for the identical offenses charged against appellant. (§ 1111.) To be sure, there was evidence that Jesse was involved in shooting Uribe's car after Little Pete's shooting (4 RT 1086, 1100), and that he fled with Little Pete and appellant after the murders (6 RT 1497-1518, 1596-1597), but there was no evidence that he did anything to facilitate, encourage, or aid and abet the murders. Indeed, trial evidence shows Jesse was in Fresno with his family during the murders. (6 RT 1489-1491, 1586-1589; 7 RT 1732-1735.) And while Cindy Durbin initially identified Jesse as one of the shooters (6 RT 1395-1397, 1413-1419), she recanted at the preliminary hearing and later at the trial.

To the extent that appellant maintains Jesse was an accomplice to the killings because he was involved in shooting at Uribe's car, the claim fails because Jesse was involved in a different crime. (§ 1111 [an accomplice is "one who is liable to prosecution for *the identical* offense."]; see *People v. Felton* (2004) 122 Cal.App.4th 260, 273 [an accomplice in one crime may corroborate the testimony of an accomplice to another charged crime].) Accordingly, because Jesse was not an accomplice to the murders, the prosecutor did not commit misconduct by arguing Jesse could corroborate Diaz.

Regardless, even if misconduct, appellant should not be heard to complain about prejudice because he demanded, based on tactical reasons, the trial court not give CALJIC No. 3.19. That proffered instruction would have told the jury that they must determine whether Jesse was an accomplice. (8 RT 2017; 9 RT 2119-2120.) Appellant's demand to remove the question from the jury in conjunction with his decision not to object to the prosecutor's argument, should

mean that appellant acquiesced on the issue of misconduct and concomitantly prejudice during the prosecutor's argument.

XV.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN EXCLUDING PROFFERED DEFENSE EVIDENCE OF DRUG USE IN THE DURBIN HOME AT THE PENALTY PHASE

Appellant contends the trial court erred at the penalty phase by excluding evidence of Uribe's and Chuck's drug activity at the time of their murders, to impeach witnesses, to rebut the prosecution's victim impact testimony, and to bolster a claim of imperfect self-defense as a factor relating to the offense. In doing so, he contends, his federal constitutional rights under the Fifth, Sixth, and Fourteenth Amendments were violated. (AOB 224-243.) Respondent disagrees and contends that appellant improperly sought to attack the character of his victims when their character was not in issue. What was in issue was the impact of their murders on their survivors. This was not a drug case and there was no evidence to show any drug activity by Uribe and Durbin contributed to their deaths. Further, appellant had no valid claim of imperfect self-defense under the circumstances of this case. As shown below, the trial court's order to exclude drug use evidence was not an abuse of its discretion.

A. Legal Principles

The Eighth Amendment to the federal Constitution permits the introduction of victim impact evidence, or evidence of the specific harm caused by a defendant, when admitted for the jury to meaningfully assess the defendant's moral culpability and blameworthiness. (*Payne v. Tennessee* (1991) 501 U.S. 808, 825.) Under California law, victim impact evidence is generally admissible as a circumstance of the crime pursuant to section 190.3, factor (a).

(*People v. Edwards* (1991) 54 Cal.3d 787, 832-836.) "The purpose of victim impact evidence is to demonstrate the immediate harm caused by the defendant's criminal conduct." (*People v. Pollock* (2004) 32 Cal.4th 1153, 1183.)

A trial court's ruling to exclude, as irrelevant, defense evidence proffered to address the prosecution's victim impact evidence is reviewed for abuse of discretion. (*People v. Harris* (2005) 37 Cal.4th 310, 353 ["'[T]he concept of relevance as it pertains to mitigation evidence is no different from the definition of relevance as the term is understood generally.' [Citation.]"; *People v. Guerra* (2006) 37 Cal.4th 1067, 1145 [A trial court retains discretion to determine the relevancy of mitigation evidence and to exclude evidence whose probative value is substantially outweighed by the probability that its admission will create substantial danger of confusing the issues or misleading the jury].) "The admission of evidence in rebuttal is a matter left to the sound discretion of the trial court. [Citation.] The court's decision in this regard will not be disturbed on appeal in the absence of 'palpable abuse.'" (*People v. Hart* (1999) 20 Cal.4th 546, 653.)

As a general matter, the federal Constitution requires that the sentencer, in all but the rarest case, not be precluded from considering as a mitigating factor any aspect of the defendant's character or record and any circumstance of the offense that the defendant proffers as a basis for a sentence less than death, so long as the evidence is relevant. (*Mills v. Maryland* (1988) 486 U.S. 367, 375; § 190.3; *People v. Mickey* (1991) 54 Cal.3d 612, 693.) The right to present mitigating evidence "does not trump or override the ordinary rules of evidence." (*People v. Thornton* (2007) 41 Cal.4th 391, 454.) Simply put, evidence that is irrelevant or incompetent is inadmissible in a penalty phase. (*People v. Gay* (2008) 42 Cal.4th 1195, 1220.)

B. Trial Proceedings

1. Guilt Phase[34/]

In his opening statement to the jury, defense counsel told the jurors that they would hear evidence that Cindy Durbin initially told arriving officers that she did not allow drug use in her home. Counsel added that Cindy was not honest with the officer because she later told another officer that Chuck regularly purchased methamphetamine from Uribe, spending about $70 to $80 per week. (4 RT 893-894.) After the opening statement and outside of the jury's presence, the prosecutor expressed surprise by this opening statement and he objected to any further reference to drug use in the Durbin home because it was irrelevant. Defense counsel countered that the matter concerned Cindy's credibility because she gave conflicting information about drug use in her home. The court initially ruled that it would allow some drug evidence with a limiting instruction telling the jury that the evidence can only be used to judge Cindy's credibility as a witness. (4 RT 906-907.)

The drug use issue came up several times during the guilt phase of the trial with different witnesses. Cindy Burciaga lived near the Durbin residence. During Burciaga's cross-examination, defense counsel asked her whether she recalled if "there were always a lot of people there." The court sustained the prosecutor's objection and a bench conference was held. (5 RT 1136-1137.) Defense counsel stated he wanted to examine Burciaga about whether there was

---

34. Respondent understands appellant's argument to challenge the exclusion of the evidence at the penalty phase only. While he initially cites Supreme Court cases generally addressing the denial of defense evidence (AOB 224-225), his later analysis pertains solely to the exclusion of the drug use evidence in the penalty phase. (See AOB 232-243.) Respondent accordingly limits its analysis to the exclusion of the evidence at the penalty phase, but provides guilt phase proceedings to give context to the trial court's ruling excluding the evidence at the penalty phase.

"like a party situation" at the Durbin residence with people coming and going on a regular basis. In counsel's view, this was "one indication, not definitive indication, that there may be drug activity at that residence." (5 RT 1139.)

Before Alvin Ariezaga's testimony, the prosecutor asked the court to limit examination of any drug use evidence by Ariezaga to the date of the murders and to the day of his testimony. The prosecutor also asked the court to curtail any questioning on Ariezaga's knowledge of drug use or transactions by Chuck, or knowledge of drug paraphernalia in the Durbin home. Defense counsel countered that this type of drug evidence was relevant to Cindy Durbin's impeachment. (5 RT 1152-1153.) The court limited drug use inquiry to whether Ariezaga used drugs on the date of the murders "or whether he used drugs today. Any other drug use or character evidence with regard to Mr. Durbin or Cindy Durbin, is irrelevant." (5 RT 1154.)

The drug use issue was addressed again before Cindy Durbin's testimony. The prosecutor reasserted that Cindy's initial statement to arriving officers about no drug use in her home was irrelevant. The court responded that her impeachment was "collateral impeachment" . . . "[i]t's a 352 issue." The court asked counsel to hold an evidentiary hearing so that it could put the statement "in some kind of context." (5 RT 1192.) Outside the jury's presence, the court conducted an evidentiary hearing where Cindy testified that while being loaded on an ambulance stretcher after the murders, she could not recall talking with Madera Police Sergeant Kenneth Alley. (5 RT 1219-1223.) Cindy recalled a later interview with the police chief where she told him about Chuck's "recreational use of methamphetamine." Cindy believed Chuck purchased the drug from Uribe. (5 RT 1229-1230.)

Sergeant Alley testified during the hearing that he posed several questions to Cindy while she was being taken to the ambulance for her gunshot wound. She was in obvious pain, but not delirious. He asked her whether she knew of

any drug or gang involvement by Chuck or Uribe. "She stated she knew of no involvement. That no one was allowed in her house that does drugs." (5 RT 1232-1236.)

At the conclusion of the evidentiary hearing, defense counsel maintained that the evidence was relevant to impeach Cindy. The court noted that witness impeachment evidence always has some probative value. (5 RT 1243.) The prosecutor added the court should exclude the evidence under Evidence Code section 352 as collateral impeachment to the issues in the case. (5 RT 1245-1246.) The court ruled to exclude the proffered impeachment evidence under Evidence Code section 352, noting "[i]t has little probative value. This is not a drug case. Drugs are not involved in this case. Motive is revenge, and not drugs." (5 RT 1246.) The court also ruled that Cindy's second statement about Chuck's recreational drug use

> was truly inflammatory because it doesn't have anything to do with this case. And looking at this and hearing the entire evidence, certainly would be an abuse of discretion if the court allow[s] impeachment evidence under these circumstances. [¶] So the court's going to reverse it's ruling and exclude the evidence of the statements made to Officer Alley that no drugs were involved at the house and second statement that drugs were in fact involved in the home.

(5 RT 1247.)

Richard Fitzsimmons testified as a defense witness and relayed that he used methamphetamine in the Durbin home about 15 to 20 minutes before the murders. (8 RT 2035.)

2. Penalty Phase

Before the start of the penalty phase, the prosecution proffered victim impact evidence from several witnesses. The parties and the court generally discussed the parameters of the proffered evidence and whether it constituted true victim impact testimony. (10 RT 2310-2311, 2314-20.) Defense counsel again sought admission of drug use evidence in the Durbin home, to include

Cindy Durbin's statements to officers, drug paraphernalia found in the home, and evidence of methamphetamine found in Chuck's system based on a toxicology report. The prosecutor countered that he was not offering victim character evidence, only victim impact evidence insofar as the deaths affected their families. (10 RT 2321.)

Defense counsel replied the evidence was not to attack the victims' character, but to show the jury that "all was not paradise in the home." In counsel's view, Chuck's drug use "is certainly something a jury should weigh in assessing victim impact" because "living with someone who is addicted to a drug such as methamphetamine must have a substantial detrimental effect on the relationship." (10 RT 2322.) The court asked defense counsel for case authority, and asked counsel "to do a little research on that issue" over the evening recess. (10 RT 2323.)

