IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

JAMES DAVID BECK and GERALD DEAN CRUZ,

Defendant and Appellant.

S029843

CAPITAL CASE

Alameda County Superior Court No. 110467
The Honorable Edward M. Lacy, Jr., Judge

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

On December 21, 1990, the Stanislaus County District Attorney filed an information charging Appellant Gerald Dean Cruz, Appellant James David Beck, Jason LaMarsh, and Ronald Willey with four counts of special circumstance multiple-murder (Pen. Code, §§ 187, 190.2, subd. (a)(3))[1] and one count of conspiracy to commit murder (§ 182).[2] The information charged the defendants on every count with an enhancement for the personal use of a deadly weapon (§12022, subd. (b)). It also charged LaMarsh on every count with an enhancement for the personal use of a firearm (§ 12022.5).[3] (3 CT

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1. Subsequent statutory references are to the Penal Code unless otherwise indicated.

2. The information enumerated the overt acts of the conspiracy. On February 21, 1992, the trial court struck one of the overt acts and renumbered the remaining overt acts. (6 CT 1613; 6 RT 1249–1250.)

3. The original complaint also charged Richard Vieira and Michelle Evans with the same crimes. (3 CT 798–800.) However, their cases were severed. Evans entered into a plea agreement in exchange for her testimony against the defendants. (1 CT 94–95; 2 CT 431–433; 24 RT 4174–4176.) She pleaded guilty to felony accessory with a maximum term of three years. Pursuant to the prosecutor's recommendation, she served only one year. (24 RT 4174–4176.) Vieira was tried separately and was convicted of all charges. The

820–826.)

On January 29, 1992, the Stanislaus County Superior Court granted the defendants' motion for a change of venue. (6 CT 1479.) The court transferred the case to the Alameda County Superior Court. (6 CT 1518.)

Jury selection began on March 3, 1992, and was completed on March 23, 1992. (6 CT 1631, 1712.) The prosecution began its case-in-chief on March 31, 1992, and concluded on April 15, 1992. (6 CT 1725; 7 CT 1749.)

Cruz began his defense on April 21, 1992, and concluded on April 28, 1992. (7 CT 1750, 1761.)

Beck presented his defense on April 30, 1992. (7 CT 1764.)

LaMarsh began his defense on May 4, 1992, and concluded on May 6, 1992. (7 CT 1765, 1768.)

Willey began his defense on May 8, 1992, and concluded on May 13, 1992. (7 CT 1769, 1772-1773.)

On May 13, 1992, the People presented their rebuttal, and Cruz presented his surrebuttal. (7 CT 1773–1774.)

On May 18, 1992, LaMarsh presented his surrebuttal. The prosecution and Cruz gave closing arguments. (7 CT 1792–1793.)

On May 19, 1992, Beck, LaMarsh, and Willey gave closing arguments, and the prosecution made its rebuttal argument. (7 CT 1794.) The jury began deliberations the next day. (7 CT 1795.)

On June 4, 1992, the jury found Beck and Cruz guilty of all counts and found all of the enhancements true. The jury reported it could not reach verdicts for LaMarsh and Willey, and the trial court declared a mistrial as to

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jury returned a verdict of life without parole on one of the murder charges, and death for the remaining four counts. On automatic appeal, this Court affirmed the murder convictions, but remanded to the trial court so it could resentence Vieira to 25 years to life for the conspiracy conviction. (*People v. Vieira* (2005) 35 Cal.4th 264, 273 (*Vieira*).)

those defendants.[4] (7 CT 1820; 9 CT 2270–2287; 38 RT 6882–6891, 6903.)

The prosecution presented its penalty phase case against Cruz on June 23, 1992. (9 CT 2338.) Cruz concluded his defense on June 29, 1992. (9 CT 2343.) On July 1, 1992, the parties made closing arguments; the jury deliberated; and the jury returned verdicts of death for each count. (9 CT 2402–2406, 2413, 2420; 41 RT 7570–7578.)

The prosecution began its penalty phase case against Beck on July 13, 1992. (9 CT 2422.) Beck began his defense the next day, and concluded on July 22, 1992. (9 CT 2423; 10 CT 2443.) On July 23, 1992, the prosecution concluded its rebuttal, and the jury began deliberations. (10 CT 2445.) The next day the jury returned a verdict of death for each count. (10 CT 2446–2451; 45 RT 8367–8369.)

On October 23, 1992, the trial court denied appellants' motions for new trials. (45 RT 8412.) It also denied Beck's motion to reduce his punishment to life without the possibility of parole. (45 RT 8416.) The trial court imposed five death sentences on Cruz and on Beck. (10 CT 2650, 2652–2665; 45 RT 8423–8428.)

Cruz and Beck's appeal was automatic and was deemed filed as of October 26, 1992. (45 RT 8427; 10 CT 2659, 2664–2665; §1239, subd. (b).)

STATEMENT OF FACTS

Introduction

Gerald Cruz and James Beck led a small group which advocated certain quasi-religious ideas, including Voodoo and white-supremacist ideology. The group often referred to their organizing principle as "The Cause." Its cult-like

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4. In a subsequent joint trial, LaMarsh and Willey were each convicted of four counts of second degree murder and one count of conspiracy to commit murder. The trial court sentenced them each to 64 years to life.

qualities included Cruz as the charismatic leader, Beck as the disciplinarian, the pooling of resources (even though Cruz did not work), and a signed loyalty oath that was marked with a blood fingerprint.

