IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

MATTHEW A. SOUZA,

Defendant and Appellant.

CAPITAL CASE
S076999

Alameda County Superior Court No. C122159B
The Honorable Joseph Hurley, Judge

RESPONDENT'S BRIEF

BILL LOCKYER
Attorney General of the State of California

ROBERT R. ANDERSON
Chief Assistant Attorney General

GERALD A. ENGLER
Senior Assistant Attorney General

BRUCE ORTEGA
Deputy Attorney General

WILLIAM KUIMELIS
Deputy Attorney General
State Bar No. 147625

455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
Telephone: (415) 703-5873
Fax: (415) 703-1234
Email: william.kuimelis@doj.ca.gov

Attorneys for Respondent

TABLE OF CONTENTS

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

TABLE OF AUTHORITIES

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)

TABLE OF AUTHORITIES (continued)

Page

Other Authorities

TABLE OF AUTHORITIES (continued)

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, **v.** **MATTHEW A. SOUZA,** Defendant and Appellant.	**CAPITAL CASE** S076999

INTRODUCTION

Appellant, Matthew Souza, along with his codefendant and a third man, drove to the Oakland apartment of Regina Watchman, who was hosting a party. Appellant was armed with an assault rifle, codefendant with a shotgun, and the third man with a pistol. After waiting outside in their car and watching for some time, the three men entered the apartment and blocked the exits. Codefendant demanded to know which one of the women there had forcibly removed his mother from the party earlier in the evening. Appellant and the third gunman provided cover with their weapons. One guest attempted to stand up but codefendant beat him to the ground with his shotgun. The guest tried to get up from the floor and codefendant beat him to the ground again. As codefendant beat the guest the second time, appellant moved into the center of the apartment and began shooting. He fired several bursts of gunfire, each separated by a pause before he resumed shooting with another burst. Appellant fired 14 times, every shot hitting a victim. The third gunman fired once without hitting anybody. By the time appellant finished, he had shot five people scattered throughout the apartment. He shot most of them several times. Three of the victims died. After appellant finished shooting, he left the apartment with codefendant and the third man. The threesome returned to their car and drove

slowly away.

At trial, appellant argued that he was not at the crime scene, that the man alleged to be him was not the actual shooter, and that not all of the victims were shot intentionally. The jury rejected these arguments. Not only did the jury find appellant guilty of three first degree murders and two wilful, deliberate, and premeditated attempted murders, but they found the multiple-murder special circumstance, which applied only to the actual shooter or an aider and abettor with the specific intent to kill, true as to appellant only. The jury then sentenced appellant to death.

On appeal, appellant raises various challenges in connection with each phase of trial. He did not preserve the majority of the claims for appellate review. Even if considered on their merits, however, the claims are unpersuasive. Briefly, appellant argues that,

(1) His trial was improperly joined with that of codefendant because they had antagonistic defenses to the multiple-murder special circumstance. However, the defenses were not antagonistic as previously defined by this Court. In other words, it was not the conflict alone that compelled the jury's verdict. Rather, it was the eyewitness and forensic evidence. Moreover, this was a classic case for a joint trial: no prior statements were admitted into evidence and the events, the victims, the witnesses, and the charges against both defendants were identical;

(2) The trial court improperly failed to instruct on the lesser included offenses of voluntary manslaughter and attempted voluntary manslaughter committed in a sudden heat of passion. However, there existed no substantial evidence of provocation sufficient to arouse the passions of an "ordinarily reasonable man." Additionally, there existed no substantial evidence that appellant acted under the influence of strong passions at the time of the killings; there was nothing sudden, heated, or passionate about his crimes;

(3) The trial court's standard second degree murder instructions inadequately defined the terms "heat of passion" and "provocation." However, this Court has held that the terms bear their common meanings at trials such as appellant's. Therefore, the trial court had no duty to instruct absent a request from counsel, and appellant made no such request;

(4) The jury improperly used a transferred intent theory, applicable only to homicides, to find him guilty of attempted murder. However, it is not reasonably likely that the jury took a theory described only in the murder instruction and applied it to a different offense;

(5) The trial court erred by instructing the jury with CALJIC No. 17.41.1. However, this Court has held that it is not reversible error to provide the instruction;

(6) The prosecutor argued various facts not in evidence. However, most of the alleged misstatements were, in fact, correct, and those few misstatements that did occur were harmless. Moreover, appellant did not object at trial;

(7) Potential jurors inclined not to impose the death penalty were erroneously excluded from the jury while potential jurors inclined to impose it were erroneously permitted to remain. However, the trial court only excluded jurors with fixed views. Also, there was nothing improper about the prosecutor's alleged use of death penalty views as a basis for peremptory challenges;

(8) The trial court's lingering doubt instruction prevented the jury from considering any lingering doubts about their special circumstances finding. However, it is not reasonably likely the jury interpreted the instruction to apply to "guilt" but not to the truth of special circumstances;

(9) Appellant was prejudiced by the trial court's failure to reinstruct at the penalty phase with several guilt phase instructions after instructing the jury to disregard previously given instructions. However, it is not reasonably likely

that the omitted instructions affected the jury's evaluation of the evidence;

(10) The trial court improperly sustained objections to testimony that codefendant once got into a fight in order to protect appellant and to an essay appellant wrote in jail pending trial. However, this hearsay evidence was neither relevant as proffered nor reliable;

(11) A victim impact instruction was argumentative and did not include necessary limitations on what the jury could properly consider. However, the instruction did not invite the jury to draw favorable inferences from particular facts so it was not argumentative. As for guidance on limitations, such guidance was neither necessary nor requested;

(12) Cumulative error requires reversal. However, as appellant was not prejudiced by any two or more errors considered together, reversal is not required;

(13) His death sentence is disproportionate to his individual culpability. However, given the fact that he is the shooter responsible for the first degree murders of three people and the wilful, deliberate, and premeditated attempted murder of two other people, appellant's argument is not persuasive.

(14) The trial court erred when it refused to give his pinpoint instruction on the proof and scope of mitigating circumstances. However, This Court has previously rejected similar claims;

With arguments (15) through (19) appellant lodges many of the complaints familiar to death penalty appeals: that CALJIC No. 8.85 is defective; that CALJIC No. 8.88 is defective; that the multiple-murder special circumstance does not sufficiently narrow the class of murderers eligible for the death penalty; that California's death penalty is unconstitutional; and that California's method of execution is unconstitutional. However, this Court has previously and repeatedly rejected these and similar claims, and appellant provides no persuasive reasons for this Court to reconsider its decisions.

In argument (20) appellant argues that the trial court's restitution orders were unauthorized. Appellant is correct.

Finally, respondent again notes that none of the errors claimed by appellant, whether considered individually or cumulatively, resulted in any prejudice. Consequently, this Court should affirm the judgment and sentence in this case.

STATEMENT OF THE CASE

On November 7, 1994, the Alameda District Attorney filed an information against appellant and his brother and codefendant, Michael Anthony Souza. Count One charged a violation of Penal Code section 187, the first degree murder of Regina Watchman; Count Two charged a violation of Penal Code section 187, the first degree murder of Dewayne Arnold; Count Three charged a violation of Penal Code section 187, the first degree murder of Leslie Trudell; Count Four charged a violation of Penal Code section 187, the attempted murder of Rodney James; Count Five charged a violation of Penal Code section 187, the attempted murder of Beulah John. (2 CT 484-487.)

The information further alleged multiple-murder special circumstances within the meaning of Penal Code section 190.2, subdivision (a)(3); that the attempted murders were wilful, deliberate, and premeditated within the meaning of Penal Code section 664; and that appellant used a rifle, and codefendant a shotgun, within the meaning of Penal Code sections 1203.06 and 12022.5, during the commission of each charged offense. (2 CT 484-487.)

On March 21, 1995, appellant and codefendant pleaded not guilty to all counts and denied all of the special allegations. (2 CT 498.)

On March 29, 1996, the information was amended to strike references to specific types of firearms in the firearm use allegation. (2 CT 503-507.) On the same date, appellant and codefendant pleaded not guilty to all counts and

denied the special allegations of the amended information. (1 RT 1-2.)

On July 6, 1998, the guilt phase of trial commenced with jury selection. (2 CT 547.)

On October 20, 1998, the jury found appellant and codefendant guilty as charged in all counts and found the firearm allegations and the wilful, deliberate, and premeditated attempted murder allegations true. (3 CT 739-751.) As to appellant only, the jury found the multiple-murder special circumstance allegation true. (3 CT 749.)

On October 28, 1998, the penalty phase of trial commenced. (3 CT 759-760.)

On November 18, 1998, the jury returned a verdict fixing appellant's penalty at death. (3 CT 791.)

On February 17, 1999, appellant applied for modification of the death verdict pursuant to Penal Code section 190.4, subdivision (e). (3 CT 794-797.)

On February 19, 1999, the trial court denied the application and imposed the judgment of death. The trial court further imposed consecutive life terms of 25-years-to-life each for the three murder convictions, plus 10 years on the affirmative firearm use finding, as well as concurrent life terms on both attempted murder convictions, all ordered stayed (Pen. Code, § 654) pending imposition of the judgment of death. (3 CT 798-799, 806.)

This automatic appeal followed. (Pen. Code, § 1239, subd. (b).)

STATEMENT OF FACTS

GUILT PHASE: THE PROSECUTION'S CASE

The Fund-Raiser and the Follow-on Party

The Hilltop Tavern is a bar in Oakland that many members of the local Native American community frequented. (16 RT 2511.) On December 18, 1993, the bar sponsored a dinner to benefit a local health clinic. (13 RT 2026;

14 RT 2073-2074, 2512.) Most of the attendees were friends and many were related. (16 RT 2512.) Rebecca Souza, appellant's mother, had been frequenting the bar for about one year and attended the benefit with some friends. (14 RT 2073.) She started drinking before she arrived at the bar that night and drank between five and ten more beers while at the bar. (14 RT 2075, 2136-2137.) She became intoxicated. (13 RT 2035; 14 RT 2082.) Hillary Leonesio became upset with Ms. Souza because she believed Ms. Souza was flirting with her boyfriend. (14 RT 2088, 2131-2132.)

When the bar closed, 10 to 15 people were invited to Regina Watchman's apartment for a follow-on party. (14 RT 2240; 15 RT 2519.) Ms. Souza did not know Ms. Watchman but was invited to the party by Esther Dale, a mutual friend who had driven her to the bar. (14 RT 2073-2074; 17 RT 2664.) Joyce Arnold drove Ms. Souza and Beulah John to the party. (14 RT 2075-2076.) Ms. Souza looked for her purse before leaving the bar but could not find it. (16 RT 2501-2502.) Apparently, she had left the purse in the trunk of Ms. Dale's car for safekeeping and had forgotten where she put it. (See 14 RT 2208; 17 RT 2623.)

Ms. Watchman's apartment was small and crowded. (15 RT 2235, 2304-2305.) The bedrooms were upstairs. (15 RT 2236, 2244, 2438.) The downstairs level was one large room with an open kitchen, a laundry area, and stairs leading to the upper level. (13 RT 2035; 15 RT 2236; 16 RT 2551; People's Ex. 31.) The lower level measured approximately 21 feet by 14 feet. (19 RT 2984.)

Ms. Watchman's boyfriend, Raymond Douglas, had been at the apartment all evening with Ms. Watchman's mother and four children, aged eight, seven, two, and one, respectively. (15 RT 2234-2235, 2291-2292.) When the guests began arriving around 2:00 a.m, Mr. Douglas began drinking with them. (15 RT 2237, 2245.) As they arrived, many of the guests appeared as if

they had been drinking for quite a while. (15 RT 2245.) More alcohol was served at the apartment and some of the guests became "pretty drunk." (13 RT 2041.) However, apart from two incidents involving the Souza family, even the next-door neighbor described the party as "serene and mellow." (13 RT 2033, 2607.)

Ms. Watchman Forcibly Removes Ms. Souza From the Follow-On Party

Regarding the follow-on party, some witnesses gave varying descriptions of an altercation between the party's host, Ms. Watchman, and the mother of appellant and co-defendant, Ms. Souza. The altercation included use of force by Ms. Watchman on Ms. Souza—a degree of force some witnesses saw differently.

Edward Arnold

Edward Arnold was a designated driver and did not drink on the evening of December 18. He had not consumed any alcohol since 1987. (19 RT 2916.) He saw Ms. Watchman come down the stairway and ask if anyone wanted anything to drink. Ms. Souza, who was standing near the stairway, asked who Ms. Watchman was. Ms. Watchman said, "This is my house." Ms. Souza asked again a few times whose house it was and who Ms. Watchman was. It appeared to Mr. Arnold that Ms. Souza was trying to provoke Ms. Watchman. Finally, Ms. Watchman said, "This is my house and I want you to leave." Ms. Souza would not leave. She continued to ask whose house it was and who Ms. Watchman was. Eventually, Ms. Watchman grabbed Ms. Souza by the hair and pulled her about 10 feet to the door. Ms. Souza was stepping along as Ms. Watchman pulled, according to Mr. Arnold. In other words, Mr. Arnold did not believe Ms. Watchman dragged Ms. Souza. Mr. Arnold did not see any hitting or kicking. (19 RT 2917-2920.)

Lea Coss

Lea Coss was a friend of Ms. Watchman's and also knew Ms. Souza.

(17 RT 2723-2724.) At the party, she saw Ms. Watchman go upstairs to use the bathroom. On her way up Ms. Watchman brushed against Ms. Souza, apparently accidentally, and apologized. Ms. Souza said something to Ms. Leonesio that Ms. Coss could not hear. When Ms. Watchman returned downstairs, she asked Ms. Souza and Ms. Leonesio if anything was wrong, to which they both answered negatively. At about 3:00 a.m., Ms. Watchman asked Ms. Souza to leave the apartment; Ms. Souza refused to leave, saying she had no reason to listen to Ms. Watchman. Ms. Watchman became upset because Ms. Souza would not leave. Ms. Watchman asked Ms. Souza to leave at least four times, but Ms. Souza continued to refuse. Ms. Watchman then grabbed Ms. Souza by the hair. Ms. Souza was already on her knees, talking to Ms. Leonesio, who was sitting in an armchair. When Ms. Watchman pulled on her hair, Ms. Souza fell on her buttocks. Ms. Watchman then dragged Ms. Souza along the floor to the front door. There, Ms. Watchman released her, stepped over her, and told her to get out. Ms. Souza still would not leave and tried to come back in. At this point, Jeri Davis got up and asked Ms. Souza if she would like a ride home. (17 RT 2728-2729, 2732, 2766-2773.)

Martin Jones

Martin Jones had not seen Ms. Souza prior to that night but noticed her at the party; she seemed inebriated. (13 RT 2034-2035.) One hour after arriving at Ms. Watchman's apartment, Ms. Souza and Ms. Watchman began arguing. (13 RT 2034.) Mr. Jones was standing from three to five feet away as the argument started. (13 RT 2036-2037.) Mr. Jones heard Ms. Watchman tell Ms. Souza several times that she needed to leave; Ms. Souza said she did not want to leave. (13 RT 2036-2037.) After Ms. Souza refused a "few" requests to leave, Ms. Watchman grabbed Ms. Souza by the hair or jacket and pulled her to the door. (13 RT 2038.) When they got to the front door, Ms. Watchman released Ms. Souza and told her again that she had to leave. (13 RT 2039-

2040.) Ms. Souza then left with two other individuals. (13 RT 2040.) Nobody else was involved, and no punches were thrown. (13 RT 2037- 2038.) Ms. Watchman appeared to be under control and did not appear to be drunk. (13 RT 2040.) Mr. Jones had consumed three to six beers over the course of the evening and did not feel drunk. (13 RT 2041.)

Raymond Douglas

Mr. Douglas saw Ms. Watchman arguing at the party with a woman he did not know. (15 RT 2246-2247.) The woman he did not know appeared to know other people at the party. (15 RT 2247.) Mr. Douglas first noticed the argument when he heard Ms. Watchman yelling at the other woman, telling her to leave. (15 RT 2247.) The other woman responded by asking, "Who are you?" To this, Ms. Watchman responded, "This is my house and I want you out." Both women were yelling. Ms. Watchman asked two or three times for the other woman to leave. (15 RT 2248.) Then she grabbed the other woman by the hair and pulled her to the door. As Ms. Watchman pulled, the other woman lost her balance and fell to the ground. Ms. Watchman then pulled the woman across the floor to the door and let her go. (15 RT 2248-2250.) After she was dragged to the door, the other woman got up, picked up her glasses from the floor, and left the apartment. (15 RT 2251, 2389-2390.) The other woman appeared to have been drinking and lost her balance easily. (15 RT 2250.) She had not been kicked and was not bleeding when she left. (15 RT 2390.) Nobody else participated in the assault. (15 RT 2253.)

Beulah John

Beulah John saw Ms. Watchman, Ms. Souza, and Ms. Leonesio talking together. She then saw Ms. Watchman pulling Ms. Souza out of the apartment by her hair. (16 RT 2520-2521.) Ms. John was shot later that night and spent the next several weeks in the hospital. As a result of the trauma of the shooting, she blocked many of the events out of her mind. (16 RT 2522-2526, 2534.)

Esther Dale

Esther Dale first noticed her friend Ms. Souza at the party when she saw Ms. Watchman dragging her out of the apartment by her hair. (17 RT 2625, 2664.) Ms. Dale left the party with Ms. Souza. (17 RT 2628-2629.)

Victoria "Joyce" Gonzales

Joyce Gonzales, Ms. Watchman's cousin, drove to the party with Ms. Souza. (17 RT 2686.) At the party, Ms. Gonzales saw Ms. Watchman tell Ms. Souza to leave. Ms. Watchman repeated this demand several times but Ms. Souza would not move. Ms. Watchman then grabbed Ms. Souza by the hair, dragged her along the floor, and pushed her out the door. (17 RT 2686-2687.) About half of the approximately 16 people who were at the party left shortly after the incident between Ms. Watchman and Ms. Souza. (17 RT 2688.)

Rebecca Souza

Ms. Souza felt intoxicated at the party. (14 RT 2082.) She argued with Ms. Watchman after Ms. Watchman told her to leave. (14 RT 2085.) At trial, she could not remember if Ms. Watchman had asked her to leave before dragging her out of the apartment. (14 RT 2086.) The first thing she clearly remembered was being struck in the back of the head and knocked down. (14 RT 2086, 2140-2141.) She also remembered lying on her back and being kicked in the ribs by Ms. Watchman as Ms. Watchman called her a whore. (14 RT 2087-2088, 2142.) Ms. Watchman then dragged her along the floor by the hair. (14 RT 2144.) Nobody else was involved in the physical confrontation. (14 RT 2090.) Ms. Souza believed Ms. Watchman was angry because of the incident at the bar when Ms. Souza appeared to flirt with Ms. Leonesio's boyfriend. (14 RT 2088, 2131-2132.)

Friends Drive Ms. Souza Home and She Tells Her Sons What Happened

Edward Arnold drove Ms. Souza home. (19 RT 2921-2922.) Esther Dale and Jeri Davis were also in the car. (17 RT 2628-2629.) The ride to Ms.

Souza's home lasted 20 to 25 minutes. (17 RT 2630.) According to Mr. Arnold, who had not been drinking, Ms. Souza spoke constantly about how she was going to "get even" with "those people." This made no sense to Mr. Arnold because although Ms. Souza said she had been beaten up he knew no beating had occurred. Mr. Arnold told Ms. Souza to calm down, get some sleep, and forget about it. Ms. Souza, however, responded, "These people aren't going to get away with this. They're going to get—they will pay for this and I'm going to get even with them." (19 RT 2921-2922.) According to Ms. Souza's friend Ms. Dale, Ms. Souza cried "a little bit." (17 RT 2630, 2664.) She also said that her head was hurting. (17 RT 2631.) Ms. Dale saw no blood or injuries on Ms. Souza despite riding in a car and talking with her for nearly half an hour. (17 RT 2633-2634.)

At trial, Ms. Souza could not recall what she had said in the car on the way home. (14 RT 2090.) However, at the preliminary hearing, Ms. Souza testified that, during the drive home, she had said she wasn't going to put up with being thrown out of the party and was going to tell her sons. She also testified that she had said, "She can't do this to me, who does she think she is." (14 RT 2111, 2113.)

Ms. Souza was living at the apartment of her cousin, Idelia Moore. Appellant and codefendant, two of Ms. Souza's three sons, also happened to be sleeping at the apartment that night. (14 RT 2068-2070, 2115.) Ms. Souza was the only witness to testify concerning what happened after she was left at the apartment. She testified that she was crying, physically hurting, and upset. (14 RT 2154.) Mostly, however, she was in a state of shock. (14 RT 2099, 2107-2108.)[1/] Once in the apartment, she noticed that she was bleeding from her

---

1. Upon cross examination by defense counsel, Ms. Souza agreed to counsel's characterization that she may have been "hysterical," when she returned. (14 RT 2156, 2160-2161.)

mouth, but she was not sure how she had received the injury. (14 RT 2145, 2181, 2198.) According to her testimony, "blood was all over the front of [her] shirt." (14 RT 2181.) The shirt was light colored and the blood was very messy so she tried to clean it soon after she arrived home. She then changed into a fresh shirt. (14 RT 2185-2187.) Ms. Souza testified that Ms. Moore had also tried to clean the shirt but the stain did not come out so Ms. Souza threw the shirt away. (14 RT 2182-2183.) Ms. Souza did not tell the police about the shirt or her injury. (14 RT 2188.) Ms. Moore did not testify.

Some time afer she arrived, her sons awoke and Ms. Souza convinced them to take her back to the party. (14 RT 2097, 2101.) Ms. Souza provided inconsistent accounts of the purpose for returning to the party. According to her testimony at the preliminary hearing, the purpose was to "get even with [Ms. Watchman]," she wanted to "hit [Ms. Watchman] on the nose or something." (14 RT 2199.) Ms. Souza further testified at the preliminary hearing that her sons had said they would "read the people up" once they got to the party. (14 RT 2204.) At trial, however, Ms. Souza testified that the purpose was to get her I.D., her purse, and her jacket. (14 RT 2099.) Apparently, some time after returning home, she realized her purse was missing and she wanted to retrieve it. (14 RT 2112, 2197.) She was not sure if anything other than her I.D. was in the purse. If there was any money in the purse, it would not have been much. (14 RT 2175.)[2/] She never told the police about her purse or her I.D. (14 RT 2202-2203.)

Ms. Souza also provided inconsistent accounts of what appellant and codefendant may have learned after they awoke. At the preliminary hearing, she testified that she did not show them the alleged injury and that, "I don't think

---

2. Ms. Souza was using an asthma inhaler at the time but there is no indication that the inhaler left her possession. Evidence of the asthma medication was offered only for the effect Ms. Souza's various medications might have had on her ability to recollect. (14 RT 2177-2178.)

they knew anything about the injury." (RT 2192.) Again, at trial, she testified that the only thing she remembered telling them was that she wanted to go back to the party to retrieve her purse, I.D., and jacket. (14 RT 2099.) However, upon cross-examination by defense counsel, she also testified that she had "probably" told them she was beaten up and "probably" showed them the cut on her mouth. (14 RT 2098, 2182.) She also testified at trial that she had told them she was assaulted by one woman, not a group, and that she may have told them that the person who assaulted her was the woman who had told her to leave her place. (14 RT 2211-2212.)

After talking together, Ms. Souza, appellant, and codefendant walked to the car. (14 RT 2109.) Although codefendant stored a .22 caliber rifle at the apartment, they did not take the rifle with them. (14 RT 2092-2094, 2102, 2109, 2165-2166.) The three drove around looking for the party but could not find it. (14 RT 2101-2102.) Ms. Souza calmed down somewhat during the drive and stopped crying. (14 RT 2161.) When they could not find the party, they drove to the bar to look for Ms. Dale's car because Ms. Souza thought she might have left her purse and jacket in the car. (14 RT 2161, 2210-2211.) From the bar they drove to Jeri Davis' house but Ms. Davis was not there. (14 RT 2163.) They then gave up looking and appellant and codefendant took Ms. Souza home. When Ms. Souza went to bed, appellant and codefendant left again. (14 RT 2103.)

Appellant Arrives at the Party and Shoots Five People, Killing Three

The facts establish that appellant, codefendant, and a third person arrived at the Watchman apartment during the early morning hours of December 19, 2003. Appellant shot five people, killing three. Eyewitnesses differed on some details, however.

Martin Jones

Approximately one hour after Ms. Souza left the party, Martin Jones was

talking with Rodney James near the front door of the apartment. (14 RT 2041.) The door opened and a young man he later identified as codefendant entered; as he entered, codefendant displayed a shotgun that had been hidden under his jacket. (14 RT 2042-2043.) Codefendant pointed the shotgun at Mr. Jones' chest and asked, "Who jumped my mother?" (14 RT 2044.) Mr. Jones described the shotgun as a sawed-off 12-gauge pump-action Mossberg with a pistol grip. Mr. Jones had experience with firearms in general and shotguns in particular; he was therefore familiar with this type of gun. (14 RT 2044; 15 RT 2457-2458; 16 RT 2500-2501.)

Codefendant advanced into the room forcing Mr. Jones to move backwards. (14 RT 2045.) After codefendant entered, a man with an assault rifle entered the apartment. (14 RT 2046.) The assault rifle had a magazine that extended three or four inches below the receiver. (14 RT 2047.) After the man with the assault rifle entered, a man with a nickel-plated .25 caliber semi-automatic handgun entered the apartment; Mr. Jones had seen such handguns before. (14 RT 2045.) The man with the assault rifle and the man with the handgun were partially masked, each wearing a bandana that covered the mouth and chin but left the rest of the face exposed. (14 RT 2045, 2047.) Appellant was "definitely" one of the armed men who followed codefendant into the apartment. (14 RT 2048-2049; 15 RT 2431.)

Codefendant walked around and stopped directly in front of a couch that was in the middle of the room, facing away from the front door. Mr. Arnold and Ms. Watchman were sitting together on the couch. (14 RT 2052-2053.) The man with the assault rifle stood at the bottom of the stairs leading to the upper level of the apartment. He held the assault rifle to his face, aiming it into the room and watching the room's occupants. (14 RT 2052, 2056.) The man with the handgun stayed at the front door aiming his weapon into the room with both hands. (14 RT 2052.)

Codefendant did all of the talking. Holding the barrel of his shotgun two feet from the people sitting on the couch, he asked, "Where's my mom's purse?" (14 RT 2054-2055, 2057.) Mr. Arnold asked, "What the hell is going on here?," told codefendant that the mothers knew one another, and tried to stand up. (14 RT 2057-2058.) As Mr. Arnold stood up, codefendant hit him on the head with the butt of the shotgun. Mr. Arnold ducked and avoided the full force of the blow. Codefendant's follow-through knocked over a nearby lamp. (14 RT 2058, 2457.) Codefendant prepared to strike Mr. Arnold again and Mr. Arnold reached for him. (14 RT 2059.) There was, however, no struggle over control of the shotgun. Mr. Arnold did not reach for the shotgun. (15 RT 2455-2456.)

The man with the assault rifle stepped forward and aimed his weapon at Mr. Arnold as codefendant prepared to strike him the second time. (14 RT 2059; 15 RT 2431, 2505.) Mr. Jones hid behind the refrigerator in the kitchen when he saw the man with the assault rifle step forward and aim his weapon. (14 RT 2060.) The man with the assault rifle appeared to be preparing to fire. (15 RT 2431.) Mr. Jones heard 15 or more gunshots coming from inside the apartment as he reached for the refrigerator. (14 RT 2060.) The gunshots did not occur quickly enough to come from a fully automatic weapon. It sounded as though they came from a semi-automatic weapon. (14 RT 2061.) At trial, Mr. Jones demonstrated the cadence of the gunshots. (15 RT 2430.) The gunfire continued for 10 to 15 seconds. (15 RT 2432.) Among the gunshots, Mr. Jones heard one gunshot that was not as loud as the others. (15 RT 2432-2433.) Mr. Jones heard footsteps and then a car driving away after the shooting stopped. After the car drove away, he came out from behind the refrigerator. (15 RT 2432-2433.)

Mr. Trudell was about three feet from the refrigerator. He was lying face down on the ground with a large pool of blood around his head. He appeared

to be dead. (15 RT 2434.) To Mr. Jones' left, near the couch, Mr. Arnold was also lying on the ground in a large pool of blood. He also appeared to be dead. (15 RT 2435.) Ms. Watchman was still sitting in the couch with blood patterns spreading across her chest. Her eyes were glazed over and she appeared to be taking her last breath; she exhaled but did not inhale after that. By this time her boyfriend had reached her and was putting his arms around her. (15 RT 2436.) Mr. James was still sitting in the chair he had been in when the shooting started. The chair was just to the left of the front door. He had been shot in the upper right shoulder. He was conscious but in shock, breathing very heavily. Mr. Jones tried to console him but was not sure whether he would survive the injury. (15 RT 2437.) Mr. Jones then went upstairs because he did not want the children to come down and see what had happened. He saw the childrens' grandmother, Ms. Watchman's mother, and told her to stay upstairs with the children. (15 RT 2436-2437, 2438.) Mr. Jones then walked outside to get some fresh air. (15 RT 2439.) Mr. Jones had previously experienced a similar shooting. (15 RT 2440.)

Lea Coss

Lea Coss was sleeping on a love seat to the left of the stairs leading to the upper level of the apartment. She woke to see a man she later identified as codefendant standing in the middle of the room shouting "who kicked my mother's ass, just show me who did it. Show me which one is the bitch that kicked my mother's ass and stole her purse." He held a gun that looked about two feet long. (17 RT 2733-2735.)

A man she later identified as appellant was standing to her right, in front of the stairs next to the love seat. He, too, held a large gun. Ms. Coss got a good look at appellant. (17 RT 2735-2736, 2788, 2807.) She could not see the front door from where she sat. (17 RT 2737.)

Mr. Arnold tried to stand up from the couch but codefendant hit him with

the butt of his gun. Mr. Arnold fell to the ground and tried to stand up again. As he tried to stand, codefendant struck him down again. (17 RT 2738, 2740-2741.) Mr. Arnold may have reached for codefendant's gun when he tried to get up the second time but he never got a hold of the gun. (18 RT 2789, 2833.) A lamp, or perhaps codefendant's gun, broke and fell to the floor after codefendant hit Mr. Arnold the second time. (18 RT 2795, 2831, 2835.) Ms. Coss then left the apartment through the sliding glass door leading to the back yard. (17 RT 2741.) As she rose from the love-seat, she heard the first of "a lot" of gunshots. (17 RT 2742; 18 RT 2808.) She could not see who was shooting or precisely where the shooting was coming from. (17 RT 2743; 18 RT 2808.) She saw a flash from a gunshot but, at trial, could not remember where it had come from. (18 RT 2811.) At the preliminary hearing, she testified that the flash had come from the middle of the room. (18 RT 2811-2812.) She tried to leave the back yard but heard a car engine running directly in front of the apartment. She became nervous and tried to hide in the back yard. (17 RT 2742.) After the shooting stopped, she heard footsteps, a car door, and a car driving away. (17 RT 2744.)