The next morning, the court noted that "[w]ith regard to the drugs found in Mr. Durbin's system and drug paraphernalia found in the house, I couldn't find any cases to give me any guidance on that." (10 RT 2337.) The prosecutor reiterated that drug use was irrelevant as it "has nothing to do with what the defendant did or what kind of loving father [Chuck] was or anything like that." (10 RT 2338.) The prosecutor explained that he was refraining from admitting specific instances of Chuck's good conduct so that the door would not be opened for evidence of his drug use. (10 RT 2338-2339.) Defense counsel countered that if the prosecutor painted Chuck "as a blameless loving father in this incident, then I think [the drug use evidence] is clearly relevant." (10 RT 2339.)

The court responded, found, and ruled that Chuck

> is a loving blameless father. He wasn't the target of the offense. He was a victim of circumstances. . . . [¶] [H]e was in his own home. And it doesn't appear to be relevant. If it is relevant, the fact of his drug use, probative value is slight compared to the prejudice. And that maybe – also will misdirect the jury from their duty to decide the punishment in

this case. So I will exclude that, continue to exclude for impeachment purposes the inconsistent statement by Cindy Durbin whether or not drugs were being used in the house.

(10 RT 2339.)

Thereafter, the district attorney carefully elicited victim impact evidence instead of victim character evidence. For example, during Maria Guzman's victim impact testimony about her son Uribe, Guzman volunteered a statement that "Juan doesn't smoke or drink or doesn't have any problems." The district attorney immediately asked the court to strike this nonresponsive comment. Defense counsel snidely stated, "It's obvious what his reason is for wanting to strike." The court granted the prosecutor's motion. (10 RT 2384.)

Randy Durbin testified about his relationship with his older brother, Chuck, and the impact of losing him. Randy explained, "[h]e was a person who helped me make some decisions in my life. He was the person that I grew up with and had some level of dependence upon. And he was the person that I sought to have someone be proud of me. He was the one that did that for me." (10 RT 2393.) Because their mother was a single parent, Randy explained Chuck was the predominant male figure in his life while growing up. (10 RT 2393.) Randy testified he raced to Chuck's home on the night of the murders and saw Chuck on the floor, deceased. When the prosecutor asked Randy how this made him feel, defense counsel asked to approach the bench. (10 RT 2395.)

Outside the jury's presence, defense counsel explained that he believed the evidence was "clearly an attempt here to portray [Chuck] as the perfect brother with – as a perfect role model for Randy Durbin." Counsel stated he felt the prosecutor had now "opened the door to the issue of drugs at the residence. Of the fact that Chuck Durbin was substantially under the influence, had a very high blood content of methamphetamine." Counsel wanted to elicit evidence of Chuck's "shortcomings" because, in his view, the victim impact evidence was "a fraud on the jury." (10 RT 2398-2399.)

The prosecutor countered "there is absolutely no evidence that this murder had anything to do with drugs. None. Zip." He added that he had been careful not to elicit victim character evidence, instead of victim impact evidence. (10 RT 2399-2400.) The court sustained its prior ruling on the drug use evidence, stating, "We are not going to revisit the area. There is no evidence that drugs had anything to do with this case." The court asked the prosecutor to keep his questioning "a little tighter." (10 RT 2400.) Noting that emotions were inherently involved in this type of evidence, the court stated that it hoped the witnesses "don't volunteer things just to try to make Chuck look better or somebody else look worse." (10 RT 2401.) Randy resumed testifying and informed the jury about the strain of Chuck's loss, and how it caused him to isolate himself from others. (10 RT 2403.)

Martha Melgoza, Uribe's girlfriend, testified next about how his death affected both her and their child. Melgoza explained how their daughter cries for her father and misses him. She also testified about how she missed having Uribe around. (10 RT 2404-2409.) Defense asked to address the court outside the jury's presence. The court excused the jury and counsel informed the court that he wanted to examine Melgoza concerning Uribe's "illegal activities" "including violence, including drug trafficking." (10 RT 2410.) Counsel maintained this evidence addressed both Melgoza's and Guzman's testimony, and it addressed "evidence" from Cindy that Uribe sold drugs to Chuck. (10 RT 2410-2411.) The prosecutor reminded the court there was no evidence from Cindy that Uribe actually sold drugs to Chuck. The court agreed, stating, "That's not evidence in this trial." (10 RT 2411.)

The court ruled again to exclude any drug evidence because "this is not a drug case so that's – that cross-examination of this witness concerning Mr. – her knowledge of Mr. Uribe's drug – alleged drug activity is excluded. It's not relevant. Even if it was, the probative value for outweighs any prejudice

spilling from such evidence." (10 RT 2412.) The court allowed evidence of Uribe's "violent activity" because some of that evidence came in during the guilt phase. (10 RT 2412.) Defense counsel, however, elected to forego cross-examining Melgoza so the "violent activity" evidence was not presented. (10 RT 2424.)

Cindy Durbin next testified about (1) the circumstances of the murders, and (2) the impact of Chuck's murder on both she and their children. Cindy explained that telling her children that their father was dead was "the hardest thing I have ever done." (10 RT 2425-2431.) She explained the lingering impact of the murders on her children. Her son ran and hid under the coffee table whenever the doorbell rang and her daughter still would not sleep alone. (10 RT 2431.) She testified that she remarried, but that she still had problems dealing with Chuck's death; she "still wakes up crying and stuff." (10 RT 2432.) Defense counsel declined to cross-examine Cindy. (10 RT 2433.)

Ginger Colwell, Chuck's mother, next testified about the impact of his murder on her. She testified about their close relationship and how she "depended on Chuck for everything, for being strong, and always holding the family together. For everything." (10 RT 2435.) On the night of the murders, she took her grandchildren home with her. The children and Colwell were crying and scared. (10 RT 2435-2427.) When she learned the next day that Chuck was dead, she "felt like [she] was dead" too. (10 RT 2437.) His death caused her depression. (10 RT 2438.) Defense counsel elected not to cross-examine Colwell. (10 RT 2440.)

The prosecutor rested after Colwell's testimony, and defense counsel made a motion for a penalty mistrial, asserting the evidence has "crossed the line" of victim impact testimony. The court denied the motion, finding the penalty trial, thus far,

> went quite well, considering the nature of what the testimony is about. Witnesses although were crying, it was to be expected. It wasn't so

outrageous or inflammatory to create, you know, an atmosphere that the defendant was going to be prejudice of either testimony.

(10 RT 2441-2442.)

Appellant then presented his mitigation case by calling his brother, step-children, niece, friends, coworkers, and neighbors as witnesses. (10 RT 2481-2531.)

C. The Trial Court Did Not Abuse Its Discretion In Excluding The Proffered Defense Evidence Of Drug Use During The Penalty Phase

Foremost, this was not a drug case and any evidence of drug activity by Chuck or Uribe had nothing to do with their murders. By all indications, Uribe's murder was retaliatory and revenge-driven. Chuck truly was an innocent murder victim who happened to confront armed intruders in his home as those intruders were bent on murdering Uribe. The court repeatedly noted so in denying appellant's attempts to introduce drug evidence into the case. A trial court retains wide discretion to exclude evidence offered in the penalty phase pursuant to section 190.3, factor (a), which is misleading, cumulative, or unduly inflammatory. (*People v. Box* (2000) 23 Cal.4th 1153, 1200-1201; *People v. Karis* (1988) 46 Cal.3d 612, 641-642, fn. 21.) The trial court did not abuse its discretion when it excluded the evidence on this basis.

Despite counsel's relentless attempts to introduce irrelevant or inflammatory drug use evidence, appellant simply was not entitled to disparage Chuck's and Uribe's characters during the penalty phase with that evidence. (E.g., *People v. Boyette, supra*, 29 Cal.4th at p. 445 [defendant was not entitled to disparage the character of victim on cross-examination during the penalty phase].) Contrary to appellant's claim here (AOB 235-237), the prosecutor's victim impact evidence was not character evidence; instead, it only "demonstrate[d] the immediate harm caused by the defendant's criminal conduct." (*People v. Pollock, supra,* 32 Cal.4th at p. 1183.) The evidence was offered to show "each

victim's 'uniqueness as an individual human being'" (*Payne v. Tennessee, supra*, 501 U.S. at p. 823), so that the jury could assess appellant's moral culpability or blameworthiness. (*Id.*, at p. 825.) The prosecution carefully presented the victim impact evidence without exalting the victims' character. (See, e.g., 10 RT 2384.) Further, appellant had no right to test the sincerity of these witnesses' sense of loss with inflammatory and irrelevant drug use evidence. (*Boyette, supra,* at p. 445. ["Testimony from the victim's family members was relevant to show how the killings affected *them*, not whether they were *justified* in their feelings due to the victim's good nature and sterling character," italics in original].)

Appellant's claim of error for the trial court's denial of his attempts to introduce the drug use evidence to impeach Cindy Durbin also fails because he merely sought to impeach her on a collateral matter. Excluding defense evidence on a subsidiary point, such as Cindy's inconsistent statements about drug use in her home, did not impair appellant's constitutional rights to present a defense or mitigation case. (*People v. Harris, supra,* 37 Cal.4th at p. 353, quoting *People v. Ramos* (2004) 34 Cal.4th 494, 528.) Because the trial court excluded the evidence pertaining to a collateral issue, and because the court did not abuse its discretion, there was no constitutional violations.

Citing the dissent in *People v. Harris, supra*, 37 Cal.4th 310, appellant contends he has a due process right to present "rebuttal evidence" to challenge victim impact evidence that Uribe and Chuck were "moral beacons, adept at the task of parenting, whose presence would be missed." (AOB 237-240.) Respondent recognizes that, as a general matter, a capital defendant must be permitted to offer any relevant potentially mitigating evidence (*Skipper v. South Carolina* (1986) 476 U.S. 1, 4-8; *Eddings v. Oklahoma* (1982) 455 U.S. 104, 112-116), but that evidence must still generally conform to the rules of evidence (*People v. Thornton, supra,* 41 Cal.4th at p. 454; *People v. Phillips* (2000) 22

Cal.4th 226, 238).[35] As such, appellant had no unfettered right to present evidence he deemed "rebuttal evidence" to the victim impact testimony, which he erroneously maintains is actually victim character testimony.