Cruz was a tyrant to his followers and Beck was his enforcer. Beck relished his position; he never hesitated to follow Cruz's orders to punish and torture the others; and sometimes he took it on himself to mete out punishments. Most of the physical torture was directed at two men, Richard Vieira and Steve Perkins. They were treated like servants, and when they made the slightest mistake, they were required to stand and receive numerous blows without moving or complaining. Appellants also electrocuted these men, and Perkins eventually had to go to the hospital. He suffered lasting physical and psychological injuries and had to move back home with his parents; but as a result, he did not participate in the murders. Cruz had three children with his girlfriend, Jennifer Starn, and he frequently beat her and threatened to kill her if she left him. He also regularly beat their eldest daughter, Alexandra, while she was an infant.

Most of the group lived on a property in Salida that was known as "the Camp." Franklin Raper also lived on that property. His drug-dealing and abrasive personality annoyed the others. After several confrontations, Cruz, Beck, and other residents physically evicted Raper. They towed his trailer a few blocks away and burned his car. But that did not satisfy appellants. Although Raper was a frail alcoholic who weighed 100 pounds and had never physically harmed them, they decided to kill Raper and anyone else who happened to be with him.

On May 20, 1990, appellants gathered together three other members of the group, Vieira, codefendant Jason LaMarsh, and codefendant Ronald Willey, as well as LaMarsh's girlfriend, Michelle Evans. Cruz had Evans draw a map of the house where Raper was staying. Then Cruz explained to the others how they would surround the house, corral the residents, and kill everyone, including

any witnesses who happened by. The plan was to beat and stab the victims because firearms would make too much noise and attract the attention of neighbors.

After midnight, they raided the house. There were five people inside including Raper. The assailants did not know three of the people. Fortunately, one woman was able to escape through the garage. However, the assailants savagely bludgeoned and stabbed the other four victims. Each vicious attack culminated in the cutting of the victim's throat. They beat Raper so badly that a tooth and part of his denture were knocked out of his mouth; blood was splattered on the wall; and his head was deformed.

At trial, appellants admitted they went to Raper's house, but claimed there was no plan to kill him. They testified that they went to the house because shortly before midnight, Evans had an urgent need to retrieve some clothes from the house, and she needed protection. However, Evans testified otherwise, as did Willey. Nor was it credible that they brought five knives, two bats, a police baton, and a handgun for protection since members of the group had gone to that house numerous times unarmed.

Appellants' defense was that they brought weapons because they believed that Raper had enlisted a motorcycle gang to come to the Camp that night to kill everyone there. But they offered no evidence that there was such a threat besides their own testimony. Moreover, the claim was not credible because Cruz left Starn, who was pregnant, and their two children at the Camp unprotected even though the Camp was purportedly the target of the attack. According to Beck, he was not worried about Starn or the children because Starn could protect them from the motorcycle gang with her gun.

Despite evidence that appellants exercised control over the others, rounded-up the group, and drove them to the murder scene, they testified at trial that they were merely passive observers. However, that claim was squarely contradicted

by Evans, the other defendants, and the neighbor who testified that he saw Cruz and Willey beat one of the victims and then Cruz cut the victim's throat. Coincidentally, appellants testified that they were best friends, and theirs was the only testimony that was mutually exonerating.

Finally, Cruz claimed that he did not call the police because he did not have a mobile phone. Beck claimed he did not want to get his friends in trouble. They both testified that they did not know at the time that there had been any murders. Accordingly, they described confrontations between each of the assailants and a victim, but claimed that they moved on before each victim was killed. Moreover, they maintained their pretense of naivete by providing just enough evidence to imply which assailant killed which victim, while maintaining that they did not actually realize that anyone had been killed. Notwithstanding Cruz and Beck's claims of innocence, the other assailants testified that after the murders, the only remorse that Cruz and Beck expressed was that they had not had the opportunity to kill more people. At trial, Cruz admitted that he witnessed four separate vicious brawls, but analogized his sympathy for the victims to how one feels when told about strangers dying in a car accident. According to a clinical psychologist who testified for Beck, even two years after the murders, Beck still showed no remorse.

The jury sensibly rejected appellants' implausible defense theory and found them guilty of four murders and conspiracy to commit murder. The jury also rejected Cruz and Beck's requests for leniency. It returned death verdicts on every count.

On appeal, Cruz makes fifteen claims and Beck makes twenty claims. In addition, Cruz joins fifteen of Beck's claims and Beck joins eleven of Cruz's claims. Appellants identify one actual error in the guilt phase and two errors in the penalty phase. However, two of those errors were harmless and the third was a sentencing error that this Court can easily remedy.

The trial court imposed death sentences for the conspiracy convictions after accepting the jury's verdicts of death. However, conspiracy to commit murder is not a death-eligible offense. So this Court should convert that sentence to a term of 25 years to life.

Appellants correctly argue that the trial court erroneously instructed the jury that it could find them guilty of conspiracy to commit murder if they harbored malice. The trial court should have specified that only express malice or intent to kill would suffice. However, the jury made other findings which demonstrated beyond a reasonable doubt that the jury believed that appellants harbored express malice. In particular, the jury's four first-degree murder convictions required a finding of express malice and premeditation and deliberation. The jury also specifically found that all of the murders were committed in furtherance of the conspiracy to commit murder. Therefore, the jury certainly believed that appellants harbored an intent to kill, and the instructional error was necessarily harmless.

During Cruz's penalty trial, the prosecutor argued that religious jurors should not be concerned with imposing the death penalty because the Bible authorized its use. Cruz does not claim error on appeal. However, the prosecutor made a similar argument in Beck's penalty trial and Beck does claim it was misconduct. In two other cases this Court found similar arguments to be improper. However, the argument was appropriate in Beck's penalty trial because Beck offered a great deal of mitigating evidence concerning his religious background and his dedication to the Bible. That may have made religious jurors more reticent about imposing the death penalty, and the prosecutor was entitled to reassure them that they could impose the death penalty without disobeying the Bible. Nevertheless, even if it was misconduct, this Court should find it harmless for the same reasons relied upon in the other cases, i.e., forfeiture and lack of prejudice.