Ms. Coss heard Mr. James calling out that he had been shot, was bleeding to death, and needed help. (17 RT 2744.) She went back into the apartment and saw Ms. John lying on the ground. Ms. John had been shot. (17 RT 2745.) Ms. Watchman was sitting, slouched, on the couch. Ms. Watchman had also been shot. At first she appeared to be alive. Then, her eyes rolled back, her head fell away, and her arms fell to her side. (17 RT 2745.) Mr. Trudell was lying half-way under the kitchen table, dead. (17 RT 2746.) Mr. Arnold was lying on the ground near the back door. At first, he appeared to be alive, and his eyes were open. Then, his eyes closed. (17 RT 2746.)

Victoria "Joyce" Gonzales

Ms. Gonzales went upstairs to use the bathroom sometime after Ms.

Souza left the party. (17 RT 2688.) Coming back down, three steps from the bottom of the stairs, she saw two men she later identified as appellant and codefendant standing near the front door and holding guns. They were standing with a third man she did not identify, also holding a gun. Ms. Gonzales was not sure what type of gun appellant was holding, but he was holding it with two hands. (17 RT 2688-2692, 2696.) The men were waving the guns in front of them. (17 RT 2692.) Codefendant was repeating, "Who did this to my mom?" or "Who did this to our mom?" (17 RT 2692-2693.) Ms. Gonzales stepped in front of the men and said, "What are you doing?" and "Your mom's our friend," or "Your mom's my friend." (17 RT 2693.) A second or so after she said these things, appellant, codefendant, and the third man left. (17 RT 2693.) While the three men were in the apartment and in her line of vision, Ms. Gonzales did not take her eyes off of them. She did not look around until after they left. (17 RT 2693.) When she did look around, she saw bodies all around her. (17 RT 2693.) Her best friend, Ms. John, was in the kitchen lying in a puddle of blood. Ms. Watchman, her cousin, was sitting and leaning against a wall, shot. Her friend Mr. James was sitting in a chair in the kitchen, leaning against another wall, shot. Her brother, Mr. Arnold, was lying on the floor on his stomach, shot. She laid down beside him. At first, his eyes were open and he appeared to be looking at her but he could not speak. (17 RT 2693-2695.)

Ms. Gonzales believed the shooting occurred when she was upstairs or when she was coming down the stairs. (17 RT 2693, 2696, 2700.) She could not recall hearing or seeing any shooting. She believed the shooting was over by the time she saw appellant and codefendant. (17 RT 2693, 2700.) She did suggest, however, that she might have seen shooting but "blocked" it from her mind. At the time of the trial, five years after the shooting, she was still seeing a therapist because of it and believed she had "blocked" details of it from her mind. (17 RT 2700, 2715.)

Soon after Ms. Gonzales laid down beside her brother, the police and the paramedics came. (17 RT 2695.) She was taken to the hospital because her leg was injured and she could not walk. The police thought she had been shot with the others. She was not sure how she injured her leg but might have injured it by diving to the floor when the shooting started. (17 RT 2695.)

Raymond Douglas

Approximately one and one-half hours after Ms. Souza left the party, Mr. Douglas heard banging on the front door. (15 RT 2253.) He was sitting on one side of the couch, Ms. Watchman was sitting in the middle, Mr. Arnold was sitting on the other side. (15 RT 2254.) Mr. Douglas walked towards the front door to answer it but the door opened before he got there. A man Mr. Douglas later identified as codefendant entered the apartment, pulled a shotgun from underneath his jacket, and aimed it at him. (15 RT 2256-2257, 2285-2286, 2318, 2320, 2339, 2342.)[3/] The shotgun had a pistol grip, and did not have a full stock. (15 RT 2258.) Mr. Douglas had no doubt that codefendant carried a shotgun. He had seen such guns before. (15 RT 2321, 2322.) As codefendant entered the apartment, he asked, "Which one of you mother-fuckers beat up my mom?" (15 RT 2322-2323, 2260.) Codefendant then walked around the couch, stood directly in front of Ms. Watchman, pointed the shotgun at her, and asked, "Who's the bitch that beat up my mom?" (15 RT 2262, 2322-2323, 2345.)

A man Mr. Douglas later identified as appellant entered the apartment immediately after codefendant and walked to the stairs leading to the second

---

3. At trial, five years after the shooting, Mr. Douglas initially identified appellant as the man with the shotgun who first entered the apartment. (15 RT 2260, 2335.) However, Mr. Douglas later corrected himself. (See, e.g., 15 RT 2392.) He consistently related in his written statement to the police, in his taped statement to the police, and at the preliminary hearing, that the first gunman to enter the apartment had the shotgun. (See, e.g., 15 RT 2375-2376.) He also identified codefendant as the man with the shotgun at the photo line up and at the preliminary hearing. (See, e.g., 15 RT 2396-2397.)

floor. Appellant carried a silver colored gun with a clip. Mr. Douglas first testified that the gun was larger than a handgun but later testified that it could have been a large handgun. In his first statement to the police he wrote that it was a handgun. A third man, this one with a revolver, stayed in the front doorway. It was impossible to run away from one of the armed men without running into another. (15 RT 2263-2265, 2346, 2348-2349, 2352.) Mr. Douglas was not sure precisely where appellant positioned himself after entering the apartment, only that it was somewhere near the stairs. (15 RT 2328.) Mr. Douglas got a good look at appellant and codefendant as they entered the apartment, however. (15 RT 2346.)

Mr. Arnold sat on the couch directly behind Mr. Douglas, who was facing the third armed man, the one standing in the doorway. (15 RT 2330.) The back of the couch was three to four feet from the door. (15 RT 2344.) Mr. Arnold said, "We don't need any trouble." (15 RT 2382.) Out of the corner of his eye, Mr. Douglas saw Mr. Arnold begin to stand up, but his attention was immediately directed back to the man in the doorway. Behind him, Mr. Douglas heard a lamp break, scuffling, and then gunfire. Mr. Douglas dropped to the floor when he heard the gunfire. (15 RT 2331-2333, 2361.) He did not see who did the shooting. (15 RT 2334, 2368.) However, before he dropped to the ground, out of the corner of his eye, as he faced the kitchen, he saw a muzzle flash in the center of the room, or "somewhere on that side of the room." (15 RT 2365, 2367.) Mr. Douglas did not see where appellant was after the lamp broke; he did not know whether appellant walked towards codefendant after first positioning himself near the stairs. (15 RT 2381.) Ms. Watchman was still sitting on the couch when the shooting started. (15 RT 2399.) After hearing five or six gunshots (Mr. Douglas was not sure how many), he saw legs running out the door. (15 RT 2334.) He ran to Ms. Watchman, who was still sitting on the couch, slumped over and bleeding. She was unconscious but he tried to hold

her. (15 RT 2268.) Mr. Arnold was lying face down on the floor. Mr. Trudell was lying on the floor near the kitchen table. There was a large pool of blood around his head. Mr. James was sitting in a chair near the kitchen table, bleeding. (15 RT 2268-2270.) Ms. Watchman's mother and, Mr. Douglas believed, Ms. Watchman's children, came down the stairs. (15 RT 2272.) The police arrived five to ten minutes after the shooting. (15 RT 2271.)

Mr. Douglas wrote a statement for the police 40 minutes after the shooting while he was still covered in blood and very upset. He testified that he was in better control of himself when he made a taped statement to the police at 10:49 a.m. He recalled additional details of the shooting over the course of the next few days. (15 RT 2370-2372.)

Beulah John

Ms. John was shot while she sat in a chair by the kitchen table but she did not remember seeing the gunmen enter the apartment or any other details of the shooting. (16 RT 2524, 2528-2529, 2534.) By the time of trial, she had blocked the shooting almost entirely out of her mind. (16 RT 2534.) She was shot in the leg just below the hip. (16 RT 2522-2523.) She was hospitalized until January 13, 1994. At the time of trial five years later, she could walk again but still could not run as a result of her injury. (16 RT 2526.)

Charles Hokes

Mr. Hokes was one of Ms. Watchman's neighbors. (17 RT 2603.) He did not attend the party but described it as "serene and mellow." (17 RT 2607.) He was awakened between 4:00 and 4:30 a.m. He believed a noise woke him, probably shooting. He definitely heard shooting once he was awake. He heard at least two gunshots close together. (17 RT 2603-2604.) A woman used his phone to call the police soon after the shooting. (17 RT 2606.)

Page Nelson

Mr. Nelson, an English teacher at Holy Names College, lived across the

street from Ms. Watchman's apartment. (15 RT 2404.) He was taking a bath at approximately 5:00 a.m., preparing for an early morning flight to the east coast. (15 RT 2404.) As he bathed, he heard extremely loud gunfire. First he heard a single gunshot. Then, after a three- to four-second pause, he heard five to ten more gunshots. Then, after another three- to four-second pause, he heard more gunshots, another pause, and another series of gunshots. In all, he heard perhaps as many as 20 gunshots. (15 RT 2405-2406.) The gunshots did not sound as though they came from a fully automatic weapon; from the spacing between each gunshot, it sounded as though the shooter pulled the trigger each time the gun fired. (15 RT 2406, 2408.) The shooting lasted about one minute. (15 RT 2425.) It sounded as though all of the gunshots were fired by the same gun. (15 RT 2423.) At trial, Mr. Nelson knocked on a table to demonstrate the pattern and timing of the gunshots he heard. (15 RT 2421.)

Mr. Nelson had often heard gunfire before. There were 10 murders in the neighborhood during the time he lived there. One person was shot to death beneath his dining room window while he was at home. He had seen other shootings in the neighborhood. (15 RT 2405, 2408-2410.)

Mr. Nelson turned off the lights in his home and looked out the window. He saw a car drive away approximately one minute after the shooting stopped. The neighborhood was silent after the shooting and he did not hear any other cars on the street. He saw the car clearly as it drove underneath a street light. (15 RT 2410-2414.) The car was driving within the speed limit as it drove away, perhaps at 20 miles per hour. He continued to look for awhile but did not see any other cars. (15 RT 2416-2417.) The car depicted in Exhibit 24, photo 8, looked very similar to the car Mr. Nelson saw. (15 RT 2418.)

Mr. Nelson gave a statement to the police before leaving for the east coast. The only news of the shooting he saw was a brief statement in the Washington Post on December 20, 1993. (15 RT 2415-2416.)

The Investigation

Physical Evidence At The Apartment

Officer Monica Russo, an evidence technician working for the Oakland Police Department, began processing the apartment for evidence at 5:20 a.m. (16 RT 2545, 2553.) People's Exhibit 31 was a diagram she prepared that depicted the apartment as she found it. (16 RT 2549.) Numerous police officers and paramedics were already at the apartment when she arrived. (16 RT 2553.) Victims were still being moved out of the apartment but one obviously dead victim was still lying on the floor. (16 RT 2554.) After the apartment was cleared, she began her search for evidence. (16 RT 2555.) Some furniture had been moved by the paramedics who treated the victims. (16 RT 2556.)

Officer Russo found 14 rifle casings spread around the room in "almost a complete 360." (16 RT 2557, 2566.) The location of each rifle casing was indicated on People's Exhibit 31 by a small triangle. (16 RT 2563, 2571-2573.) Significantly, in light of changes potentially caused by emergency personnel, she found casings spread throughout the room in locations where they would not have been disturbed: one casing was in a basket on top of a table (16 RT 2564, 2580; People's. Ex. 33E [photograph of .223 caliber casing]), two casings were on top of the kitchen counter (16 RT 2565), and two were on top of a blue patio-type chair (16 RT 2565-2566, 2584-2585; People's Ex. 33D [photograph of two .223 caliber casings on chair].)[4/]

Officer Russo found two bullet holes in the apartment. One hole went through the southern wall that ran from east to west, striking 20 inches west of the east wall and three feet above the floor. The other hole went through the opposite wall, the northern wall that ran east to west, striking 11 feet west of the eastern wall and three feet above the floor. (16 RT 2574-2578; see also

---

4. Judging by its location, the patio-type chair did not appear to have been moved by the emergency personnel. (See People's Ex. 31; Def A, Ex. A.)

People's Ex. 31 [where X1 and X2 represent the two bullet holes].) Neither bullet was recovered; one was permanently buried in the wall of the apartment and the other passed through the wall of the apartment. (16 RT 2574-2576.)

Officer Russo next found five major pools of blood on the floor, numbered one through five on People's Exhibit 31, that were presumably left by the victims before they were moved. (16 RT 2558-2559; People's Ex. 31.) She also found one .25 caliber pistol casing and two slugs or bullets of unspecified caliber. (16 RT 2557, 2568-2569.) She found no evidence that a shotgun had been fired in the room. (16 RT 2587, 2591.)

Lansing Lee, an Oakland Police Department criminalist, analyzed the ballistics evidence. (18 RT 2839-2842.) He determined that all 14 of the .223 caliber casings recovered from the apartment were fired by the same rifle. (18 RT 2857-2858.) One of the slugs recovered from the apartment was a .25 caliber and one was a .223 caliber. (18 RT 2859.) One slug removed from Ms. Watchman, four bullets removed from Mr. Arnold, and one of the fragments removed from Mr. Trudell were .223 caliber. (18 RT 2859-2863.) Of the six .223 caliber bullets he was provided, Mr. Lee could determine that five were fired from the same weapon. (18 RT 2863-2864.) One fragment recovered from Mr. Trudell and one recovered from Ms. Watchman were also "likely" recovered from that weapon. (18 RT 2861-2862.) The remaining fragments were too small to identify or compare. (18 RT 2860-2863, 2878-2879.) None of the fragments appeared to have come from a shotgun. (18 RT 2889.)

According to Mr. Lee, .223 caliber rifles can be automatic or semi-automatic. (18 RT 2851-2852.) An automatic weapon can fire more than one round with each trigger pull; a semi-automatic weapon fires only one round with each trigger pull. (18 RT 2852.) The number of fully automatic weapons available to the public is "very limited." Assault rifles are often only semi-automatic. (18 RT 2852.) The maximum capacity of assault rifle magazines

ranges from 5 to 50 or more rounds. (18 RT 2865-2866.)

The Autopsies

Sharon Van Meter, M.D., a board certified pathologist, explained the results of the autopsies performed on the dead victims. (12 RT 1911.) Ms. Watchman was shot three times: once in the right shoulder, once in the right arm—the bullet path continuing into her torso—and once in the upper chest. (13 RT 1924-1928, 1961-1962; People's Ex. 23 [diagram of Ms. Watchman's wounds].) Ms. Watchman bled to death from these wounds, dying within three to twenty minutes. She did not necessarily lose consciousness before dying. (13 RT 1928.) There was a black mark or stippling around one of the bullet holes in Ms. Watchman's clothing. The mark was consistent with marks made by smoke and materials from the discharge of the gun. Most guns do not cause such marks beyond a distance of two feet, no gun causes them from a distance much farther than two feet. The gunshot, however, was not sufficiently close for the smoke and other material to burn through the fabric and affect Ms. Watchman's skin. (13 RT 1950-1952, 1995-1996.) Ms. Watchman's blood-alcohol level was .12 percent. (13 RT 1946-1947.)

Mr. Arnold was shot seven times: three times in the chest, once in the abdomen, once in the upper thigh, once on the upper back, and once in the back of the forearm. (13 RT 1939-1941; People's Ex. 23 [diagram of Mr. Arnold's wounds].) He died within one to two minutes. (13 RT 1944.) There was a black mark around one bullet hole in Mr. Arnold's pants but this mark was consistent with bullet wipe rather than the stippling found in Ms. Watchman's clothing. (13 RT 1949-1950.) Dr. Van Meter was not given Mr. Arnold's shirt to examine. (13 RT 2012-2013.) Mr. Arnold's blood-alcohol level was .54 percent; testing also revealed a "fairly high level" of methamphetamine in his system. (13 RT 1945-1946.)

Mr. Trudell was shot twice: once to the left side of the back of the head

and once to the left side of the upper back. (13 RT 1956-1957; People's Ex. 21 [diagram of Mr. Trudell's wounds].)[5/] He died within a few heartbeats. (13 RT 1959.) There was no evidence of stippling so Dr. Van Meter concluded that Mr. Trudell was shot from a distance greater than three feet. (13 RT 1959.) Mr. Trudell's blood-alcohol content was .16 percent. (13 RT 1960.)

Dr. Van Meter found no evidence that a shotgun was fired at the scene. (13 RT 1980-1987, 2014-2015, 2021-2022.) She removed bullets and bullet fragments from Ms. Watchman's, Mr. Arnold's, and Mr. Trudell's bodies and gave them to the police for analysis. (13 RT 1933-1938, 1969-1976.)

The Lineups

On December 21, 1993, two days after the shooting, the police displayed a photographic lineup containing photographs of appellant and codefendant to several witnesses, including Mr. Douglas, Mr. Jones, and Ms. Coss. (15 RT 2274-2275, 2353, 2441-2442; 16 RT 2484; 17 RT 2747-2748; 18 RT 2818-2819.) All of the witnesses identified codefendant as the first armed man to enter the apartment. (15 RT 2275-2276, 2285, 2318, 2320-2321; 16 RT 2442-2443; 17 RT 2748-2749.) No witness identified defendant's photo as a photo of one of the armed men. Mr. Douglas and Mr. Jones were certain the lineup did not contain photos of the armed men who had been with codefendant. (15 RT 2354-2355; 16 RT 2482-2484.)

On December 28, the police conducted a physical lineup. (15 RT 2356.)

---

5. Dr. Van Meter did not address the wounds of the two victims who survived the shooting. Ms. John testified that she was shot once in the leg. (16 RT 2523.) Mr. James, who died two years after the shooting (People's Ex. 35), was shot once in the shoulder, according to eyewitnesses. (15 RT 2270, 2437.) Matching the 14 .223 caliber casings found at the apartment with the number of bullet wounds otherwise accounted for also suggest that Mr. James was only shot once. (16 RT 2557, 2568-2569.) Therefore, in a remarkable display of marksmanship, every one of the 14 shots appellant fired from the .223 caliber rifle hit its human target.

Mr. Douglas and Ms. Coss identified appellant as the second armed man to enter the apartment. (15 RT 2279, 2286, 2351, 2355; 17 RT 2750; 18 RT 2822.) Mr. Jones identified appellant as one of the armed men but was not sure if he was the second or third one to enter. (15 RT 2444-2445.) Mr. Jones and Mr. Douglas both testified that appellant looked different in person than he did in the photo displayed in the photographic lineup. (15 RT 2357; 16 RT 2484.)[6/]

Codefendant's Car Is Recovered

The day of the shooting, at about 4:30 p.m., the police found codefendant's car parked on 9th Avenue in Oakland. (16 RT 2538-2539, 2541.) They kept the car under surveillance, hoping appellant or codefendant would return. (16 RT 2540.) Several hours later, the police recovered the car when people began to loiter around it. (16 RT 2541.) Inside the trunk, the police found three shotgun shells. (19 RT 2895-2896, 2898-2900.) As described earlier, one of Ms. Watchman's neighbors, Mr. Nelson, identified a photograph of the car as very similar to the one he saw driving away from the shooting. (15 RT 2418.)

GUILT PHASE: CODEFENDANT'S CASE

Codefendant re-called Officer Russo, who described in further detail the locations of the shell casings and bullet holes she found. (19 RT 2970-2999.)

Mr. Lee was recalled and testified that a shotgun slug could create a single bullet hole. (19 RT 3026-3027.) However, he found no evidence that a shotgun slug had been fired in this case. He further testified that a .223 caliber rifle ejects spent shell casings to the right, sometimes as far as 30 feet. The casings could ricochet. (19 RT 3020-3021, 3033.) However, if a .223 caliber rifle is fired from a single position, the casings would not be spread widely

---

6. The photograph of appellant had been taken from Department of Motor Vehicle records (DMV). (RT 3044-3045.)

throughout the room. (19 RT 3028.)

Codefendant did not testify. (19 RT 3168.)

GUILT PHASE: APPELLANT'S CASE

Officer Swisher

Oakland Police Officer Thomas Swisher was the primary investigator in the case. (19 RT 3038-3039.) He soon learned that Ms. Souza had been involved in an altercation at the apartment and determined the names of her sons, appellant and codefendant. (19 RT 3042.) Based on that information, he created the photographic lineup. (19 RT 3043.) For appellant and codefendant, he obtained photos from the DMV. He then asked the photo lab to make the booking photos he used for the other participants to look like DMV photos. (19 RT 3044-3045.) He knew that some of the witnesses were Native-American but was not aware of the ethnicity of anyone in the photographs. He selected the photographs strictly by appearance. (19 RT 3048.) He sought photos of people who looked like the photos he had of appellant and codefendant. (19 RT 3062.) As noted previously, nobody identified the photo of appellant at the photographic lineup. (19 RT 3053.)

On December 27th, appellant and codefendant surrendered with their father and an attorney. (19 RT 3053.) This followed a manhunt that had lasted nearly ten days and conversations between Officer Swisher an the Souza family. (19 RT 3064, 3066.) The physical lineup was held one day after appellant and codefendant surrendered. (19 RT 3065.)

Hillary Leonesio

Hillary Leonesio attended the benefit at the Hilltop Tavern with her boyfriend. At the Hilltop, Ms. Watchman approached her and said that Ms. Souza was flirting with her boyfriend and she (Leonesio) should do something about it. Ms. Leonesio then asked Ms. Souza what was going on. Ms. Souza

said nothing was going on; that was the end of it. (19 RT 3079.)

At Ms. Watchman's apartment, Ms. Leonesio was sitting in the loveseat beside the stairs and Ms. Souza was kneeling beside the loveseat, talking to her. (19 RT 3083.) Ms. Watchman brushed against Ms. Souza as she went up the stairs. It appeared to be accidental but Ms. Souza became angry and said, "Who is that woman?" (19 RT 3084, 3123.) Ms. Watchman came back down later and said, "What do you mean, who is that woman?" More angry words were exchanged between the two and Ms. Watchman grabbed Ms. Souza, who was still kneeling, by the hair and dragged her out of the house and onto the porch. (19 RT 3085.) Ms. Watchman then stepped over Ms. Souza and closed the door behind her. (19 RT 3086.) There was no punching or kicking. Ms. Leonesio did not see any blood or injuries on Ms. Souza. (19 RT 3122.) Soon thereafter, Ed Arnold, Ms. Dale, and Ms. Davis left. (19 RT 3087-3088.)

Thirty minutes after Ms. Souza was forced to leave, Ms. Davis called and asked Ms. Leonesio to look for Ms. Souza's purse and coat. Ms. Leonesio looked but could not find the items. (19 RT 3088, 3090.)

Thirty minutes after the phone call, Ms. Leonesio went outside to check on her boyfriend who was asleep in a car. She tried to wake him but could not. (19 RT 3091.) Another car pulled up beside them. At least one person, possibly two, was in the back seat. (19 RT 3092-3093.) The car then backed out of the parking space it was in and backed in towards the apartment, back end towards the apartment and front end towards the street. (19 RT 3093.) There appeared to be three people in the car. (19 RT 3094.) These people just sat there with the engine running. It appeared as though they were waiting to see what she would do. (19 RT 3094.) She went back into the apartment as the three people in the car watched her. (19 RT 3095.) She went out back to look at the car from the gate and saw a man run up the stairs to the apartment. The car's engine was still running. (19 RT 3096-3097.) She went back inside the apartment to tell the

others what she had observed when three men with guns came into the room. (19 RT 3098-3099.) She focused on the first man to enter. (19 RT 3101.) All three men looked like American Indians but they could have also passed for Hispanics. (19 RT 3124.)

The first man went in front of the couch, the second stopped next to the armchair near the stairs, and the third stayed by the door. (19 RT 3105.) Ms. Leonesio later identified codefendant as the first man. (19 RT 3115-3116.) Codefendant demanded, "I want to know who's the one that beat up my mom. I want to know who beat up my mom and I want her coat and purse." (19 RT 3105, 3132.) Ms. Watchman started to stand up but codefendant moved closer to her, causing her to sit back down. (19 RT 3106.) Mr. Arnold stood up and codefendant hit him over the head with his gun, knocking Mr. Arnold down to the ground and breaking a lamp. (19 RT 3107-3108, 3159-3160.) Mr. Arnold had not moved towards codefendant, he had merely stood up when codefendant struck him down. (19 RT 3158.) Mr. Arnold tried to get up off of the floor. While he was still on the floor, Ms. Leonesio heard gunfire and saw a flash of light from codefendant's gun. (19 RT 3109-3110.) She immediately ran out the door to the patio with Ms. Coss and heard more gunfire. (19 RT 3110.) At first, Ms. Leonesio testified that the gunfire lasted for 20 to 30 seconds, was rapid, and was continuous. (19 RT 3111-3113.) She later clarified this testimony and explained that there were pauses between groups of shots; she heard bursts, followed by pauses, followed by more bursts. There were several such bursts and pauses. (19 RT 3136-3137.)

After the shooting stopped, Ms. Leonesio went back into to apartment and saw the injured and dead victims in roughly the same locations described by the other witnesses. (19 RT 3113-3115.)

Appellant

Appellant did not testify. (19 RT 3169.)

PENALTY PHASE: CASE IN AGGRAVATION

Leslie Miller, a tribal chairman and relative of Ms. Watchman and Mr. Arnold testified to their good nature. (21 RT 3518, 3526.) Ms. Watchman had four young children who were sleeping upstairs when the shooting started. (21 RT 3424.) Two of the children were babies; although one of the older children seemed to be coping with Ms. Watchman's death, the other remained deeply disturbed and was not adjusting well. (21 RT 3524-3525.)

Mr. Arnold's daughter Angel testified that his murder left four children fatherless. (RT 3529.) She was the oldest, at 18, while the youngest was 11. (21 RT 3529.) Her father was a great man and she and her family were deeply affected by his death. (21 RT 3530, 3534, 3537.)

Joyce Arnold still required therapy at the time of trial, five years after the shooting. (21 RT 3545.) She tried to forget the shooting but could not. She continued to have flashbacks. (21 RT 3545.)

Patricia Gordon, Mr. Trudell's sister, testified that he was a Vietnam War veteran who initially had a difficult time readjusting to civilian life. However, he soon found great satisfaction in teaching children. He devoted much time and energy to a nonprofit organization called Indian Youth of America and did a great deal of other volunteer work with children. (21 RT 3548-3552.)

PENALTY PHASE: CASE IN MITIGATION

With his penalty phase case in mitigation, appellant presented numerous witnesses, including family and friends, who testified to such things as his gentleness, his loving nature, his peacefulness, the closeness he had with his codefendant brother, and the leadership role codefendant sometimes exercised. Some family members, as well as some professionals, testified to difficulties appellant had in school, along with some successes.

Harry Souza, Jr.

Appellant's father, Harry Souza, Jr., testified that appellant was one of four children. (21 RT 3600.) He described appellant as a happy and affectionate child. (RT 3601.) All the kids were close; they never fought. (21 RT 3602.) The grandparents and other relatives played an active role in the childrens' lives. (21 RT 3604.) When appellant was six years old, the school determined that he had a hearing problem. (21 RT 3605.) The hearing problem was corrected but appellant was held back a year in school because he had been absent so often. (21 RT 3607.) Also at about this time appellant was identified as having a learning disability. He was enrolled in a special speech therapy class and classes to address his learning disability. (21 RT 3607.) Appellant was very good at drawing and mathematics. (21 RT 3608.)

When appellant was nine years old, the family moved in with another family, the Eaves. (21 RT 3610.) The Eaves had children of their own and appellant got along well with their entire family. (21 RT 3611.) Appellant and codefendant were very close. Codefendant, the older one, was the leader. (21 RT 3612-3613.)

When the family moved out of the Eaves home, Ms. Souza took three of the children to Idaho while Mr. Souza tried to save enough money for rent. Appellant stayed with his father because appellant's Little League team was about to compete in an important play off series. (21 RT 3613-3614.) Appellant was lonely and would call Idaho every other night to talk with codefendant. (21 RT 3614.)

Appellant's parents divorced when appellant was 13 years old. (21 RT 3616.) Ms. Souza retained custody of the children but disappeared with them for about one year. When Mr. Souza finally located the children and their mother, he and Ms. Souza agreed that the children would stay with him for one week. The day Mr. Souza was supposed to return them, Ms. Souza phoned and

told him he could keep the children. She did not want them. (21 RT 3616-3617.) The children were very upset. (21 RT 3617.)

Mr. Souza never received any reports from school of unacceptable behavior by appellant. (21 RT 3619.)

Appellant and codefendant eventually moved into an apartment in Berkeley with their older brother. (21 RT 3619.)

Appellant was a very shy, caring child who never got into a fight in his life. (21 RT 3620.)

Mark Souza

Appellant's oldest brother, Mark Souza, described appellant as a happy affectionate child. (21 RT 3628-3629.) Of the four siblings, appellant and Mark were closer with each other than with codefendant or their sister; likewise, codefendant and their sister were closer than with Mark or appellant. (21 RT 3629.) Appellant was the animal lover of the family. (21 RT 3631.) Codefendant was a better athlete than appellant. (21 RT 3632.) However, Mark taught appellant how to boogie board at the beach and appellant picked it up quickly. (21 RT 3641-3642.) Appellant was also a pretty good dancer. (21 RT 3636.) Appellant and Mark would spend hours drawing together. (21 RT 3633.) Mark was the assistant manager of the Shattuck Apartments and appellant would help Mark at work. Appellant was responsible and dependable, probably one of the better employees Mark ever had. (21 RT 3637.) While they were living together, Mark and appellant would watch sunsets together about five days each week; there was an exceptionally good view from the roof of the apartment building. (21 RT 3638.) Mark never knew appellant to be violent or aggressive. (21 RT 3639.)

Mark owned several guns and the brothers would use them on camping trips. (21 RT 3642-3646.) Mark would also take appellant to a shooting range where they would both shoot. (21 RT 3646.) Sometimes, if the range was

closed, they would shoot from back roads. (21 RT 3646.) Appellant was an "OK" shot, nothing like in the movies. (21 RT 3645.)

Marcie Souza

Appellant's younger sister, Marcie Souza, testified that appellant was never violent with her or anyone else; the two would wrestle and horse around but did so no more often than other kids. (21 RT 3649, 3652.) Appellant and codefendant were like twins; codefendant was usually the leader. (21 RT 3650.) Marcie didn't know about any girlfriends appellant might have had; he was too shy. (21 RT 3650.) Appellant was very artistic. (21 RT 3651.)

David Bard

The manager of the Shattuck Apartments, David Bard, testified that appellant lived in one of the apartments for a "couple of years." (21 RT 3657.) Appellant's grandmother worked at the apartments for 32 years before she died. (21 RT 3656.) Mr. Bard described the Souza family as close and loving. (21 RT 3657.) At all times, appellant was well behaved, polite, and respectful. (21 RT 3657-3658.) Mr. Bard never saw any sign that appellant participated in gang activity or abused alcohol or drugs. (21 RT 3658.)