Further, to the extent that appellant maintains a capital defendant has some unspecified due process right to rebut victim character evidence during the penalty phase (see AOB 225-226, 235-240), this Court need not address the issue because the evidence presented here was victim impact evidence, not character evidence. Appellant's premise for his putative constitutional right to rebut, is premised on his blurring of the distinction between victim impact evidence and evidence of the victim's character. Here, the evidence was narrowly elicited to show the specific harm caused by appellant, including how the murders affected the victims' families, so that the jury could properly assess appellant's blameworthiness. The prosecutor was very careful not to exalt the victims' character in the manner appellant complains of here (see, e.g., 10 RT 2384), so appellant's assumption that the evidence was actually victim character evidence is unfounded. (Cf. *People v. Boyette, supra*, 29 Cal.4th at p. 445.)

Appellant's final contention is that consideration of the drug use evidence was relevant to the circumstances of the offense such that it would have affected the jury's consideration of self-defense or imperfect self-defense as lingering doubt evidence. (AOB 241.) First, appellant did not offer the

---

35. On this point, appellant's observation that victim impact testimony "carries with it the corollary that a true and accurate picture may not be wholly to the benefit of the victim's memory" (AOB 233), overlooks the more fundamental issue that such evidence is still subject to the rules of evidence. (See *People v. Phillips, supra,* 22 Cal.4th at p. 238 [The rule allowing all relevant mitigating evidence has not "abrogated the California Evidence Code."].) "'As a general matter, the ordinary rules of evidence do not impermissibly infringe on the accused's right to present a defense.'" (*Ibid.*, citing *People v. Hall* (1986) 41 Cal.3d 826, 834.) Stated differently, evidence of a "true and accurate picture" must run the gauntlet of the ordinary rules of evidence.

evidence for this purpose, so the trial court did not have the opportunity to consider the evidence on the grounds now asserted here. As such, this Court should find the contention is forfeited for failure to raise it below. (*People v. Fauber* (1992) 2 Cal.4th 792, 830-831 [party may not raise on appeal a new theory of admissibility of impeachment evidence].)

Second, even if not forfeited, as shown in Argument VIII, *ante*, appellant simply had no right to claim any type of self defense because Chuck was legally justified in confronting appellant and appellant's son in the defense of his family and home. (§ 198.5 [Home Protection Bill of Rights]; *People v. Szadziewicz, supra,* 161 Cal.App.4th at p. 834 [defendant not entitled to imperfect self-defense instruction where he broke into victim's hotel room]; *People v. Hardin, supra,* 85 Cal.App.4th at pp. 628-638 [same]; see § 197(2) [homicide is justified when committed in defense of habitation].) As such, any claim of self-defense under the circumstances of this case could not properly be proffered as evidence of lingering doubt.

Regardless, even if this Court finds error for exclusion of "rebuttal evidence" during the penalty phase, it was harmless beyond a reasonable doubt. Exclusion of defense mitigation evidence is subject to harmless error review under the *Chapman* standard. (*People v. Brown, supra,* 31 Cal.4th at p. 579.) The exclusion of evidence that Chuck ingested methamphetamine before he was murdered, that he recreationally used the drug, and that Uribe sold the drug would not have minimized the extremely aggravating nature of the crimes and served as a basis for a sentence less than death. The jury determined that appellant was one of two armed assailants that barged into the Durbin home, where the Durbin children were immediately present, in their murderous hunt for Uribe. The jury also learned appellant shot Chuck to death – execution style – in front of his children, in the living room of their home. The children's mother was also shot during the gunshot fusillade. The drug use evidence bore

no relevance to the jury's assessment of the severity of the crimes. Moreover, any evidence of Chuck's drug use, beyond a reasonable doubt, would not have affected the jury's penalty determination given the profound and lingering impact that his murder had on his children. Appellant's moral culpability remains the same, beyond a reasonable doubt, in the absence of any evidence of the drug evidence.

XVI.

THE TRIAL COURT DID NOT ERR IN ADMITTING VICTIM IMPACT EVIDENCE SHOWING CINDY DURBIN'S DIFFICULT EXPERIENCES OF BEING A SINGLE PARENT AFTER HER HUSBAND'S MURDER

Appellant contends the trial court erred in allowing evidence that Natasha Durbin died from influenza after Chuck's murder, and that Brett Durbin suffered from autism. In his view, the evidence was "extremely aggravating" and irrelevant because there was nothing to show that these events were causally related to Chuck's murder. The error, he contends, violated his rights to due process and a reliable penalty determination under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. (AOB 245-256.) Respondent disagrees and initially contends appellant's challenge about evidence of Brett's autism is forfeited for failure to challenge its admission below. In any event, the challenged evidence was offered to show how Chuck's murder affected his wife, Cindy, who was forced into single parenthood and left with the prospect of raising their children without help from their father, Chuck.

A. Legal Principles

The Eighth Amendment erects no *per se* bar prohibiting a capital jury from considering victim-impact evidence. (*Payne v. Tennessee, supra*, 501 U.S. at pp. 825, 829.) Such evidence is admissible as a "circumstance of the crime"

under section 190.3, factor (a). (*People v. Edwards, supra,* 54 Cal.3d at pp. 832-836.) While such evidence is generally admissible, "irrelevant information or inflammatory rhetoric that diverts the jury's attention from its proper role or invites an irrational, purely subjective response should be curtailed." (*People v. Harris, supra*, 37 Cal.4th at p. 351, internal citations and quotations omitted.)

"The death penalty statute does not adopt any new rules of evidence peculiar to itself, but simply allows the generally applicable rules of evidence to govern." (*People v. Richardson* (2008) 43 Cal.4th 959, 1033.) The trial court retains broad discretion to admit or exclude penalty phase evidence under normal rules of evidence during a capital trial. (E.g., *People v. Harris, supra*, 37 Cal.4th at p. 353 ["'[T]he concept of relevance, as it pertains to mitigation evidence is no different from the definition of relevance as the term is understood generally.' [Citation.]".) A trial court's ruling on the relevance of evidence will not be reversed on appeal where there is no showing of an abuse of discretion. (*People v. Edwards, supra*, 54 Cal.3d at p. 817.)

B. Relevant Background

Before the start of the penalty phase, defense counsel made a motion to exclude evidence of Natasha Durbin's death, which occurred in 1997. Counsel contended the evidence was "highly prejudicial" and under Evidence Code section 352, it should be excluded. (10 RT 2326.) The prosecutor countered that the evidence bore on the impact of Cindy Durbin, insofar as she had to deal with Natasha's death alone, without Chuck's support. (10 RT 2326-2327.)

The next day the court addressed the motion. The prosecutor again contended Natasha's death was "relevant only to the extent that the victim's death impacted Cindy Durbin. She had to go through the death of a child without her husband to help her and console her, help her make funeral arrangements. That's relevant." (10 RT 2340.) Defense counsel countered that

the evidence was "so emotionally charged" that it would divert attention from the jury's task of determining appellant's proper penalty. (10 RT 2341.) The court ruled that the fact that Chuck was not present to assist, comfort, and support Cindy over Natasha's death "is highly relevant." (10 RT 2341.)

Defense counsel lamented "I think that we can predict that it's going to be extremely emotional. I mean it's common sense." (10 RT 2341.) The court noted that the penalty phase was already charged with some emotion, stating

> [t]here is all levels of emotion. Mr. Durbin died three years ago. And the District Attorney could make it so inflammatory to cause a mistrial. However, if he asks the questions matter of fact, and doesn't stir the emotions of the witness, I think it's allowable.

(10 RT 2341-2342.)

The challenged portions of Cindy's victim impact testimony are as follows:

Q: Did this incident effect [sic] your children in any way?
A: Yes. My son Brett for at least the first year, year and a half, every time the doorbell would ring at night he would run and hide underneath the coffee table. Savana still won't sleep alone.
Q: Did Brett receive counseling?
A: All of us did for the first year and a half. Tasha [Natasha] was affected most by it. Counselor saw her longer than the rest of the kids because she saw more, I think. She saw – she told me she saw the guy shoot Chuck. And she saw Chuck fighting with one of them.
Q: *Now you say Brett is still affected. Does Brett have any disability?*
A: *He is autistic slightly.*
Q: Does he have a difficult time communicating?
A: Yes. He is getting better. His speech – if you don't know him personally and stuff, it's hard for some people to understand what he is saying. He relates better to women more than men. If he doesn't know a strange man, he won't go up to him and talk to him.
Q: Has he ever accused any one of hurting his father?
A: Yes. I just recently had a baby, and a friend of mine came over and was seeing Tia, the baby, and he went down to pick her up out of the basinet, and Brett told him, you are the one that shot my daddy, Chuck. We told him, no. The people that did that are in jail.
Q: Now, you recently had a baby; is that right?
A: Yes.

Q: Are you re-married?
A: Yes. Six months ago I got re-married.
. . . . . .
Q: *Last – I believe last year did something – year and a half ago, did something happen to Natasha?*
A: *My daughter died of influenza last August.*
Q: *And did the fact Chuck was not there to help you and console you in that situation have any affect on your ability to deal with that death?*
MR. LITMAN [defense counsel]: Objection. Leading.
THE COURT: Overruled.
THE WITNESS: *Yes. I still don't think I dealt with her death.*

(10 RT 2431-2433, italics added.)

At the conclusion of Cindy's testimony, defense counsel moved for a mistrial because the evidence "crossed the line" of admissible victim impact testimony. Counsel claimed appellant could not receive a fair trial based on evidence that Natasha had passed away, which counsel contended was highly prejudicial. (10 RT 2441.) The court disagreed, and in denying the motion, stated

> Well, I was just thinking the opposite. It went quite well, considering the nature of what the testimony is about. Witnesses although crying, it was to be expected. It wasn't so outrageous or inflammatory to create, you know, an atmosphere that the defendant was going to be prejudiced of either testimony.

(10 RT 2341-2342.)

C. The Challenge To Evidence Of Brett's Autism Is Forfeited; Regardless, The Trial Court Did Not Abuse Its Discretion In Admitting This Type Of Victim Impact Evidence

As a threshold matter, respondent contends that the challenge to evidence relating to Brett's autism is forfeited for failure to raise any objection below. (See 10 RT 2431-2432.) Moreover, appellant failed to raise the claim of error when he made a mistrial motion; he limited the mistrial motion to the evidence of Natasha's death only. As such, his challenge to the introduction of evidence of Brett's autism is forfeited for failure to raise it below. (Evid. Code, § 353;

People v. Gordon, supra, 50 Cal.3d at p. 1255 ["[T]he rule is that a defendant may not complain on appeal that evidence was inadmissible on a certain ground if he did not make a timely and specific objection on that ground in the trial court"].)