None of appellants' other claims have merit.

Cruz contends that evidence seized from his home the morning after the murders should have been suppressed. Cruz argues that the search warrant was issued on information that LaMarsh was a suspect in the crime and lived in Cruz's apartment. But by the time the officer executed the warrant, the officer knew there was no longer probable cause for the search because LaMarsh actually lived in a nearby trailer. However, the officer never claimed that LaMarsh lived in Cruz's apartment. His affidavit asserted only that LaMarsh "frequented" or sometimes "stayed" at that apartment. Moreover, he still had a good faith belief that the warrant was valid because he had information that the people who lived in Cruz's apartment and the two nearby trailers were in a commune or cult and they shared everything, including their living spaces. Further, by the time the officers searched Cruz's apartment, Cruz had already been arrested. Since Cruz matched the description of one of the other suspects, and lived right next to LaMarsh, there is no doubt that the officer would have obtained a valid search warrant and all of the evidence would have been inevitably discovered.

Appellants argue that they should have been tried separately or together, but not with LaMarsh and Willey because their defenses were antagonistic. However, defendants did not have the right to a separate trial just so they could avoid incriminating evidence from codefendants who participated in the same crimes. Nor did appellants have the right to a separate trial so they could place all the blame on coconspirators without worrying about them telling their own side of the story. Contrary to appellants' argument, the joint trial was fair, and the trial court took extensive precautions to ensure that little evidence that would have been excluded in a separate trial was admitted in the joint trial.

Appellants contends that heightened courtroom security created an inherently prejudicial environment which violated their rights to a fair trial.

However, they forfeited the claim by failing to object. Moreover, it was appropriate to have one deputy in the courtroom for each defendant. It was also appropriate to have three of the deputies sit behind the defendants so they could respond quickly to any violence.

Appellants claim the trial court conducted voir dire unfairly by refusing to include in the questionnaire a question regarding whether the jurors understood the meaning of life without parole; by questioning the jurors in open court; and by refusing to ask certain follow-up questions. However, the trial court's procedures complied with established law. The jury questionnaire was extremely long and comprehensive, and it is established that the best procedure is to not probe the jurors' understanding of life without parole unless they broach the subject. Moreover, to the extent appellants were trying to convey that life without parole was irrevocable, that was contrary to the law, since the governor can commute that term.

Appellants complain that the trial court granted the prosecutor's request to excuse several prospective jurors for cause even though their criticism of the death penalty was not extreme and they said they would follow the law. However, all of the challenged jurors expressed unequivocal antipathy for the death penalty and indicated it was unlikely they would ever impose it. No further follow-up questioning was necessary once it was clear that rehabilitation was impossible.

Appellants claim that the trial court allowed the prosecutor to rehabilitate a "pro-death" juror, but prevented defense counsel from rehabilitating any of the jurors who expressed doubts about the death penalty. However, the trial court, prosecutor, and defense counsel each asked the "pro-death" juror only one question. The trial court allowed defense counsel to ask other prospective jurors many more questions. Moreover, since all the challenged jurors said they were unlikely to impose the death penalty regardless of the evidence, there is no

possibility that they could have been rehabilitated with further follow-up questions.

Appellants claim that the record is inadequate for review because four juror questionnaires, as well as the written record of follow-up questions, are missing from the record. However, this Court has faced far greater deficiencies in the record and found the record adequate for review. Moreover, almost all of the questionnaires are in the record and there is a complete reporter's transcript of all proceedings. The answers from the questionnaires that caused concern were identified and discussed during voir dire. Moreover, all four defense attorneys were afforded an opportunity to cite answers from the missing questionnaires to rebut the challenges for cause. But they generally did not take advantage of that opportunity–most likely because there was nothing in those questionnaires that could rehabilitate the prospective jurors. And while some of the written follow-up questions are missing, the record suggests that only Cruz submitted a comprehensive list, and that list is in the record.

Appellants complain that the trial court unfairly reopened voir dire so the prosecutor could peremptorily challenge a juror. However, the trial court had good cause to reopen voir dire because immediately after all the parties passed for cause, the juror told the trial court that he had substantial doubts whether his religious beliefs would permit him to impose the death penalty.

Appellants argue that the trial court erred by admitting evidence that Cruz, Beck, and Vieira were a tightknit group and had many firearms. However, appellants failed to object to much of that evidence. Moreover, it is well established that the closeness of coconspirators is relevant to prove a conspiracy. Similarly, the firearms evidence was relevant to show that the assailants had superior weapons if their goal was to protect themselves from a motorcycle gang. The fact that they took less lethal weapons proved that their

true purpose was not self-defense, but rather to commit the murders and avoid attracting neighbors with the sound of gunfire.

Appellants contend that their right to remain silent was violated when Willey's attorney commented that if Cruz's attorney did not want Cruz to answer questions, he should not have had Cruz testify. However, the jury had been repeatedly told that the defendants had the right to remain silent, and the comment referred to the decision of Cruz to *testify*. Therefore, it could not have implicated his right to remain silent. Since Beck also testified, no improper inference against either appellant was possible.

Appellants contend that the trial court violated their due process rights by allowing Willey to reopen his defense to admit an autopsy photograph of the victim, Dennis Colwell. However, the trial court did not abuse its discretion. Willey asked to reopen less than a day after he rested; nothing happened in front of the jury during that interval; the evidence was probative for Willey, but not prejudicial to appellants; and it took just a few minutes to admit the exhibit.