Lee Williams

As a member of appellant's father's band, Lee Williams knew appellant as a child. (21 RT 3662.) He sometimes babysat appellant and codefendant. (21 RT 3662-3663, 3669.) Both children were well behaved. (21 RT 3663.) Appellant was a talented artist and a happy and affectionate child. (21 RT 3664.) Appellant was warm and engaging but shy. (21 RT 3665.) Mr. Williams never saw appellant engage in violent or aggressive behavior. (21 RT 3665.) Appellant's mother was a good parent. After appellant's parents divorced, Mr. Williams rarely saw appellant or the other Souzas. (21 RT 3666-3668.)

Gary Nichols

Appellant's father's previous employer, neighbor, and close friend, Gary Nichols, observed appellant when appellant and his father lived next door to Mr. Nichols. (21 RT 3671.) Appellant was always well behaved. (21 RT 3672, 3674.) Appellant had loving grandparents. (21 RT 3672.) Appellant seemed especially close to his mother and all of the boys were very protective of their mother. (21 RT 3673.) Mr. Nichols last saw appellant three years before appellant's parents divorced. (21 RT 3673.)

Cathleen Thomas

Cathleen Thomas lived in the Souza home for six months and took care of the children when they were young. (21 RT 3676.) She recalled that appellant was a "little bit" shy. (21 RT 3678-3679.) All of the Souza children were well behaved. (21 RT 3679.) Appellant was a happy child. (21 RT 3680.) She could not remember whether appellant or codefendant were more likely to be the leader of activities. (21 RT 3680.)

Ruth Underwood

Ruth Underwood met the Souza family in 1978 or 1979. (21 RT 3683.) She described the family as close. (21 RT 3684.) Appellant was shy and was more likely than the others to stay in the background. She could not remember seeing appellant in a fight. (21 RT 3685.) Appellant seemed to be a normal well-mannered little boy. (21 RT 3686, 3688.) Ms. Underwood continued to see Ms. Souza after the divorce. (21 RT 3686.) Ms. Souza began drinking excessively. (21 RT 3686.) The boys were not going to school at that point. (21 RT 3687.) Ms. Souza would go out drinking two to three nights a week with Esther Dale, and Ms. Underwood would have to pick Ms. Souza up because her purse and car keys would be locked in the trunk of Ms. Dale's car. This happened two or three dozen times. (21 RT 3689.)

Landry Nicks

Appellant's special education teacher from the fourth through sixth grades, Landry Hicks, recalled that appellant's learning disabilities were in written language and fluency in reading. His relative strength was in mathematics. Appellant was also artistic. (22 RT 3707-3709.) Appellant was calm, shy, and respectful in class. He did not talk much unless spoken to. (22 RT 3710.)

Nora Fakoury

Appellant's special education teacher in the seventh grade, Nora Fakoury, gave appellant a good citizenship award for following school rules, and placed him on the honor roll for working hard at school. (22 RT 3712-3714.) At the end of the year, appellant was promoted to high school. (22 RT 3715.) Appellant was a congenial child but he had attendance problems. (22 RT 3716-3717.) Ms. Fakoury had previously told the investigator from the public defender's office that appellant "had little motivation to work and he did the minimum to get by." (22 RT 3719.) The certificates she awarded him suggested to Ms. Fakoury that appellant's performance must have improved somewhat during the course of the year. (22 RT 3719-3720.)

Robert Baumgarten

Robert Baumgarten was a special education coordinator at Berkeley High School who worked with students who had been mainstreamed into regular classes. (22 RT 3723.) Appellant was at the school from the second semester of tenth grade through the first semester of eleventh grade. (22 RT 3723-3724.) Appellant had a learning disability that affected his ability to read and write. His strengths were problem-solving and math. (22 RT 3726.) The practical effect of appellant's disability was that he could better process things he heard than things he read. (22 RT 3736.) The learning disability did not affect his intelligence. Appellant's intelligence was higher than average. (22 RT 3727.)

Despite his learning disability, appellant excelled academically; his grades were above average. (22 RT 3730.) He passed the high school proficiency examination on his first try, scoring 80 out of 100 in reading, 80 out of 100 in writing, and 94 out of 100 in mathematics. (22 RT 3731.) In class, appellant was quiet, cooperative, worked hard, and got along well with other students. He liked to draw. (22 RT 3732.) Appellant would not act impulsively. He was thoughtful and deliberate. (22 RT 3737-3738.) There was no indication of gang activity or drug or alcohol abuse. (22 RT 3753.) In February of 1993, appellant's attendance became very erratic. Then he simply stopped coming to school. (22 RT 3735.)

Adrianne Yank

Adrianne Yank was a mathematics teacher at Berkeley High School. She was appellant's pre-algebra teacher in the fall of 1992. Appellant received an "A" in the class. (22 RT 3744.) Appellant was a good student; he was never a behavior problem; he had a positive attitude towards learning; he was quiet, diligent, and shy. (22 RT 3745.)

Bill Dane

Bill Dane was a mathematics teacher at Berkeley High School. He was appellant's art teacher in the fall of 1992. (22 RT 3748.) Appellant was the last student Mr. Dane would have expected to have a problem in class. In fact, appellant he received an "A" in the class. (22 RT 3749.)

Jeanette Beasley

Appellant's great aunt, Jeanette Beasley, had known appellant all his life. (22 RT 3754.) Appellant and his siblings were always well behaved. (22 RT 3755.) She saw the children less after their parents' divorce but she still observed that the children had a loving relationship with their grandparents. (22 RT 3756-3757.) Appellant appeared to be protective of his mother. (22 RT 3758.)

Alma Gonzalez

Alma Gonzalez was a good friend of appellant's grandmother. She knew appellant in 1991, 1992 or 1993; he would come with his grandmother and help her set up the papers for community bingo games. Appellant seemed to enjoy helping his grandmother. (22 RT 3760-3761, 3763.) Ms. Gonzalez continued to see appellant at the bingo games for about one year; she did not see him after that. (22 RT 3764.)

Helen Eaves

For several months in 1985, the Souza family lived in a house with Helen Eaves, her brothers Bob and Jerry Eaves, and Bob's son, David. (22 RT 3766-3767.) David Eaves was eleven, about the same age as appellant; the two were good friends. (22 RT 3767-3768.) Appellant and his siblings were well-mannered good kids. Appellant loved animals. (22 RT 3768.) She never saw appellant argue. (21 RT 3770.) Ms. Souza was a good cook and homemaker. (22 RT 3774.) At some point, the families lost contact. (22 RT 3772.)

David Eaves

David Eaves and appellant got along great. (22 RT 3776-3777.) Among codefendant, appellant, and Mr. Eaves, codefendant was typically the leader if there was one. (22 RT 3779.)

Jerry Eaves

Jerry Eaves and appellant's father played music together. (22 RT 3784.) Mr. Eaves knew appellant from the three or four months they lived in the same house and from a two week trip to Oklahoma. (22 RT 3785.) Mr. Eaves never saw kids as polite as appellant and his siblings. (22 RT 3786.) Appellant tried to teach Mr. Eaves and the other adults how to break dance. (22 RT 3786.) Appellant was especially kind to animals and was very kind to his grandparents. (22 RT 3787.)

Paul Goldman

Paul Goldman was the coordinator of the adult school district that included the Santa Rita jail. Appellant was enrolled in the adult education program at the jail. (22 RT 3791.) He passed the General Education Diploma examination in 1997 and was working towards fulfilling the requirements for a regular high school diploma at the time of trial. (22 RT 3791.)

Katari Jones

Katari Jones was a teacher at the Santa Rita jail. (22 RT 3795.) Appellant was one of her students at the jail. (22 RT 3796.) Appellant was a very consistent student. He did his assignments well and they were completed on time. (22 RT 3797.) In class, appellant was quiet and difficult to distract. (22 RT 3800.) He was a cooperative student who seemed to enjoy a challenge. (22 RT 3798.) Since moving to another jail, appellant had been mailing his assignments in. (22 RT 3798.)

Verla Chaddick

Verla Chaddick was a counselor at Rio Vista High School who became involved in appellant's educational plan when he was in the eighth grade. (22 RT 3817.) She was aware that appellant and codefendant had gaps in their school attendance and that both were shy. (22 RT 3817-3818.) Ms. Chaddick was aware that appellant had been identified as a special education student and she ensured that he was given tests to determine his needs in high school. The testing showed that he would still benefit from special assistance. (22 RT 3818-3819.) Ms. Chaddick monitored appellant's progress at the school and was excited to see that he was doing very well. She was disappointed when he left Rio Vista High School. (22 RT 3819.) Appellant was always well mannered when they met and she did not receive any complaints about him. (22 RT 3819.)

James Valtz

James Valtz taught appellant tenth grade world literature at Berkeley High School. (22 RT 3821.) Appellant was a shy, quiet, responsible, and diligent student. (22 RT 3821.) He did really well in the class and received a "B." (22 RT 3822.) By "shy," Mr. Valtz meant that appellant was reserved. He would not volunteer things, but if he was asked, he would speak about the subject. (22 RT 3823.) Appellant was a serious and mature young man. (22 RT 3822.) He was more composed than the average male adolescent student. (22 RT 3823.)

Mary Davidson

Mary Davidson adopted appellant's mother. She was thus appellant's maternal grandmother. (22 RT 3825-3826.) Over the years, Ms. Davidson saw appellant and his siblings grow up. Appellant was always helpful. Ms. Davidson never had to correct his behavior. (22 RT 3828.) She received sporadic mail from appellant over the years but more after he was incarcerated. (22 RT 3829.) Appellant was always a very nice boy. (22 RT 3830.)

Randy Souza

Appellant's uncle, Randy Souza, was a professional dancer. (22 RT 3833.) He gave appellant and his siblings dance lessons in 1981. (22 RT 3833.) Appellant seemed to enjoy the classes. He was willing and eager to learn. He excelled. (22 RT 3834.) Mr. Souza observed appellant on a regular basis until he moved to Colorado in 1989. (22 RT 3834.) The last time Mr. Souza saw appellant before trial was nine years earlier. (22 RT 3839.) Appellant was quiet and shy but had a compassion for others that came from love. He was very affectionate. (22 RT 3835.) While appellant's parents were married, Mr. Souza observed the mother intoxicated in front of the children. (22 RT 3836.) In fact, appellant's mother would become belligerent and violent when drinking, even in front of the children. (22 RT 3837-3838.)

ARGUMENT

I.

THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION FOR SEVERANCE

Appellant argues that he and codefendant had antagonistic defenses to the alleged multiple-murder special circumstance and that the trial court, therefore, improperly denied his motion to sever the trials, violating various of his state and federal constitutional rights. (AOB 31-53.) Not so.

A. Proceedings Below

On June 11, 1998, appellant filed a motion to sever his trial from that of codefendant. (2 CT 536.23-536.47.) One of appellant's arguments was that he and codefendant might present antagonistic defenses:

> The evidence presented by the prosecution at the preliminary hearing establishes that defendant Matthew Souza and codefendant Michael Souza, along with a third uncharged individual, went to the apartment of Sylvia Watchman armed with a semi-automatic rifle and a shotgun, respectively. Witnesses identified codefendant Michael Souza as the individual who fired the fatal shots using the shotgun. Physical evidence suggests that the shots were fired from a semi-automatic rifle rather than a shotgun. Given these basic facts, each codefendant is likely to defend by asserting that it was the other who fired the fatal shots. While both may remain liable as aiders and abettors, the identity of the actual shooter is crucial to establishing liability for the special circumstance of multiple murder. (*See* Penal Code § 190.2a(3) and § 190.2(c) [when convicted of any special circumstance other than felony murder as an aider and abettor, the prosecution must establish intent to kill].) Further, the fact that one individual was the shooter may be used as an aggravating factor in the penalty phase of the trial. (*See* Penal Code § 190.3(j).) Thus, although not establishing a complete defense, the core of each codefendant's case is likely to be the assertion that it was the other brother who actually committed the killings.

(2 CT 536.33-536.34.)

Appellant also argued that the trial court should sever the trials in light

of incriminating out-of-court statements codefendant had made that the prosecution might offer into evidence at trial. (2 CT 536.35-536.36.)

On June 11, 1998, appellant also filed a motion in limine to exclude codefendant's out-of-court statements. (2 CT 536.48-536.54.)

On July 1, 1998, Judge Golde granted appellant's motion to exclude codefendant's out-of-court statements but denied the motion to sever the trials. (1 RT 13-15.)

On July 22, 1998, Judge Hurley revisited appellant's motion to sever the trials. Counsel declined the opportunity to argue their positions. Citing *People v. Pinholster* (1992) 1 Cal.4th 865, the court noted that a defendant's natural tendency is to shift blame to a codefendant but that is not sufficient grounds for severance. The court also noted that this Court used the same logic in *People v. Turner* (1984) 37 Cal.3d 302, and strongly affirmed it in *People v. Hardy* (1992) 2 Cal.4th 86, 167-168.[7] Based on the evidence before him, as opposed to speculation on how conflicts might occur, Judge Hurley denied the motion to sever the trials. (2 RT 242-243.)

B. Applicable Law

Under Penal Code section 1098, "[w]hen two or more defendants are jointly charged . . . they must be tried jointly, unless the court order[s] separate trials." Thus, under section 1098, a trial court must order a joint trial as the "rule" and may order separate trials as an "exception ." (*People v. Cleveland* (2004) 32 Cal.4th 704, 726; *People v. Alvarez* (1996) 14 Cal.4th 155, 190.) "Joint trials are favored because they promote economy and efficiency and serve the interests of justice by avoiding the scandal and inequity of inconsistent verdicts." (*People v. Coffman* (2004) 34 Cal.4th 1, 40, internal quotation marks

---

7. The reporter's transcript refers to the *Hardy* case as *Howard*, but that appears to be a typographical error.

omitted.) A "classic case" for joint trial is presented when defendants are charged with common crimes involving common events and victims. (*People v. Cleveland, supra*, 32 Cal.4th at p. 726.)

> In light of this legislative preference for joinder, separate trials are usually ordered only in the face of an incriminating confession, prejudicial association with codefendants, likely confusion resulting from evidence on multiple counts, conflicting defenses, or the possibility that at a separate trial a codefendant would give exonerating testimony.

(*People v. Box* (2000) 23 Cal.4th 1153, 1195, internal quotation marks omitted; *People v. Cleveland, supra*, 32 Cal.4th at p. 726.)

However, antagonistic defenses alone do not compel severance. (*People v. Cummings* (1993) 4 Cal.4th 1233, 1286.) In *People v. Coffman, supra*, another capital case, this Court set forth the applicable law regarding severance and conflicting defenses:

> In [citation], we said: Although there was some evidence before the trial court that defendants would present different and possibly conflicting defenses, a joint trial under such conditions is not necessarily unfair. [Citation.] Although several California decisions have stated that the existence of conflicting defenses may compel severance of codefendants' trials, *none has found an abuse of discretion or reversed a conviction on this basis*. [Citation.] If the fact of conflicting or antagonistic defenses alone required separate trials, it would negate the legislative preference for joint trials and separate trials would appear to be mandatory in almost every case. We went on to observe that although it appears no California case has discussed at length what constitutes an antagonistic defense, the federal courts have almost uniformly construed that doctrine very narrowly. Thus, [a]ntagonistic defenses do not per se require severance, even if the defendants are hostile or attempt to cast the blame on each other. [Citation.] Rather, to obtain severance on the ground of conflicting defenses, it must be demonstrated that the conflict is so prejudicial that [the] defenses are irreconcilable, and the jury will unjustifiably infer that this conflict alone demonstrates that both are guilty. [Citation.] When, however, there exists sufficient independent evidence against the moving defendant, it is not the conflict alone that demonstrates his or her guilt, and antagonistic defenses do not compel severance. [Citation.]

(*People v. Coffman, supra*, 34 Cal.4th at pp. 41-42, internal quotation marks

omitted, emphasis in original.)

A trial court's ruling on a severance motion is reviewed for abuse of discretion on the basis of the facts known to the court at the time of the ruling. (*People v. Box*, *supra*, 23 Cal.4th at p. 1195; *People v. Alvarez*, *supra*, 14 Cal.4th at p. 189.) Even if a trial court abuses its discretion in failing to grant severance, reversal is required only upon a showing that, to a reasonable probability, the defendant would have received a more favorable result in a separate trial. (*People v. Coffman*, *supra*, 34 Cal.4th at p. 41.) Also, the reviewing court may reverse a conviction where, because of the consolidation, a gross unfairness has occurred such as to deprive the defendant of a fair trial or due process of law. (*People v. Cleveland*, *supra*, 32 Cal.4th at p. 726.)

C. The Trial Court Properly Denied Appellant's Motions To Sever The Trials

The trial court did not abuse its discretion in denying properly appellant's pretrial motion to sever his trial from codefendant's trial because this was a "classic case" for joint trial. Appellant and codefendant were charged with having committed the same crimes involving the same events and victims. Appellant and codefendant were also both charged as a capital defendant. Because the charges against appellant and codefendant were identical, there was no danger of jury confusion and no danger of prejudicial association. There was also no suggestion that, if tried separately, codefendant would have provided exonerating testimony. Also, there was no issue of extrajudicial statements in which codefendant implicated appellant.

Moreover, appellant and codefendant did not have irreconcilable defenses as defined in *People v. Coffman*, *supra*, 34 Cal.4th at page 42. Based on the evidence before the court at the time of its ruling, it was not the case that any conflicting defense would *alone* compel the jury to return guilty verdicts against both appellant and codefendant. Even if the court only had before it the

facts appellant proffered in his motion to sever, it was clear that there were several eyewitnesses to the shooting and that there was conclusive forensic evidence. Given such independent evidence, a jury was unlikely to rely on the mere fact of conflicting defense theories. Again, no abuse of discretion in denial of the severance motion appears.

D. Harmless Error

Even if this Court concludes that the trial court abused its discretion in denying severance, any error was harmless. Compelling independent evidence of appellant's guilt leads to the inescapable conclusion that he has not demonstrated a reasonable probability of a more favorable outcome had the trial court granted severence, as is required for reversal. (*People v. Coffman, supra,* 34 Cal.4th at p. 43; see *People v. Watson* (1956) 46 Cal.2d 818, 836.) The prosecution had overwhelming independent evidence of appellant's guilt, and it was not any purported conflict with codefendant's case alone that demonstrated his guilt. (*People v. Coffman, supra,* 34 Cal.4th at p. 43 [no abuse of discretion and no reasonable probability of a more favorable outcome had severance been granted in light of the prosecution's independent evidence of guilt, where one defendant (Coffman) described her relationship with the other defendant (Marlow), his threats and violence towards her, other murders in which he had forced her to participate, and his kidnaping, robbery, probable sexual assault, and burial of the victim].)

As set forth in the Statement of Facts (see pp. 14-27), it was undisputed that each victim was killed with a rifle, not a shotgun. Moreover, overwhelming evidence demonstrated that codefendant carried a shotgun, not a rifle. Mr. Jones had a good view of codefendant as he entered the apartment. Mr. Jones also had experience with firearms in general and shotguns in particular. He precisely and confidently described codefendant's gun as a sawed-off 12-gauge pump-action

Mossberg with a pistol grip. (14 RT 2044; 15 RT 2457-2458; 16 RT 2500-2501.) Mr. Douglas also got a good look at codefendant and at the gun he was carrying. Mr. Douglas, too, was familiar with shotguns and testified that codefendant carried a shotgun with a pistol grip. (15 RT 2256-2258, 2285-2286; 2318, 2320, 2339, 2342.) Mr. Douglas had no doubt that codefendant carried a shotgun as he had seen such guns before. (15 RT 2321, 2322.) No witness testified that appellant carried a shotgun. On the contrary, Mr. Jones, who was also familiar with assault weapons, testified that the second gunman to enter the apartment, the gunman identified by others as appellant, carried an assault rifle. (14 RT 2045, 2048-2049.) Mr. Douglas was not so sure about appellant's gun. He described it as a silver colored gun with a clip and as a large handgun but not as a shotgun. (15 RT 2263-2264, 2346, 2348-2349.)

Against this evidence, appellant points to Ms. Leonesio's testimony that she saw codefendant fire his gun and Ms. Coss' and Mr. Douglas' testimony that they saw muzzle flashes come from codefendant's position in the center of the room. The ballistics evidence demonstrates that Ms. Leonesio's testimony is incorrect if Mr. Jones' and Mr. Douglas' testimony that codefendant carried a shotgun is correct. However, Mr. Jones and Mr. Douglas made their observations about the shotgun before the shooting started, during the relative calm before the storm. Ms. Leonesio, on the other hand, made her observations during those shocking and traumatic seconds that her friends were being shot at and she was running out the door to save her life. Respondent submits that Ms. Leonesio's observations are the most likely to have been rushed and inaccurate. As for the testimony that muzzle flashes came from the center of the room, that is entirely consistent with appellant shooting his assault rifle. Although appellant initially stood by the stairs, Mr. Jones testified that appellant began stepping into the middle of the room, towards codefendant, and aimed his rifle just before the shooting started. (14 RT 2059-2060.) Mr. Jones' observation

was corroborated by the wide dispersal of the victims and the rifle casings, suggesting that the shooter was moving and turning as he fired. Appellant's movement into the center of the room would also explain why Ms. Leonesio believed codefendant was shooting his gun. She might not have noticed appellant moving towards codefendant.

Accordingly, since there was persuasive and compelling independent evidence of appellant's guilt, apart from anything codefendant's counsel said, appellant suffered no prejudice from the denial of severance. Therefore, the bottom line here is that appellant's arguments, that denial of severance violated his Fifth, Sixth, Eighth, and Fourteenth Amendment rights to a fair trial, proof beyond a reasonable doubt on the truth of the special circumstance allegation, and a reliable penalty determination, all fail.

II.

THE TRIAL COURT WAS NOT REQUIRED TO INSTRUCT ON VOLUNTARY MANSLAUGHTER OR ATTEMPTED VOLUNTARY MANSLAUGHTER

Appellant argues that the trial court erred in refusing to instruct the jury on the lesser-included offenses of voluntary manslaughter and attempted voluntary manslaughter. According to appellant, there existed sufficient evidence of provocation and sudden heat of passion to support the instructions. Appellant calls the error a violation of his state and federal constitutional rights to due process, trial by jury, and to present a defense. (AOB 54-121.) Not so.

A. The Proceedings Below

Counsel for appellant and codefendant requested instructions on the lesser included offense of voluntary manslaughter committed in a reasonable and sudden heat of passion. (2 CT 587-591.)[8] Citing *People v. Spurlin* (1984) 156 Cal.App.3d 119, the prosecutor argued that reasonable heat of passion requires provocation from the decedent. (2 CT 640; 19 RT 2947.) The trial court agreed with the prosecutor and refused to give manslaughter instructions except on the count relating to Ms. Watchman, the only victim who had assaulted Ms. Souza. Appellant's counsel indeed conceded that the trial court should give manslaughter instructions only on the count relating to Ms. Watchman. (19 RT 2947-2948.)

Appellant's counsel also requested instructions on unpremeditated second degree murder and on the relevance of provocation evidence to the

---

8. For ease of discussion, respondent will follow appellant's lead and thus our argument on the propriety of instructing on voluntary manslaughter as a lesser included offense to murder will apply equally to the propriety of instructing on attempted voluntary manslaughter as a lesser included offense to attempted murder. (See AOB 57, fn. 15)

element of premeditation. (19 RT 2954-2957, 2959-2962; 20 RT 3184-3185.) The trial court granted the requests, agreeing that provocation inadequate to reduce murder to manslaughter may nevertheless be relevant on the issues of premeditation and deliberation. The trial court provided the standard CALJIC instructions on second degree murder (3 CT 705, 706, 711, 712, 713, 721 [CALJIC Nos. 8.30, 8.31, 8.71, 8.73, 8.74, 17.10]) and on the relevance of provocation evidence in determining the degree of murder (3 CT 712 [CALJIC No. 8.73[9]]) without limitation to any particular count. (19 RT 2954-2958; 20 RT 3172, 3185, 3235.)

In light of these rulings, appellant's counsel withdrew his request for, and objected to, manslaughter in the heat of passion instructions as to the Ms. Watchman killing. (20 RT 3226-3231.) He explained,

> I don't want to confuse the jury with the different provocations that may be involved with respect to voluntary manslaughter and with respect to reducing first to second. [¶] . . . [¶] Any time the word provocation is used, I don't want it to be confused with provocation that is required for manslaughter, which is one of my tactical reasons in asking that these instructions not be given.

(20 RT 3230-3231.)

Appellant's counsel agreed with the trial court's and codefendant's counsel's summation of the defense position that, any small tactical value of perhaps obtaining a manslaughter conviction on one count was of no benefit if the jury also returned two first-degree murder convictions. Accordingly, the

---

9. CALJIC No. 8.73, as modified, provided as follows:

> If the evidence establishes that there was provocation which played a part in inducing an unlawful killing of a human being, you should consider the provocation for such bearing as it may have on whether a defendant killed with or without premeditation and deliberation.

(3 CT 712; 20 RT 3268.)

"aim and goal" of the defense case was to avoid multiple first degree murder convictions, even if that meant accepting an increased risk of second degree murder convictions. (20 RT 3230-3231.)

B. Applicable Law

1. The Trial Court's Duty To Instruct On Lesser Included Offenses

A defendant has a constitutional right to have the jury determine every material issue presented by the evidence. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1007, citing *People v. Lewis* (2001) 25 Cal.4th 610, 645.) To protect this right and the broader interest of safeguarding the jury's function of ascertaining the truth, a trial court must instruct on lesser included offenses, even in the absence of a request, whenever there is substantial evidence raising a question as to whether all of the elements of the charged offense are present. (*People v. Cunningham*, *supra*, 25 Cal.4th at p. 1008, citing *People v. Lewis*, *supra*, 25 Cal.4th at p. 645.) Conversely, even on request, a trial judge has no duty to instruct on any lesser offense unless there is substantial evidence to support such instruction. (*People v. Cunningham*, *supra*, 25 Cal.4th at p. 1008.)

This Court has explained that the "substantial evidence" required to trigger the giving of instructions is not merely "any" evidence:

> [T]he existence of "*any* evidence, no matter how weak" will not justify instructions on a lesser included offense, but such instructions are required whenever evidence that the defendant is guilty only of the lesser offense is "substantial enough to merit consideration" by the jury. [Citations.] "Substantial evidence" in this context is "'evidence from which a jury composed of reasonable [persons] could . . . conclude[]'" that the lesser offense, but not the greater, was committed. [Citations.]
>
> In deciding whether there is substantial evidence of a lesser offense, courts should not evaluate the credibility of witnesses, a task for the jury. [Citations.]

(*People v. Breverman* (1998) 19 Cal.4th 142, 162-163, emphasis in original.)

The correctness of jury instructions is determined from the entire charge

of the court, not from a consideration of parts of an instruction or from a particular instruction. (*People v. Burgener* (1986) 41 Cal.3d 505, 538.)

A trial court's decision to give an instruction does not necessarily establish that the evidence necessitated it, because instructions are commonly given in an abundance of caution. (*People v. Steele* (2002) 27 Cal.4th 1230, 1251.)

2. The Sudden Heat Of Passion Theory Of Manslaughter

Manslaughter, an unlawful killing without malice, is a lesser included offense of murder. (Pen. Code, § 192; *People v. Ochoa* (1998) 19 Cal.4th 353, 422.) Voluntary manslaughter occurs when an unlawful killing occurs "upon a sudden quarrel or heat of passion." (Pen. Code, § 192, subd. (b).) The crime is defined by a standard instruction (CALJIC No. 8.42) based largely on language from *People v. Logan* (1917) 175 Cal. 45, 49. We begin with the instruction's formulation of the crime because it has been repeated through the decades (see, e.g., *People v. Wickersham* (1982) 32 Cal.3d 307, 326; *People v. Berry* (1976) 18 Cal.3d 509, 518; *People v. Valentine* (1946) 28 Cal.2d 121, 139) and remains the standard:

> To reduce an unlawful killing[10] from the offense of murder to manslaughter upon the ground of sudden quarrel or heat of passion, the provocation must be of such character and degree as . . . naturally would excite and arouse such passion[,] and the assailant must act under the influence of that sudden quarrel or heat of passion.
>
> The heat of passion which will reduce a homicide to manslaughter must be such a passion as naturally would be aroused in the mind of an ordinarily reasonable person in the same circumstances. A defendant is not permitted to set up his own standard of conduct and to justify or excuse himself because his passions were aroused, unless the circumstances in which the defendant was placed and the facts that confronted him were such as also would have aroused the passion of the

---

10. In light of *People v. Lasko* (2000) 23 Cal.4th 101, 104, 111, the words "intentional felonious homicide" have been changed to "unlawful killing." (CALJIC No. 8.40 (2001 Revision).)

ordinarily reasonable person faced with the same situation. Legally adequate provocation may occur in a short, or over a considerable, period of time.

The question to be answered is whether or not, at the time of the killing, the reason of the accused was obscured or disturbed by passion to such an extent as would cause the ordinarily reasonable person of average disposition to act rashly and without deliberation and reflection, and from such passion rather than from judgment.

If there was provocation, whether of short or long duration, but of a nature not normally sufficient to arouse passion, or if sufficient time elapsed between the time [of the] provocation and the fatal blow for passion to subside and reason to return, and if an unlawful killing of a human being followed such provocation and had all of the elements of murder, as I have defined it, the mere fact of slight or remote provocation will not reduce the offense to manslaughter.

a. The Two Prongs Of The Sudden Heat Of Passion Theory Of Manslaughter

Heat of passion voluntary manslaughter consists of two prongs: provocation and sudden heat of passion. (*People v. Sedeno* (1974) 10 Cal.3d 703, 719 ["provocation *and* heat of passion must be affirmatively demonstrated. [Citations.]" Emphasis in the original], overruled on another ground in *People v. Breverman*, *supra*, 19 Cal.4th 142; *People v. Fenenbock* (1996) 46 Cal.App.4th 1688, 1704-1705 [citing *Sedeno* and separately analyzing evidence of each prong]; see CALJIC No. 8.42, paragraph 1 ["the provocation must be of such character and degree as . . . naturally would excite and arouse such passion[,] *and* the assailant must act under the influence of that sudden quarrel or heat of passion." Emphasis added.])

The "provocation" prong requires evidence of "'facts and circumstances . . . sufficient to arouse the passions of the ordinarily reasonable man. . . .'" (*People v. Wickersham*, *supra*, 32 Cal.3d at p. 326 [quoting *Valentine* and *Berry*]); see CALJIC No. 8.42, paragraph 2, sentence 2 ["the circumstances in which the defendant was placed and the facts that confronted him [must be] such as also would have aroused the passion of the ordinarily reasonable person

faced with the same situation."].) Accordingly, sufficient provocation must satisfy an objective or "reasonable person" standard. (*People v. Lee* (1999) 20 Cal.4th 47, 60; *People v. Wickersham*, *supra*, 32 Cal.3d at p. 326; *People v. Lucas* (1997) 55 Cal.App.4th 721, 739.)