Regardless, the court did not abuse its discretion in admitting the challenged evidence. The evidence was properly offered to show the impact of Chuck's murder on the mother of his children, and how his murder conscripted her into the hardship of single parenthood, which included raising a special needs child and dealing with another child's death, alone. Nothing about this evidence was irrelevant or inflammatory such that it tended to encourage the jury to act irrationally. Nor was the evidence too remote from defendant's acts to be irrelevant to his moral culpability because it bore directly on the impact of Chuck's murder on his widow – she was made to rear their three children alone after his murder.

Appellant nevertheless contends the evidence was irrelevant to the penalty determination because it was not causally related to the murder. (AOB 252-253.) This contention misses the point because this evidence was not offered to show how Chuck's murder impacted the children (although other evidence was offered on this point), it was offered to show how it impacted *Cindy*. Appellant also contends that the prosecutor's "purported pretext" for the evidence "is unsound and has slight probative value." (AOB 254.) Respondent disagrees and contends the issue is simply whether the trial court properly acted within its discretion in finding the evidence was relevant and probative under the generally applicable rules of evidence. (E.g., *People v. Richardson, supra*, 43 Cal.4th at p. 1033.) It did, so appellant's contention should be rejected.

In any event, if error, the admission of the evidence was not prejudicial. The erroneous admission of evidence during the penalty phase "is reversible if there is a reasonable possibility it affected the verdict. This standard is

essentially the same as the harmless beyond a reasonable doubt standard of *Chapman v. California* (1967) 386 U.S. 18, 24. [Citation.]" (*People v. Lancaster* (2007) 41 Cal.4th 50, 94.) There is no reasonable possibility the evidence affected the penalty verdict because there is no conceivable way the jury could infer Chuck's murder caused Natasha's death and Brett's autism. The prosecutor's questioning did not imply that appellant's conduct caused Natasha's death or contributed to Brett's autism. (10 RT 2431-2433.) Indeed, Cindy testified that Natasha "died of influenza" (10 RT 2433), not from a mysterious malady caused by Chuck's murder. Moreover, the prosecutor did not argue that appellant's actions caused Brett's autism and contributed to Natasha's death. The reference to Natasha's death and Brett's autism itself was very brief.

The exclusion of this challenged evidence would not have affected the jury's determination of penalty given the extremely aggravated nature of the crimes. Once again, the jury found that appellant was one of two armed assailants who committed the brazen home invasion murders in front of Cindy and her children. Evidence showed that appellant shot Chuck execution style in front of his children. Cindy likewise was shot, but luckily survived. The evidence of Natasha's death from influenza and Brett's autism paled in comparison to the extremely aggravated nature of the murders such that there is no reasonable possibility its admission could have affected the penalty verdict. Thus, any error was harmless beyond a reasonable doubt.

XVII.

NO *CRAWFORD* ERROR OCCURRED DURING APPELLANT'S PENALTY TRIAL

Appellant contends that his right to confrontation under the Sixth Amendment as defined in *Crawford* was violated during his penalty phase by the introduction of Natasha Durbin's hearsay statements as testified by Corporal

Ciapessoni and her grandmother, Ginger Colwell. (AOB 257-269.) Respondent initially challenges appellant's assumption that *Crawford's* confrontation clause analysis applies to the penalty phase of a capital trial. Regardless, assuming arguendo, this constitutional right applies to the penalty phase, Natasha's statement to her grandmother and Corporal Ciapessoni was not testimonial. Further, any *Crawford* error in admitting Natasha's statement was harmless beyond a reasonable doubt.

A. Background

At the start of the penalty phase, defense counsel brought a motion to limit or exclude evidence in the penalty phase. Counsel sought an offer of proof about the content of each witness's testimony. As to Corporal Ciapessoni, the prosecutor explained the officer would testify to statements made by Natasha Durbin, who had since died, regarding "what she saw in the house at the time of the shooting." (10 RT 2308-2311.) The prosecutor sought to admit them under the excited utterance hearsay exception. (10 RT 2312, 2354.) The arguments on the admissibility of Natasha's statements were continued to the next day. (10 RT 2330-2331.)

On October 6, 1998, the trial court conducted an evidentiary hearing out of the jury's presence to determine the admissibility of Natasha's statements. Corporal Ciapessoni testified that he responded to the crime scene and saw three children in the kitchen with Cindy. They were upset and crying. He interviewed each child separately. Natasha was upset. She told the officer that she was asleep in her living room when she was awakened by two men in the kitchen area. One of the males stated something like, "Juan you disappointed us." She then heard some shots from the kitchen. The two males then left through the front door. (10 RT 2348-2349.)

Ginger Colwell also testified at this evidentiary hearing and explained that she was the children's grandmother. Natasha was six years old at the time of

the murders. Colwell arrived at the crime scene at about 10:30 p.m. to take the children to her home. The children were "scared to death. They were crying." (10 RT 2351-2352.) After Colwell left with the children, she asked Natasha about the murders. Natasha was scared and told her grandmother that "she heard them call Juan and they called him a traitor." Colwell asked if Chuck said anything. Natasha replied that she put a pillow over her siblings' heads, pulled the covers over them, and they did not move during the shooting. (10 RT 2352.) Colwell stopped questioning Natasha because the child was too upset. (10 RT 2353.)

Defense counsel challenged Natasha's statements, arguing that they did not qualify as excited utterances under a hearsay exception because the statements were made at a substantially later time. (10 RT 2354.) Counsel added that admission of the statements was a violation of appellant's confrontation clause right under the United States Constitution. The trial court overruled the objections and ruled to allow admission of Natasha's statements. (10 RT 2355.)

Corporal Ciapessoni later told the jury that he interviewed Natasha in the master bedroom. Natasha was upset and crying. Natasha told the officer that

> she was asleep in the living room and was awoken [sic] at which time she observed two men she did not know in the kitchen of the residence. She overheard one of the men say, "Juan you disappointed us," and then she heard shots being discharged in the residence. And then she observed two men leaving the residence.

(10 RT 2389.)

Cindy testified before the jury that she and the children received counseling after the murders. Absent objection, she testified that the counselor saw Natasha longer than the other children because "she saw more, I think. She saw – she told me she saw the guy shoot Chuck. And she saw Chuck fighting with one of them." (10 RT 2431.) This response was unsolicited by the prosecutor.

Ginger Colwell testified before the jury about Natasha's statement and the circumstances surrounding it. She explained that she went to the crime scene

to pick up her grandchildren. The children "were so scared." (10 RT 2436.) Colwell took the frightened and crying children to her home. She explained, "they were hysterical, scared, and crying, and so was I." (10 RT 2347.) Natasha told Colwell "grandmother, they were calling Juan a traitor." When Colwell asked if Chuck said anything, Natasha said Chuck told her to run and hide. Natasha then put a pillow over her siblings' heads and pulled a cover over them so they would not get hurt. (10 RT 2339-2340.)

B. The Confrontation Clause Is Not Implicated In A Penalty Phase Trial

Appellant now maintains that he was denied his right to confrontation by the admission of Natasha's statements. As an initial matter, respondent challenges appellant's assumption that the confrontation clause applies to the penalty phase of a California capital trial. While this Court has previously assumed without deciding that it does (*People v. Romero* (2008) 44 Cal.4th 386, 421; *People v. Sapp* (2003) 31 Cal.4th 240, 291), appellant provides no authority that a defendant's confrontation rights persist into the penalty phase of a capital trial. Respondent submits it does not and hence *Crawford* has no application to the hearsay evidence admitted at appellant's penalty phase.

"It is far from clear that the Confrontation Clause applies to a capital sentencing proceeding." (*United States v. Higgs* (4th Cir. 2003) 353 F.3d 281, 324.) This is because the United States Supreme Court has never held that the confrontation clause applies to the penalty phase of a capital trial after the jury determines the defendant is death eligible. (See *Szabo v. Walls* (7th Cir. 2002) 313 F.3d 392, 398 ["[T]he Supreme Court has held that the Confrontation Clause does not apply to capital sentencing. It applies through the finding of guilt, but not to sentencing, even when that sentence is the death penalty. (See *Williams v. New York* 337 U.S. 241, 93 L. Ed. 1337, 69 S. Ct. 1079 (1949))"]; *United States v. Roche* (7th Cir. 2005) 415 F.3d 614, 618.)

In *United States v. Fields* (5th Cir. 2007) 483 F.3d 313, cert. denied (2008)

128 S.Ct. 1065 (*Fields*), the defendant was convicted of various offenses, including capital murder. He was sentenced to death under the Federal Death Penalty Act, and on appeal he challenged the admission of documentary and testimonial hearsay at his penalty hearing on confrontation clause grounds, contending that such evidence was barred after *Crawford*. (*Id.*, at p. 324.) Largely relying on *Williams v. New York, supra*, 337 U.S. 241, the reviewing court disagreed, holding that "the Confrontation Clause does not operate to bar the admission of testimony relevant only to a capital sentencing authority's selection decision. [fn.]" (*Fields, supra,* at p. 326, see *id.* at pp. 331-337 [also noting that the confrontation clause does not apply to non-capital sentencing proceedings].) The court was careful to explain that its holding applied to the penalty determination stage and not the death eligibility phase. (*Ibid.*, at fn. 7.) Finally, the court noted while the confrontation clause did not apply to sentencing hearings, due process requires that some minimal indicia of reliability accompany a hearsay statement. (*Id.,* at pp. 337-338.)

As in *Fields*, this Court should likewise hold that the confrontation clause does not operate to bar the admission of testimony relevant only to a capital sentencing authority's selection decision. Instead, as was true prior to *Crawford*, hearsay evidence should only be subject to the normal rules of evidence to establish its relevance, probative value, and reliability. (See *United States v. Jordan* (E.D. Va 2005) 357 F.Supp.2d 889, 898-905.) Because the trial court here found the evidence satisfied the normal rules of evidence, and because appellant's due process right was not violated, there was no error.

C. Regardless, Natasha's Statements To Colwell And Corporal Ciapessoni Were Not Testimonial

Appellant contends Natasha's statement to her grandmother, Colwell, was testimonial because the case "had passed well into the investigation phase," and Colwell was more than just a casual disinterested observer since her son was

murdered. (AOB 263.) Not so. To determine if Natasha's hearsay statement to Colwell is testimonial under *Crawford*, this Court must ask whether the circumstances objectively indicate that the primary purpose of the questioning is to establish past events potentially relevant to later criminal prosecution. (*Davis, supra*, 547 U.S. at p. 822; *People v. Cage, supra*, 40 Cal.4th at p. 984 & fn. 14.) Another salient inquiry is to consider whether the statement occurred under circumstances akin to the formality and solemnity characteristic of testimony. (*Cage, supra*, at p. 984.)