Appellants claim that there was insufficient evidence to support the conspiracy convictions because Evans' testimony was "inherently unreliable" and her testimony was not adequately corroborated as required by law. However, Evans' testimony was far more reliable than the defendants' testimony, and it was corroborated by substantial physical and testimonial evidence.

Appellants contend the trial court violated their constitutional rights by excluding them from sidebar discussions, discussions about jury questions and responses, motions for mistrial, and an inquiry into possible juror misconduct. However, it is well established that defendants have no right to be present at sidebar discussions and routine legal arguments. Appellants affirmatively waived their right to be present while the trial court and attorneys discussed jury questions and responses. The motions for mistrial were routine and

perfunctory, and appellants' presence would not have made any difference. And the inquiry about juror misconduct turned out to be much ado about nothing: a juror merely read a newspaper article about an unrelated criminal trial.

Appellants claim the trial court erred by refusing to instruct the jury on voluntary manslaughter based on imperfect self-defense. Appellants claim the jury could have believed that they planned the murders in the unreasonable belief that they needed to kill Raper before he sent a motorcycle gang to the Camp to kill everyone there. However, no one ever testified that the purpose of the conspiracy was defensive, nor is a preemptive assault a valid basis for any kind of self-defense. Similarly, appellants were not entitled to an instruction on perfect or imperfect self-defense based on anything that occurred at the murder scene because there was absolutely no evidence that any of the victims threatened appellants.

Appellants claim the trial court inadequately instructed the jury on sudden quarrel and heat of passion; the need to find a defendant not guilty of a greater offense before reaching a verdict on a lesser offense; and the personal use of a deadly or dangerous weapons. However, all of the instructions were adequate, and appellants cannot show that more favorable verdicts would have resulted if the jury had been instructed with appellants' supplemental instructions.

Appellants claim that the trial court inadequately instructed the jury on the multiple murder special circumstance allegation. However, the instruction properly conveyed that the jury could find the allegation true only if a defendant committed at least two murders, and that the murders were either committed by the defendant, personally, or with an intent to kill.

Appellants claim the standard instructions on inferring consciousness of guilt from the destruction of evidence, fleeing the crime scene, and false extrajudicial statements were all improper pinpoint instructions. However,

appellants have not preserved any of these claims because they failed to object to the instructions. Moreover, this Court has repeatedly rejected each of appellants' arguments.

Similarly, appellants claim the standard CALJIC instructions misled the jury about how to interpret circumstantial evidence and how to apply the beyond-a-reasonable-doubt standard. However, appellants did not object to any of these instructions. And, again, this Court has repeatedly rejected these same claims.

Appellants contend that the trial court erred during the guilt phase by denying their request to make rebuttal argument prior to the prosecutor's rebuttal argument. However, pursuant to statute, the order of argument does not include rebuttal for defendants, and appellants did not make any persuasive argument why the trial court should deviate from the presumptive order. Therefore, the trial court did not abuse its discretion by denying appellants' request.

Appellants complain that during their penalty trials, the trial court inadequately instructed the jury on the use of prior criminal activity. However, this Court has held that the instruction, as slightly modified by the trial court, was proper. Moreover, appellants requested the instruction on criminal activity and never objected to the trial court's minor change; so they forfeited their claim.

Cruz claims the firearms evidence from the guilt trial prejudiced his penalty trial; but Cruz forfeited that claim because it was his responsibility to ask for a limiting instruction at the penalty trial. Cruz claims the trial court should have excluded evidence from his penalty trial that he was put on juvenile probation for spray painting a car; but Cruz is estopped from complaining about that evidence because it was his own attorney who elicited it. Cruz claims the trial court should have excluded from the penalty trial evidence that he abused his daughter; but the trial court properly admitted that evidence of prior criminal

activity because Cruz engaged in a continuous course of child abuse which violated section 273a.

Similarly, Beck complains that during his penalty trial, the trial court improperly allowed the prosecutor to play an audiotape of Beck and Cruz screaming at Cruz's daughter and making her cry. While that evidence was not admissible as prior criminal activity, it was properly admitted as rebuttal to Beck's extensive mitigation evidence that he was a good father and treated children well. Beck complains that the trial court did not allow him to counter that evidence with a phone message from Steve Perkins which contained threats against Starn, which Beck claimed showed that Cruz controlled Perkins and–by extension–Beck. However, that message showed only that Perkins was mad at Starn for abandoning Cruz. Moreover, the trial court did allow Beck to play phone messages that Cruz left for Starn, and those were far more probative of Cruz's temper and purported control of others.

Beck also claims that because of the strong association between him and Cruz, his penalty trial was tainted by prejudicial evidence against Cruz from Cruz's penalty trial. However, Beck was never discussed at Cruz's penalty trial; the trial court instructed Beck's penalty jury to disregard evidence from Cruz's penalty trial; and Beck could not have been prejudiced by evidence that was detrimental to Cruz because the whole point of Beck's penalty defense was that Cruz was an evil man who had corrupted Beck.

Appellants claim the trial court erred by denying their new trial motions. However, the purportedly newly discovered evidence that Evans and LaMarsh tricked appellants into fighting at the Elm Street house was worthless because it was based on an unsworn letter from an incarcerated murderer who refused to sign an affidavit or testify in court. Similarly, appellants would not have received more favorable verdicts if the prosecutor had not suppressed a few of Starn's statements. Appellants were aware of those statements from other

sources; the statements were generally much more incriminating than exonerating; and they were cumulative of other evidence.

Appellants make routine challenges to California's death penalty statute and penalty phase instructions. However, all of their attacks on California's death penalty and standard instructions have been consistently and repeatedly rejected by this Court, and appellants do not provide any compelling reasons for this Court to overrule its earlier decisions.