The "heat of passion" prong, which *Wickersham* terms "the subjective element" of the crime, requires evidence that the defendant acted "under the influence of a strong passion at the time of the homicide." (32 Cal.3d at p. 327; CALJIC No. 8.42, paragraph 1 ["the assailant must act under the influence of that sudden quarrel or heat of passion."].) This prong, however, is not entirely subjective. For example, it is subject to an objective consideration of a "cooling off' period, as follows:

> Where . . . sufficient time has elapsed for angry passion to end and for reason to control [the defendant's] conduct, it will no longer reduce [the] killing to manslaughter. The question, as to whether the cooling period has elapsed and reason has returned, is not measured by the standard of the accused, but the duration of the cooling period is the time it would take the average or ordinarily reasonable person to have cooled the passion, and for that person's reason to have returned.

(CALJIC No. 8.43; *People v. Daniels* (1991) 52 Cal.3d 815, 868 ["if sufficient time has elapsed for the passions of an ordinarily reasonable person to cool, the killing is murder, not manslaughter."], quoting 1 Witkin & Epstein, Cal. Criminal Law (2d ed. 1988) §§ 517, pp. 584-585.)

People v. Koontz (2002) 27 Cal.4th 1041, 1085-1086, is instructive. In *Koontz*, the defendant and his roommate shared a two bedroom apartment in a facility run by the Volunteers of America. The evidence showed that the victim had entered the common area to seek assistance in resolving a dispute with defendant, and that defendant shot him in the presence of a mediator/security monitor. The defendant claimed that his roommate had threatened him with a knife when they were in their shared apartment, and that, when the defendant shot him a few minutes later in a common area of the apartment complex, he

was still acting under the influence of the provocation. This Court rejected Koontz' contention that the trial court erred by failing to give an instruction on voluntary manslaughter:

> Without specifying precisely how he was provoked, defendant argues that the killing occurred during the course of a conflict with the victim. As the Attorney General observes, however, the evidence shows the victim tried to distance himself from defendant just before the shooting, and Currie, in his role as security monitor, attempted to resolve the tension between the two men. *Any provocation arising out of defendant's prior arguments with the victim was no longer immediately present by the time of the shooting, such that a reasonable person in defendant's position would have reacted with homicidal rage.* Hence, we cannot say the trial court erred in failing to instruct the jury on voluntary manslaughter based on heat of passion.

(*Id.* at pp. 1085-1086, emphasis added.)

b. Sufficiency Of The Provocation

This Court has described the requisite manslaughter provocation in various ways. *People v. Hurtado* (1883) 63 Cal. 288, 292, termed it provocation "sufficient to excite an *irresistible* passion in a reasonable person." (Emphasis added.) *People v. Balderas* (1985) 41 Cal.3d 144, 196, spoke of ". . . provocation . . . such as would arouse feelings of *pain or rage* in 'an ordinarily reasonable person' or 'an ordinary man of average disposition.'" (Citing *Berry*, *supra*, 18 Cal.3d at p. 515, emphasis added.) *People v. Pride* (1992) 3 Cal.4th 195, 250, held that criticism about work performance three days before the killing was insufficient as a matter of law "to arouse *feelings of homicidal rage or passion* in an ordinarily reasonable person." (Emphasis added.) *People v. Breverman*, *supra*, 19 Cal.4th at pages 163-164, in apparent reliance on the third paragraph of CALJIC No. 8.42, spoke of "provocation sufficient to produce such effects in a person of average disposition," where "such effects" referred to being "aroused by passion" and having "reason . . . thus obscured. . . ." The plurality opinion in *People v. Lee*, *supra*, 20 Cal.4th 47, described the standard

three different ways: "conduct . . . sufficiently provocative that it would cause an ordinary person of average disposition to act rashly or without due deliberation and reflection [citing *Berry*]" (*id.* at p. 59); "conduct [that] would cause an average person to react with deadly passion" (*ibid.*), and "[t]he provocation must be such that an average, sober person would be so inflamed that he or she would lose reason and judgment." (*Id.* at p. 60.) *People v. Waidla* (2000) 22 Cal.4th 690, 740, footnote 17, stated that the requisite provocation must be "adequate to arouse a reasonable person [citation]" and then found no substantial evidence of provocation "adequate[] to arouse a reasonable person to make the kind of *sudden and devastating* attack that [the defendant] participated in making." (Emphasis added.)

Arguably, there is considerable difference between provocation sufficient to arouse a reasonable person to feel passion or to act rashly, on the one extreme, and provocation sufficient to incite a reasonable person to violence, even killing, on the other. Reasonable persons often become angry and act rashly—by making ill-considered remarks, for example. They may often feel rage, although presumably not homicidal rage. Reasonable persons do not often resort to violence and never—absent true justification—kill.

Some help can be found in the case law's application of the generalized rule to particular facts. Acts that arouse great fear, anger, or jealousy (*People v. Logan, supra*, 175 Cal. at p. 49), or words sometimes (*People v. Berry, supra*, 16 Cal.3d at p. 515; *People v. Valentine, supra*, 28 Cal.2d at p. 144), can constitute adequate provocation. However, verbal provocation must at least amount to taunting and, evidently, must be accompanied by previously provocative conduct, such as the adultery in *People v. Berry, supra*, 16 Cal.3d at page 515, and *People v. Borchers* (1958) 50 Cal.2d 321, 329. Smirking, "dirty" looks, unspecified name-calling, and an invitation to "pull over" in one's car—presumably for a confrontation or fight—are insufficient. (*People v.*

Lucas, *supra*, 55 Cal.App.4th at p. 739.) Predictable conduct by a victim who is resisting a felony does not constitute provocation. (*People v. Balderas*, *supra*, 41 Cal.3d at p. 196.)

c. Source Of The Provocation

The alleged provocation "must be caused by the victim . . . or be conduct reasonably believed by the defendant to have been engaged in by the victim." (*People v. Manriquez* (2005) 37 Cal.4th 457, 583, quoting *People v. Lee*, *supra*, 20 Cal.4th at p. 59.)

In *People v. Spurlin*, *supra*, 156 Cal.App.3d at pages 125-126, this principle was applied to facts similar to those in the instant case. In *Spurlin*, defendant had an argument with his wife, felt ill, and went to the bathroom. The next thing he remembered was striking her in the head with a hammer and strangling her to death. Having broken the hammer in the attack, he retrieved a second hammer and struck his sleeping son in the head, killing him as well. The trial court refused to instruct the jury on heat of passion manslaughter with respect to the son's killing, because there was no evidence the son had done anything to provoke the defendant. (*Id.* at p. 123.) The defendant was convicted of the first degree murder of his son (as well as the second degree murder of his wife).

The Court of Appeal affirmed. Noting that "[c]ounsel have cited us to no California cases dealing directly with the question of whether the provocation necessary to reduce the charge from murder to manslaughter must be caused by the victim," the court looked to out-of-state cases and concluded that provocation must arise from the person who was killed (except in certain instances inapplicable here). (*Spurlin*, *supra*, 156 Cal.App.3d at pp. 125-126.)

People v. Williams (1995) 40 Cal.App.4th 446, reached a similar result. In *Williams*, the defendant tied and gagged two women. He believed one of the woman had stolen from him but there was no apparent provocation from the

other. The defendant shot and killed both. The trial court refused to instruct the jury on heat of passion manslaughter with respect to the second victim. (*Id.* at pp. 451-453.) Citing *Spurlin*, the Court of Appeal affirmed, noting that there was no substantial evidence of provocation or heat of passion with respect to the second victim. (*Id.* at pp. 454-455.)

Courts have also used this general principle to find that a defendant's unusual mental state cannot constitute the necessary provocation because the provocation must come from, or must reasonably believed to come from, the victim. (*In re Thomas C.* (1986) 183 Cal.App.3d 786, 798; see also *People v. Steele*, *supra*, 27 Cal.4th at p. 1252 [evidence of defendant's mental deficiencies but no evidence the defendant was provoked by his victim]; *People v. Lujan* (2001) 92 Cal.App.4th 1389, 1412, 112 Cal.Rptr.2d 769 [defendant's behavior was that of an obsessed stalker, not that of a reasonable person].)

C. Analysis

1. Waiver

Any error in not providing the instructions was waived as "invited error" by counsel's express, reasoned, tactical decision to object to the instructions.[11/] (*People v. Duncan* (1991) 53 Cal.3d 955, 969-970; *People v. Cooper* (1991) 53

---

11. Respondent requests that this Court expressly rule on all waiver arguments. Appellant's failures to raise specific and timely objections below means his claims are waived and are the subject of procedural default. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1116, fn. 20; see also *Cowan v. Superior Court (People)* (1996) 14 Cal.4th 367, 371-372 [noting alternate terminology].)

Imposition of state procedural bars advances important institutional goals in the state criminal justice system (see *In re Robbins* (1998) 18 Cal.4th 770, 778, fn. 1) and precludes subsequent federal habeas review of the claim, except under a narrow class of exceptions. (*Coleman v. Thompson* (1991) 501 U.S. 722, 750.) Accordingly, to repeat, respondent requests that this Court explicitly rule on the waiver argument, even if this Court decides, alternatively, that appellant's contention also fails on the merits. (*Harris v. Reed* (1989) 489 U.S. 255, 264, fn. 10.)

Cal.3d 771, 831.) The remainder of this argument will demonstrate that counsel's deliberate tactical decision was based on an accurate assessment of the evidence and law and was clearly expressed to the trial court. In any event, as the remainder of this argument further demonstrates, appellant's arguments fail on the merits.

2. There Existed No Substantial Evidence Of Voluntary Manslaughter Here

No substantial evidence supported an instruction on heat of passion manslaughter. The assault on Ms. Souza was simply not enough to provoke a reasonable person to a heat of passion. As Ms. Souza herself testified, she was assaulted by one person, Ms. Watchman, at the party. (14 RT 2090.) During the 20- to 25-minute drive from the party to Ms. Souza's home (17 RT 2630), she cried "a little bit" (17 RT 2630, 2664), was upset, and claimed she would get revenge (19 RT 2921-2922). During the drive home, Ms. Souza's friends spoke with her but did not see any signs of bleeding (17 RT 2633-2634), indicating that there was not much blood, if any, at that time. Ms. Souza first noticed that she was bleeding from her mouth when she arrived home but was not sure how she received the injury (14 RT 2145, 2181, 2198), indicating the injury was not severe. Ms. Souza eventually noticed that there was blood "all over her shirt" so she changed into a fresh shirt and tried to wash the bloody one (14 RT 2185-2187); at some point after she arrived home, appellant and codefendant awoke. Ms. Souza "probably" showed them the cut on her mouth and told them she was beaten up by one woman at a party. (14 RT 2098, 2182, 2211-2212.) Ms. Souza convinced them to take her back to the party to retrieve her purse and jacket which she by now realized were missing. (14 RT 2099.) The three drove around looking for the party but could not find it. (14 RT 2101-2102.) Ms. Souza calmed down during the drive. (14 RT 2161.) When they could not find the party, they drove back to the bar but could not find the purse or jacket there,

either. (14 RT 2161, 2210-2211.) Appellant and codefendant drove her home and drove away again; she went to sleep. (14 RT 2103.)

A reasonable person in appellant's situation would become angry and might even say something rash but would not consider, much less resort to, violence. However, even if the provocation standard is merely "aroused passion" and "acting rashly" (the most forgiving standard imaginable under the law), and even if it were satisfied by the evidence, it does not follow that substantial evidence existed to support an instruction on heat of passion manslaughter because the second prong of the test was not met.

Substantial evidence that appellant acted in a sudden heat of passion evidence was also required. This evidence was also lacking. There was nothing sudden, heated, or passionate about the shootings. The evidence shows that the shootings were planned and deliberate. Appellant and codefendant drove around for some time looking for the apartment with their mother but failed to find it. (14 RT 2101-2102.) During this time, their mother had time to calm down and they drove her back home. (14 RT 2103, 2161.) After they dropped off their mother, appellant and codefendant acquired guns and an accomplice. Later that morning, they arrived at the apartment. They did not immediately rush in, however. They waited outside in the car, repositioned the car, and watched. (19 RT 3093-3095.) Finally, after they were done watching, they entered the apartment. Upon entering the apartment, appellant, codefendant, and their accomplice acted in concert by providing cover for one another and sealing off the exits from the living room. (14 RT 2052, 2056; 15 RT 2265.) Codefendant did the talking; appellant watched silently, providing cover with his assault rifle. (14 RT 2054-2056; 2057.) When it appeared that codefendant was meeting resistance from Mr. Arnold, appellant stepped forward and began shooting. (14 RT 2059; 15 RT 2431, 2505.) Mr. Nelson and Ms. Leonesio testified that there were several bursts of gunfire, each followed by a pause

before the next burst. (15 RT 2405-2408; 19 RT 3136-3137.) Every shot that appellant fired hit a human target; and those targets were spread throughout the apartment in nearly every direction. When appellant was finished shooting, he, codefendant, and their accomplice climbed back into their car and slowly drove away. (15 RT 2416-2417.) This is not evidence of a sudden heat of passion, this is evidence of a deliberate plan.

Accordingly, since there existed insufficient evidence to sustain a finding of heat of passion, the defense was entitled to no instruction on voluntary manslaughter.

3. Even Assuming Substantial Evidence Of Voluntary Manslaughter, Instructions Would Have Only Been Warranted As To The Killing Of Ms. Watchman

Even assuming voluntary manslaughter instructions were warranted, the trial court properly ruled that they were only warranted on the count relating to Ms. Watchman.

There was no dispute at trial that only Ms. Watchman assaulted Ms. Souza. Moreover, the evidence shows that appellant and codefendant knew that only one woman had assaulted her. According to Ms. Coss, codefendant demanded, "Show me *which one is the bitch* that kicked my mother's ass and stole her purse." (17 RT 2733-2734.) According to Mr. Douglas, codefendant demanded to know, "*Which one* of you mother-fuckers beat up my mom?" and "*Who's the bitch* that beat up my mom?" (15 RT 2762, 2322-2323, 2345.) According to Ms. Leonesio, codefendant demanded, "I want to know *who's the one* that beat up my mom." (19 RT 3105, 3132.) Ms. Souza even testified that she probably told codefendant and appellant that she was assaulted by one woman. (14 RT 2211-2212.)

Appellant's intentional killing of anyone other than the woman he reasonably believed assaulted Ms. Souza cannot be mitigated under a voluntary manslaughter theory. Anger at one individual, no matter how heated and

passionate, cannot provoke a reasonable person to intentionally shoot and kill bystanders he knows are innocent. Thus, it does not matter whether one relies on a hard rule such as that in *People v. Spurlin*, *supra*, 156 Cal.App.3d 119, which expressly limits the application of sudden heat of passion, or whether one relies solely on the reasonable person prong of the sudden heat of passion analysis. Because of the outrageousness of appellant's conduct, the result is the same.

Appellant argues that most of the shootings were unintentional, that many victims were simply in the line of fire, or that he had no control of his rifle as it blazed away in fully automatic mode. (AOB 99-102.) That argument is soundly refuted by the ballistics evidence showing that every shot fired from the rifle hit a human target; by the physical evidence showing the locations of the victims in various parts of the apartment; by the testimony of Mr. Jones that the shots did not occur fast enough to come from a fully automatic weapon; and by the testimony of Mr. Nelson and Ms. Leonesio that they heard several brief bursts and pauses of gunfire. This is not evidence of out of control gunfire. This is evidence of a skilled marksman carefully searching for targets and then hitting each of them with cold precision.[12/]

Because the trial court limited any voluntary manslaughter instructions to the killing of Ms. Watchman, counsel objected to them. As discussed earlier (see pp. 49-51, *ante*), counsel advised the court that he was relying on a second degree murder theory based on provocation as to all of the killings. He did not want to confuse the jury with different standards of provocation, thus jeopardizing the possible second degree murder verdicts. Given the probability that appellant would not meet the standard required for manslaughter on any of

---

12. Appellant's oldest brother, Mark Souza, testified during the penalty phase that appellant was very familiar with guns, shooting them on camping trips, at the shooting range, and on back roads when the shooting range was closed. (21 RT 3642-3646.)

the killings, counsel made a reasonable tactical decision and did not base it on a misunderstanding of the law.

D. Harmless Error

Appellant argues that the absence of voluntary manslaughter instructions prejudiced him. (AOB 106-121.) Not so.

In a noncapital case, the erroneous failure to instruct on a lesser included offense is reviewed for prejudice under *People v. Watson*, *supra*, 46 Cal.2d 818. (*People v. Breverman*, *supra*, 19 Cal. 4th at p. 178.) In other words, reviewing court may reverse a conviction only if, after an examination of the entire cause, it appears reasonably probable the defendant would have obtained a more favorable outcome absent the error. (*Ibid.*, citing *People v. Watson*, *supra*, 46 Cal.2d at p. 836; see *People v. Sakarias* (2000) 22 Cal.4th 596, 621.)

The United States Supreme Court has held that, in a capital case, the failure to instruct on a lesser included offense does not constitute federal constitutional error if the trial court did instruct the jury on another lesser offense supported by substantial evidence. (*Schad v. Arizona* (1991) 501 U.S. 624, 647.) In *Schad*, the Supreme Court held that the principles of *Beck v. Alabama* (1980) 447 U.S. 625 were satisfied if the jury was provided some noncapital, third option between the capital charge and acquittal. (*Schad v. Arizona*, *supra*, 501 U.S. at p. 647; see *People v. Breverman*, *supra*, 19 Cal.4th at p. 167.) It would therefore follow that, in both capital and noncapital cases, a trial court commits only state law error if, it erroneously fails to instruct on voluntary manslaughter but, as here, does instruct on one or more lesser included offenses supported by substantial evidence.

Here, the jury was provided with the noncapital option of second degree murder. (3 CT 704, 705, 706, 711, 712, 713, 721 [CALJIC Nos. 8.20, 8.30, 8.31, 8.71, 8.73, 8.74, 17.10].) The jury was also provided with the noncapital

option of first degree murder without special circumstances. (3 CT 714, 716, 717 [CALJIC Nos. 8.80.1, 8.83, 8.83.1]). (See *People v. Sakarias*, *supra*, 22 Cal.4th at p. 621, fn. 3.)

This leaves the possibility of only state law error. As explained above, under the state law standard of prejudice, the defendant must show a reasonable probability that the lack of manslaughter instructions affected the verdict. (See *People v. Sakarias*, *supra*, 22 Cal. 4th at p. 621.) Appellant cannot do so because the evidence that he killed his victims under the sudden heat of passion is negligible compared to the overwhelming evidence that he committed deliberate and premeditated murders. (See Statement of Facts, *ante*.) Moreover, the jury found beyond a reasonable doubt that the attempted murders, committed at the same time as the murders, were wilful, deliberate, and premeditated. The jury reached these findings after being instructed,

> To constitute wilful, deliberate, and premeditated attempt to commit murder, the would-be slayer must *weigh and consider the question of killing and the reasons for and against such a choice and, having in mind the consequences, decides to kill* and makes a direct but ineffectual act to kill another human being.

(3 CT 708; CALJIC No. 8.67, emphasis added.) The jury's findings of wilfulness, deliberation, and premeditation are directly at odds with the claim that appellant acted under a sudden heat of passion.

Finally, even assuming a higher standard of prejudice, reversal is not required. (See *People v. Sedeno*, *supra*, 10 Cal.3d at p. 720.) In an instruction applicable to all three murder counts, the court informed the jury about the effect of provocation in determining the degree of the murder, as follows:

> If the evidence establishes that there was provocation which played a part in inducing an unlawful killing of a human being, you should consider the provocation for such bearing as it may have on whether a defendant killed with or without premeditation and deliberation.

(CT 712; RT 3268; see also CALJIC 8.73.) Other instructions told the jury that if it had a reasonable doubt as to whether the defendant committed first degree or second degree murder, it must give the defendant the benefit of that doubt and return a second degree finding. (3 CT 711; CALJIC No. 8.71.) In defense counsel's guilt phase argument to the jury, he highlighted the distinction between first and second degree murder and argued that there was insufficient evidence of premeditation and deliberation, thus requiring a second degree murder verdict. (20 RT 3400-3406; see also 20 RT 3347-3348 [codefendant's counsel emphasizes provocation of appellant and codefendant and its mitigating effect].)

In view of these circumstances, it is clear the jury necessarily resolved the provocation issue against appellant by returning three first degree murder findings, thus rejecting counsel's argument that there was provocation negating premeditation and deliberation. The failure to give a voluntary manslaughter instruction based upon sudden heat of passion was undoubtedly harmless, because based upon the factual resolutions the jury necessarily made in reaching their first degree verdicts, it surely would have returned the same verdicts even if the rejected voluntary manslaughter instruction had been given. (See *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1144-1145; *Chapman v. California* (1967) 386 U.S. 18, 24.)

Accordingly, this second claim of error must fail.

III.

THE TRIAL COURT ADEQUATELY INSTRUCTED THE JURY ON SECOND DEGREE MURDER

Appellant argues that the trial court's standard second degree murder instructions did not adequately pinpoint his theory of the case, that the prosecutor misstated the law during closing argument adding to the prejudicial effect of the trial court's errors, and that the cumulative effect of these state law and federal constitutional errors prejudiced him. Specifically, appellant argues that the instructions inadequately defined the terms "provocation" and "heat of passion." (AOB 122-152) Not so.

A. No Instructional Error Occurred

1. The Proceedings Below

As set forth in our Argument II, setting forth the procedural background (see pp. 49-50, *ante*), counsel for appellant and codefendant requested instructions on the lesser included offense of voluntary manslaughter committed in a reasonable and sudden heat of passion. The prosecutor argued that reasonable heat of passion required provocation from the decedent. The trial court agreed with the prosecutor and refused manslaughter instructions on all counts other than that relating to Ms. Watchman, the only victim who had assaulted Ms. Souza. Appellant's counsel conceded that the instructions should only be given on the count relating to Ms. Watchman.

Appellant's counsel also requested instructions on unpremeditated second degree murder and on the relationship of the evidence of provocation to the element of premeditation. The trial court granted the requests, agreeing that provocation inadequate to reduce murder to manslaughter may nevertheless be relevant on the issues of premeditation and deliberation. (20 RT 3185-3186.) The trial court provided the standard CALJIC instructions on second degree

murder[13] and on the relevance of provocation evidence in determining the degree of murder[14] without limitation to any particular count.

In light of these rulings, appellant's counsel withdrew his request for, and objected to, manslaughter instructions even as to the Ms. Watchman killing, explaining that he was relying on a second degree murder theory on all counts and did not want to confuse the jury with multiple standards of provocation.

Neither appellant's nor codefendant's counsel objected to the adequacy of the instructions. Neither counsel requested clarification or amplification of the instructions. Neither counsel requested special or pinpoint instructions on their theories of second degree murder.

During closing arguments, appellant's counsel highlighted the distinction between first and second degree murder and argued that there was insufficient evidence of premeditation and deliberation, thus requiring a second degree murder verdict. (20 RT 3400-3406.) Codefendant's counsel placed particular emphasis on provocation and its mitigating effect (20 RT 3347-3348.)

2. Applicable Law

Appellant argues that the instructions inadequately explained the term "heat of passion" used in CALJIC No. 8.20, and the term "provocation" used in CALJIC No. 8.73. Not only is this claim forfeited but appellant is wrong on the merits.

As discussed in our Argument II, at pages 51-52, *ante*, it is settled that, in criminal cases, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence even in the absence of a request. However, once a jury is adequately instructed on the elements of the charged offenses, lesser included offenses, and recognized defenses, more specific

---

13. See 3 CT 704, 705, 706, 711, 712, 713, 721 [CALJIC Nos. 8.20, 8.30, 8.31, 8.71, 8.73, 8.74, 17.10].

14. See 3 CT 712 [CALJIC No. 8.73]

instructions which seek to create doubt on the elements are considered pinpoint instructions that the trial court is only required to give upon request. (See *People v. Barton* (1995) 12 Cal.4th at 186, 197; *People v. Saille* (1991) 54 Cal.3d 1103, 1120; *People v. Bolden* (2002) 29 Cal.4th 515, 556.)

A defendant who did not request amplification or clarification of pinpoint instructions at trial, such as CALJIC Nos. 8.20 and 8.73, may not complain on appeal that the instruction was ambiguous or incomplete. (*People v. Mayfield* (1997) 14 Cal.4th 668, 778-779.)

It is true that where the terms used in an instruction have a technical meaning peculiar to the law, the trial court has a sua sponte duty to define the terms. (*People v. Richie* (1994) 28 Cal.App.4th 1347, 1360; *People v. Feinberg* (1997) 51 Cal.App.4th 1566, 1575-1576.) However, if a phrase "'is commonly understood by those familiar with the English language and is not used in a technical sense peculiar to the law, the court is not required to give an instruction as to its meaning in the absence of a request.' [Citation.]" (*People v. Rowland* (1992) 4 Cal.4th 238, 270-271 .) One rationale for the later rule was expressed well in *People v. Halbert* (1926) 78 Cal.App. 598, 612. In a prosecution for involuntary vehicular manslaughter, "gross negligence" was explained by using the terms "wilful," "wanton," and "wantonness," without further definition. The Court of Appeal held that the words were used in their ordinary sense, and "[a] jury which did not understand them would not understand an explanation of them."

Provocation causing heat of passion negates deliberation and premeditation thereby reducing the crime of first degree murder to second degree murder. (*People v. Lee* (1994) 28 Cal.App.4th 1724, 1732; *People v. Middleton* (1997) 52 Cal.App.4th 19, 31.) To inform the jury of the elements of first degree murder and of the lesser included offense of second degree murder, CALJIC Nos. 8.20 and 8.30 state that first degree murder must result

from deliberation and premeditation, not heat of passion, and that in the absence of deliberation and premeditation, the murder is of the second degree. CALJIC No. 8.73, amplifies these instructions by specifically pointing to the evidence of provocation which can negate deliberation and premeditation.

This Court has held that, when voluntary manslaughter is not in issue, the word "provocation" used in CALJIC No. 8.73 and the term "heat of passion" used in CALJIC No. 8.20 bear their common meaning and require no further explanation in the absence of a specific request. (*People v. Cole* (2004) 33 Cal.4th 1158, 1217-1218.) *People v. Mayfield, supra*, 14 Cal.4th at pages 778-779, held that CALJIC No. 8.73 is not ambiguous and does not fail to sufficiently specify the subjective factors that the jury ought to consider in deciding how provocation bears on the elements of first and second degree murder.

3. Analysis

People v. Cole, supra, 33 Cal.4th at pages 1217-1218 and *People v. Mayfield, supra*, 14 Cal.4th at pages 778-779 are dispositive. Because "provocation" or "heat of passion" bore their common meanings at appellant's trial, where voluntary manslaughter was not at issue, the trial court had no sua sponte duty to amplify or clarify the terms. And, because appellant did not request amplification or clarification of the instructions at trial, he may not complain on appeal that the instructions were ambiguous or incomplete. Therefore, appellant's argument that the instructions were ambiguous or incomplete is barred on appeal, as well as meritless. (*People v. Welch* (1999) 20 Cal.4th 701, 757; *People v. Mayfield, supra*, 14 Cal.4th at pp. 778-779.)

B. The Prosecutor's Arguments Did Not Make The Instructions Misleading

Appellant argues that the prosecutor misled the jury by incorrectly stating the law during his closing argument, thus rendering otherwise adequate

instructions inadequate. (AOB 127-128, 141-152.) Not so.

First, the prosecutor argued nothing inaccurately.

Second, even if portions of the prosecutor's arguments were inaccurate, they would not have misled any reasonable juror. The trial court provided the jury with CALJIC No. 1.00, describing the respective duties of judge and jury. This instruction informed the jury that the court was the source of legal instruction and that if anything concerning the law said by the attorneys conflicted with the court's instructions on the law, the jury must follow the court's instructions.[15/] The trial court also provided the jury with CALJIC No. 1.02, informing the jury that statements made by the attorneys were not evidence.[16/] Because of the nature of the closing arguments, the very name of which implies advocacy, attorneys "have wide latitude to discuss and draw inferences from the evidence at trial." (See *People v. Dennis* (1998) 17 Cal.4th 468, 522 [reviewing closing argument for prosecutorial misconduct].) On review, a prosecutor's arguments must be viewed in the context of the argument as a whole, not in isolation. (See *People v. Lucas* (1995) 12 Cal.4th 415, 475 [reviewing closing argument for prosecutorial misconduct].)[17/]

---

15. The instruction provided, "You must apply the law that I state to you, to the facts, as you determine them, and in this way arrive at your verdicts and any finding you are instructed to include in your verdicts. [¶] You must accept and follow the law as I state it to you . . . . *If anything concerning the law said by the attorneys in their arguments or at any other time during the trial conflicts with my instructions on the law, you must follow my instructions.*" (3 CT 668, emphasis added; see CALJIC No. 1.00.)

16. The instruction provided, "*Statements made by the attorneys during the trial are not evidence*, although, if the attorneys have stipulated or agreed to a fact, you must regard that fact as conclusively proved." (3 CT 670, emphasis added; see CALJIC No. 1.02.)

17. Appellant appears to carefully avoid basing his claim on prosecutorial misconduct. If, however, this Court construes the argument as an allegation of prosecutorial misconduct, the claim was waived by appellant's

1. The Prosecutor Correctly Argued That The Extent Of Any Heat Of Passion Could Be Inferred By Examining The Provocative Acts That Allegedly Caused It

Appellant alleges that "[t]he prosecutor incorrectly told jurors that the central question was whether '*provocation*' (not heat of passion) 'prevented the person provoked from forming the intent to kill as a process of process of premeditation and deliberation.' (RT 3446)" (AOB 142.) Appellant further alleges that the prosecutor incorrectly argued that there must be "'*provocation* that *reduces* the crime from a willful, premeditated murder to a second degree murder . . . .' (RT 3450.)" (AOB 143.) The error, according to appellant, is that the instructions did not explain how provocation can be inconsistent with premeditation and deliberation and that the prosecutor's argument emphasized this inadequacy of the instructions. However, as previously discussed, provocation and heat of passion bore their common meanings at appellant's trial. A common sense application of the terms informed the jury that provocation may, but will not necessarily, cause heat of passion. After all, heat of passion must come from somewhere or something. The ultimate question, of course, remains the extent of the heat of passion and whether it was sufficient to affect appellant's capacity to act with deliberation and premeditation. Nothing in the instructions or in the prosecutor's argument changed that. However, because it was impossible to crawl into appellant's head, it was not unreasonable or misleading for the prosecutor to ask the jury to consider the cause of the alleged heat of passion. Such an examination of the provocation that caused the alleged heat of passion could serve as a useful analytical tool and intermediate step. The jury was instructed along these lines with CALJIC No. 8.83.1 which provided, "The specific intent or mental state with which an act is done may be shown by the circumstances surrounding its commission." (3 CT 717.) The arguments

---

failure to object at trial on that ground. See our Argument VI at pages 88-89 for a discussion of the applicable legal standards.

were neither incorrect nor misleading.