Under this standard, Natasha's excited statement to her grandmother after the murder of her father and the shooting of her mother bore absolutely no characteristics of testimony. Contrary to appellant's argument, there was no evidence that Colwell's primary purpose was to elicit Natasha's statement about the murders to assist in a later prosecution. Instead, objectively viewed, the evidence pointed to the contrary and showed only a grandmother's loving concern and consolation for her traumatized granddaughter. Moreover, statements are not testimonial merely because they are later used at trial. (*People v. Cage, supra*, 40 Cal.4th at p. 991.) As such, Natasha's hearsay statement to Colwell was not testimonial under *Crawford*.

Objectively viewed, Natasha's statement to Corporal Ciapessoni presents a close question of whether it was testimonial. "Statements are testimonial if there primary purpose was to produce evidence for possible use at a criminal trial; they are nontestimonial if the primary purpose is to deal with a contemporaneous emergency such *as assessing the situation*, dealing with threats, *or apprehending a perpetrator*. [Citations.]" (*People v. Romero, supra*, 44 Cal.4th at p. 422, italics added.) A statement does not become testimonial merely because it is used later at trial. (*People v. Cage, supra*, 40 Cal.4th at p. 991.) Respondent submits that Natasha's frightened statement to Corporal Ciapessoni, when objectively viewed, was meant to aid in the

apprehension of the perpetrators and not for the primary purpose to produce evidence for a later trial. It was also consistent with the purpose of trying to assess a developing situation among multiple witnesses at the scene of a crime.

At this juncture, the situation was an ongoing emergency more akin to the circumstances of *Davis*, than *Hammon v. Indiana* (2006) 547 U.S. 813. (E.g., *People v. Saracoglu, supra*, 152 Cal.App.4th at pp. 1596-1598.) While Natasha was questioned alone in the master bedroom, there was no evidence that her statement was being primarily received for possible use in a later trial. Instead, objectively viewed, it was meant to meet the ongoing emergency of apprehending at-large murder suspects and assessing a developing situation at the crime scene. (*Ibid.*) Moreover, this scared little girl's statement bore none of the solemnity and formality characteristic of testimony. It was not formalized dialogue. Her statement was not a deliberate recount about how the murders started and progressed; instead, it was a fresh excited utterance about a violent crime as witnessed through the eyes of a frightened child. (Cf. *People v. Corella, supra*, 122 Cal.App.4th at p. 469 [opining that spontaneous statements under Evidence Code section 1240 are necessarily not testimonial under *Crawford* because they are made "without reflection or deliberation" and are therefore not "made in contemplation of their 'testimonial' use in a future trial."]; *People v. Pedroza* (2007) 147 Cal.App.4th 784, 795 [following *Corella*]; *People v. Rincon* (2005) 129 Cal.App.4th 738, 756-757 [stating that the *Crawford* majority "strongly implied" the same conclusion].) Her remarks were not akin to an ex parte statement under the Marian statutes. As such, Natasha's statement was non-testimonial under *Crawford*.

Regardless, the introduction of Natasha's statement through Corporal Ciapessoni, if *Crawford* error, was harmless beyond a reasonable doubt because the evidence was properly admitted through Colwell's testimony. Colwell testified that her granddaughter was hysterical and crying after the murders.

Natasha told Colwell that "they" were calling Juan "a traitor." Chuck told Natasha to hide so the child covered her siblings with pillows and blankets and laid still. (10 RT 2339-2340.) Moreover, Cindy testified, absent objection, that Natasha said she saw Chuck fighting with one of the assailants and the assailant shot Chuck. (10 RT 2431.) Further, compelling grounds exist to believe Natasha's statements to Cindy and Colwell on their own merits. The jury heard evidence at the guilt phase that children were present in the living room at the time of Chuck's murder and that Little Pete confronted Juan and told him "what's up Juan Uribe. What's up now?" (5 RT 1273-1275.) Cindy testified, at the guilt phase, that one of the assailants called Uribe a traitor and told him that he was going to die. (6 RT 1387-1388.) Because Natasha's statement to Corporal Ciapessoni was largely cumulative to this other evidence, the erroneous admission, beyond a reasonable doubt, would not have affected the penalty verdict.

XVIII.

THE TRIAL COURT PROPERLY INSTRUCTED WITH THEN-STANDARD CALJIC NO. 8.85, NOTWITHSTANDING APPELLANT'S REQUEST FOR MODIFICATION AND PINPOINT INSTRUCTIONS

Appellant contends the trial court erred in denying his request for (1) a "pin-point" jury instruction focusing on his motive for the attack, and (2) a modification to CALJIC No. 8.85 focusing on Uribe's "contribution to appellant's emotional disturbance," both as factors in mitigation. In his view, CALJIC No. 8.85, the then-standard jury instruction, which in part explained section 190.3, factor (k), did not give "full effect" to his penalty defense, so the trial court erred by denying his instructional requests. (AOB 270-285.) Respondent disagrees and contends there was no error; and, in any event, the jury gave full effect to the defense mitigation evidence under the factor (k) portion of the instruction.

A. Background

Defense counsel submitted jury instructions addressing both the guilt and penalty phases at the beginning of the guilt phase. (See 12 CT 2538-2543 [proffered penalty phase instructions].) One of these penalty instructions was modified CALJIC No. 8.85 discussing the penalty factors for the juror's consideration. (12 CT 2540-2541.) Pertinent to the claim made here, the modified instruction directed the jury to consider under subdivision "(e), whether or not the victim in whole, or in part, contributed to the extreme mental or emotional state of the defendant." (12 CT 2540.) There was no further discussion from the parties about the defense's modified CALJIC No. 8.85 request, but the instruction was not given. (See 10 RT 2601-2603; 12 CT 2575-2577.)

Some time before October 7, 1998, the defense submitted two sets of proffered jury instructions. (See 12 CT 2469-2486 [Defense Special Instruction Nos. 1-18]; 12 CT 2575-2598.) Proposed Defense Special Instruction No. 8 (No. 8) was among those submitted. It provided:

> You may consider the motive for the commission of the crime as a mitigating factor which extenuates the gravity of the crime even though it is not a legal excuse for the crime and any other aspect of the defendant's character or background that the defendant offers as a basis for a sentence less than death.

(12 CT 2476, 2590.)

On October 7, 1998, during the second day of the penalty phase, defense counsel asserted that instruction No. 8 addressed "mitigating motive to the commission of the offense." (10 RT 2418.) The prosecutor countered that he was going to argue that motive was an aggravating factor, and he noted that "instructions under [factor (k)] clearly allow the jury to consider [mitigation] motive, and this should not be given." (10 RT 2418.) The court ruled the proffered defense instruction was confusing given the argument of counsel.

The court noted that defense counsel could argue that motive was a mitigating circumstance under the instruction for section 190.3, factor (k). (10 RT 2417-2418.)

The next day, following the close of the penalty phase, the court reiterated its refusal to give instruction No. 8, stating, "Eight, the court has rejected motive instruction. Both sides will argue under A or K, factor A or factor K. Therefore, the motive instruction will be misleading." (10 RT 2535.)

The parties argued accordingly. The prosecutor argued that "Factor A is the one that we are relying on, . . ." (10 RT 2540.) The prosecutor then argued that with the possible exception of factor (k), the other mitigating factors did not apply in the case. (10 RT 2541-2543.) He then argued that the motive for Uribe's murder was "about respect," because appellant's "family was not given the respect he felt it deserved." (10 RT 2549.) As to Chuck, the prosecutor maintained that appellant murdered him in front of his children because "[h]e was just in the way." (10 RT 2549-2550.)

Defense counsel argued that the court was going to instruct the jury "regarding the 11 factors that the law allows you to consider" with the only aggravating factor, if at all, being factor (a). (10 RT 2557.) In addressing factor (a), counsel told the jury that appellant did not shoot both of the victims, and appellant did not empty his gun into Chuck. (10 RT 2560.) Counsel then argued appellant was understandably upset by Little Pete's shooting and that there "was some anger, some rage building up inside [appellant]." (10 RT 2561.) Appellant's alcohol consumption, counsel maintained, "unlocked his anger and unlocked his rage and caused him to act in a way that was inconsistent with the way that he acted the rest of this life." (10 RT 2562.) Counsel then argued the application of other factors in mitigation. (10 RT 2562-2566.) Counsel then argued factor (k) circumstances. (10 RT 2566-2570.)

Thereafter, the court instructed the jury with unmodified standard CALJIC No. 8.85. Significantly, the court instructed the jury that they should consider section 190.3, factor (k) evidence, if applicable. The instruction under factor (k) allowed the jury to consider "[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime and any sympathetic or other aspect of the defendant's character, background or record that the defendant offers as a basis for a sentence less than death, whether or not related to the offense for which he is on trial." (10 RT 2602-2603; 12 CT 2575-2577.)

B. Applicable Law And Review Standard

Generally, an appellate court reviews a trial court's instructions under the de novo review standard. (*People v. Guiuan* (1998) 18 Cal.4th 558, 569-570; *People v. Alvarez, supra,* 14 Cal.4th at p. 217.) The underlying question is one of law involving the determination of applicable legal principles. (*People v. Guiuan, supra*, 18 Cal.4th at pp. 569-570.)

> [T]he standard CALJIC penalty phase instructions "are adequate to inform the jurors of their sentencing responsibilities in compliance with federal and state constitutional standards." [Citation.]

(*People v. Gurule* (2002) 28 Cal.4th 557, 659.)

Moreover, a trial court may reject defense instructions if they are duplicative, confusing, argumentative, or an incorrect statement of law. (*Ibid.*) However, a defendant is entitled upon request to an instruction "pin pointing" his theory of the case, if the instructions are not argumentative, and are supported by sufficient evidence justifying them. (*People v. Wharton, supra,* 53 Cal.3d at pp. 570-571.)