Finally, appellants make standard claims of cumulative error. But the only consequential error was imposition of death sentences for the conspiracy convictions. That is not the type of error that could cumulate with other errors. This Court should convert the sentences for the conspiracy convictions to terms of 25 years to life. However, any other errors, whether considered individually or cumulatively, were harmless. Therefore, in all other respects, this Court should affirm the judgments.

The Guilt Phase Trial

The Prosecution's Case

Background

The property located at 4150 Finney Road in Salida was known to its residents and their friends as "the Camp." It consisted of several small residential buildings and trailers. In early 1990, Appellant Cruz led a tightknit group that consisted of a few residents of the Camp and a couple of people who lived nearby and visited the Camp. Cruz lived in a studio apartment with his girlfriend, Jennifer Starn, and their two children. (15 RT 2712–2173, 2764; 20 RT 3384–3385; 21 RT 3573–3574; 24 RT 4181, 4207–4209; see 31 RT 5542–5545, 5550–5551, 5560–5564; 32 RT 5601, 5618–5619; 34 RT 5960–5961, 5965; 39 RT 6988-6989 [Cruz and Starn's third child was born

two months after the murders]; see also 29 RT 5012 [Cruz testified he had a common law marriage to Starn]; but see *Elden v. Sheldon* (1988) 46 Cal.3d 267, 275 [California abolished common law marriage in 1895]; 39 RT 6979 [Starn testified during penalty phase that she was never legally married to Cruz].) Appellant Beck lived in a neighboring "Prowler" trailer with Richard Vieira. (21 RT 3575; 24 RT 4181; see 29 RT 5013; 30 RT 5287–5288.) Codefendant Jason LaMarsh stayed in a trailer behind the "Prowler" trailer–though he also lived with his mother in nearby Ripon. (21 RT 3574, 3606–3607; see 29 RT 5013; see also 28 RT 4906 [owner of the property did not know that Beck and LaMarsh lived there]; 32 RT 5598–5599.) Michelle ("Missy") Evans lived with her grandmother in Ripon. But she had recently started dating LaMarsh and she often stayed with him in his trailer at the Camp. (20 RT 3397, 3565; 21 RT 3574, 3717–3718, 3733; 24 RT 4177–4180.) In addition, Codefendant Ronald Willey lived in the town of Ceres and sporadically socialized with the rest of the group. (20 RT 3492, 3559; 23 RT 4072; 24 RT 4312–4313.)

Several other people who lived at the Camp were friendly with Cruz's group: Elmer "Jiggs" Bridges; David Williams; Kevin Brasuell and his girlfriend Dee Ann Messinger; and Richard Ciccarelli and his wife and children. (19 RT 3267–3269, 3283, 3289; 20 RT 3381–3383, 3386, 3544–3545; 21 RT 3571, 3576, 3604.) Franklin Raper lived in a trailer near Bridges' cabin, but he was an outsider who antagonized the other residents. (20 RT 3386–3390; 21 RT 3576, 3578–3579; 23 RT 4037; see 28 RT 4903–4904; 29 RT 5019, 5023.)

Appellants frequented gun and army supply stores. They often wore camouflage clothing; they put up military netting near their homes; and they owned many knives and guns and grenades. (20 RT 3397; 21 RT 3666–3669, 3694; 24 RT 4314.) In February 1990, they purchased four camouflage masks.

(15 RT 2757; 21 RT 3663.) In March 1990, they bought two knives: a large army-type bayonet known as an M-9 and a large Ka-Bar knife. They also bought Sais martial arts weapons. (15 RT 2757; 21 RT 3660, 3665, 3673, 3686.) In April 1990, Cruz purchased a police-style baton. (21 RT 3693; 24 RT 4173; Exh. 19.)

Raper sold drugs from his trailer at the Camp. This created a great deal of noise and traffic. The other Camp residents resented the activity, particularly when drug paraphernalia was left in the area. (19 RT 3287–3288; 20 RT 3390, 3581, 3595.) Raper also antagonized the community when he connected an electrical extension cord to Bridges' cabin; ran up the electricity bill; and then refused to pay his share. (19 RT 3290; 21 RT 3580, 3603.) When Bridges, who was about 65 years old, disconnected Raper's power, Raper cursed and threatened him. (21 RT 3603–3604.) This threat particularly upset Cruz, since he had recently become the property manager. (20 RT 3568; 21 RT 3602, 3654; see 28 RT 4902.) Everyone at the Camp wanted Raper to leave, but he refused. (20 RT 3556, 3558; 21 RT 3581; see 28 RT 4905.) Cruz and LaMarsh said they wanted to get their hands on Raper. (20 RT 3387.)

In April 1990, LaMarsh had an argument with Raper and his friend, James "Fat Cat" Smith. Smith and Raper went into Raper's trailer and locked the door. LaMarsh struck the trailer several times with a baseball bat; then Smith opened the door and threw a lamp at LaMarsh. The lamp struck LaMarsh's arm and he left. (23 RT 4037–4040; see 32 RT 5623–5624; 33 RT 5801, 5833–5837.)

In late April or early May 1990, Cruz's group decided to drive Raper from the Camp. Cruz, Beck, LaMarsh, Vieira, and Brasuell pounded on Raper's trailer. David Jarmin, who visited the Camp often and was friendly with everyone, went inside and escorted Raper out and away. Then Beck towed Rapers's trailer a few blocks and left it in front of the duplex at 5223 Elm

Street. (15 RT 2724; 21 RT 3586, 3710; 23 RT 4073–4078; see 29 RT 5028; 32 RT 5685.) Evans' sister, Tanya Miller, had lived in one unit of that duplex. However, Miller was facing eviction, and she had already moved in with her grandmother. (15 RT 2760; 19 RT 3314, 3339, 3354; 20 RT 3412; 21 RT 3703, 3706, 3714; 24 RT 4182.)