2. The Prosecutor Correctly Argued That Subjective Belief Was Relevant And That Predictable Responses To Appellant's And Codefendant's Crimes Were Not Relevant

Appellant alleges "the prosecutor argued that the only evidence of 'provocation' that the jury could consider in determining whether the shooter premeditated was the conduct in which the victims *actually* engaged, as opposed to what the boys *believed* had occurred. (RT 3308, 3420-3421, 3446, 3449.)" (AOB 144.) This is not what the prosecutor argued. Nothing at 20 RT 3308 addresses this issue. At 20 RT 3420-3421 the prosecutor argued the exact opposite of what appellant alleges: "We don't know what [Ms. Souza] told the boys. We don't know. . . . We can presume that they were informed, [codefendant] was, that some violence had been done inside that house to [Ms. Souza]. I don't know if that happened or not, doesn't matter. *If [codefendant] believed that, that's enough.*" (20 RT 3421, emphasis added.) The prosecutor properly focused the jury's attention on appellant's and codefendant's subjective state of mind.

At 20 RT 3446-3447 the prosecutor correctly applied the law. He did "suggest" that only Ms. Watchman's provocative acts were relevant, but made it perfectly clear he was responding to a defense argument that the jury should view Mr. Arnold's predictable response to codefendant's crimes as provocative acts (see 20 RT 3401), something the jury could not do.[18/]

---

18. See, e.g., *People v. Rich* (1988) 45 Cal.3d 1036, 1112, holding that predictable conduct by a victim resisting felonious conduct by the accused is not provocation sufficient for a reduction to second degree murder. Appellant's reliance on *People v. Wickersham*, *supra*, 32 Cal.3d at p. 322 for a contrary position is misplaced. (See AOB 147.) In *Wickersham*, the defendant and her husband were lawfully in their home when the two began struggling over a gun kept there. The defendant shot and killed her husband during the struggle. The lawful conduct prior to the actual shooting in *Wickersham* distinguishes it from *Rich* and the facts of this case. Here, codefendant, appellant, and a third

Appellant cites this last argument two more times in his opening brief, alleging first that the prosecutor "told the jurors that because it was only [Ms.] Watchman who even arguably engaged in 'provocation' under CALJIC No. 8.73, the jurors could not consider her provocative acts as to the charges involving other victims. (RT 3311, 3446-3449.)" (AOB 145-146.) Once again, this is not what the prosecutor argued. Nothing at 20 RT 3311 addresses this issue. The argument at 20 RT 3446-3449 is the same one discussed previously. This was an argument about the amount of evidence, not an argument about how the evidence could be used. Then, appellant again alleges that "the prosecutor relied heavily on the absence of evidence that the other victims *actually* engaged in any egregious conduct in arguing that the element of premeditation and deliberation had been established as to them since there was no 'provocation' to 'prevent' premeditation or to 'reduce' the crimes. (RT 3289, 3311, 3446-3448, 3450.)" (AOB 146.) Nothing at 20 RT 3289 or 3311 addresses this issue. The argument at 20 RT 3446-3448, 3450 is the same one previously discussed. Once again, this is not what the prosecutor argued.

At 20 RT 3449-3450 the prosecutor simply argued that there was no evidence of provocative acts other than Ms. Watchman's. These arguments were neither incorrect nor misleading.

3. The Prosecutor's Objection To Defense Counsel's Argument That More Than One Person Assaulted Ms. Souza Was Based On The Evidence, Not A Legal Claim That The Shooter's Belief Was Irrelevant

Appellant criticizes the prosecutor for objecting to a defense argument that appellant and codefendant believed more than one person had assaulted Ms.

---

individual stormed into an apartment uninvited and threatened the occupants with firearms. When Mr. Arnold predictably stood up to protest, codefendant clubbed him down to the ground with his shotgun. When Mr. Arnold predictably attempted to get up off of the floor, appellant stepped forward and began shooting.

Souza. (AOB 144, citing 20 RT 3241.) The prosecutor objected on the ground that the argument misstated the testimony of Ms. Souza, who was very clear that only one woman had assaulted her. Appellant construes this as a prosecution argument that his subjective belief was irrelevant. Not so. Nearly all of the witnesses testified that codefendant stated he was seeking the one woman who had assaulted Ms. Souza. There was virtually no evidence that codefendant or appellant believed more than one person had assaulted Ms. Souza. Therefore, the prosecution's objection was not based on anyone's subjective state of mind, but on the state of the evidence. The objection was neither incorrect nor misleading.

4. The Prosecutor's Argument That Mr. Arnold Acted Reasonably Was Not A Comment On Appellant's Or Codefendant's State Of Mind

Appellant alleges that the prosecutor's argument that Mr. Arnold acted reasonably somehow misled the jurors into believing the shooter's state of mind was not relevant. (AOB 147.) This is simply not so. The argument was neither incorrect nor misleading.

5. The Prosecutor Properly Argued That The Alleged Provocative Acts Were Unlikely To Have Caused Heat Of Passion Sufficient To Interfere With Premeditation And Deliberation

Appellant alleges that the prosecutor impermissibly argued that the assault on Ms. Souza was insufficient to interfere with appellant or codefendant's premeditation and deliberation. (AOB 148.) As previously discussed, an examination of the acts that allegedly provoke a defendant to a heat of passion is a legitimate way to gain some understanding of the degree to which those passions were aroused. The argument was neither incorrect nor misleading.

For the foregoing reasons, the prosecutor's arguments were neither incorrect statements of law nor misleading. Therefore, appellant's argument that

the prosecutor corrupted otherwise adequate instructions must fail.

C. Harmless Error

Even assuming error, any error was harmless. Even the complete failure to instruct on a lesser included offense does not constitute federal constitutional error if the trial court did instruct the jury on another lesser offense supported by substantial evidence. Here, even assuming error completely invalidating the second degree murder instructions, the jury was provided with the noncapital option of first degree murder without special circumstances. (See our Argument II, Harmless Error, at pp. 63-65, *ante*.) This leaves the possibility of only state law error.

As explained in our Argument II, Harmless Error, at pages 63-65 *ante*, under the state law standard of prejudice, the defendant must show a reasonable probability that the incorrect instructions affected the verdict. Appellant cannot do so because the evidence of intent to kill was overwhelming and the jury's findings that appellant acted wilfully, with premeditation, and with deliberation necessarily precluded heat of passion.

For the same reasons, even if the stricter standard of review applicable to federal constitutional error applied, any error was harmless; surely the jury would have returned the same verdicts even if provocation and heat of passion had been more fully explained. (See *People v. Gutierrez*, *supra*, 28 Cal.4th at pp. 1144-1145; *Chapman v. California*, *supra*, 386 U.S. at p. 24.)

Accordingly, this claim must fail.

IV.

IT IS NOT REASONABLY PROBABLE THAT THE JURY APPLIED THE TRANSFERRED INTENT INSTRUCTION TO THE ATTEMPTED MURDER CHARGE

The trial court's instruction on deliberate and premeditated murder contained a pinpoint instruction on transferred intent. Appellant argues that the jury may have improperly used transferred intent to find him guilty of attempted murder without finding that he intended to kill the attempted murder victims. (AOB 156-162.) Not so.

A. The Proceedings Below

On the prosecution's motion, the trial court added a one-sentence pinpoint instruction to the text of the standard deliberate and premeditated murder instruction. The modified instruction read as follows,

> All murder which is perpetrated by any kind of willful, deliberate and premeditated killing with express malice aforethought is murder of the first degree.
>
> The word "willful," as used in this instruction, means intentional.
>
> The word "deliberate" means formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action. The word "premeditated" means considered beforehand.
>
> If you find that the killing was preceded and accompanied by a clear, deliberate intent on the part of the defendant to kill, which was the result of deliberation and premeditation, so that it must have been formed upon pre-existing reflection and not under a sudden heat of passion or other condition precluding the idea of deliberation, it is murder of the first degree.
>
> The law does not undertake to measure in units of time the length of the period during which the thought must be pondered before it can ripen into an intent to kill which is truly deliberate and premeditated. The time will vary with different individuals and under varying circumstances.
>
> The true test is not the duration of time, but rather the extent of the reflection. A cold, calculated judgment and decision may be arrived at in a short period of time, but a mere unconsidered and rash impulse, even

though it includes an intent to kill, is not deliberation and premeditation as will fix an unlawful killing as murder of the first degree.

To prove that a killing was "deliberate and premeditated" it is not necessary to prove that a defendant maturely and meaningfully reflected upon the gravity of his act.[19]

It is not necessary that premeditation and deliberation be directed at a specific individual, it may be directed at a group.

To constitute a deliberate and premeditated killing, the slayer must weigh and consider the question of killing and the reasons for and against such a choice and, having in mind the consequences, he decides to and does kill.

(3 CT 704, emphasis added; see CALJIC No. 8.20.)

The trial court instructed the jury on attempted murder with CALJIC No. 8.66 and on the willful, deliberate, and premeditated enhancement allegation with CALJIC No. 8.67. (3 CT 707-708.)

The attempted murder instruction did not contain the pinpoint instruction at issue here. No language in the attempted murder instruction, or elsewhere, suggested that it incorporated definitions from other crimes. On the contrary, the trial court instructed the jury that the intent required for each crime differed and that the proper standard for each would be included with the definition of each crime: CALJIC No. 3.31 instructed that, for each charged crime, "there must exist a union or joint operation of act or conduct and *a certain specific intent* in the mind of the perpetrator. Unless such specific intent exists the crime to which it relates is not committed. [¶] *The specific intent required is included in the definitions of the crimes charged* and the lesser included offenses. (3 CT 699, emphasis added.) CALJIC No. 17.02 instructed that "[e]ach count charges a distinct crime. You must decide each count separately. Each defendant may be found guilty or not guilty of any or all of the crimes charged." (3 CT 720.)

During closing argument, the prosecutor did not stray from his position

---

19. This sentence was also added as a pinpoint instruction at the prosecution's request. (2 CT 560.)

that the shooter intended to kill each specific victim. He addressed no other hypothesis. (20 RT 3283, 3289-3290, 3442-3444.) Appellant's counsel did not address whether the two surviving victims were shot with the intent to kill them personally. Codefendant's counsel argued that the shooter intended only to shoot Mr. Arnold and that the shooter fired at all others unintentionally. (20 RT 3363.) Counsel for codefendant conceded that appellant and codefendant were guilty of second degree murder of the three murder victims; as to the victims that were killed, counsel conceded that intent to kill any of them was enough. (20 RT 3324-3328, 3363-3364.) Apart from his general argument that the shootings of all victims other than Mr. Arnold were unintentional, however, he did not address the attempted murder charges.

In addition to its three first degree murder findings, the jury found appellant guilty of two counts of attempted murder and found the wilful, deliberate, and premeditated enhancement to be true in both counts. (3 CT 747-748.)

B. Applicable Law

Both first degree premeditated murder and attempted murder with premeditation require the specific intent to kill. (Pen. Code, §§ 187, 189, 664; *People v. Bland* (2002) 28 Cal.4th 313, 327-328.) The prosecution bears the burden of proving this element beyond a reasonable doubt. (See, e.g., *United States v. Gaudin* (1995) 515 U.S. 506, 509-511.)

Under the transferred intent doctrine, a defendant's intent to kill one victim transfers to unintended victims that are killed. As this Court has explained, "Whether one conceptualizes the matter by saying that the intent to kill the intended target transfers to others also killed, or by saying that the intent to kill need not be directed at a specific person, the result is the same: assuming legal causation, a person maliciously intending to kill is guilty of the murder of

all persons actually killed. If the intent is premeditated, the murder or murders are of the first degree." (*People v. Bland*, *supra*, 28 Cal.4th at p. 323-324.)

Transferred intent does not apply to unintended victims that are not killed. Unlike murder, for which malice may be implied in certain situations, attempted murder requires the specific intent to take a life. (*People v. Bland*, *supra*, 28 Cal.4th at pp. 327-328.) Therefore, "[s]omeone who in truth does not intend to kill a person is not guilty of that person's attempted murder even if the crime would have been murder—due to transferred intent—if the person were killed. To be guilty of attempted murder, the defendant must intend to kill the alleged victim, not someone else. The defendant's mental state must be examined as to each alleged attempted murder victim." (*Ibid.*)

However, on a *concurrent* intent theory, a defendant who intends to kill only one member of a group may be guilty of the attempted murder of everyone in the group. (*People v. Bland*, *supra*, 28 Cal.4th at pp. 327-328.) This Court explained concurrent intent as follows:

> [A]lthough the intent to kill a primary target does not *transfer* to a survivor, the fact the person desires to kill a particular target does not preclude finding that the person also, concurrently, intended to kill others within . . . the "kill zone." The intent is concurrent . . . when the nature and scope of the attack, while directed at a primary victim, are such that we can conclude the perpetrator intended to ensure harm to the primary victim by harming everyone in that victim's vicinity. For example, . . . a defendant who intends to kill A and, in order to ensure A's death, drives by a group consisting of A, B, and C, and attacks the group with automatic weapon fire or an explosive device devastating enough to kill everyone in the group. The defendant has intentionally created a "kill zone" to ensure the death of his primary victim, and the trier of fact may reasonably infer from the method employed an intent to kill others concurrent with the intent to kill the primary victim. When the defendant escalated his mode of attack from a single bullet aimed at A's head to a hail of bullets or an explosive device, the factfinder can infer that, whether or not the defendant succeeded in killing A, the defendant concurrently intended to kill everyone in A's immediate vicinity to ensure A's death. The defendant's intent need not be transferred from A to B, because although the defendant's goal was to kill A, his intent to

> kill B was also direct; it was concurrent with his intent to kill A. Where the means employed to commit the crime against a primary victim create a zone of harm around that victim, the factfinder can reasonably infer that the defendant intended that harm to all who are in the anticipated zone. This situation is distinct from the 'depraved heart' [i.e., implied malice] situation because the trier of fact may infer the actual intent to kill which is lacking in a 'depraved heart' [implied malice] scenario. [Citation.]

(*Id.* at pp. 329-330, internal quotation marks omitted, emphasis in original.)

"This concurrent intent theory is not a legal doctrine requiring special jury instructions, as is the doctrine of transferred intent. Rather, it is simply a reasonable inference the jury may draw in a given case: a primary intent to kill a specific target does not rule out a concurrent intent to kill others." (*People v. Bland, supra*, 28 Cal.4th at p. 331, fn. 6.)

Instructions allegedly permitting a jury to incorrectly apply transferred intent to attempted murder are not prejudicial unless there is a "reasonable likelihood" the jury understood the charge as the defendant asserts. (*People v. Bland, supra*, 28 Cal.4th at p. 332, quoting *People v. Kelly* (1992) 1 Cal.4th 495, 525.) As stated earlier, the correctness of jury instructions is determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction. (*People v. Burgener, supra*, 41 Cal.3d at p. 538.)

C. Analysis

First, the trial court properly provided a pinpoint instruction on transferred intent. In his closing argument, codefendant's counsel argued that the shooter intended to kill only one of the three murder victims. The prosecutor disagreed, but counsel's argument demonstrates that transferred intent was a relevant issue as to the two remaining murder victims. (See *People v. Bolden, supra*, 29 Cal.4th at p. 558 [in appropriate circumstances a requested jury

instruction may be required that pinpoints a theory of the case].)

Second, because appellant did not object to or request amplification or clarification of these legally correct instructions, appellant's argument that the instructions were inadequate or misleading is forfeited on appeal. (*People v. Welch*, *supra*, 20 Cal.4th at p. 757; *People v. Mayfield*, *supra*, 14 Cal.4th at pp. 778-779.)

Third, it is not reasonably likely that the jury applied the transferred intent instruction to the attempted murder counts.

To explain, the transferred intent instruction appeared only in the murder instruction. The attempted murder instruction was supplied separately. The instruction on each crime separately described the intent element that the jury had to find beyond a reasonable doubt before the jury could find appellant guilty. Moreover, the court specifically instructed that each crime charged had a *certain* specific intent element that would be provided with the definition of that crime. Nothing the prosecutor or either defense counsel said during closing argument suggested that the intent to kill one individual could transfer to an unintentional victim in the case of attempted murder. The closest any attorney came to such an argument was codefendant's correct argument that intent transferred to the unintended victims who were killed.

Given the facts of this case, there is no reasonable likelihood that the jury misapplied the transferred intent instruction. Therefore, appellant's argument that the instructions were ambiguous must fail.

D. Harmless Error

Even if the court erred by providing ambiguous instructions on the applicability of transferred intent, the error was harmless. Under either of the factual scenarios possible here and argued to the jury, overwhelming evidence supported appellant's attempted murder convictions even without reliance on

transferred intent. The verdict was surely unattributable to the error. (See *Chapman v. California, supra,* 386 U.S. at p. 24.)

The prosecutor argued that appellant specifically intended to kill each victim he shot. (20 RT 3283-3284, 3289-3290, 3442-3444.) This argument was supported (1) by the testimony that appellant fired several bursts of gunfire, each followed by a pause; (2) by the accuracy of appellant's shooting; and (3) by the location of the victims, bullet holes, and shell casings. This is not evidence of a single uncontrolled burst of automatic-weapon fire, as appellant argues. This evidence demanded the conclusion that appellant moved about and pivoted as he aimed at different victims.

Several bursts of gunfire were heard by Mr. Nelson, the English professor who lived across the street and was bathing at the time. First he heard a single gunshot. Then, after a three to four second pause, he heard five to ten more gunshots. Then, after another three to four second pause, he heard more gunshots, another pause, and another series of gunshots. In all, he testified that he heard perhaps as many as 20 gunshots, a figure that corresponds remarkably well with the 15 shell casings found at the apartment. (15 RT 2405-2406.) Ms. Leonesio, too, testified that she heard several groupings of gunshots. At first, she testified that the gunfire lasted for 20 to 30 seconds, was rapid, and was continuous. However, she later clarified this testimony and explained that there were pauses between groups of shots; she heard bursts, followed by pauses, followed by more bursts. There were several such bursts and pauses. (19 RT 3136-3137.) Mr. Jones, who had previously testified that he was familiar with firearms, testified that the gunshots did not occur quickly enough to come from a fully automatic weapon. It sounded to him as though the shots came from a semi-automatic weapon. He also demonstrated the cadence of the gunshots. (14 RT 2061; 15 RT 2430.) Appellant argues that all of the victims were shot during a single out of control burst of fully automatic gunfire. (AOB 99-100,

162.) However, evidence of repeated bursts of gunfire refute appellant's argument. The repeated bursts of gunfire are consistent with a shooter acquiring new targets, carefully aiming, and then shooting.

The accuracy of appellant's aim was remarkable. He fired his rifle 14 times and hit human targets, in various locations within the apartment, with every single shot. (See our Statement of Facts at p. 27 fn. 5, *ante*.) This is evidence of his intent to shoot each victim. Appellant suggests that the fact that the two attempted murder victims were "only" shot once suggests that appellant did not really mean to shoot them. (AOB 99, 162.) That is unlikely. Considering the accuracy of appellant's shooting and the number of shots already fired, it is more likely that appellant was simply running out of ammunition.

The victims were spread throughout the apartment. The pools of blood the victims left behind show that one was shot near the north western corner of the apartment, one was shot near the middle of the northern wall of the apartment, one was shot near the front door in the north eastern corner of the apartment, one was shot near the middle of the eastern wall of the apartment, and one was shot in the kitchen near the south eastern corner of the apartment. (16 RT 2558-2559; People's Ex. 31.) It is unlikely that an uncontrolled burst of fully automatic weapon fire could have hit so many victims in so many different locations *without hitting anything in between*. This is evidence of accurate purposeful shooting.

A bullet hole in the middle of the northern wall of the apartment and a bullet hole in the southern wall of the apartment were approximately 180 degrees apart. Both bullet holes were the same distance above the ground, about three feet. (16 RT 2574-2578; see also People's Ex. 31.) There were no bullet holes in between other than the ones in appellant's victims. Moreover, these bullet holes must have been made by appellant's rifle. All but one of the shots

fired were fired from appellant's automatic rifle. (18 RT 2857-2858.) The other shot was fired from the third gunman's .25 caliber handgun, but the bullet slug from the handgun was recovered inside the apartment and could not have made either of the holes in the walls. (18 RT 2859.) Of the two bullet holes in the walls, the bullet that made the hole in the northern wall passed through the wall and outside of the apartment and the bullet that made the hole in the southern wall remained buried in that wall. (16 RT 2574-2576.) In short, 180 degrees of separation without a single stray bullet—even the bullets that hit the walls passed through victims first—is evidence of accurate, purposeful shooting.

Shell casings from appellant's assault rifle were spread throughout the apartment in 360 degrees. (16 RT 2557, 2566.) Appellant suggests that the shell casings may have been accidentally moved by emergency personnel. (AOB 15.) While this could explain movement of shell casings on the floor, it does not address the two shell casings on the kitchen counter (separated by a floor to ceiling wall from appellant's initial position near the stairway), the shell casing in the fruit basket on the kitchen table, or the shell casing on top of the chair near the patio door. (16 RT 2564-2566, 2580, 2584-2585.) Again, this is evidence that appellant moved about the room and pivoted as he aimed at new targets and fired.

Because the jury surely did not rely on transferred intent in light of the foregoing evidence, the verdict was surely unattributable to the pinpoint instruction. Therefore, any error was harmless.

Lastly, even if appellant's view of the facts is adopted, any error in the pinpoint instruction did not prejudice him. Despite overwhelming evidence to the contrary, appellant argues that all but one or two of the victims were unintentionally shot in an uncontrolled burst of fully automatic fire. (AOB 99-100, 162.) This argument places all of appellant's victims in the same "kill zone." Thus, the shootings would fall squarely within the ambit of concurrent

intent. Even if the jury agreed with appellant's theory, the verdict was surely unattributable to an erroneous instruction on transferred intent.

V.

CALJIC No. 17.41.1 IS A VALID INSTRUCTION

Appellant argues that the trial court erred, and violated many of his constitutional rights, by instructing the jury with CALJIC No. 17.41.1.[20] (AOB 163-165.) Not so.

Any argument that CALJIC No. 17.41.1 infringes upon defendant's constitutional right to jury nullification, is without merit in light of *People v. Williams* (2001) 25 Cal.4th 441, 449-463. The court in *Williams* declared: "Jury nullification is contrary to our ideal of equal justice for all and permits both the prosecution's case and the defendant's fate to depend upon the whims of a particular jury, rather than upon the equal application of settled rules of law . . . ." (*Id.* at p. 463.) The court explained that, although the possibility of jury nullification exists because of certain procedural aspects of our criminal justice system, a defendant does not have a constitutional right to that possibility. (*Id.* at pp. 449-451.)

This Court should reject the remainder of defendant's claims in light of *People v. Engelman* (2002) 28 Cal.4th 436. In *Engleman*, this Court, in the exercise of its supervisory powers, disapproved the future use of CALJIC No. 17.41.1. (*People v. Engelman, supra,* 28 Cal.4th at p. 449.) However, the court concluded that the instruction did not constitute "a violation of the constitutional right to trial by jury or otherwise constitutes error under state law" "merely because CALJIC No. 17.41.1 might induce a juror who believes there has been

---

20. The trial court instructed the jury: "The integrity of a trial requires that a jurors at all times during their deliberations conduct themselves as required by these instructions. Accordingly, should it occur that any juror refuses to deliberate or expresses an intention to disregard the law or to decide the case based on penalty or punishment or any other improper basis, it is the obligation of the other jurors to immediately advise the court of the situation." (3 CT 726.)

juror misconduct to reveal the content of deliberations unnecessarily (or threaten to do so)." (*People v. Engelman, supra*, 28 Cal.4th at p. 444.) This Court also determined that, in light of the other instructions given, the instruction did not violate the defendant's state constitutional right to a unanimous jury verdict and to the independent and impartial decision of each juror. (*Ibid.*) It stated: "The defendant's state constitutional right to a unanimous verdict is not violated when that right has been explained to the jury and an instruction gives rise to a risk that jurors might be encouraged to exert pressure on each other by threatening to bring in the court to mediate disputes among jurors." (*Ibid.*)

The instructions in this case, like in *Engelman*, conveyed the necessity for each juror to exercise his or her impartial, independent judgment.[21] (Cf. *People v. Engelman, supra*, 28 Cal.4th at pp. 444-445.) The jury heard closing arguments and instructions and retired to deliberate. Nothing in the record of this case indicates that the jury's deliberations were chilled or otherwise constitutionally impaired by the challenged instruction.

Therefore, appellant's argument must fail.

---

21. The court instructed the jury: "The People and the defendant are entitled to the individual opinion of each juror. [¶] Each of you must consider the evidence for the purpose of reaching your verdict, if you can do so. Each of you must decide the case for yourself, but should do so only after discussing the evidence and the instructions with the other jurors. [¶] Do not hesitate to change an opinion if you are convinced it is wrong. However, do not decide any question in a particular way because a majority of the jurors, or any of them, favor that decision. [¶] Do not decide any issue in this case by chance, such as the drawing of lots or by any other chance determination." (3 CT 724; see CALJIC No. 17.40.)

VI.

THE PROSECUTOR COMMITTED NO ACTS OF PREJUDICIAL MISCONDUCT AND APPELLANT'S CONTRARY ARGUMENTS ARE FORFEITED

Appellant argues that the prosecutor misled the jury on numerous occasions by referring to "false" evidence during argument, which respondent understands to be allegations of prosecutorial misconduct. (AOB 166-177.) Not so.

A. Applicable Law

In *People v. Jablonski* (2006) 37 Cal.4th 774 [38 Cal.Rptr.3d 98] this Court summarized the law concerning prosecutorial misconduct during closing argument as follows:

> "When a prosecutor's intemperate behavior is sufficiently egregious that it infects the trial with such a degree of unfairness as to render the subsequent conviction a denial of due process, the federal Constitution is violated. Prosecutorial misconduct that falls short of rendering the trial fundamentally unfair may still constitute misconduct under state law if it involves the use of deceptive or reprehensible methods to persuade the trial court or the jury." (*People v. Panah* [(2005)] 35 Cal.4th [395,] 462, [].) As a prerequisite for advancing a claim of prosecutorial misconduct, the defendant is required to have objected to the alleged misconduct and requested an admonition "unless an objection would have been futile or an admonition ineffective." (*People v. Arias* (1996) 13 Cal.4th 92, 159, [].) "A defendant claiming that one of these exceptions applies must find support for his or her claim in the record. [Citation.] The ritual incantation that an exception applies is not enough." (*People v. Panah, supra,* at p. 462 [].) "'To prevail on a claim of prosecutorial misconduct based on remarks to the jury, the defendant must show a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner.' [Citation.] 'Prosecutors have wide latitude to discuss and draw inferences from the evidence at trial. [Citation.] Whether the inferences the prosecutor draws are reasonable is for the jury to decide.'" (*People v. Wilson* (2005) 36 Cal.4th 309, 337 [].)

(*People v. Jablonski*, *supra*, 37 Cal.4th at pp. ___ [38 Cal.Rptr.3d at pp. 147-148].)

There is no exception to the waiver rule for capital cases. (*People v. Frye* (1998) 18 Cal.4th 894, 969; *People v. Clair* (1992) 2 Cal.4th 629, 662.) Moreover, as this Court has stated numerous times, there is no "close case" exception to avoid the waiver bar to consideration of claims. (*People v. Cain* (1995) 10 Cal.4th 1, 48; *People v. Carrera* (1989) 49 Cal.3d 291, 321.)

B. Appellant's "False Evidence" Argument

Attempting to evade the rule requiring a timely objection, appellant incorrectly characterizes argument as "false evidence."[22/] To support his false evidence theory, appellant cites cases addressing suppression of exculpatory evidence, which is an altogether different situation from the one alleged here.

For example, in *Banks v. Dretke* (2004) 540 U.S. 668, 693, 699-702, the prosecutors did not disclose that a key witness was a paid police informant, and stood by as that witness testified to the contrary. In *United States v. Agurs* (1976) 427 U.S. 97, 103, the prosecutors did not disclose the murder victim's criminal record although the record demonstrated the victim's violent character and was pertinent to the defendant's justification defense. In *Giglio v. United States* (1972) 405 U.S. 150, 153, the prosecutors did not disclose their promise to the key government witness that he would not be prosecuted if he testified. In *Napue v. Illinios* (1959) 360 U.S. 264, 269, the government's key witness testified that he had not been promised anything in return for his testimony; however, the government had promised him a reduction of sentence but not disclosed the promise. In *Belmontes v. Woodford* (9th Cir. 2003) 350 F.3d 861,

---

22. Acknowledging that he lodged no objection to any of the alleged misconduct, appellant argues that no objection is required when a prosecutor relies on false evidence. (See AOB 167, 172.)

878-879, the prosecutor failed to disclose that he had helped a government witness receive a favorable disposition of several misdemeanor charges and failed to correct the witnesses false and misleading testimony that he had not been "busted" before. In *United States v. LaPage* (9th Cir. 1985) 767 F.2d 488, 489-490, a government witness lied on the witness stand and the prosecutor did nothing although the prosecutor knew the witness was lying.

Two things distinguish appellant's nondisclosure cases from the misconduct he alleges. First, in the nondisclosure cases, *actual evidence* was introduced or was prevented from being introduced. In the misconduct appellant alleges, there is no evidence, only argument from the prosecutor. However, the jury was specifically instructed that statements made by the attorneys are not evidence. (3 CT 670; CALJIC No. 1.02.) Second, in the nondisclosure cases, relevant information was kept from the defense and the jury. In the misconduct appellant alleges, all of the relevant information was presented to the jury and it had an opportunity to resolve competing viewpoints.

One case appellant relies upon demonstrates the second distinction well. In *People v. Seaton* (2001) 26 Cal.4th 598, 646-650, the relevant events occurred in the courtroom. The prosecutor there developed doubts about the testimony on blood clotting provided by his expert witness. The doubts were based solely on testimony at trial by competing experts. The prosecutor nonetheless relied on his expert's testimony in closing argument on guilt. After the guilt phase but before the penalty phase of the trial, the prosecutor drafted an internal memorandum to his supervisor reflecting his doubts and criticizing the expert, calling his expert's testimony dubious. After the penalty phase, the defense was provided the prosecutor's memorandum and those of two other prosecutors that were also critical of the expert. This Court held that the prosecutor did not err by relying on the expert in closing argument because, "the jury is capable of deciding which of the competing experts is the more

convincing, and the prosecutor's views have no bearing on that decision." (*Id.* at p. 648.)

For the foregoing reasons, respondent will proceed with a prosecutorial misconduct analysis.