C. The Trial Court Properly Refused Appellant's Penalty Instructions

The trial court properly ruled that instruction No. 8 would confuse the jury given the argument that motive was an aggravating circumstance under section

190.3, factor (a). In essence, the instruction would have run contrary to the prosecutor's closing argument about the circumstances of the crimes under factor (a). The trial court recognized the jury was likely to be confused, and ruled that it would be up to the jury to assign motive as a mitigating circumstance under factor (k), or an aggravating circumstance under factor (a). (10 RT 2418-2419.) This ruling was proper because instruction No. 8 was likely to confuse the jury given the argument of counsel and the properly-given standard instruction under CALJIC No. 8.85. "Instructions should also be refused if they might confuse the jury." (*People v. Gurule, supra*, 28 Cal.4th at p. 659, citing *People v. Hendricks* (1988) 44 Cal.3d 635, 643.)

Appellant's second claim that the trial court erred for not instructing with his proffered modified instruction which told the jury that they could focus on Uribe's "contribution to appellant's emotional disturbance" as a factor in mitigation, should also be rejected. (AOB 279.) Appellant's proffered modified instruction provided in subdivision (e) that the jury could consider "[w]hether or not the victim in whole, or in part, contributed to the extreme mental or emotional state of the defendant." (12 CT 2540.) There was insufficient evidence to show the victims contributed to appellant's homicidal conduct. There was no evidence Chuck did anything toward appellant and Little Pete, so the instruction was unwarranted on that ground alone.

Further, there was insufficient evidence Uribe "contributed to" appellant's "extreme mental or emotional state." While there was evidence that appellant was upset and crying at the hospital after learning Little Pete's head had been grazed, that incident occurred several weeks before the murders. Indeed, at the time of Little Pete's shooting, appellant believed Jesse Candia was responsible, not Uribe. There was no evidence that Uribe did anything toward appellant and Little Pete in the ensuing weeks leading up to the murders. There was no lengthy continued period of provocatory conduct that created a building tension

between appellant and Uribe. (E.g., *People v. Berry* (1976) 18 Cal.3d 509, 514-515 ["two-week period of provocatory conduct warranted giving voluntary manslaughter instruction]; *People v. Borchers* (1958) 50 Cal.2d 321, 329 [victim's "long continued provocatory conduct" warranted manslaughter instruction].) Nor was there any evidence that appellant was laboring under an "extreme mental or emotional state." The evidence showed that after consuming alcohol at his barbecue, he rallied his friend and relatives to go on an armed hunting expedition to murder Uribe. Appellant was driven by revenge, not an extreme mental or emotional state.

Moreover, appellant cannot demonstrate prejudice. The trial court properly instructed with standard CALJIC No. 8.85, which in subdivision (d) told the jury that they should consider "[w]hether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance." (10 RT 2602; 12 CT 2575.) In fixing his penalty at death, the jury necessarily rejected any contention that appellant was under the influence of extreme mental or emotional disturbance, such that the failure to instruct the jury that Uribe "contributed to" any disturbance is harmless beyond a reasonable doubt. Put otherwise, Uribe could not have contributed to something the jury already determined did not exist under properly given instructions. Any error is thus harmless beyond a reasonable doubt. (E.g., *People v. Sedeno, supra,* 10 Cal.3d at pp. 720-721.)

Finally, standard CALJIC No. 8.85 was sufficient itself to inform the jury of their sentencing responsibilities in arriving at the appropriate penalty in compliance with federal and state constitutional standards. (*People v. Gurule, supra,* 28 Cal.4th at p. 659; *People v. Barnett* (1998) 17 Cal.4th 1044, 1176-1177.) Under this standard instruction, the jury was told that they shall consider factor (k) evidence, i.e.,

> *Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime* and any sympathetic or other

> aspect of the defendant's character, background, or record that the defendant offers as a basis for a sentence less than death, whether or not related to the offense for which he is on trial.

(10 RT 2602-2603, italics added; 12 CT 2576-2577.)

Contrary to appellant's claim (AOB 279-284), the court's instruction addressing factor (k) was sufficient for the jury to give full consideration and effect to his "motive mitigation" evidence. Appellant's "motive mitigation" evidence, if believed, constituted "any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." This instruction is unlike the faulty mitigation instruction given in *Penry v. Johnson* (2001) 532 U.S. 782, because it provides a jury the vehicle for expressing its reasoned moral response to a defendant's particular mitigating evidence. (See *Boyde v. California* (1990) 494 U.S. 370, 372, 377-383 [factor (k) does not preclude consideration of constitutionally relevant mitigation evidence].) As such, as the trial court properly ruled that under standard CALCRIM No. 8.85 both sides were in a position to argue evidence of motive under factor (a) or factor (k). (10 RT 2535.) There was no instructional error.

XIX.

THE TRIAL COURT PROPERLY REFUSED ARGUMENTATIVE AND INCORRECT DEFENSE MITIGATION INSTRUCTIONS

Appellant contends the trial court erred by refusing two proffered mitigation instructions: (1) an instruction that mitigating circumstances need not be proven beyond a reasonable doubt; and (2) an instruction that evidence of favorable prosecution treatment given to an accomplice may be considered in mitigation. (AOB 286-295.) These contentions lack merit.

A. Applicable Legal Principles

> [T]he standard CALJIC penalty phase instructions "are adequate to inform the jurors of their sentencing responsibilities in compliance with

federal and state constitutional standards." [Citation.]

(*People v. Gurule, supra,* 28 Cal.4th at p. 659.) Moreover, a trial court may reject defense instructions if they are duplicative, confusing, argumentative, or an incorrect statement of law. (*Ibid.*) However, a defendant is entitled upon request to an instruction "pin pointing" his theory of the case, if the instructions are not argumentative or duplicative, and are supported by sufficient evidence justifying them. (*People v. Wharton, supra,* 53 Cal.3d at pp. 570-571.)

B. The Trial Court Properly Refused The Proffered Defense Instructions

1. Defense Special Instruction No. 11

At some point before October 7, 1998, defense counsel proffered two sets of penalty phase instructions to the trial court. Defense Special Instruction No. 11 (No. 11) was among the proffered instructions. Citing *People v. Wharton, supra*, 53 Cal.3d at p. 600, the instruction provided:

> The mitigating circumstances that I have read for your consideration are given to you merely as examples of some of the factors that you may take into account as reasons for deciding not to impose a sentence of death in this case. You should pay careful attention to each of these factors. Any one of them may be sufficient, standing alone to support a decision that death is not the appropriate punishment in this case. But you should not limit your consideration of mitigating circumstances to these specific factors. You may also consider any other circumstance relative to the case or to the defendant as shown by the evidence as reasons for not imposing the death penalty. *A mitigating circumstance does not have to be proved beyond a reasonable doubt to exist. You must find that a mitigating circumstance exists if there is any substantial evidence to support it.* Any mitigating circumstance presented to you may outweigh all the aggravating factors. You are permitted to use mercy, sympathy, or sentiment in deciding what weight to give each mitigating factor.

(12 CT 2479, 2592-2593, italics added.)

During the instruction conference, the court said it would not give No. 11, ruling that "[i]t does not mention anything about aggravation. Single

aggravating incident may outweigh single mitigating circumstances. There's authority on that. People vs. Hines, H-i-n-e-s 1997 case reported at 15 Cal.4th 997, 1068." (10 RT 2421-2421.) The court added that under *Hines*, instruction No. 11 was argumentative. (*Ibid.*)

Appellant challenges this ruling, focusing on the italicized portion of the above-quoted instruction. (AOB 286-290.) Because the entire instruction was proffered as an integrated charge, the trial court had no duty to parse out portions of it and correct it where the standard CALJIC penalty phase instructions provided constitutionally adequate juror guidance on their sentencing responsibilities. (*People v. Gurule, supra*, 28 Cal.4th at p. 659.) Overall, instruction No. 11 was argumentative because much of it invited the jury to draw inferences favorable to appellant alone from specified items of evidence. For example, the portion stating "You must find that a mitigating circumstance exists if there is any substantial evidence to support it" improperly *directs* the jury to make findings based on the evidence. Similarly, the portion "A mitigating circumstance does not have to be proved beyond a reasonable doubt to exist," was somewhat misleading and argumentative because this standard of proof does not apply at all, not merely to mitigating circumstances, during the penalty phase. (*People v. Hines, supra,* 15 Cal.4th at p. 1066, citing *People v. Visciotti* (1992) 2 Cal.4th 1, 67-68.)

Moreover, portions of instruction No. 11 were duplicative of CALJIC No. 8.88 (12 CT 2583-2584), which is another ground for properly refusing the instruction. (*People v. Gurule, supra*, 29 Cal.4th at p. 659.) The statement providing, "You are permitted to use mercy, sympathy, or sentiment in deciding what weight to give each mitigating factor" (12 CT 2479), is both argument, and somewhat redundant to a portion of CALJIC No. 8.88 instructing the jury that "You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider."

(12 CT 2584.) As such, the trial court properly denied the instruction.

Appellant nonetheless claims the trial court erred by refusing portions of instruction No. 11 because its entirety was taken verbatim from an instruction recounted in *People v. Wharton, supra*, 53 Cal.3d at page 600, footnote 23. On review, Wharton challenged a portion of his proffered instruction, which told the jury "You must find a mitigating circumstance exists if there is any substantial evidence to support it." He argued the instruction limited the jury's consideration of relevant mitigating evidence. (*Id.*, at p. 600.) This Court disagreed, noting that the instruction, in context, was "clearly favorable" to him, was consistent with the Eighth Amendment, and did not prevent the jury from considering any mitigating circumstance. (*Id.*, at p. 601.) While this Court generally stated the instruction was "consistent with Eighth Amendment guarantees" (*id.*, at p. 600), its use was not categorically sanctioned. In some circumstances, such as here, the instruction might prove duplicative, or indeed argumentative, and hence should be properly rejected. (*People v. Gurule, supra*, 28 Cal.4th at pp. 659-660; *People v. Hines, supra*, 15 Cal.4th at pp. 1066-1067.)

2. Defense Special Instruction No. 16

Appellant similarly proffered Defense Special Instruction No. 16 (No. 16) which told the jury, "You may consider and weigh as a circumstance in mitigation under factor A the favorable treatment by someone you personally believe to be an accomplice." (12 CT 2484, 2597.) At the jury instruction conference the trial court ruled, citing *People v. Rodrigues, supra,* 8 Cal.4th at page 1188, the instruction should not be given because it was "irrelevant." (10 RT 2422.) Appellant now maintains the trial court improperly refused instruction No. 16. (AOB 286, 291-295.) Not so, because "'[t]he focus in a penalty trial of a capital case is on the character and record of the individual offender. The individually negotiated disposition of an accomplice is not

constitutionally relevant to defendant's penalty determination." [Citation.]"[36] (*Rodrigues, supra*, at p. 1188; see *People v. Gurule, supra,* 15 Cal.4th at p. 1068 [same].)