A few minutes after Beck towed Raper's trailer, he joined Cruz, Williams, LaMarsh, and Brasuell as they pushed Raper's car off of the Camp. LaMarsh tossed a gas can on the car and it spilled gasoline all over the interior. Then someone set the car on fire. (20 RT 3398–3399; 21 RT 3586–3587; 23 RT 4079–4082; see 32 RT 5685–5686; 33 RT 5822–5824.)

A few days later, someone broke down a fence that LaMarsh and Vieira had recently built near Cruz's home. Cruz's group suspected that Raper was responsible. (20 RT 3399, 3404; 22 RT 3838; see 28 RT 4977–4978; 32 RT 5628.)

Around May 10, 1990, Miller agreed to allow Raper and his friend, Dennis Colwell, to stay in the Elm Street house until she was officially evicted. Over the next few days, Raper and Colwell made themselves at home and invited various friends and acquaintances to stay there. Miller asked them to leave a couple of times, but they refused. (19 RT 3354; 21 RT 3708, 3713–3716; 22 RT 3764–3766.)

On May 18, 1990, Beck, Cruz, Willey, LaMarsh, and Vieira escorted Evans to the Elm Street house so she could retrieve some belongings and get some of Miller's furniture. (21 RT 3727; 24 RT 4186, 4188, 4265.) They brought a 12-pack of beer as a peace offering. At first, Cruz's group and Raper and Colwell were cordial. However, after a little while, LaMarsh accused Raper of stealing one of his guns while he was sleeping. (24 RT 4189–4190; 25 RT 4417; see 23 RT 4083–4086 [David Jarmin testified that Raper saw him steal the gun and they both lied to LaMarsh about it]; 24 RT 4185; see also 29 RT 5038, 5042;

32 RT 5620–5622; 34 RT 5969.) LaMarsh and Raper briefly fought. Cruz's group stayed another fifteen minutes, and then they left without retrieving any property. (24 RT 4188, 4190, 4265; see 29 RT 5045, 5049–5050, 5053; 32 RT 5624–5626; 34 RT 5970.)

Later that same evening, Colwell drove by the Camp in Raper's car. He drove slowly as if he were surveilling Cruz's group. Cruz, Beck, LaMarsh, Evans, and Willey spotted Colwell and ran towards him. Willey quickly reached the car and pulled Colwell out through the window. One of the group joined Willey, and they took turns beating Colwell. Cruz wanted Colwell to tell them what was going on at the Elm Street house. (24 RT 4191–4193; see 29 RT 5054–5059; 32 RT 5688–5689; 34 RT 5971, 6056–6057.) LaMarsh and Willey drove the car for fifteen minutes and then returned it to Colwell. (24 RT 4196–4197; see 32 RT 5689–5690; 34 RT 5972–5973.)

The Conspiracy

In the early evening of May 20, 1990, Cruz asked Evans to draw a diagram of the Elm Street house and she did. While she did so, Cruz sharpened his Ka-Bar knife. (24 RT 4200, 4255.) Cruz arranged for the group to meet later that night. He called Willey and asked him to come over. Willey was reluctant to do so, but finally agreed. Beck or LaMarsh went and picked up Willey at his home in Ceres. (20 RT 3494–3502, 3539; 24 RT 4204, 4254–4255; see 29 RT 5067–5068; 34 RT 5976–5978.) After everyone was at the Camp, they met in LaMarsh's trailer. (24 RT 4203–4205.) Cruz led the meeting, which was attended by Beck, LaMarsh, Vieira, Evans, and Willey. Cruz used the diagram to describe his plan to raid the Elm Street house and kill Raper and anyone else who happened to be there. (24 RT 4207–4208; see 31 RT 5547–5550; 32 RT 5629; 33 RT 5714; 34 RT 5983.)

Cruz gave everyone specific assignments. Evans and LaMarsh were supposed to enter the Elm Street house through the front door. They would get everyone into the living room and Evans would count how many people were inside. Next, she would go to the back bedroom, open the window, and let Beck and Vieira in. Cruz and Willey would come in the side door. (24 RT 4209; 25 RT 4402.) Vieira would recheck all the rooms to make sure they were empty; then he would guard the hallway so no one escaped. (24 RT 4210–4211.) No one was to use guns because the sound would attract neighbors. (25 RT 4403.)

Cruz gathered some weapons and handed them out for the attack. He gave a Ka-Bar knife and baseball bat to Vieira. (24 RT 4215, 4217–4218, 4236; Exh. 18; see 29 RT 5070; 32 RT 5640–5641, 5702; 34 RT 5991.) Cruz gave a Wildcat knife and Ninja swords to Willey. (24 RT 4216, 4218–4219.) LaMarsh already had a bat and, unbeknownst to the others, his own concealed .22 caliber handgun. (24 RT 4218; 25 RT 4403; see 29 RT 5085; 32 RT 5589–5590, 5637–5638, 5644–5645; 33 RT 5717; 34 RT 5991.) Cruz gave Evans a small knife. (24 RT 4225–4226; see 27 RT 4702, 4708–4709.) Beck already had his own M-9 knife. (24 RT 4219, 4247–4248; Exh. 117; see 32 RT 5641, 5703.) Cruz had his own Ka-Bar knife and the police baton he wore on his belt. (15 RT 2781; 24 RT 4219, 4222; Exh. 19; see 32 RT 5641, 5703; 34 RT 5991.) Cruz also gave camouflage paint ball masks to Vieira, Willey, and Beck, and took one for himself. (15 RT 2690, 2757; 16 RT 2779–2780, 2788, 2847; 21 RT 3660–3663; 22 RT 3881–3882; 24 RT 4232–4233, 4252–4253, 4400; Exh. 4(a); see 29 RT 5076; 30 RT 5253–5254; 35 RT 6349.)