C. Proceedings Below And Analysis

1. Waiver

As a preliminary matter, defense counsel failed to raise a contemporaneous objection or request an admonition after any of the alleged instances of prosecutorial misconduct. Moreover, none of the prosecutor's challenged comments or questions were so improper or inflammatory that a timely admonition would have been inadequate to cure any possible harm. (See, e.g., *People v. Samayoa* (1997) 15 Cal.4th 795, 841; *People v. McPeters* (1992) 2 Cal.4th 1148, 1180-1181; *People v. Wharton* (1991) 53 Cal.3d 522, 566; *People v. Harris* (1989) 47 Cal.3d 1047, 1084.) Because a timely objection and admonition could have cured any harm flowing from the prosecutor's challenged actions, this Court should conclude that appellant's claims of prosecutorial misconduct are barred on appeal. (*People v. Cain*, *supra*, 10 Cal.4th at p. 78; *People v. Hardy, supra,* 2 Cal.4th at pp. 208-209.)

2. Guilt Phase Arguments

a. Almost Every Victim Was Shot Above The Waist

Appellant alleges the prosecutor "pointed to the 'fact' that all of the victims had been shot in vital spots, rather than in the legs or other extremities. (20 RT 3441.) This evidence was false." (AOB 168.) Not so.

The prosecutor made no such argument and the record contains no such argument at the location appellant cites. What the prosecutor did argue was, "When you look at these photographs, these shots were all placed in locations that would—could be lethal shots. [¶] If you look at where the wounds are,

whoever fired the shots hit them in spots that you know would cause death or serious bodily injury. No one's hit in the foot or lower leg, *almost* everybody's hit above the waist and the vast majority are, in fact, in the chest or head." (20 RT 3281-3282, emphasis added.) The argument accurately described the evidence.

b. Mr. James And Ms. John Were Shot Twice

The prosecutor argued that Mr. James and Ms. John had each been shot twice. (20 RT 3442.) Given the clear and otherwise undisputed evidence before the jury that each had only been shot once, this error can only be explained as a simple counting error by the prosecutor that harmed nothing other than his own credibility. Given the testimony at trial, it is not reasonably likely that the jury applied the argument in an improper or erroneous manner.

c. The Lack Of Stippling On Mr. Arnold Indicated He Was Shot From A Distance

The prosecutor argued that the absence of stippling on Mr. Arnold's skin and clothing indicated that he was shot from a distance further than from where codefendant was standing. (20 RT 3454.) Appellant alleges, "[T]his 'evidence' was false. Dewayne Arnold's shirt was not preserved or tested for the presence of stippling." (AOB 168.) Not so.

The prosecutor's argument was correct; appellant's is misleading. Mr. Arnold's shirt was not preserved for testing. However, his pants were preserved and were tested. Dr. Van Meter, the pathologist, testified that there was a bullet hole in Mr. Arnold's pants with no evidence of stippling, only a "bullet wipe" indicating Mr. Arnold had been shot from too far away for stippling to occur. (13 RT 1949-1950, 2011-2013.) The argument correctly described the evidence.

d. Appellant Fired Until He Had No Ammunition

The prosecutor argued that appellant fired until he had no ammunition. (20 RT 3921.) Appellant alleges that this "evidence" was untrue. (AOB 169.) Not so. Appellant points out that he "only" fired 14 rounds from his rifle and

could have had more ammunition. However, Mr. Lee, the criminalist, testified that the maximum capacity of assault rifle magazines ranges from 5 to 50 or more rounds. (18 RT 2865-2866.) No evidence suggested appellant had more than 14 rounds of ammunition when he entered the apartment. The argument was a reasonable inference.

3. Penalty Phase Arguments

a. Powder Burns And A Close-Range Gunshot

The prosecutor argued that "powder burns on the victim" and "[p]lacing the gun up to their body" was evidence of the seriousness of appellant's crimes. (22 RT 3921.) Appellant alleges that this "evidence" was false, that there was no evidence of powder burns on any victim. (AOB 169.) Not so.

Regarding the powder burns, Dr. Van Meter testified that there was stippling, or powder burns, on Ms. Watchman's clothing. The powder simply did not burn through her clothing and reach her skin. This indicated she had been shot from a distance of about two feet. (13 RT 1950-1952, 1995-1996.) The argument correctly described the evidence. Regarding the "placing the gun up to their body" argument, the prosecutor was not suggesting that there was evidence of a contact wound. Rather, the argument points out that two feet is a very close range from which to shoot an unarmed woman with an assault rifle. The argument correctly described the evidence.

b. Appellant Started "At The Top" With His Violent Crimes

The prosecutor argued,

> Something was mentioned about how the defendant doesn't have the long criminal adult felony conviction record. Well, he's got five felony convictions on his record right now. You know, he's not one of those guys that started with petty offenses, small time felony, moved up the ladder and by the time he's 35 he's got a bunch of felony convictions. As soon as she was able, as soon as he's 18 years old, he starts right at the top. Multiple murder. He couldn't have a long adult history for Christ's sake, he was only 18 when he did this. It took him a few months to get to the top. Somehow that's supposed to be mitigation?

(22 RT 3920.) Appellant alleges, "The prosecutor's implication was obvious that while [appellant] did not have an 'adult felony conviction record,' he may well have had a long juvenile or other record to which the prosecutor was privy but the jury was not." (AOB 170.) Not so.

There is no need to seek hidden implications in the prosecutor's argument, the thrust of the argument was damning enough on its face: appellant did not drift slowly into a life of crime; he started right at "the top." The argument correctly described the evidence.

c. Appellant Would Enjoy Some Privileges In Prison

The prosecutor argued that life without parole was not appropriate because, even in prison, appellant could enjoy aspects of life he had taken from the victims. For example, the prosecutor argued, "he can have his family visit him when he's in prison. *Maybe* even get married and have conjugal visits." (22 RT 3922, emphasis added.) Appellant alleges that these remarks were false. (AOB 170.) The argument was partially incorrect but was not prejudicial.

The argument incorrectly stated that appellant might be able to receive conjugal visits. At the time, California law had recently changed and such visits were prohibited by the California Code of Regulations. (Pen. Code, § 2601 [amended in 1997 to delete language granting prisoners the right to personal visits]; CCR Title 15, § 3177, subd. (b)(2) [prisoners sentenced to life without parole not entitled to overnight visits from family members].) However, the remainder of the argument was correct. Moreover, the main point of the argument, that appellant would enjoy privileges in prison that he had taken from his victims, was not affected by the error. This is especially true in light of jury instructions informing the jurors to accept the law as stated by the court (3 CT 668; CALJIC No. 1.00). (*People v. Frye*, *supra*, 18 Cal.4th at p. 970.)

Therefore, it is not reasonably likely that the jury applied the argument in an improper or erroneous manner.

d. Mr. James Died Of A Drug Overdose Two Years After The Shooting

The prosecutor argued that Mr. James died two years after the crimes as a result of a drug overdose and that appellant was responsible because the trauma of the shooting had driven him to drugs. (22 RT 3885-3886.) The argument was partially incorrect but was not prejudicial. There was no evidence that Mr. James died of a drug overdose, although the prosecutor did introduce his death certificate into evidence. (Pros. Ex. 35.) However, whether a victim appellant shot in the shoulder died two years later as a result of a drug overdose or some other cause does not seem significant compared to appellant's three first degree murders and two attempted murders. As for the mental anguish Mr. James suffered as a result of the shooting, that was a reasonable inference from the evidence and needed no reference to drugs to carry significant weight. Therefore, it is not reasonably likely that the jury applied the argument in an improper or erroneous manner.

e. Counsel Was A Skilled Advocate Who Has Presented Conflicting Theories

The prosecutor argued that appellant's counsel was a skilled advocate who was doing his best to represent his client. He then quoted from the record of codefendant's counsel's closing argument, incorrectly attributing the quotations to appellant's counsel. Using the quotations, he noted that the defense had argued during the guilt phase that nobody knew how Ms. Souza's purse and coat got into the trunk of Ms. Dale's car. He then noted that, during the penalty phase, appellant had called a witness who testified that she had driven Ms. Souza home as many as 36 times because she had left her purse and coat in the trunk of Ms. Dale's car. He then asked the jury to bear such discrepancies in mind when appellant's counsel argued at the close of the

penalty phase. (22 RT 3887-3889.) Appellant alleges that this was "a scathing attack on [appellant's] defense counsel, Mr. Costain, as a liar whom the jurors could not trust." (AOB 171.) Not so. The argument incorrectly identified the source of the quotation—a matter that could have been easily remedied had there been an objection at trial—but it was not a personal attack on defense counsel. The first part of the argument, conceding that counsel was a skilled advocate doing his best to represent his client, was a fair comment on any defense counsel's role but did not suggest that any advocate was permitted to be dishonest. The second part of the argument, contrasting the defense positions in the guilt and sentencing phases of trial, did not suggest dishonesty, only inconsistency, and was a fair comment on the argument and evidence presented to the jury. (Compare *People v. Medina* (1995) 12 Cal.4th 651, 759 [to observe that an experienced defense counsel will attempt to "twist" and "poke" at the prosecution's case does not amount to a personal attack on counsel's integrity]; with *People v. Gionis* (1995) 9 Cal.4th 1196, 1217 [argument that defense counsel has "duty" "to lie, conceal and distort everything and slander everybody" improper but not prejudicial in that case]; *People v. Bell* (1989) 49 Cal.3d 502, 538 ["to the extent that the remarks might be understood to suggest that counsel was obligated or permitted to present a defense dishonestly, the argument was improper."].)

D. Harmless Error

Viewed individually or cumulatively, there is no reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner in either the guilt or the penalty phase of the trial. (See *People v. Pinholster*, *supra*, 1 Cal.4th at p. 945 [though prosecutor's conduct occasionally crossed the line of appropriate advocacy, none of the claims of

misconduct contributed to the verdict].) Therefore, appellant's arguments must fail.

VII.

APPELLANT WAS NOT DENIED HIS RIGHT TO TRIAL BY A FAIR AND IMPARTIAL JURY

Appellant argues that his right to a trial by an impartial jury was violated. Specifically, appellant first argues that the trial court erroneously excluded potential jurors inclined not to impose the death penalty, and erroneously retained potential jurors inclined to impose it. (AOB 179-215.) Not so. Second, appellant argues that the trial court's rulings, in conjunction with the prosecutor's use of peremptory challenges, resulted in a jury impermissibly inclined to impose the death penalty. (AOB 215-230.) Not so.

A. Challenges To Prospective Jurors

1. Applicable Law

Prospective jurors may be excluded if their views would prevent or substantially impair the performance of their duties as jurors (*Wainwright v. Witt* (1985) 469 U.S. 412, 424; *People v. Rodrigues*, *supra*, 8 Cal.4th at p. 1140) in the case before them. (*People v. Earp* (1999) 20 Cal.4th 826, 853; *People v. Bradford* (1997) 15 Cal.4th 1229, 1318; *People v. Wader* (1993) 5 Cal.4th 610, 652-653.) There is no requirement that a prospective juror's bias against the death penalty be proven with unmistakable clarity. (*Wainwright v. Witt, supra,* 469 U.S. at p. 424; *People v. Carpenter* (1999) 21 Cal.4th 1016, 1035.) Rather, it is sufficient that the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law in the case before the juror. (*People v. Rodrigues, supra*, 8 Cal.4th at p. 1147; *People v. Hill* (1992) 3 Cal.4th 959, 1003.)

If a juror gives conflicting or ambiguous answers to questions about his or her views on the death penalty, the trial court is in the best position to evaluate the juror's responses, so its determination as to the juror's true state of

mind is binding on the appellate court. (*Wainwright v. Witt*, *supra*, 469 U.S. at pp. 428-429; *People v. Phillips* (2000) 22 Cal.4th 226, 234; *People v. Rodrigues*, *supra*, 8 Cal.4th at p. 1147.) Any ambiguities in the record are resolved in favor of the trial court's assessment, and the reviewing court determines whether the trial court's findings are fairly supported by the record. (*People v. Crittenden* (1994) 9 Cal.4th 83, 122; *People v. Howard* (1988) 44 Cal.3d 375, 417-428.) The standard of review is whether the determination is supported by substantial evidence and is not clearly erroneous. (*People v. Memro* (1995) 11 Cal.4th 786, 817-818; *People v. Gordon* (1990) 50 Cal.3d 1223, 1262.)

"To preserve the right to assert on appeal that the trial court wrongly denied a challenge for cause, a defendant must (1) exercise a peremptory challenge to remove the juror in question, (2) use all of his or her peremptory challenges, and (3) communicate to the court dissatisfaction with the jury selected. [Citation.]" (*People v. Seaton*, *supra*, 26 Cal.4th at p. 637; *People v. Williams* (1997) 16 Cal.4th 635, 667.)

2. The Trial Court Properly Excluded Four Prospective Jurors Who Demonstrated An Inability To Perform Their Duties

Appellant argues that prospective jurors Belinda Madali, Ted Froyland, Elsie Rutland, and Danny Leong, were wrongfully excluded by the trial court after they expressed anti-death penalty views. (AOB 182-199.) Not so. The court excused each juror cause for appropriate reasons.

a. Prospective Juror Belinda Madali

When the court asked Ms. Madali if she could realistically consider both sentencing options in a capital case, she answered, "It would be really, really difficult for me to make that decision. I mean it would take a whole lot before that decision could be made by me." (6 RT 897.) Asked what she meant by a "whole lot," Ms. Madali explained, "It is basically the whole circumstance. Everything that it takes—I mean everything that's taken and accounted for. The

evidence, the person, what—the circumstance, what happened. All of that." (6 RT 897.) Then the following discussion occurred:

> Q: [by the court] . . . . But when you talk about making that decision, is there something within you that you're kind of warning me about, that you might not be able to do that: You might not be able to realistically consider both choices because of your own feelings or the unsureness of your feelings?
>
> A: Yes.
>
> Q: As you—are there, now, realistically, practically thinking that you could keep an open mind, hear all of the evidence and depending on the evidence that you could impose the death penalty? Do you think you could?
>
> A: I don't know how to answer that. It really—I mean I—to me it would really take a whole—I mean when I say a whole lot, I don't know what would make it—I can't say that I wouldn't say no to the death penalty. But I—it would take a whole, whole, whole, lot.
>
> Q: If an individual were charged with, oh, being a major participant in the [H]olocaust, if an individual were charged with blowing up a public building with 200 people including infants in it are those things you think—
>
> A: A possibility.
>
> Q: —fit a whole lot?
>
> A: Yes.
>
> Q: If somebody's charged with shooting a gun and shooting several people, does that measure up to a whole lot in your mind?
>
> A: No. All depends on the state of mind too.
>
> Q: Okay. I understand as you're struggling with this trying to express your feelings, as I understand it, you're conveying that you really have a problem with the death penalty?
>
> A: Yes.
>
> Q: But you also thought about it enough to appreciate a lot can go into it besides a body count; but then you also come back to the idea that you really have a problem with the death penalty?
>
> A: Yes.

(6 RT 897-899.)

Codefendant's counsel then questioned Ms. Madali further. When he asked whether she could be open to both penalties, she said, "In my heart, it would make me sick to make that decision. (6 RT 900.) Counsel asked again and Ms. Madali said, "yes." (6 RT 901.)

The prosecutor challenged Ms. Madali for cause. During his argument, he repeatedly emphasized her demeanor when answering questions, and also stressed how she struggled and paused before answering. The prosecutor remarked that Ms. Madali struggled for "some period" before answering that she could possibly consider the death penalty for a major participant in the Holocaust or somebody who blew up a large building with 200 people, including infants, inside yet, immediately said "no," in no uncertain terms, when asked about somebody who shot several people with a gun. (6 RT 911.) The court agreed that there were "—five—six-second delays sometimes when she was being asked about some of these questions. She was really struggling." (6 RT 911.) Codefendant's counsel argued in opposition to the challenge. The court reminded counsel that, "[t]his lady would be sickened at the thought of it." "You got one right answer out of her after the unique standard that was set up, but she struggled and still was making it clear, even as she struggled, that it might be possible, but it took seconds of silence before she would even suggest that." (6 RT 913.) Concluding that the issue was not even "close," the court granted the challenge for cause. (6 RT 914.)

There was substantial evidence that Ms. Madali's views would prevent or substantially impair the performance of her duties as a juror. She expressed extreme discomfort at the very thought of determining sentence in a case involving the death penalty. She also admitted that she might not be able to even consider death as a punishment. Therefore, the trial court properly dismissed her for cause.

b. Prospective Juror Ted Froyland

The trial court asked Mr. Froyland if he could realistically and practically consider both sentencing options in a capital case. Mr. Froyland answered, "Not without difficulty." (5-c RT 745.) Asked whether his difficulty would be more with one option than the other, he answered, "Oh, absolutely"; "The death penalty is a very final penalty, so not to be taken lightly." (5-c RT 745.) Asked if he meant more than the obvious, that the death penalty is a very final thing, Mr. Froyland agreed with the trial court's suggestion that he was saying it would be "very difficult" for him to impose the death penalty. (5-c RT 745.) Mr. Froyland acknowledged indicating in his questionnaire that he was moderately in favor of the death penalty, and told the judge that his response in the questionnaire was accurate. (5-c RT 746.) Mr. Froyland then drew a distinction between whether one considered the individual to be punished or society at large. (5-c RT 746.) The trial court informed Mr. Froyland that he was only permitted to look at the individual, "not the costs to society or anything like that." (5-c RT 746-747.) Asked again whether he "would be a fair juror to decide that, about the death penalty," Mr. Froyland answered, "I'd be more in favor of life imprisonment." (5-c RT 747.) Asked whether he had "prejudged," the following exchange occurred:

> A: [By Mr. Froyland] Since this trial has come to my attention and facing the potential of serving on as a juror of it, I have looked at some retrospect in areas that I have not looked at before, actually. And with the religious convictions that I have and so forth, I would be more likely to sway or fall on the side of more lenient punishment. But that's not having heard one fact, whatsoever.
>
> Q: Okay. And I know your religion has as a major element component of it that—that's self reflection and looking within. [¶] How strong is that feeling as you've looked within?
>
> A: Pretty strong.

(5-c RT 748.)

The court had no further questions. Neither defense counsel nor the prosecutor had any questions. The prosecutor then challenged Mr. Froyland for cause. Defense counsel did not object and the challenge was granted without comment. (5-c RT 748-749.)

There was substantial evidence that Mr. Froyland's views would prevent or substantially impair the performance of his duties as a juror. Although moderately in favor of the death penalty in the abstract, his feelings about its application in any particular case were different. Asked if he had "prejudged" the penalty issue, he answered that he had strong convictions that would cause him to choose the more lenient punishment. (5-c RT 748.)

Mr. Froyland demonstrated views that would have prevented or substantially impaired the performance of his duties as a juror. Moreover, while appellant's failure to object does not waive his right to raise the issue on appeal (see *People v. Velasquez* (1980) 26 Cal.3d 425, 443), in this situation it does suggest defense counsel's concurrence in the court's assessment of an inability to impose the death penalty. (Cf. *People v. Balderas*, *supra*, 41 Cal.3d at p. 180 [defense acceptance of jury without exhausting peremptory challenges is "strong indicator[ ] that the jurors were fair, and that the defense itself so concluded"].) The trial court properly sustained the challenge for cause.

c. Prospective Juror Elsie Rutland

In her jury questionnaire, Elsie Rutland indicated that she was opposed to the death penalty except in special circumstances or severe cases. (4 RT 552.) She had not ruled out the possibility of a death sentence in all cases, but, asked whether she could give the prosecution a "fair shake in this," she said, "No, because I don't believe in the death penalty, basically." (4 RT 552-553.) Other than for mass murderers, serial killers, and war criminals, Ms. Rutland could not think of an example where the death penalty might be appropriate. (4 RT 553.)

Defense counsel asked Ms. Rutland no questions. The trial court sustained the prosecutor's challenge for cause. The defense did not object. (4 RT 553.)

Ms. Rutland demonstrated views that would have prevented or substantially impaired the performance of her duties as a juror. Moreover, as previously discussed with respect to Mr. Froyland, while the failure to object does not waive the right to raise the issue on appeal, in this situation it does suggest defense counsel's concurrence in the court's assessment of an inability to impose the death penalty. The trial court properly sustained the challenge for cause.

d. Prospective Juror Danny Leong

In his jury questionnaire, Danny Leong wrote, "I think it is not necessary to have the death penalty." (8 RT 1239.) On voir dire, he testified that he did not see himself as someone who could impose the death penalty. (8 RT 1239.) Defense counsel asked no questions. The trial court sustained the prosecutor's challenge for cause. The defense did not object. (8 RT 1239.) After Mr. Leong had left the courtroom, the trial court commented, "usually I try to elaborate more. I'm sorry, I drew a blank. I couldn't figure how to ask it a different way, except less clearly." Counsel for codefendant responded, "His answer would have been the same, I'm sure." (8 RT 1240.)

Mr. Leong demonstrated views that would have prevented or substantially impaired the performance of his duties as a juror. Here, too, the failure to object suggests defense counsel concurred in the court's assessment of an inability to impose the death penalty. The trial court properly sustained the challenge for cause.

3. The Trial Court Properly Denied Defense Challenges For Cause Against Three Prospective Jurors Who Demonstrated They Could Perform Their Duties

Appellant argues that the trial court improperly denied defense challenges for cause against three prospective jurors. (AOB 218-225.) Not so. In any

event, appellant was not prejudiced because these potential jurors did not sit on his jury.

a. Michael Labuda

Michael Labuda repeatedly testified that he could listen to all of the evidence before deciding on a sentence. (6 RT 846, 847-848, 852, 857.) He had also indicated in his jury questionnaire that he believed life in prison without the possibility of parole was a more serious sentence than the death penalty. (6 RT 846.) Since marrying about 18 months earlier, Mr. Labuda had become a weaker supporter of the death penalty; his wife was strongly against the death penalty. (6 RT 849.) Even after finding a defendant guilty, his mind would not be made up concerning sentence. (6 RT 852.) He did, however, lean more strongly towards the death penalty in murder cases. (6 RT 853.) When asked in the abstract whether he could consider the background of a defendant convicted of three first degree murders when determining sentence, he initially indicated he would have a hard time. (RT 853-854.) However, when the court gave him concrete examples, Mr. Labuda said he could consider a defendant's background. (6 RT 855-6.) The trial court denied the defense challenge for cause. (6 RT 876.)

Mr. Labuda did not demonstrate views that would prevent or substantially impair the performance of his duties as a juror. The trial court properly denied the challenge for cause.

b. Quoc Illige

In her jury questionnaire Ms. Quoc Illige indicated she could not consider a defendant's background during the penalty phase of a trial. However, when the trial court advised her that the law would require her to consider such information, she said she would do so. (6 RT 810.) She also affirmed that she could do so after each of the trial court's two hypothetical questions involving the relevance of background information. (6 RT 811.) Ms. Illige indicated in

the jury questionnaire that she believed life without parole was a more severe sentence than the death penalty but testified during voir dire that she would listen to the defense arguments. (6 RT 813.) Asked whether she could keep an open mind concerning the choice between life without parole and the death penalty, she said she could. (6 RT 813.) Ms. Illige believed she could keep an open mind even if the defendants were convicted of three murders, but also stated that that was hard to say without knowing any of the facts. (6 RT 814, 816.) She indicated that if the only thing she knew about the case was that the defendants were guilty of three first degree murders and two attempted murders, and there was no mitigation, she would vote for the death penalty. (6 RT 818-819.) However, Ms. Illige also said she would keep an open mind and consider evidence in mitigation if it were offered. (6 RT 819-821.) The trial court denied the defense challenge for cause to Ms. Illige, commenting, "I think she can be fair. And if I'm supposed to have any discretion, this is one of them that's actually an easy call 'cause she made it clear to me, in all that I could see from her answers and her responses, that she thought she could be fair. She'd try to be fair. She isn't there with any preconceived ideas." (6 RT 871.)

Ms. Illige did not demonstrate views that would prevent or substantially impair the performance of her duties as a juror. The trial court properly denied the challenge for cause.

c. Mark Wesson

In his jury questionnaire, Mark Wesson indicated that life in prison is a financial burden on society and should only be awarded "in circumstances that were not premeditated and more accident than intended." (7 RT 1045, 1052.) During voir dire, Mr. Wesson explained that his use of the word "accident" in the questionnaire "was kind of a brief way of, you know, saying there's a lot of factors which I don't know about that I would have to know about." (7 RT 1045.) Mr. Wesson stated he would have no difficulty considering things such

as motive when determining sentence. (7 RT 1046.) He also said he would be able to keep an open mind concerning life in prison versus the death penalty even in the case of defendants convicted of three first degree murders and two attempted murders. (7 RT 1046-1047.) He believed that the death penalty should be applied in cases of premeditated murder, but had not really considered what premeditated involved. (7 RT 1053-1054.) If, after being instructed on the meaning of premeditation, Mr. Wesson knew that premeditated murders had been committed but did not know anything more about the case, he would be "inclined for the death penalty." (7 RT 1054-1055.) He believed that one would eventually adapt to life in prison and, after time, imprisonment would no longer appear to be punishment, but refused to agree with defense counsel that he would automatically impose the death penalty in cases of multiple premeditated murders. (7 RT 1055-1056.) Mr. Wesson believed factors in aggravation and in mitigation were important when deciding between life in prison and the death penalty, but stated too that circumstances arising after confinement, such as "finding God in prison," would carry less weight with him than factors arising prior to confinement. (7 RT 1056-1058, 1060.) However, Mr. Wesson also made clear that he would "definitely" keep an open mind and consider evidence about how a defendant was doing in custody if instructed to do so. (7 RT 1058-1059.)

The trial court denied the defense challenge for cause to Mr. Wesson, ruling, "all in all, I think his answers were enough to establish that he would be fair, that he would try to weigh everything he was supposed to weigh." (7 RT 1075.) The trial court later reviewed the transcripts of Mr. Wesson's testimony and confirmed his findings that Mr. Wesson could be fair and consider all of the evidence. (8 RT 1331-1332.)

Mr. Wesson did not demonstrate views that would prevent or substantially impair the performance of his duties as a juror. The trial court properly denied the challenge for cause.

d. Harmless Error

Mr. Labuda, Ms. Illige, and Mr. Wesson were all later excused for other reasons. Where no prospective juror challenged for cause actually sat on the jury, none could have tainted the panel with their alleged bias. (*People v. Milwee* (1998) 18 Cal.4th 96, 146.) Moreover, appellant did not exhaust his peremptory challenges. Therefore, even if the court erred by denying the defense challenges for cause, appellant was not prejudiced.

4. Juror No. 5 Demonstrated He Could Perform His Duties

Appellant argues that the trial court erred by refusing the defense challenge for cause against Juror No. 5. (AOB 200-215.) Not so. In any event, appellant forfeited the issue.

a. Proceedings Below

The trial court asked Juror No. 5 if he could fairly evaluate all of the evidence in the case and keep open the option of either penalty in a capital case. Juror No. 5 answered, "I believe so." (4 RT 411.) The trial court then asked if Juror No. 5 could remain impartial if there were as many as three murder convictions and two attempted murder convictions. Juror No. 5 answered, "Yeah, I think so." (4 RT 411.) After further questions not relevant here, the trial court gave counsel an opportunity to pose questions.

Codefendant's counsel asked what type of cases Juror No. 5 had in mind when he commented in the jury questionnaire that, in some cases, an "eye for an eye" was appropriate punishment. Juror No. 5 responded, "Certainly in some situations, when it's, I guess, beyond a reasonable doubt, you know, eye for an eye"; "and in a supposed civilized society, where a life is taken away for no reason, seemingly, as the Bible will state eye for an eye, you know, if it was

taken away for no real good reason, let me put it that way. I mean there's always reasons for something, but there's—if the society is going to maintain itself, something has to be done, I would think." (4 RT 413.) Counsel posed a series of hypothetical questions involving multiple murders with no mitigating circumstances and asked Juror No. 5 whether he thought death would be an appropriate punishment in those cases. The trial court sustained the prosecutor's objections that the questions assumed the worst case scenario. (4 RT 414-415.)

The trial court resumed questioning with a hypothetical bank robbery after which the getaway driver was found liable for three murders that occurred during the robbery. Without providing any mitigating factors, the court asked whether Juror No. 5 believed death would be the appropriate punishment. Juror No. 5 answered, "I believe so." (4 RT 416-417.) The court asked whether, after determining guilt, Juror No. 5 could "keep an open mind to hear the evidence concerning the appropriate punishment that might come in in the penalty phase?" Juror No. 5 answered, "I'd try to keep an open mind." When asked, "Do you think you'd be able to do that?," Juror No. 5 nodded his head. (4 RT 417.)

Appellant's counsel asked whether Juror No. 5 would automatically vote for the death penalty if the defendants were found guilty of three first degree murders and two intentional, deliberate, and premeditated attempted murders. Juror No. 5 answered, "Well, I wouldn't say automatically." Asked whether, at the outset, he would be inclined to impose the death penalty in such a case, Juror No. 5 answered, "yes." Asked, "Would there be anything that we could tell you or show you to change your mind?," Juror No. 5 answered, "Well, that's hard to say. It depends." (4 RT 418.) Asked whether the burden would be on the defense to change his mind in such a case, Juror No. 5 answered, "Yes." (4 RT 418-419.)

The prosecutor asked Juror No. 5 whether he could listen to the mitigation evidence in the penalty phase before making up his mind about punishment. Juror No. 5 answered, "I could listen." Juror No. 5 affirmed that he would "[m]ore than likely" lean towards death if he only knew the basic facts of three murders and two attempted murders, but agreed that mitigation or other evidence "could" change his decision. (4 RT 420.)

Defense counsel challenged Juror No. 5 for cause, arguing that he would be "pro death" after a conviction. (4 RT 434-437.) The trial court noted its observation that Juror No. 5 seemed to be pretty objective about the death penalty, generally, and that multiple murders were merely aggravation that would make him lean towards death.[23/] The prosecutor argued that the questions defense counsel posed, because they contained only aggravating and no mitigating circumstances, elicited misleading answers from Juror No. 5. Given such a scenario, the prosecutor continued, it was not surprising that Juror No. 5 indicated he would lean towards the death penalty. (4 RT 437-439.)

The trial court denied the challenge for cause, indicating that he agreed with the prosecutor's "impressions." (4 RT 439.)