Appellant nevertheless argues there should have been "a specific instruction on intracase proportionality review." He also maintains that this Court should undertake intracase proportionality review, for the first time on appeal, to compare the sentences afforded the accomplices in this case. (AOB 291-292.) First, appellant did not request "a specific instruction on intracase proportionality," so his contention is not properly before this Court. (See *People v. Rodrigues, supra*, 8 Cal.4th at p. 1189 [to preserve a claim of error, defendant must request particularized instructions].) Second, the trial court had no duty to so instruct because the California death penalty statute is not constitutionally required to incorporate intracase proportionality or factor the sentences of accomplices. (*Id.*, at pp. 1188-1189; *People v. Mincey, supra,* 2 Cal.4th at pp. 479-480.) Third, since this Court has previously rejected intracase proportionality review, and because appellant offers no new reason to readdress this holding, it should again decline an invitation to engage in "intracase appellate review [as] a proper exercise of [its] appellate jurisdiction." (AOB 292.)

As such, the trial court did not err in rejecting instruction No. 16.

---

36. For this reason, appellant's claim that a jury should be *permitted* under factor (k), of section 190.3 (AOB 294), even if not constitutionally compelled, to consider accomplice treatment is mistaken. Again, in California, the focus of the proper penalty is based on the particulars of the individual defendant, not the treatment of his accomplices.

XX.

THE TRIAL COURT DID NOT ERR BY NOT REINSTRUCTING THE JURY AT THE PENALTY PHASE WITH CALJIC NOS. 2.01 AND 2.02 ADDRESSING CIRCUMSTANTIAL EVIDENCE

Appellant contends the trial court erred by failing to sua sponte instruct the jury with CALJIC Nos. 2.01 and 2.02 at his penalty trial. (AOB 296-299.) Respondent disagrees because the instructions address the circumstantial evidence rule in terms of guilt and innocence, the inapplicable reasonable doubt standard, and mental states. The prosecutor presented no evidence that appellant was previously convicted of felony offenses or committed uncharged violent acts, so these instructions had no application to the penalty phase evidence here. (*People v. Brown, supra,* 31 Cal.4th at pp. 563-564 [CALJIC No. 2.01 is required in the penalty phase only where the prosecution substantially relies on circumstantial evidence to prove unadjudicated violent criminal conduct]; *People v. Edwards, supra,* 54 Cal.3d at p. 842 [CALJIC No. 2.01, which ties circumstantial evidence to the reasonable doubt standard, is not appropriately given in a penalty trial, except where evidence of other crimes is introduced in aggravation].)

Then-standard CALJIC No. 2.01 provided:

> 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 the 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 on which the inference necessarily rests *must be proved beyond a reasonable doubt*. [¶] Also, if the circumstantial evidence [as to any particular count] permits two reasonable interpretations, one of which points to the defendant's *guilt* and the other to [his][her] *innocence*, you must adopt the interpretation that points to *the*

defendant's innocence. [¶] If, on the other hand, one interpretation of this evidence appears to you to be reasonable and the other interpretation unreasonable, you must accept the reasonable interpretation and reject the unreasonable.

(Italics added.)

"A trial court has a sua sponte duty to give CALJIC No. 2.01 in criminal cases 'where circumstantial evidence is substantially relied upon for proof of guilt . . .'" (*People v. Johnwell* (2004) 121 Cal.App.4th 1267, 1274, quoting *People v. Yrigoyen* (1955) 45 Cal.2d 46, 49-50.) CALJIC No. 2.01, however, has no application where the standard of proof is different than the beyond a reasonable doubt standard. (*Ibid.*; see *People v. Edwards, supra*, 54 Cal.3d at pp. 842-843.) Moreover, because the prosecution did not rely on circumstantial evidence "for proof of guilt," the instruction simply had no application. (*People v. Brown, supra*, 31 Cal.4th at p. 563 ["CALJIC No. 2.01 is required only were the prosecution substantially relies on circumstantial evidence. '[W]here circumstantial evidence is not the primary means by which the prosecution seeks to establish that the defendant engaged in criminal conduct, the instruction may confuse and mislead, and thus should not be given.' [Citation.]"].)

Appellant's claim of error regarding CALJIC No. 2.02 likewise fails because it had no application to appellant's penalty phase. Then-standard CALJIC No. 2.02, which instructed the jury on how to consider circumstantial evidence to prove mens rea for criminal acts, provided:

The [specific intent] [or] [and] [mental state] with which an act is done may be shown by the circumstances surrounding the commission of the act. However, you may not [find the defendant guilty of the crime charged [in Count[s] __ . . .], [or] [the crime[s] of ___, . . .] which [is a] [are] lesser crime[s],] [or] [find the allegation __ to be true,] unless the proved circumstances are not only (1) consistent with the theory that the defendant had the require [specific intent] [or] [and] [mental state] but (2) cannot be reconciled with any other rational conclusion. [¶] Also, if the evidence as to [any] [specific intent] [or] [and] [mental state]

> permits two reasonable interpretations, one of which points to the existence of the [specific intent] [or] [mental state] and the other its absence, you must adopt that interpretation which points to its absence. If, on the other hand, one interpretation of the evidence as to the [specific intent] [or] mental state] appears to you to be reasonable, and the other unreasonable, you must accept the reasonable interpretation and reject the unreasonable.

(Italics added.)

The trial court would have confused and mislead the jury by giving the instruction (*People v. Brown, supra*, 31 Cal.4th at p. 562), and erred by giving an instruction correct in law, but inapplicable to the facts of the case or the proceeding itself. (*People v. Rowland* (1992) 4 Cal.4th 238, 282 [giving an instruction that is correct as to the law but irrelevant or inapplicable is error].) As such, the trial court had no duty to instruct with CALJIC No. 2.02 at appellant's penalty phase.

XXI.

APPELLANT FORFEITED HIS CHALLENGE TO THE TRIAL COURT'S CONSIDERATION OF HIS MODIFICATION MOTION; REGARDLESS, THE TRIAL COURT DID NOT ERR IN DENYING THE MOTION TO MODIFY THE DEATH VERDICT

Appellant contends the trial court erred by using evidence of premeditation in Chuck's murder as a factor in aggravation to deny appellant's motion to modify the death verdict. (AOB 300-305.) Respondent contends this argument is forfeited for failure to raise it in the trial court. (*People v. Tafoya, supra,* 42 Cal.4th at p. 196.) Regardless, if reviewable, the claim lacks merit.

A. The Motion To Modify The Death Verdict

On January 29, 1999, defense counsel filed a motion to modify the death verdict contending the jury erred in determining factors in aggravation substantially outweighed mitigating factors. Counsel pointed to appellant's lack

of criminal history, his acts of kindness to family and friends, his intoxication coupled with the "rash act" of the murders, the fact he did not shoot both victims, the unusual circumstances leading up to the murders, and his compliance with jail rules while awaiting trial. (13 CT 2855-2859.)

On February 3, 1999, the prosecutor filed an opposition contending that the death verdict was not contrary to law or evidence. Specifically, the prosecutor maintained appellant held a leadership position in the murders, the murders occurred during a planned home invasion, people other than the murder victims were injured, Chuck was already seriously injured when appellant shot him in the head, appellant murdered Chuck in front of Chuck's children, appellant had a "poor motive" for the murders, appellant was convicted of two premeditated murders, and appellant lacked remorse. (13 CT 2860-2864.)

On February 8, 1999, the trial court addressed the motion to modify the death verdict, before sentencing appellant. Defense counsel took exception to some of the factors asserted by the prosecutor in his written motion. (11 RT 2640-2641.) Counsel decided to "keep [his] comments very brief" and reasserted appellant's lack of criminal history, his support of his family, and his work record to argue for a modification of the death verdict. (11 RT 2642-2643.)

In denying the motion, the trial court meticulously ruled as follows:

> Very well. The court has re-weighed independently the evidence of aggravating and mitigating circumstances. The court has also made an independent determination of the propriety of the penalty. The court finds, in the exercise of its independent judgment, the weight of the evidence supports the jury's verdict. Accordingly, the motion for modification of the penalty from death to life imprisonment without the possibility of parole is denied for the following reasons:
>
> The court has reviewed the evidence presented at the trial and has carefully and independently weighed, considered, taken into account, and guided by the aggravating and mitigating factors set forth by section 190.3 of the Penal Code. It is not the court's intention to list every item of evidence and all arguments presented. For the purpose of clarifying

the court's reasoning, this will be a recital of the principal factors which most powerfully inform and influence the decision at hand.

The Court finds that the first degree murder of Chuck Durbin was an intentional killing personally committed by the defendant *and the court further finds that the murder of Chuck Durbin was premeditated, deliberate, willful, and committed with malice aforethought.*

(11 RT 2643-2644, italics added.)

The trial court also found that Uribe's murder was premeditated, willful, and deliberate, that appellant planned and orchestrated Uribe's murder, he recruited participants and personally lead the stalking of Uribe, he led the home invasion murder into the Durbin residence knowing others were present, the victims were unsuspecting and extremely vulnerable, Cindy Durbin was shot and seriously wounded, appellant's actions showed the callous disregard for the Durbin children, he brutally murdered Chuck in front of his children, he showed no remorse and boasted of the murders shortly after, and the murders were utterly senseless. (11 RT 2643-2646.)

Thereafter, the court considered "all possible mitigating evidence," "carefully weighed and considered the aggravating and mitigating factors as set forth in Section 190.3 of the Penal Code," and found the "aggravating circumstances are so substantial in comparison with the mitigating circumstances that death is warranted instead of life in prison without the possibility of parole." (11 RT 2646-2647.)

B. The Contention Is Forfeited For Failure To Assert It Below

Appellant contends the trial court erred in finding Chuck's murder was premeditated for purposes of denying the motion to modify the death verdict. (AOB 300-305.) Indeed, appellant recognizes the defense modification motion "inexplicably" "made no reference to the lack of premeditation" in Chuck's murder. (AOB 302, fn. 143.) In modification motions conducted after *People v. Hill* (1992) 3 Cal.4th 959, failure to interpose contemporaneous objection

forfeits the issue. (*People v. Tafoya, supra*, 42 Cal.4th at p. 196; *People v. Riel* (2000) 22 Cal.4th 1153, 1220.) Because appellant's modification motion occurred well after 1992, his failure to raise the issue in the trial court forfeits it on review.