During the meeting, Cruz told the group that they were going to "do them all and leave no witnesses." (24 RT 4209.) That meant they would kill everyone at the house. (24 RT 4211, 4297.) Cruz also said that if anyone in the group failed to carry out the plan, he or she would be killed, too. (25 RT 4404.)

The Murders

Just after midnight, on May 21, 1990, the group entered Cruz's white Mercury Zephyr and he drove them to the Elm Street house. (15 RT 2783; 24 RT 4215, 4223–4224; see 29 RT 5060–5061; 30 RT 5298.) Except for Evans and LaMarsh, they all wore camouflage clothing. Cruz stopped in front of the house and let out Evans and LaMarsh. Cruz drove on and parked down the street. Cruz, Beck, Willey, and Vieira put on camouflage paint ball masks. Vieira also put on a ski cap. (15 RT 2788; 16 RT 2899, 2901; 17 RT 2942–2943, 2968; 3036; 19 RT 3334; 22 RT 3883; 24 RT 4224, 4232–4233, 4236; 25 RT 4420; Exhs. 40, 41, 42, 91-B; see 21 RT 3547–3548; see also 29 RT 5078–5080; 30 RT 5300; 32 RT 5644–5645, 5666, 5702; 33 RT 5766–5767; 34 RT 5984, 5986.)

Raper and Colwell were sitting in the living room. Raper was sharpening a knife. Emmie Darlene Paris and Richard "Garfield" Ritchey were sitting in the kitchen. Donna Alvarez was sleeping in the back bedroom with the door locked. (17 RT 2977, 2982, 3003–3004; 19 RT 3317; 24 RT 4227–4228; see 32 RT 5647.)

LaMarsh had his gun concealed inside his coat pocket and put his bat against the house just outside the front door. He and Evans went inside and began checking the rooms to see who was there. Evans found the garage and hallway rooms empty, but the back bedroom door was locked. LaMarsh went into the front bedroom. (17 RT 2986–2990; 24 RT 4225–4227, 4229; see 28 RT 4932; 29 RT 5087; 30 RT 5182; 32 RT 5644–5645, 5648–5649.)

Ritchey told Evans that Alvarez was in the back bedroom. Evans knocked on the door and told Alvarez to get out of the room. (17 RT 2983–2984; 24 RT 4229–4230; see 28 RT 4921–4922.) Alvarez came out of the bedroom and

Evans went inside and locked the door. Evans opened the window and let Beck and Vieira in. She forgot to tell Beck that she had counted five people in the house. (17 RT 3005; 24 RT 4230; see 34 RT 5987.) Vieira and Beck pulled out their knives. Beck headed down the hallway; Vieira checked the closet and master bathroom, and then followed Beck down the hallway. Evans heard Paris scream, and she went out the window and ran back to the car. (19 RT 3286; 24 RT 4235–4237; 25 RT 4411; see 27 RT 4761; 28 RT 4933; 32 RT 5658; 33 RT 5813–5814.)

Meanwhile, Alvarez had gone into the living room. She asked Raper where she could sleep and he told her to go into the front bedroom. Ritchey went with her. (17 RT 2984, 3001–3002, 3007.) When they got to the bedroom, they found LaMarsh leaning against the far wall. (17 RT 2985–2986, 2990–2991, 3000, 3010, 3013.) LaMarsh cocked his gun, pointed it at them, and ordered them back into the living room. (17 RT 2987, 2992; see 32 RT 5650; 33 RT 5736, 5847.) Ritchey and Alvarez ran back to the living room. Alvarez continued into the kitchen and hid behind a cupboard. (17 RT 2992; see 32 RT 5652.)

LaMarsh went out the front bedroom window and circled back around to the front door. He grabbed his bat and went inside. Ritchey, Colwell, and Paris were approaching the door as LaMarsh came in. He swung his bat at them and they all fell back. (15 RT 2805, 2807; 19 RT 3287, 3330; 25 RT 4411; see 32 RT 5652; 33 RT 5813–5814.)

Moments after LaMarsh went inside, Ritchey managed to get out the front door and he ran towards the street. He screamed, "'Oh, God, help me.'" Cruz and Willey were just approaching the house. Cruz yelled at Willey, "'Get 'im, get 'im.'" Willey tackled Ritchey in the street, sat on his back, and then started beating him. (17 RT 2933–2937; 20 RT 3427; 24 RT 4234; 4239; Exh. 83; see 29 RT 5092–5093; 30 RT 5303, 5308; 34 RT 5987, 5992–5996.) The clamor

attracted a neighbor, Earl Creekmore, who came outside and watched the remainder of the assault on Ritchey. (20 RT 3410; see 29 RT 5127.)

Cruz joined Willey, and they kept picking up Ritchey and beating him down. They hit Ritchey on the back of his head with clasped hands and also repeatedly kicked him. Ritchey said, "'Please don't, no, please' and 'help me.'" (17 RT 2931–2932; 20 RT 3416–3417, 3421–3422; 24 RT 4238.) Cruz went inside briefly. Willey continued to beat Ritchey, and also stabbed him in the arm, abdomen, chest, and back, perforating his heart. (18 RT 3206–3207; 20 RT 3418.) During the melee, Ritchey pulled the mask off of Willey's head. (15 RT 2788; 22 RT 3883.)