Ultimately, the defense did not exercise a peremptory challenge against Juror No. 5. (See 12 RT 1815-1835.) In fact, the defense "passed" its opportunity to exercise a peremptory challenge no fewer than seven times after Juror No. 5 was seated, electing to allow the prosecutor to exercise a challenge without using one of its own or, even more significantly, to stop peremptory

---

23. Because the trial court's meaning on this point is not entirely clear, respondent also provides the quotation from which the summary came: "he seemed to be—pretty objective. And then when he's presented with that, yeah, he thinks the death penalty fits. [¶] I'll reserve it. [¶] Now, when he's put in the context of now you've just convicted somebody of multiple murders, don't you think death is appropriate, yeah, that doesn't seem to the same thing he was conveying repeatedly to me, which was that he could be objective." (4 RT 436.)

challenges if he chose not to exercise one. (12 RT 1825-1835.) The defense did not exhaust its peremptory challenges during the selection of the 12 principal jurors. After the twelve jurors, including Juror No. 5, had been selected, codefendant's counsel announced, "The defense is very satisfied with this jury, your honor." Appellant's counsel agreed. (12 RT 1835.)

b. Waiver

Appellant neither exercised a peremptory challenge against Juror No. 5 nor communicated dissatisfaction with the jury selected. Therefore, he forfeited his right to assert this issue on appeal.

Appellant argues that the issue is not waived because appellant did exhaust his peremptory challenges in the subsequent proceeding where the alternate jurors were selected and one of the alternate jurors ultimately sat on appellant's jury. (AOB 205-215.) This argument does not help appellant. First, it does not excuse appellant's failure to exercise his peremptory challenge against Juror No. 5 or his expression of satisfaction with the first jury containing Juror No. 5. The proceedings during which the alternate jurors were selected was distinct from the proceedings during which the principal jurors were selected. During this second proceeding, counsel were given a new set of peremptory challenges. (12 RT 1853.) Second, counsel for codefendant and appellant expressed satisfaction with the pool of alternate jurors. (12 RT 1853-1856.) Third, there was no objection or request to reopen when the ultimate jury was empaneled, although defense counsel had made use of just such an opportunity during the selection of the alternate jurors. (See 1851-1853.)

Appellant also argues that his right to challenge a violation of his right to a fair and impartial jury could not be waived. (AOB 205-215.) Not so. Not only has waiver of dissatisfaction with a juror been repeatedly recognized by this Court (*People v. Seaton*, *supra*, 26 Cal.4th at p. 637; *People v. Williams*, *supra*, 16 Cal.4th at p. 667), this case perfectly illustrates two justifications for the

waiver doctrine. First, by electing not to exercise one of his unused peremptory challenges, appellant effectively chose to have Juror No. 5 sit on his jury. Appellant should not be permitted to change tactics now that the trial is over. Second, had appellant exercised a peremptory challenge against the juror or alerted the trial court that he was dissatisfied, the issue could have been resolved at trial.

Therefore, appellant's arguments must fail. The issue was waived.

c. Analysis

Appellant's argument also fails on the merits. Juror No. 5 repeatedly testified that he could keep an open mind and would consider all of the evidence before deciding an appropriate punishment. He indicated that in "*some*" cases, "an eye for an eye" was appropriate punishment. (4 RT 413.) When pressed by defense counsel to explain what he meant by that, he explained that "*something*" has to be done if life is taken away for no good reason but did not suggest that the death penalty was necessary. (4 RT 413.)

Confronted with hypothetical questions involving multiple murders and no mitigation, Juror No. 5 indicated an inclination towards the death penalty but testified that he would keep an open mind and consider all of the evidence. (4 RT 417.) He said his decision would not be automatic. (4 RT 418.) Asked one time by the defense what it might take to change his mind in the case of multiple first degree murders and attempted murders, he said that was hard to say and that it would depend. (4 RT 418.) Asked whether he thought the burden to change his mind in such a case would be on the defense, he said yes. (4 RT 418-419.)

Appellant argues that Juror No. 5 gave answers strikingly similar to those given by a juror in *People v. Boyette* (2002) 29 Cal.4th 381, who this Court held should have been excluded for cause. Some answers, were, indeed, similar. However, there are significant differences that distinguish the answers of the

two jurors. The juror in *Boyette* indicated that he was "strongly in favor" of the death penalty (*id.* at p. 417); Juror No. 5 did not. The juror in *Boyette* indicated the death penalty should automatically be imposed on those defendants convicted of committing a multiple murder (*ibid.*); Juror No. 5 did not. The juror in *Boyette* equivocated when asked whether he would exclude consideration of a life term (*ibid.*); Juror No. 5 did not. Perhaps most important, however, were the serious doubts the juror in *Boyette* expressed about the very possibility of life imprisonment without possibility of parole; he simply did not believe there was such a thing. It was these last statements that this Court emphasized. (*Id.* at pp. 417-418.) Juror No. 5 did not express any such doubts about life imprisonment.

For the foregoing reasons, Juror No. 5, unlike the Juror in *Boyette*, did not demonstrate views that would prevent or substantially impair the performance of his duties as a juror. Therefore, appellant's argument must fail.

d. Harmless Error

Even if the court erred by refusing to exclude Juror No. 5, any error was harmless. Exhaustion of peremptory challenges is a prerequisite to a claim of prejudicial error in the denial of a challenge for cause. (*People v. Horton* (1995) 11 Cal.4th 1068, 1093, citing *People v. Johnson* (1992) 3 Cal.4th 1183, 1211, and *People v. Morris* (1991) 53 Cal.3d 152, 185.) Because appellant did not exhaust his peremptory challenges, choosing instead to keep Juror No. 5 on the jury, he was not prejudiced. Any error was harmless.

5. The Prosecutor's Peremptory Challenges

Appellant argues that the prosecutor improperly used peremptory challenges against death penalty skeptics. (AOB 228-230.) Not so.

"[T]here is 'no . . . constitutional infirmity in permitting peremptory challenges by both sides on the basis of specific juror attitudes on the death penalty.' [Citation.]" (*People v. Walker* (1988) 47 Cal.3d 605, 624-625; see

also, e.g., *People v. Ochoa* (2001) 26 Cal.4th 398, 432.) In any event, failure to object to such challenges waives the issue on appeal. (*People v. Champion* (1995) 9 Cal.4th 879, 907.)

This issue was waived on appeal by the defense's failure to object at trial. On the merits, the argument fails because peremptory challenges based on specific juror attitudes about the death penalty are proper.

B. The Jury Was Not Improperly Culled Of All "Life-Inclined" Jurors

Appellant argues that the trial court applied *Wainwright v. Witt*, *supra*, 469 U.S. 412, unevenly to exclude "life-inclined" jurors and that the prosecutor improperly exercised his peremptory challenges to exclude "life-inclined" jurors, thus "produc[ing] a jury culled of all those who revealed during voir dire that they had conscientious scruples against or were otherwise opposed to capital punishment." (AOB 215-230.) Not so.

1. Applicable Law

The United States Supreme Court held in *Lockhart v. McCree* (1986) 476 U.S. 162, that death-qualification is a legitimate tool of the prosecution for "obtaining a single jury that can properly and impartially apply the law to the facts of the case at both the guilt and sentencing phases of a capital trial." (*Id.* at pp. 175-176.) Excluding jurors who disclose that they cannot decide the case solely on the evidence before them is neither improper nor unfair. (*Id.* at p. 178.) Moreover, a defendant is not entitled to a jury evenly balanced between jurors inclined to impose the death penalty and jurors inclined not to impose the death penalty. (*Id.* at pp. 178-179.) "In our view, it is simply not possible to define jury impartiality, for constitutional purposes, by reference to some hypothetical mix of individual viewpoints." (*Id.* at p. 183.) Similarly, this Court has held that death-qualification does not result in a death-oriented jury that

violates state constitutional protections. (*People v. Pinholster*, *supra*, 1 Cal.4th at p. 913; *People v. Stankewitz* (1990) 51 Cal.3d 72, 104.)

2. Analysis

As the United States Supreme Court has stated, "it is simply not possible to define jury impartiality, for constitutional purposes, by reference to some hypothetical mix of individual viewpoints." (*Lockhart v. McCree*, *supra*, 476 U.S. at p. 183.) The bottom line here is that appellant was not denied his right to a trial by a fair and impartial jury. No violation of his right to a reliable penalty determination occurred either. As previously discussed, appellant's arguments concerning particular jurors are either meritless, forfeited, or both. Many also fail because appellant cannot demonstrate prejudice. Therefore, the jury was properly composed.

VIII.

THE LINGERING DOUBT INSTRUCTION DID NOT MISLEAD THE JURY

Appellant argues that the trial court's lingering doubt instruction, by using the word "guilt," prevented the jury from considering any lingering doubts about the truth of the special circumstance. (AOB 231-265.) Not so.

A. The Proceedings Below

During the penalty phase, appellant requested a pinpoint instruction informing the jury that, when determining penalty, it could consider any lingering doubt it had that he was the "actual shooter." (3 CT 755; 21 RT 3571-3572.)[24] The prosecutor objected to the instruction. (21 RT 3558-3559.) The trial court noted that it had discretion to provide a pinpoint instruction on lingering doubt but did not agree with the language of the proposed instruction. (21 RT 3572-3574.) Two court sessions later, the court provided the parties with a lingering doubt instruction that did not contain references to the facts of appellant's case.[25] (22 RT 3699.) Defense counsel informed the trial court, "I still would request that it be given the way we requested it, but failing that, I'm satisfied with this, your honor." (22 RT 3699.) The trial court also instructed

---

24. The proposed instruction provided: "A juror who voted for conviction at the guilt phase may still have a lingering or residual doubt *as to whether the defendant was the actual shooter, intended to kill, or premeditated and deliberated.* Such a lingering or residual doubt, although not sufficient to raise a reasonable doubt at the guilt phase, may still be considered as a mitigating factor at the penalty phase. Each individual juror may determine whether any lingering or residual doubt is a mitigating factor and may assign it whatever weight the juror feels is appropriate." (3 CT 755, emphasis added.)

25. The trial court's instruction provided: "It may be considered as a factor in mitigation if you have a lingering doubt as to the guilt of the defendant." (3 CT 783.)

the jury with CALJIC No. 8.85 [26] and with CALJIC No. 8.88,[27] detailing the evidence it must consider.

In his argument to the jury, the prosecutor attacked the concept of lingering doubt, generally. He argued that he preferred to refer to it as

---

26. CALJIC No. 8.85 provided, in part:

> In determining which penalty is to be imposed on the defendant, you shall consider all of the evidence which has been received during any part of the trial of this case, except as you may be hereafter instructed. You shall consider, take into account and be guided by the following factors, if applicable:
>
> (a) The circumstances of the crimes of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true. . . .
>
> . . . . . .
>
> (j) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.
>
> (k) 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 or record as a basis for a sentence less than death, whether or not related to the offense for which he is on trial. You must disregard any jury instruction given to you in the guilt or innocence phase of this trial which conflicts with this principle.

(3 CT 782.)

27. CALJIC No. 8.88 provided: "you shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed. [¶] . . . A mitigating circumstance is any fact, condition or event which as such, does not constitute a justification or excuse for the crime in question, but may be considered as an extenuating circumstance in determining the appropriateness of the death penalty." (3 CT 789.)

"malingering doubt" and further argued that it was an insult to the burden of proof and to the decisions the jury had already reached in the guilt phase. (22 RT 3889-3890.)

Defense counsel for appellant, in his argument, carefully explained the relevance and the importance of lingering doubt, demonstrating how it was perfectly compatible with the beyond-a-reasonable-doubt standard the jurors had applied in the guilt phase. He also specifically urged jurors to consider any lingering doubts that appellant was the actual shooter, rather than a non-shooting aider and abettor. (22 RT 3908-3910.)

In his rebuttal argument, the prosecutor addressed the lingering doubt argument. He suggested that, if the jurors wanted an easy way out, they could take up defense counsel's invitation to revisit their earlier decision that appellant was the shooter. The prosecutor then expressed his belief that the jurors took their job seriously and did not need an easy way out. (22 RT 3926.)

B. Applicable Law

A capital defendant has no federal or state constitutional right to have the penalty phase jury instructed to consider residual lingering doubt about his or her guilt. (See e.g., *People v. Panah* (2005) 35 Cal.4th 395, 497; *People v. Cox* (1991) 53 Cal.3d 618, 677; *Oregon v. Guzek* (Feb. 22, 2006, 04-928) __ U.S. __ [05 Daily Journal D.A.R. 2060] [noting that the Court has never held that such a right exists].) However, the jury's consideration of lingering doubt is proper, and the defendant may urge his or her possible innocence to the jury as a factor in mitigation, both as a circumstance of the crime and as a circumstance extenuating its gravity. (*People v. Memro*, *supra*, 11 Cal.4th at p. 883.) Instruction under either of those mitigating factors adequately alerts the jury that it may consider lingering doubt in reaching its decision. (*People v. Osband* (1996) 13 Cal.4th 622, 716.)

In assessing if jury instructions correctly conveyed the law, a reviewing court must determine how the jury reasonably understood the instruction, and whether the instruction, so understood, accurately reflects applicable law. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1161.) "[I]nstructions are not considered in isolation. Whether instructions are correct and adequate is determined by consideration of the entire charge to the jury. [Citation.]" (*People v. Holt* (1997) 15 Cal.4th 619, 677.)

Failure to object to an instruction on the law precludes an appellant from raising the instructional error issue on appeal. (See, e.g., *People v. Hart* (1999) 20 Cal.4th 546, 622; but see Pen. Code, § 1259; *People v. Brown* (2003) 31 Cal.4th 518, 539 fn. 7 [instructional error is not waived by failure to object, if defendant's substantial rights are affected].)

C. Analysis

1. Waiver

Defense counsel not only failed to object, but advised the trial court that he was "satisfied" with the instruction it provided. His additional comment that he still "requested" his version was only an indication that he preferred one legally correct instruction over another. His statement of preference was not a specific objection alerting the trial court to a potential legal error and it did not preserve any issue. Therefore, the issue was waived. This Court need not decide whether to invoke Penal Code section 1259 and address the merits of appellant's assignment of error because, even assuming the claim is preserved, it is meritless, as respondent will now demonstrate.

2. There Is No Reasonable Likelihood The Jury Misunderstood The Trial Court's Instruction In Such A Way As To Prevent Consideration Of Lingering Doubt On The Truth Of The Multiple-Murder Special Circumstance

Appellant draws a distinction between guilt and the truth of a special circumstance allegation. He then argues that the reference in the instruction to guilt and the lack of any reference to the special circumstance allegation would, inevitably, have led the jurors to conclude that the instruction did not apply to their special circumstance determination. (AOB 231-265.) Not so.

Simply put, from the perspective of a reasonable jury determining sentence, there would have been no distinction between guilt on the substantive counts and the truth of the multiple-murder special circumstance. A reasonable jury would consider the two concepts together as the unitary result of the guilt phase. If there was any reasonable doubt as to the meaning of the word "guilt" in the instruction, the other instructions and the sentencing arguments removed it.

For example, CALJIC No. 8.85 instructed the jury that it had to consider the circumstances of the crimes, *any special circumstances*, appellant's level of participation, and any other extenuating circumstance. (3 CT 782.) Moreover, the jury was specifically directed to disregard *any* other instruction that appeared to conflict with this primary rule. (3 CT 782.) CALJIC No. 8.88 instructed the jury that it had to consider mitigating factors, which it defined broadly as "any fact, condition or event which as such, does not constitute a justification or excuse for the crime in question, but may be considered as an extenuating circumstance in determining the appropriateness of the death penalty." (3 CT 789.) These instructions did not permit exclusion of mitigation concerning the special circumstance allegations; they affirmatively required it and even alerted the jury that no instruction, properly understood, would instruct otherwise.

The sentencing summations by the prosecutor and appellant's counsel affirmed that the jury could consider any lingering doubts concerning appellant's role as the shooter. The prosecutor anticipated a lingering doubt argument and attacked the concept, generally, but did not suggest that a lingering doubt

argument was legally incorrect. (22 RT 3889-3890.) The prosecutor's arguments simply suggested that, in this case, the jurors should have no lingering doubt because of the strength of the evidence. Defense counsel specifically urged the jury to consider any lingering doubts concerning appellant's role. (22 RT 3908-3910.) On rebuttal, the prosecutor did not argue that defense counsel incorrectly argued the law. On the contrary, the prosecutor invited the jury to use lingering doubt to reach a life sentence if it wanted an easy way out. (22 RT 3926.) This argument reinforced the legal validity of the concept. The prosecutor addressed lingering doubt as it related to appellant's role, but only to suggest that the weight of the evidence was overwhelming and there should be no lingering doubt.

For the foregoing reasons, a reasonable jury would have understood the word "guilt" in the instruction to be a reference to the entirety of the guilt phase proceedings. Therefore appellant's arguments must fail.

D. Harmless Error

Even if the lingering doubt instruction prevented consideration of lingering doubt on the special circumstance, any error was harmless. Despite appellant's assertions to the contrary, as discussed in our Argument I, at pages 47-49, *ante*, overwhelming evidence supported the jury's findings during the guilt phase that appellant was the actual shooter. As the actual shooter, he committed multiple murder. There was virtually no evidence to the contrary. Therefore, it is not reasonably probable that a result more favorable to appellant would have achieved been reached in the absence of error. (*People v. Brown* (1988) 46 Cal.3d 432, 447-448 [for state law violations in penalty phase of capital trial, reversal is required if "reasonable probability" verdict would have been different absent the error]; *People v. Watson*, *supra*, 46 Cal.2d at p. 836.) The issue was not of a federal constitutional nature as appellant claims, because

appellant had no federal constitutional right that lingering doubt be considered by the jury.

IX.

ANY ERROR IN FAILING TO REINSTRUCT WITH GUILT PHASE INSTRUCTIONS WAS HARMLESS

Appellant argues that he was prejudiced at the penalty phase of his trial by the trial court's failure to reinstruct with several guilt phase instructions, after instructing the jury to disregard all previously given instructions. (AOB 265-280.) Not so.

A. Background

In the guilt phase, the trial court provided the standard instructions guiding the jury's consideration of evidence. (3 CT 668-691.) In the penalty phase, the trial court instructed the jurors with CALJIC No. 8.84.1 to disregard all guilt phase instructions omitted from the penalty phase. (3 CT 781.)[28/] The trial court did not reinstruct with several instructions, such as CALJIC Nos. 1.01, 1.02, 1.03, 1.05, 2.00, 2.01, 2.02, 2.09, 2.11, 2.13, 2.22. (3 CT 780-789.) In his sentencing argument, the prosecutor referenced CALJIC No. 8.84.1 when he explained to the jury that there was no burden of proof at the sentencing phase. (22 RT 3871.)

B. Applicable Law

This Court has held that failure to reinstruct on applicable evidentiary principles after instructing the jury with CALJIC No. 8.84.1 is error. (*People*

---

28. The instruction provided, in relevant part: "You will now be instructed as to all of the law that applies to the penalty phase of this trial. [¶] You must determine what the facts are from the evidence received during the entire trial unless you are instructed otherwise. You must accept and follow the law that I shall state to you. *Disregard all other instructions given to you in other phases of this trial.*" (3 CT 781.)

v. Moon (2005) 37 Cal.4th 1, 37; but see *People v. Carter* (2003) 30 Cal.4th 1166, 1219-1220 [noting that a rule that evidentiary instructions need be given only upon request in the penalty phase would be a logical extension of case law but resolving case on other grounds].) Such error is subject to harmless error review. (*People v. Moon*, *supra*, 37 Cal.4th at p. 37; *People v. Carter*, *supra*, 30 Cal.4th at pp. 1220-1222.) The relevant inquiry is whether it is likely that the omitted instructions affected the jury's evaluation of the evidence. (*People v. Moon*, *supra*, 37 Cal.4th at p. 38-39.) The standard of review is whether there is a "reasonable likelihood" the instructions precluded the jury from considering constitutionally relevant evidence. (*Ibid.*)

C. Harmless Error

Any error was harmless. Appellant argues that, in the absence of an instruction to the contrary, the jury may have believed the arguments of counsel could be treated as evidence. (AOB 269-280.) This is not reasonably probable.

Appellant's argument that the jury may have believed summation arguments could be treated as evidence is not supported by the record and is purely speculative. This Court rejected a similar argument in *People v. Moon*, *supra*, 37 Cal.4th at page 39 when it rejected the defendant's contention that the instructions left the jury "free to make a standardless assessment of the evidence presented at both phases of the trial when determining [his] sentence." This Court called the argument "pure speculation." (*Ibid.*)

Most of appellant's present claim addresses guilt phase evidence and argument. It is not probable that a jury would believe arguments of counsel it evaluated as such in the guilt phase could change character and be treated as evidence in the penalty phase. For, although the guilt phase instructions were no longer operative, nothing in the penalty phase suggested that the nature of evidence and argument and the distinction between the two had changed.

As for the evidence presented and the arguments of counsel at the penalty phase, that was straightforward and not reasonably likely to be the subject of confusion.

Appellant recounts several of the prosecutor's arguments addressed in our Argument III, at pages 69-74, *ante*, apparently suggesting that the guilt phase summation would be revisited by the jury on their own during the penalty phase and treated as evidence. (AOB 273-279.) For the reasons previously discussed, it is not reasonably likely that the jury treated the summation arguments as evidence or that the jury mistook argument for evidence.

Appellant argues that even the judge was misled by the prosecutor's arguments. (AOB 276.) Respondent submits that this had nothing to do with instructions or confusion about the difference between evidence and argument. Instructions cannot prevent such an error.

For the foregoing reasons, any error was harmless.

X.

THE TRIAL COURT DID NOT PREVENT APPELLANT FROM PRESENTING RELEVANT AND RELIABLE EVIDENCE IN MITIGATION DURING THE PENALTY PHASE

Appellant argues that the trial court improperly sustained the prosecutor's objections to testimony that codefendant once got into a fight in order to protect appellant, and to an essay appellant wrote in jail pending trial. (AOB 280-290.) Not so.

A. Testimony That Codefendant Once Fought In Order To Protect Appellant

1. Proceedings Below

Appellant's father, Harry Souza, testified that codefendant once got into a fight to protect appellant while the two were going to high school. The prosecutor objected that the testimony was not relevant. Defense counsel proffered that the testimony "goes to family closeness." The trial court sustained the objection, adding, "that's a bit far afield." (21 RT 3618-3619.)

2. Applicable Law

In *People v. Frye*, *supra*, 18 Cal.4th 894, this Court summarized the standards of admissibility concerning mitigation evidence as follows:

> The Eighth and Fourteenth Amendments require that the sentencer in a capital case not be precluded from considering any relevant mitigating evidence, that is, evidence regarding "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." [Citations.] The constitutional mandate contemplates the introduction of a broad range of evidence mitigating imposition of the death penalty. [Citations.] The jury "must be allowed to consider on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed. [Citation.]

> At the same time, however, the United States Supreme Court has made clear that the trial court retains the authority to exclude, as irrelevant, evidence that has no bearing on the defendant's character, prior record or the circumstances of the offense. [Citation.] Thus, in a proper exercise of its discretion, the trial court determines the relevancy of mitigation evidence in the first instance. [Citations.]
>
> [R]elevance as it pertains to mitigation evidence is no different from the definition of relevance as the term is understood generally. [Citation.] "'Relevant mitigating evidence is evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value. . . .'" [Citations.]

(*People v. Frye*, *supra*, 18 Cal.4th at pp. 1015-1016.)

3. Analysis

The trial court did not abuse its discretion, i.e., did not rule beyond the bounds of reason (*People v. Gimenez* (1975) 14 Cal.3d 68, 72) in sustaining the prosecutor's objection. Defense counsel's theory of relevance at trial was that the incident demonstrated "family closeness." Although family closeness may have had some bearing on appellant's character, evidence that codefendant got into a fight at school with a third party had no immediately apparent relevance to family closeness. If defense counsel had a particular theory that would have tied codefendant's fight more closely to appellant's character, he did not offer it to the trial court.[29]

---

29. Moreover, the testimony was inadmissable as unreliable hearsay. It would have been a father's retelling of what his son told him while trying to justify getting involved in a fight at school. The testimony was offered for the truth of the underlying statement but the underlying statement was self serving and inherently unreliable. Although the trial court did not specify unreliable hearsay as an additional basis for sustaining the objection, "a ruling or decision, itself correct in law, will not be disturbed on appeal merely because given for a wrong reason. If right upon any theory of the law applicable to the case, it must be sustained regardless of the considerations which may have moved the trial court to its conclusion." (*People v. Zapien* (1993) 4 Cal.4th 929, 976, internal quotation marks and citations omitted.)

On appeal, appellant argues that additional theories demonstrate the evidence's relevance. However, he did not assert these additional theories at trial as grounds for admission and this is barred from doing so on appeal. (Evid. Code, § 354; see *People v. Lividatis* (1992) 2 Cal.4th 759, 778 [failure to assert exceptions to hearsay rule].)

For the foregoing reasons, the trial court did not err.

4. Harmless Error

Even assuming error, any error was harmless because ample and undisputed evidence of the closeness of the family, of appellant's gentleness, of appellant's loving nature, of appellant's peacefulness, and of codefendant's leadership role was introduced at trial. (See Statement of Facts, *ante*.) Accordingly, there is no reasonable probability the jury would have reached a different verdict in the absence of the alleged error. (See *People* v. *Weaver* (2001) 26 Cal.4th 876, 980 [applying *Watson* standard to exclusion of hearsay evidence at penalty phase in a capital case]; see also *People* v. *Alcala* (1992) 4 Cal.4th 742, 796 [applying *Watson* standard of review to erroneous exclusion of testimony].) Indeed, even under the stricter *Chapman* standard, any error was harmless beyond a reasonable doubt. Therefore, appellant's arguments must fail.

B. The Essay Appellant Wrote In Jail Pending Trial

1. Proceedings Below

Defense counsel offered into evidence an essay appellant wrote in jail titled, "Someone Who Understands."[30/] (RT 3799.) The prosecutor objected on

---

30. The essay read, "We all need someone who understands us. Some people turn to their family or their friends when they need help. I always talk to my brother because I know that [codefendant] who is my brother, really understands me. We've known each other for 22 years. We first met when I was born. At first we didn't always get along, but after a while I learned that

hearsay grounds. The trial court sustained the objection. Defense counsel immediately requested a bench conference that went unreported. (22 RT 3799-3800.) Subsequently, however, the jury was excused and the court made a record of the bench conference. To wit, defense counsel asked why a prosecution witness was allowed to read a poem but a defense witness was not allowed to read appellant's essay. The trial court responded, among other grounds, that the defense did not object but the prosecutor did. Defense counsel argued that the essay would show appellant's education level or progress. The court responded that eight or ten lines on a piece of paper could not possibly be relevant on that issue. There had already been an abundance of far more relevant and persuasive evidence on that issue. Moreover, the court concluded the essay contained a discussion about appellant's relationship with codefendant that would present an additional hearsay problem. (22 RT 3809-3812.)

2. Applicable Law

Due process concerns may override state evidentiary rules at the penalty phase of a capital trial in circumstances where the evidence in question is "highly relevant to an issue critical to punishment and substantial reasons exist to assume the evidence is reliable." (*People v. Phillips, supra,* 22 Cal.4th at p. 238, see also *Green v. Georgia* (1979) 442 U.S. 95.) In general, however, this Court has held that the hearsay rule applies at the penalty phase of a capital trial. (*People v. Weaver, supra*, 26 Cal.4th at p. 980, citations omitted; see also *People v. Phillips, supra,* 22 Cal.4th at p. 238, citing *People v. Edwards* (1991) 54 Cal.3d 787, 837 ["neither this court nor the high court has suggested that the rule allowing all relevant mitigating evidence has abrogated the California Evidence Code"].)

---

my brother was a person I could trust and one who would always stand by me. [¶] We have had a lot of fun together. I'll never forget the time we would play football together. I guess people understand each other best when their [*sic*] faced with bad and good times together?" (Ex. V.)

People v. Edwards, *supra*, 54 Cal.3d at pages 818-821, is instructive. In *Edwards*, the defendant sought to introduce a taped statement he made shortly after his arrest and a notebook he compiled shortly after the crime. This Court rejected the defendant's arguments that the evidence, though hearsay, was admissible under the state-of-mind exception to the hearsay rule. This Court found that the post crime statements were made at a time when the defendant "had a compelling motive to deceive and seek to exonerate himself from, or at least to minimize his responsibility for," the crimes. (*Id.* at p. 820.) Therefore, there was "'ample ground to suspect defendant's motives and sincerity' when he made the statements." (*Ibid.*, quoting *People v. Whitt* (1990) 51 Cal.3d 620, 643.) "The need for cross-examination is especially strong in this situation, and fully warrants exclusion of the hearsay evidence." (*People v. Edwards*, *supra*, 54 Cal.3d at p. 820.)

Finally, the proponent of penalty phase evidence has the burden of showing it is reliable or trustworthy. (*People v. Kraft* (2000) 23 Cal.4th 978, 1074.)

3. Analysis

The trial court properly sustained the prosecutor's hearsay objection. The defense did not meet its burden of showing the essay, prepared as appellant sat in jail waiting for trial, was reliable or trustworthy. Unreliable or untrustworthy evidence is not admissible even if it addresses a highly relevant issue critical to punishment. Moreover, the essay was not relevant. Defense counsel's theory of relevance at trial was that the essay demonstrated appellant's education level or progress. The trial court correctly pointed out that such a small sample was not relevant on that issue. No abuse of discretion appears.

On appeal, appellant argues that additional theories demonstrate the essay's relevance. However, these additional theories were not asserted at trial as grounds for admission and are barred on appeal. (Evid. Code, § 354; see

People v. Lividatis, *supra*, 2 Cal.4th at p. 778 [failure to assert exceptions to hearsay rule].)

For the foregoing reasons, there was no error.

4. Harmless Error

Even assuming error, any error was harmless because ample and undisputed evidence of appellant's educational level and progress was admitted at trial. (See our Statement of Facts, at pp. 33-42, *ante*.) As to the theories of relevance appellant raises for the first time on appeal, that is, his closeness to codefendant, their loving relationship, and the humanizing effect all of this would have, there was ample evidence of those things, too. (See our Statement of Facts, at pp. 33-42, *ante*.) Accordingly, there is no reasonable probability the jury would have reached a different verdict in the absence of the alleged error. (See *People v. Weaver, supra,* 26 Cal.4th at p. 980 [applying *Watson* standard to exclusion of hearsay evidence at penalty phase in a capital case]; see also *People v. Alcala, supra,* 4 Cal.4th at p. 796 [applying *Watson* standard of review to erroneous exclusion of testimony].) Indeed, even under the stricter *Chapman* standard, any error was harmless beyond a reasonable doubt. Therefore, appellant's arguments must fail.

XI.

THE TRIAL COURT GAVE A CORRECT VICTIM IMPACT INSTRUCTION

Appellant argues that a victim impact instruction was argumentative and did not include necessary limitations on what the jury could properly consider. (AOB 291-297.) Not so.