C. Regardless, The Trial Court Did Not Err

Section 190.4, subdivision (e), requires the trial court to make an independent determination whether the death penalty is proper in light of the relevant evidence and applicable law.[37] (*People v. Ochoa* (1998) 19 Cal.4th 353, 461.) The trial judge's function is not to make an independent and de novo penalty determination, but rather to independently reweigh the evidence and determine whether, in the judge's independent judgment, the weight of the evidence supports the jury's verdict. (*People v. Cunningham, supra,* 25 Cal.4th at p. 1039.) On review, this Court subjects the trial court's ruling to

---

37. Subdivision (e) of section 190.4 states:

> (e) In every case in which the trier of fact has returned a verdict or finding imposing the death penalty, the defendant shall be deemed to have made an application for modification of such verdict or finding pursuant to Subdivision 7 of section 11. In ruling on the application, the judge shall review the evidence, consider, take into account, and be guided by the aggravating and mitigating circumstances referred to in Section 190.3, and shall make a determination as to whether the jury's findings and verdicts that the aggravating circumstances outweigh the mitigating circumstances are contrary to law or the evidence presented. The judge shall state on the record the reasons for his findings.
>
> The judge shall set forth the reasons for his ruling on the application and direct that they be entered on the Clerk's minutes. The denial of the modification of the death penalty verdict pursuant to subdivision (7) of Section 1181 shall be reviewed on the defendant's automatic appeal pursuant to subdivision (b) of Section 1239.

independent review, by reviewing the trial court's determination after independently considering the record. (*People v. Ochoa, supra,* 19 Cal.4th at p. 461.) This Court, however, does not make a de novo determination of penalty. (*Ibid.*)

Under this standard, the trial court properly and independently considered evidence of Chuck's premeditated murder as an aggravating factor because there was substantial evidence to support the finding. (11 RT 2644.) As shown in Argument IV, *ante*, trial evidence established appellant and Little Pete shot Chuck after Chuck ran out of his kitchen and confronted them in his livingroom. (5 RT 1170-1172, 1273-1275; 6 RT 1387-1388.) Little Pete then shot Uribe to death in the kitchen. (5 RT 1273; 6 RT 1387-1388.) While driving away from the crime scene, appellant boasted he shot Chuck because he believed Chuck was going to get a gun. (5 RT 1278.) From this evidence, a jury could reasonably infer a motive that appellant killed Chuck to facilitate Uribe's murder because Chuck interfered in their murderous plan to kill Uribe.

Further, appellant shot Chuck at close range in the head and neck after Little Pete had seriously wounded him, which demonstrates premeditation and deliberation. (5 RT 1265-1266, 1270-1271, 1288-1289.) Richard Diaz testified that he saw appellant shoot Chuck at close range with the .38 caliber handgun in the livingroom after a brief struggle. (5 RT 1273-1275.) Police later found a spent .38 caliber bullet (exhibit no. 15) near Chuck's head. (4 RT 928.) Dr. Avalos opined that Chuck was shot in the head and neck with a larger caliber gun, after first being shot in the torso with a smaller caliber gun. He opined Chuck's head and neck wound were consistent with the .38 caliber bullet found next to his head. (4 RT 966-976.) Thus, the manner of Chuck's murder itself evinces substantial evidence of premeditation, even though it happened in a relatively brief period of time.

Moreover, appellant fails to show prejudice.

> The ruling must be set aside, the penalty judgment vacated, and the cause remanded for reconsideration of the verdict-modification application if and only if the "error" was prejudicial.

(*People v. Benson* (1990) 52 Cal.3d 754, 812.) The question of prejudice is resolved under the "reasonable possibility" test – "i.e., is there a reasonable possibility that the error affected the decision[.]" (*Ibid.*) Here, the trial court provided an extensive list of its reason for denying the modification motion. Given this extensive list, it is not reasonably possible that the trial court's consideration of the sole challenged reason affected its decision to deny the motion. As such, appellant's claim of error and prejudice must be denied.

XXII.

CALIFORNIA'S CAPITAL SENTENCING SCHEME DOES NOT VIOLATE ANY CONSTITUTIONAL PROVISION, OR INTERNATIONAL LAW

In summary manner, appellant makes eight specific challenges to California's capital sentencing scheme, which he recognizes have been repeatedly rejected by this Court. (AOB 306-313.) As this Court has previously and repeatedly rejected these contentions, and because appellant provides no new basis to reconsider these holdings, the contentions should again be rejected. Respondent likewise responds in summary manner.

A. The Constitution Does Not Require The Jury To Make Unanimous, Written Findings Regarding Aggravating Factors

Appellant claims the lack of written findings on aggravating factors violated his constitutional right to meaningful appellate review under the Sixth and Fourteenth Amendments. (AOB 307.) Not so because "[w]ritten findings regarding aggravating factors are not constitutionally required." (*People v. Whisenhunt, supra*, 44 Cal.4th at p. 228.)

B. The Constitution Does Not Require The Application Of The Beyond A Reasonable Doubt Standard To The Jury's Sentencing Decision

Appellant next maintains that this Court's decision in *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255, holding that the federal constitution does not require proof beyond a reasonable doubt to aggravating factors exist or outweigh mitigating factors does not survive *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490. (AOB 307-308.) Not so. (*People v. Whisenhunt, supra*, 44 Cal.4th at p. 227.)

C. The Constitution Does Not Require Juror Unanimity On Its Sentencing Factors

Appellant claims the Sixth Amendment to United States Constitution requires juror unanimity on all its sentencing factors. (AOB 308.) This Court has previously rejected this claim (*People v. Richardson, supra,* 43 Cal.4th at p. 1036), and appellant provides no new reason to reconsider this holding.

D. The Federal Constitution Does Not Require Intercase Proportionality Review

Appellant next contends the lack of any intercase proportionality violated constitutional requirements that the death penalty not be imposed in an arbitrary or capricious manner. (AOB 308-309.) "The absence of intercase proportionality review does not violate the Eighth and Fourteenth Amendments to the United States Constitution." (*People v. Whisenhunt, supra*, 44 Cal.4th at p. 227; see *People v. Vieira* (2005) 35 Cal.4th 264, 302.) Because the jury's selection of the death verdict was properly guided by section 190.3 (*People v. Bacigalupo* (1993) 6 Cal.4th 457, 476-479), its decision was not arbitrary or capricious.

E. Factors (d) And (g) Of Section 190.3, Are Not Impermissibly Vague

Appellant next maintains that factors (d) and (g) of section 190.3 are vague

because they use the adjectives "extreme" and "substantial," acting as barriers to the jury's consideration of proper mitigating evidence. (AOB 309.) Not so. "The use of the adjective 'extreme' in factor (d) of section 190.3 does not render the statute unconstitutional." (*People v. Whisenhunt, supra*, 44 Cal.4th at p. 228.) The same is true for the adjective "substantial" in factor (g) of section 190.3. (*People v. Prieto* (2003) 30 Cal.4th 226, 276.)

F. California's Death Penalty Statute Properly Narrows The Class Of Offenders Eligible For The Death Penalty

Appellant argues California's death penalty statute, section 190.2, fails to meaningfully narrow the class of persons eligible for the death penalty. (AOB 310.) Not so. "California's statutory special circumstances (§ 190.2, subd. (a)(1)-(22)) are not so numerous or inclusive as to fail to narrow the class of murderers eligible for the death penalty." (*People v. Yeoman* (2003) 31 Cal.4th 93, 165; see *Pulley v. Harris* (1984) 465 U.S. 37, 53.)

G. Prosecutorial Discretion To Determine Whether To Seek The Death Penalty Is Constitutional

Appellant next contends there is a substantial risk of arbitrariness between the counties on whether to seek the death penalty, in violation of the Equal Protection Clause. (AOB 311.) This Court has repeatedly rejected this contention. (*People v. Richardson, supra*, 43 Cal.4th at p. 1036; *People v. Crittenden* (1994) 9 Cal.4th 83, 152.) Appellant provides no new reason to readdress this holding.

H. California's Death Penalty Statute Does Not Violate International Law

Appellant contends his death judgment was "reached through an unconstitutional statutory process" requiring reversal of the judgment. (AOB 312-313.) As shown above, California's death penalty statute is not unconstitutional. Because the premise for his claim is erroneous, so too is his

conclusion that the statute violates international law. "International law does not prohibit a sentence of death rendered in accordance with state and federal constitutional statutory requirements." (*People v. Whisenhunt, supra,* 44 Cal.4th at p. 228; *People v. Hillhouse* (2002) 27 Cal.4th 469, 511.)

CONCLUSION

Accordingly, respondent respectfully requests that the judgment be affirmed.

Dated: December 1, 2008

Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of the State of California

DANE R. GILLETTE
Chief Assistant Attorney General

MICHAEL P. FARRELL
Senior Assistant Attorney General

WARD A. CAMPBELL
Supervising Deputy Attorney General

KATHLEEN A. MCKENNA
Supervising Deputy Attorney General

BRIAN ALVAREZ
Supervising Deputy Attorney General

Attorneys for Plaintiff

FR1999XS0001
95025486.wpd

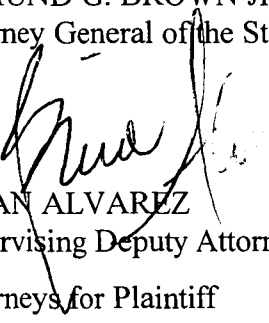
CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 48373 words.

Dated: December 1, 2008

Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of the State of California



BRIAN ALVAREZ
Supervising Deputy Attorney General

Attorneys for Plaintiff

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Rangel**

No.: **S076785**

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 December 2, 2008, 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 2550 Mariposa Mall, Room 5090, Fresno, CA 93721, addressed as follows:

Charles M. Bonneau
Law Office of Charles Bonneau
331 J St., Suite 200
Sacramento, CA 95814
Attorney for Appellant RANGEL
(Two Copies)

The Honorable Ernest LiCalsi
District Attorney
Madera County District Attorney's Office
209 West Yosemite Avenue
Madera, CA 93637

County of Madera
Main Courthouse
Superior Court of California
209 West Yosemite Avenue
Madera, CA 93637

Court of Appeal of the State of California
Fifth Appellate District
2424 Ventura Street
Fresno, CA 93721
(Served Via Courier)

Legal Affairs Secretary
Office of the Governor
State Capitol Building, 1st Floor
Sacramento, CA 95814

CCAP
Central California Appellate Program
101 Second Street, Suite 600
San Francisco, CA 94105-3672

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 December 2, 2008, at Fresno, California.

Jacquelyn Ornelas
Declarant

Signature

95025535.wpd