A. Proceedings Below

The prosecutor requested a special instruction pinpointing victim impact evidence as a circumstance of the crime within the meaning of Penal Code section 190.3, subdivision (a). (3 CT 753.) Defense counsel objected on the ground that it was an was an argumentative pinpoint instruction, that it "points to a fact—." The trial court overruled the objection. (21 RT 3563-3565.) The trial court incorporated the instruction into paragraph (a) of CALJIC No. 8.85, which instructed the jury on factors in aggravation and mitigation it was permitted to consider. CALJIC No. 8.55, thus modified, provided,

> (a) The circumstances of the crimes of which the defendant was convicted in the present proceeding and the existence of any special circumstance found to be true. *As part of the circumstances of the offense under factor A, you may also consider the testimony offered in this penalty phase portion of the trial concerning the impact of the crimes on the family and friends of the victims.*

(3 CT 782, emphasis added.) Defense counsel reserved his initial objection that the instruction was argumentative, but did not objection to its inclusion as part of CALJIC No. 88.5 if the instruction was to be given over his objection. (22 RT 3698-3699.)

B. The Instruction Was Not Argumentative

"'An instruction should contain a principle of law applicable to the case, expressed in plain language, indicating no opinion of the court as to any fact in issue.' [Citations.]" (*People v. Wright* (1988) 45 Cal.3d 1126, 1135.) A statement inviting the jury to draw favorable inferences from specified items of evidence is "argumentative" and "properly belongs not in instructions, but in the arguments of counsel to the jury." (*Ibid*; see also 5 Witkin, Cal. Criminal Law (3d ed., 2000) Criminal Trial § 625, p. 890 ["An instruction is improper that recites facts drawn from the evidence in such a manner as to constitute an argument to the jury in the guise of a statement of the law."])

Thus, an instruction that refers only to a category of evidence or a legal theory, not to any specific evidence, does not "improperly impl[y] certain conclusions from specified evidence" and is not argumentative. (*People v. Wright*, *supra*, 45 Cal.3d at p. 1137; *People v. Harris* (1992) 10 Cal.App.4th 672, 675, fN. 3 [CALJIC No. 2.52 (flight) is not an argumentative instruction].)

Here, the instruction was not argumentative. The instruction properly referred to a broad category of evidence and did not imply any conclusion should be drawn from particular evidence. Moreover, it properly explained a legal theory not otherwise specifically addressed by the instructions: that victim impact evidence may be considered as an aggravating circumstance of the offense. (See *People v. Edwards*, *supra*, 54 Cal.3d 787.) Therefore, appellant's argument must fail.

C. The Instructions Were Complete

In addition to the argumentative objection raised at trial, appellant argues for the first time on appeal that the instruction was incomplete. Specifically, he argues that the instruction improperly failed to indicate limits on the appropriate use of victim impact evidence. (AOB 295.) Not so.

First, the issue is barred on appeal by defense counsel's failure to object on this ground at trial. As discussed in our Arguments III and VIII (at pp. 67-68, 119 *ante*), a defendant who did not request amplification or clarification of pinpoint instructions at trial may not complain on appeal that the instruction was ambiguous or incomplete. (*People v. Mayfield*, *supra*, 14 Cal.4th at pp. 778-779.)

Appellant's argument also fails on the merits. As discussed in our Argument VIII, at page 119, *ante*, when assessing whether jury instructions correctly convey the law, a reviewing court must consider all of the instructions and determine how it is "reasonably likely" the jury understood them. (*People v. Barnett*, *supra*, 17 Cal.4th at p. 1161; *People v. Holt*, *supra*, 15 Cal.4th at p. 677.)

Appellant argues that the instructions did not completely address four areas. (AOB 291-296.) First, appellant argues that the instructions did not indicate why victim impact evidence was introduced. This is not correct; even assuming such guidance is necessary, the pinpoint instruction informed the jury that victim impact evidence is considered an aggravating circumstance of the offense. Second, appellant argues that the instructions did not indicate that the victim impact must have been caused by him. This requirement was self-evident; no reasonable jury would have held appellant responsible for injuries he did not cause directly or indirectly. Third, appellant argues that the instructions did not prohibit arriving at a decision based on emotion or vengeance rather than reason. This was not required because the jury was instructed on the aggravating factors it was permitted to consider. Vengeance and emotion were not among them. Moreover, as appellant points out earlier, "the expression of one thing is the exclusion of another." (AOB 244; *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 522.) Where specific items are listed, it is assumed that the omission of items similar in kind is intentional and

the omitted items are therefore excluded. (*People v. Castillo* (1997) 16 Cal.4th 1009, 1020, (conc. opn. of Brown, J.).) Fourth, appellant argues that the instructions did not prohibit considering opinions of victim impact witnesses concerning appropriate punishment or appellant's character. There was no such evidence, however, and even if there had been, as with appellant's third argument, such opinions were not listed among the exclusive set of permissible factors in aggravation. Therefore, appellant's arguments must fail.

D. Harmless Error

Even if the pinpoint instruction would have led a reasonable jury to err in the way appellant alleges, any error was harmless. The victim impact evidence was negligible. Evidence in aggravation consisted almost entirely of the manner in which appellant committed his crimes. Therefore, it is not reasonably probable that a result more favorable to appellant would have achieved been reached in the absence of error. (*People v. Brown*, *supra*, 46 Cal.3d at pp. 447-448 [for state law violations in penalty phase of capital trial, reversal is required if "reasonable probability" verdict would have been different absent the error]; *People v. Watson*, *supra*, 46 Cal.2d at p. 836.) Therefore, appellant's arguments must fail.

XII.

THERE IS NO CUMULATIVE ERROR THAT WOULD REQUIRE REVERSAL OF THE PENALTY JUDGMENT

Appellant argues that even if no single error alleged requires reversal of the jury's penalty judgment, the cumulative effect of such errors compels reversal. (AOB 297-301.) Not so.

For the reasons set forth in Arguments I through XI, there was at most one error committed, the failure to reinstruct with guilt phase instructions during the penalty phase. That error, if it was one, was harmless. And even if some other minor improprieties occurred, the errors were harmless whether considered individually or collectively under any standard of review. (See, e.g., *People v. Box, supra,* 23 Cal.4th at p. 1214 ["Defendant asserts that even if the errors alleged above are not in themselves reversible, they are so cumulatively. We disagree. The few errors that may have occurred during defendant's trial were harmless whether considered individually or collectively. Defendant is entitled to a fair trial, not a perfect one"]; *People v. Smithey* (1999) 20 Cal.4th 936, 1007 ["Because we find no instructional error affecting the jury's consideration of mitigating factors, defendant's claim of heightened prejudice from cumulative error is without merit"]; *People v. Jackson* (1996) 13 Cal.4th 1164, 1245 [what few errors occurred at appellant's trial were harmless, singularly or cumulatively]; *People v. Lucas*, *supra*, 12 Cal.4th at p. 476 ["We have considered each claim on the merits, and neither singly nor cumulatively do they establish prejudice requiring the reversal of the convictions"].) This case is no different than any of the foregoing. Appellant's cumulative error claim is without merit.

XIII.

APPELLANT'S DEATH SENTENCE IS NOT DISPROPORTIONATE TO HIS PERSONAL CULPABILITY

Appellant argues his death sentence is disproportionate to his individual culpability in violation of Article I, Section 17 of the California Constitution, and the Eighth Amendment. (AOB 268-270.) Not so.

> To determine whether a sentence is cruel or unusual as applied to a particular defendant, a reviewing court must examine the circumstances of the offense, including its motive, the extent of the defendant's involvement in the crime, the manner in which the crime was committed, and the consequences of the defendant's acts. The court must also consider the personal characteristics of the defendant, including age, prior criminality, and mental capabilities. If the court concludes that the penalty imposed is grossly disproportionate to the defendant's individual culpability or, stated another way, that the punishment shocks the conscience and offends fundamental notions of human dignity the court must invalidate the sentence as unconstitutional.

(*People* v. *Riel* (2000) 22 Cal.4th 1153, 1223-1224, citations and internal quotations omitted.)

In light of the circumstances of the present crimes (principally, appellant's first degree murder of three unarmed strangers and his willful, deliberate, and premeditated attempts to murder two others after entering a home armed with an assault rifle and blocking the exits), the punishment imposed was not grossly disproportionate, even taking into account the mitigating evidence presented by the defense. (Cf. *People v. Lewis*, *supra*, 25 Cal.4th at pp. 677-678; *People v. Bacigalupo* (1991) 1 Cal.4th 103, 151-152; *People v. Lewis* (1990) 50 Cal.3d 262, 285-286; *People v. Carrera*, *supra*, 49 Cal.3d at p. 346.) Appellant's reliance on *People v. Dillon* (1983) 34 Cal.3d 441, is misplaced. The defendant there, a 17-year-old who shot and killed his victim out of fear and panic, was sentenced to life in prison despite the view of judge and jury that the

sentence was excessive in relation to his culpability. (*Id.* at p. 487; see *People v. Johnson* (1989) 47 Cal.3d 1194, 1253 [distinguishing *Dillon*].) Here, the jury expressly chose appellant's sentence and the trial court denied appellant's application to modify the sentence. Moreover, the *Dillon* defendant was convicted of "only" one first degree felony murder. Accordingly, appellant's argument must fail.

XIV.

THE TRIAL COURT PROPERLY REFUSED APPELLANT'S PINPOINT INSTRUCTION ON MITIGATING CIRCUMSTANCES

Appellant argues that the trial court erred when it refused to give his pinpoint instruction on the proof and scope of mitigating circumstances. (AOB 314-321.) Not so.

The proffered instruction provided:

> The mitigating circumstances that I have read for your consideration are given merely as examples of some factors that a juror may take into account as reasons for deciding not to impose a death sentence in this case. A juror should pay careful attention to each of those 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 a juror should not limit his or her consideration of mitigating circumstances to these specific factors.
>
> A juror may also consider any other circumstances relating 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. A juror may find that a mitigating circumstance exists if there is any evidence to support it no matter how weak the evidence is.
>
> Any mitigating circumstance may outweigh all the aggravating factors.
>
> A juror is permitted to use mercy, sympathy, and/or sentiment in deciding what weight to give each mitigating factor.

(3 CT 756.)

The trial court refused to give this instruction. (21 RT 3571; 22 RT 3700.) The trial court agreed that "there may be parts of it I will give in different contexts, but at this point I wouldn't even know where to begin the modifications." (21 RT 3569.) Specifically, the trial court was concerned that the reference to "beyond a reasonable doubt" would confuse the jury and lead them to believe there was some standard that did apply; that the substitution of "no matter how weak it is" for "substantial evidence" was not a correct

statement of the law; and the reference to "mercy," was ambiguous. The court believed the reference to mercy was redundant if it comprised a second reference to sympathy, and was not a correct statement of the law if it was meant to be a relevant consideration in its own right. (21 RT 3568-3571.) At a subsequent hearing, defense counsel indicated he might make separate requests that portions of the instruction be given (22 RT 3700), but never did so.

This Court has previously rejected claims of error for refusing similar instructions. (See, e.g., *People v. Smith* (2003) 30 Cal.4th 581, 638; *People v. Bonillas* (1989) 48 Cal.3d 757, 789-790.) Appellant provides no persuasive argument for reconsidering those holdings. Therefore, appellant's arguments must fail.

XV.

CALJIC NO. 8.85 IS NOT DEFECTIVE

Appellant argues that CALJIC No. 8.85 (3 CT 782) misled the jury about the weighing of aggravating and mitigating factors. Specifically, appellant argues that the instruction included factors inapplicable to the facts of this case and that there was no guidance as to which factors were mitigating and which were aggravating. (AOB 321-326.) Not so.

Appellant's arguments have been repeatedly considered and rejected by this Court. (See, e.g., *People v. Farnam* (2002) 28 Cal.4th 107, 191-192 ["it was proper for the court to instruct the jury in the language of CALJIC No. 8.85 without deleting certain factors that were inapplicable to defendant's case" and "the trial court had no obligation to advise the jury which statutory factors are relevant solely as mitigating circumstances and which are relevant solely as aggravating"].) Appellant provides no persuasive argument for this Court to reconsider its prior rulings. Therefore, the argument must fail.

XVI.

CALJIC NO. 8.88 IS NOT DEFECTIVE

Appellant argues that CALJIC No. 8.88 (3 CT 789) misled the jury about the sentencing process. Specifically, appellant argues that the instruction provided a vague and ambiguous standard for weighing mitigating and aggravating factors, that the instruction failed to inform the jurors that the central determination of the penalty phase was to determine whether the death penalty was appropriate, and that the instruction failed to inform the jurors that they must return a sentence of life in prison if mitigation outweighed aggravation. (AOB 326-336.) Not so.

Appellant's arguments have been repeatedly considered and rejected by this Court. (See, e.g., *People v. Coffman, supra*, 34 Cal.4th at p. 124 [specifically rejecting each of appellant's arguments].) Appellant provides no persuasive argument for reconsideration. Therefore, appellant's arguments must fail.

XVII.

THE MULTIPLE-MURDER SPECIAL CIRCUMSTANCE SUFFICIENTLY NARROWS THE CLASS ELIGIBLE FOR THE DEATH PENALTY

Appellant argues that the special circumstance the jury found to be true in his case, Penal Code section 190.2, subdivision (a)(3), the multiple-murder special circumstance, violates the Eighth Amendment of the federal Constitution. Specifically, appellant argues that the class eligible for the death penalty under the statute is not sufficiently narrow. (AOB 336-340.) Not so.

Appellant's arguments have been repeatedly considered and rejected by this Court. (See, e.g., *People v. Sapp* (2003) 31 Cal.4th 240, 286-287.) Appellant provides no persuasive argument for reconsidering this Court's prior rulings. Therefore, appellant's arguments must fail.

XVIII.

CALIFORNIA'S DEATH PENALTY LAW IS CONSTITUTIONAL

Appellant's argues that many features of California's capital sentencing scheme, alone or in combination with each other, violate the federal Constitution. (AOB 340-395.) Not so.

A. Penal Code Section 190.2 Is Not Impermissibly Broad

This Court has repeatedly rejected appellant's argument (AOB 342-345) that California's death penalty law fails to adequately narrow the class of murderers eligible for the death penalty. (*People v. Bolden*, *supra*, 29 Cal.4th at p. 566; *People v. Barnett*, *supra*, 17 Cal.4th at p. 1179; *People v. Arias* (1996) 13 Cal.4th 92, 187; *People v. Stanley* (1995) 10 Cal.4th 764, 842-843; *People v. Wader*, *supra*, 5 Cal.4th at p. 669.)

B. Penal Code section 190.3, subdivision (a), Does Not Permit Arbitrary And Capricious Punishment

This Court has repeatedly rejected appellant's argument (AOB 345-350) that Penal Code section 190.3, subdivision (a), ("circumstances of the crime"), has no limitations and thus permits arbitrary and capricious imposition of the death penalty. (*People v. Osband*, *supra*, 13 Cal.4th at p. 703; *People v. Sanders* (1995) 11 Cal.4th 475, 563; *People v. Medina, supra,* 11 Cal.4th at p. 780; *People v. Turner* (1994) 8 Cal.4th 137, 208.)

C. Adequate Safeguards To Prevent Arbitrary And Capricious Sentencing Are Not Lacking

This Court has repeatedly rejected all but one of the arguments appellant makes in support of his argument (AOB 351) that California's death penalty law violates the Sixth, Eighth, and Fourteenth Amendments because it contains no

safeguards against arbitrary and capricious sentencing and deprives defendants of the right to a jury trial on each element of a capital crime. Because appellant provides no persuasive argument for reconsidering those holdings, the arguments must fail. The remaining argument, as discussed below, must also fail.

1. There is No Requirement That Aggravating Factors Be Proven Beyond A Reasonable Doubt

Contrary to appellant's argument (AOB 352-367), even after *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490, and *Ring v. Arizona* (2002) 536 U.S. 584, there is no constitutional requirement that aggravating factors (other than prior criminality) be proven beyond a reasonable doubt. (*People v. Bolden, supra*, 29 Cal.4th at p. 566; *People v. Ochoa, supra*, 26 Cal.4th at pp. 453-454; *People v. Barnett, supra*, 17 Cal.4th at p. 1178.) Moreover, there is no constitutional requirement for the jury to reach unanimous agreement on the circumstances in aggravation that support a death penalty verdict. (*People v. Taylor* (1990) 52 Cal.3d 719, 749.)

2. There Is No Requirement That Aggravating Factors Outweigh Mitigating Factors Beyond A Reasonable Doubt

Contrary to appellant's argument (AOB 367-371) even after *Apprendi v. New Jersey, supra*, 530 U.S. 466, 490, and *Ring v. Arizona, supra,* 536 U.S. 584, there is no constitutional requirement that aggravating factors be proven to outweigh mitigating factors beyond a reasonable doubt, or that the jury unanimously find that death is the appropriate penalty beyond a reasonable doubt. (*People v. Bolden, supra*, 29 Cal.4th at p. 566; *People v. Ochoa, supra*, 26 Cal.4th 398, 453-454; *People v. Barnett, supra*, 17 Cal.4th at p. 1178.)

3. There Is No Requirement That Aggravating Factors Be Proven By A Preponderance Of The Evidence

Contrary to appellant's argument (AOB 372-373), there is no constitutional requirement that aggravating factors be proven by at least a

preponderance of the evidence, that aggravating factors be proven to outweigh mitigating factors by at least a preponderance of the evidence, or that the jury find that death is the appropriate penalty by at least a preponderance of the evidence. "'Because the determination of penalty is essentially moral and normative [citation], and therefore different from the determination of guilt,' the federal Constitution does not require the prosecution to bear the burden of proof or burden of persuasion at the penalty phase." (*People v. Sapp*, *supra*, 31 Cal.4th at p. 317; citing *People v. Hayes* (1990) 52 Cal.3d 577, 643; *People v. Bemore* (2000) 22 Cal.4th 809, 859.)

4. There Is No Requirement That The Trial Court Provide A "Tie-Breaking" Instruction

In what appears to be a novel argument, appellant urges that a "tie-breaking rule" is required to avoid unconstitutionally "wanton" and "freakish" or arbitrary sentence selection when a jury cannot agree on an aggravating factor or on the appropriate penalty. (AOB 374.) Not so.

Not only does appellant cite no specific authority for his argument, it is plainly contrary to law. Initially, respondent notes appellant made no request for such an instruction at trial, so he cannot raise this issue on appeal. (*People v. Welch*, *supra*, 20 Cal.4th at p. 757.)

A "tie" cannot occur as to either aggravation or penalty. As to aggravation, each juror is to assess whether he or she believes any particular aggravating factor is present. (*People v. Breaux* (1991) 1 Cal. 4th 281, 315.) Penalty selection requires a unanimous decision, so if a jury is evenly split, simply "breaking the tie" would not result in a penalty verdict. (Pen. Code, § 190.4, subd. (b).)

Moreover, this curious claim that a "tie-breaking" instruction is required, which has more the aura of a game show result than the justice system, conflicts with well-established law. It is not appropriate for a judge to instruct a jury, in advance, of the consequences of a deadlock because it could confuse or

misguide the jury as to its responsibilities. (*People v. Gurule* (2002) 28 Cal.4th 557, 648; *People v. Memro, supra*, 11 Cal.4th at 882.)

Finally, the standard instructions given in this case are constitutionally adequate to advise the jury of its duties and responsibilities in penalty selection. (*People v. Gurule, supra*, 28 Cal.4th at 659.) For the foregoing reasons, appellant's argument must fail.

5. There Is No Requirement That The Trial Court Instruct That There Is No Burden Of Proof During The Penalty Phase

Contrary to appellant's argument (AOB 374-375), there is no constitutional requirement that the trial court instruct the jury that there is no burden of proof at the penalty phase. Indeed, because the California death penalty statute does not specify any burden of proof, except for prior-crimes evidence, the trial court should not instruct at all on the burden of proving mitigating or aggravating circumstances. (*People v. Carpenter* (1997) 15 Cal.4th 312, 417-418; *People v. Holt, supra*, 15 Cal.4th at pp. 682-684.)

6. Written Findings Regarding Aggravating Factors Are Not Required

Contrary to appellant's argument (AOB 375-378), California's death penalty law is not unconstitutional because it does not require that the jury base any death sentence on written findings regarding aggravating factors. (*People v. Fauber* (1992) 2 Cal.4th 792, 859; *People v. Belmontes* (1988) 45 Cal.3d 744, 805; *People v. Jackson* (1980) 28 Cal.3d 264, 316-317; *People v. Frierson* (1979) 25 Cal.3d 142, 178-180; see also *Clemons v. Mississippi* (1990) 494 U.S. 738, 750; *Harris v. Pulley* (9th Cir. 1982) 692 F.2d 1189, 1195-1196, vacated and remanded on other grounds, *Pulley v. Harris* (1984) 465 U.S. 37.)

7. Inter-Case Proportionality Review Is Not Required

Contrary to appellant's argument (AOB 378-382), California's death penalty law is not unconstitutional because this Court does not require inter-case proportionality review. (*People v. Bolden, supra*, 29 Cal.4th at p. 566; *People*

v. Barnett, supra, 17 Cal.4th at p. 1182; *People v. Crittenden, supra*, 9 Cal.4th at p. 156; *People v. Mincey* (1992) 2 Cal.4th 408, 476; *People v. Hayes, supra*, 52 Cal.3d at p. 645.)

8. Restrictive Adjectives In The List Of Potential Mitigating Factors Are Not Impermissible Barriers To Consideration Of Mitigation

Contrary to appellant's argument (AOB 382-384), the use of restrictive adjectives in the list of potential mitigating factors (e.g., "Whether or not the offense was committed while the defendant was under the influence of *extreme* mental or emotional disturbance" (Pen. Code, § 190.3, factor (d), emphasis added), does not impermissibly act as barriers to consideration of mitigation by a penalty jury. (*People v. Ghent* (1987) 43 Cal.3d 739, 776; *People v. Morales* (1989) 48 Cal.3d 527, 567-568; *People v. Wright* (1990) 52 Cal.3d 367, 444; *People v. Turner, supra*, 8 Cal.4th 137, 208-209; *People v. Davenport* (1995) 11 Cal.4th 1171, 1230; *People v. Jones* (1997) 15 Cal.4th 119, 190.)

D. There Is No Requirement To Instruct The Jury That A Presumption Favors A Sentence Of Life In Prison

Relying only on a law journal note,[31] appellant argues that the trial court's failure to instruct the jury that there is a presumption favoring a sentence of life in prison violated the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution. (AOB 384-385.) Not so.

This Court has already rejected this claim.

> Defendant also claims the statute is constitutionally deficient because it "fails to require a presumption that life without parole is the appropriate sentence." No authority is cited for the proposition, and it lacks merit. If a death penalty law properly limits death eligibility by requiring the finding of at least one aggravating circumstance beyond

---

31. See Note, *The Presumption of Life: A Starting Point for a Due Process Analysis of Capital Sentencing* (1984) 94 Yale L.J. 351, cited at AOB 210.

> murder itself, the state may otherwise structure the penalty determination as it sees fit, so long as it satisfies the requirement of individualized sentencing by allowing the jury to consider all relevant mitigating evidence. [Citations.]

(*People v. Arias*, *supra*, 13 Cal.4th at p. 190.) *Arias* does not stand alone in rejecting the claim appellant makes here; this Court has rejected the claim consistently and frequently. (See *People v. Kipp* (2001) 26 Cal.4th 1100, 1137; *People v. Taylor*, *supra*, 26 Cal.4th at p. 1178; *People v. Carpenter* (1999) 21 Cal.4th 1016, 1064; *People v. Jones*, *supra*, 15 Cal.4th at p. 196; *People v. Crittenden*, *supra*, 9 Cal.4th at p. 153.)

E. Equal Protection Principles Are Not Violated By The Death Penalty Law

This Court has repeatedly rejected appellant's argument (AOB 385-391) that California's death penalty law deprives capital defendants of equal protection because it does not guarantee some sort of disparate sentence review that was in the past given to noncapital convicts under the Determinate Sentencing Act. (*People v. Boyette*, *supra*, 29 Cal.4th at p. 467, fn. 22, citing *People v. Keenan* (1988) 46 Cal.3d 478, 545; accord *People v. Allen* (1986) 42 Cal.3d 1222.) Furthermore, capital defendants are not similarly situated with noncapital defendants, and as this Court has held, the first prerequisite to a successful equal protection claim "is a showing that the state has adopted a classification that affects two or more similarly situated groups in an unequal manner." (*People v. Massie* (1998) 19 Cal.4th 550, 570-571, and cases there cited; internal quotation marks omitted.)

F. Neither International Norms Nor The U.S. Constitution Are Violated By The Death Penalty Law

This Court has also rejected appellant's argument (AOB 391-395) that "California's use of the death penalty as a regular form of punishment falls short of international norms of humanity and decency and violates the Eighth and Fourteenth Amendments." (*People v. Ghent*, *supra*, 43 Cal.3d at pp. 778-779; *People v. Hillhouse* (2002) 27 Cal.4th 469, 511.)

Moreover, this Court should preclude appellant from claiming violations of customary international law or treaties for the first time on appeal, since he never raised such claims in the trial court. Additionally, as demonstrated in our responses to all of appellant's preceding arguments, appellant has failed to establish the premise that his trial involved any violations of state and/or federal constitutional law. (*People v. Jenkins* (2000) 22 Cal.4th 900, 1055 [failure to establish violations of state and federal constitutional law in the first instance prevents claim that alleged errors were violations of international law].)

For the foregoing reasons, appellant's arguments must fail.

XIX.

THE METHOD OF EXECUTION IN CALIFORNIA IS NOT UNCONSTITUTIONAL

Appellant raises two objections to the lethal injection method of execution. First, that appropriate regulations have not been adopted and, second, that the sentence is cruel and unusual. (AOB 395-407.) Not so.

Appellant first claims that the Department of Corrections alleged failure to adopt regulations "mandated by Penal Code section 3604" violates due process. (AOB 397-401.) Section 3604 provides that the punishment of death shall be inflicted by the administration of a lethal gas or by an intravenous injection. (Pen. Code, § 3604, subd. (a).) If a person sentenced to death fails to choose between the methods of execution by a specified date, death shall be imposed by lethal injection. (Pen. Code, § 3604, subd. (b).) Subdivision (a) of section 3604 also provides that the lethal injection should be carried out "by standards established under the direction of the Department of Corrections." Appellant contends that "[t]o [his] knowledge, the Department of Corrections has not complied with the mandate of section 3604, subdivision (a), to establish standards for the administration of lethal injections or with the provisions of the administrative Procedures Act." (AOB 398.) Our response is twofold.

First, the Department of Corrections has adopted detailed standards and procedures for the imposition of the death penalty by lethal injection. These standards are available to everyone on the Department of Corrections' website.[32/] Second, to the extent appellant's claim is based on his belief that the Department has failed to abide by alleged requirements of the Administrative Procedures Act, such a claim is not cognizable in this direct appeal. The claim depends on matters that could only exist outside the record on appeal and,

---

32. The Department's standards and procedures can be viewed at: http://www.cdc.state.ca.us/ReportsResearch/lethalInjection.html

moreover, does not bear on appellant's sentence, but solely on the legality of the of the execution of the sentence. (See *People v. Samayoa*, *supra*, 15 Cal.4th at p. 864, internal quotation marks and citations omitted ["the claim [that the death by lethal injection constitutes cruel and unusual punishment] must be rejected out of hand as a ground for reversal of the judgment of death. It bears solely on the legality of the execution of the sentence and not on the validity of the sentence itself"].)

The second part of appellant's argument is the claim that California's lethal injection procedures violate the Eighth Amendment ban on cruel and unusual punishment. (AOB 401-407.) This issue has been resolved by this Court adversely to appellant's position. (See *People v. Taylor*, *supra*, 26 Cal.4th at p. 1177; *People v. Samayoa*, *supra*, 15 Cal.4th at p. 864; *People v. Holt*, *supra*, 15 Cal.4th at p. 702.) Alluding to matters outside the record, appellant describes instances in which there were complications or mishaps in the use of lethal injections. But this Court has rejected such "anecdotal evidence" as a basis for a claim that the method of execution as administered in California violates the Eighth Amendment. (*People v. Holt*, *supra*, 15 Cal.4th at p. 702.) In addition, addressing a similar claim, the Ninth Circuit Court of Appeals concluded that "[t]he risk of accident cannot and need not be eliminated from the execution process in order to survive constitutional review." (*Campbell v. Wood* (9th Cir. 1994) 18 F.3d 662, 687; see also *LaGrand v. Stewart* (9th Cir. 1998) 133 F.3d 1253, 1265.) Indeed, the existence of some pain in the method of execution does not mean that the method is cruel and unusual. "Cruel" implies "[s]omething inhuman and barbarous, something more than the extinguishment of life." (*Campbell v. Wood*, *supra*, 18 F.3d at p. 683, quoting *In re Kemmler* (1890) 136 U.S. 436, 447.)

In sum, respondent submits that California's method of execution by lethal injection does not violate the prohibition against cruel and unusual punishment. Appellant's argument must fail.

XX.

THE TRIAL COURT'S RESTITUTION ORDERS WERE UNAUTHORIZED

Respondent concedes that the combination of direct restitution and restitution fines imposed by the trial court exceeded the limits applicable at the time appellant committed his crimes. (See AOB 407-413.)Appellant is due a remand to the trial court for a recalculation of restitution orders.

CONCLUSION

Accordingly, respondent respectfully requests that the judgment be affirmed.

Dated: March 10, 2006

Respectfully submitted,

BILL LOCKYER
Attorney General of the State of California

ROBERT R. ANDERSON
Chief Assistant Attorney General

GERALD A. ENGLER
Senior Assistant Attorney General

BRUCE ORTEGA
Deputy Attorney General

WILLIAM KUIMELIS
Deputy Attorney General

Attorneys for Respondent

WMK:dmn
SF1999XS0002

CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 45373 words.

Dated: March 10, 2006

Respectfully submitted,

BILL LOCKYER
Attorney General of the State of California

WILLIAM KUMELIS
Deputy Attorney General

Attorneys for Respondent

DECLARATION OF SERVICE BY MAIL

Case Name: ***People v. Matthew A. Souza***
Case No. **S076999**

I am employed in the Office of the Attorney General, which is the office of a member of the Bar of this Court at which member's direction this service is made. 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 March 10, 2006, I served the attached

RESPONDENT'S BRIEF

in the internal mail collection system at the Office of the Attorney General,455 Golden Gate Avenue, Suite 11000, San Francisco, California 94102, for deposit in the United States Postal Service that same day in the ordinary course of business in a sealed envelope, postage fully prepaid, addressed as follows:

C. Delaine Renard
State Public Defender's Office
221 Main Street, 10th Floor
San Francisco, CA 94105

Honorable Joseph Hurley
Alameda County Superior Court
1225 Fallon Street, Room 209
Oakland, CA 94612

California Appellate Project
Michael Lasher
101 Second Street
Suite 600
San Francisco, CA 94105

Honorable Thomas J. Orloff
District Attorney
County of Alameda
1225 Fallon Street, Room 900
Oakland, CA 94612

I declare under penalty of perjury the foregoing is true and correct and that this declaration was executed on March 10, 2006, at San Francisco, California.

Denise M. Neves

Denise M. Neves
Signature