Alvarez ran from the kitchen to the garage. She hid there for a minute and heard people scuffling in the house; she heard Paris screaming. She was able to push the broken garage door open a crack; she slid underneath it and ran to a neighbor's house. The neighbor's girlfriend called 9-1-1. (15 RT 2725; 17 RT 2992–2995; 2997–2999; 19 RT 3320, 3372; 20 RT 3412.)

Meanwhile, inside the Elm Street house, LaMarsh approached Raper while he was still sitting in his chair. Raper raised his arm to defend himself and LaMarsh swung his baseball bat and broke Raper's arm just above the wrist. (18 RT 3089, 3111; 24 RT 4331–4332; 25 RT 4391, 4396; see 28 RT 4933; 30 RT 5304, 5326; 32 RT 5654, 5669; 33 RT 5829; 35 RT 6371–6372; 36 RT 6460.) Then LaMarsh beat Raper's head until it was misshapen. The beating knocked at least one tooth and part of a broken denture out of Raper's mouth, and caused blood to spray all over the wall. (15 RT 2727, 2824, 2878; 16 RT 3017, 3025–3027; 18 RT 3072, 3088, 3090, 3096–3097, 3134, 3215; see 28 RT 4819, 4876; 32 RT 5593.) Cruz joined the assault and stabbed Raper on the side of his neck; he also cut Raper's throat, severing his carotid artery and larynx. (18 RT 3088, 3090, 3092.) LaMarsh ran back to the car, and when he got there, he pounded the ground with his bat. (24 RT 4243; see 32 RT 5661.)

Vieira caught Emmie Paris in the kitchen. She tried to hide under a table, but he dragged her out. She screamed, "'Oh, God, oh, God.'" Vieira repeatedly hit Paris on the head, face, chest, and arms with his bat, spraying blood onto the walls, dishwasher and stove. Cruz may have also hit Paris with his baton. Then Vieira stabbed Paris in the neck and chest, puncturing her lung. Then he cut her throat; the cut extended all the way to her spine, and severed her larynx, pharynx, carotid artery, and jugular veins. (15 RT 2728; 16 RT 3018–3021; 18 RT 3104, 3108–3109, 3119, 3212, 3220, 3259, 3261; 22 RT 3880; 24 RT 4237; 25 RT 4409; see 28 RT 4924; 32 RT 5657.)

Beck caught Colwell near the interior garage door. Vieira or Cruz repeatedly beat Colwell's head with the handle of his knife, fracturing Colwell's skull and damaging his brain. Beck stabbed Colwell in the face, scalp, neck, abdomen, and chest; then Beck cut Colwell's neck, severing his jugular vein, carotid artery, and larynx. (15 RT 2731, 2825, 2827; 17 RT 3022–3024; 18 RT 3099–3100, 3102, 3156, 3231–3232; 22 RT 3878, 3958; 24 RT 4247–4248; see 30 RT 5305–5306; 31 RT 5553; 32 RT 5657, 5752–5753; see 22 RT 3878, 3958 [Colwell's blood was found on Cruz's baton].)

Cruz left the house and rejoined Willey. Willey stepped aside and Cruz stood over Ritchey. Cruz bent down and pulled Ritchey's upper body up off the ground. Cruz cut Ritchey's throat, severing his jugular veins, carotid artery, and windpipe; the cut extended all the way down to Ritchey's vertebrae. (18 RT 3075, 3077; 20 RT 3419, 3436–3437; see 34 RT 5997.) Cruz let Ritchey fall to the ground and Ritchey made a gurgling sound as he choked on his own blood. (15 RT 2780; 18 RT 3074; 20 RT 3428; see 34 RT 6104.) Cruz and Willey went inside the Elm Street house briefly. (17 RT 2939; 24 RT 4241–4242.)

Creekmore went into his own house and his girlfriend called 9-1-1 twice. (20 RT 3430.) Kathy Moyers, the girlfriend of another neighbor, had also

arrived during Ritchey's beating. She also went inside and called 9-1-1. The dispatcher told her the police were already on their way. (17 RT 2931, 2938, 2946, 2966; 20 RT 3429.)

Cruz, Beck, Vieira and Willey came out of the house together and talked briefly on the porch. Then they walked or ran back to the car. They left behind Vieira's bat, camouflage mask, and knit cap; Cruz's Ka-Bar knife and baton; and Willey's camouflage mask. Those items were later recovered by police. (16 RT 2779–2797; 17 RT 2941–2943, 2946; 19 RT 3320, 3325, 3327–3328, 3337; 24 RT 4242–4243; see 32 RT 5662; 34 RT 6001.)

Evans was waiting inside the car and LaMarsh was standing outside the car. Beck and Cruz were covered in blood. They were all hyped up, and it took them five minutes before they were calm enough to get in the car. (15 RT 2782, 2786–2787; 16 RT 2919, 3047–3048; 24 RT 4221, 4240, 4244–4245, 4247, 4249; 25 RT 4468, 4419, 4421, 4468; see 34 RT 6001, 6098.)

Willey told Cruz to drive him to his home in Ceres. (20 RT 3492, 3506–3507, 3519, 3522; 24 RT 4247; see 29 RT 5118; 30 RT 5311; 32 RT 5663; 34 RT 6002.) As they drove from the scene, LaMarsh wanted to throw his bat out the car window, but Cruz told him to hold onto it. (24 RT 4248, 4256; see 29 RT 5119; 30 RT 5312; 32 RT 5664; 34 RT 6006.) Cruz became very upset when Willey said that someone had stood nearby and watched them kill Ritchey. Cruz said that they should have killed the neighbor because there were not supposed to be any witnesses. (16 RT 2914–2915; 24 RT 4246, 4250.) LaMarsh asked if Raper was dead, and Beck said, "'He's dead. I saw his face crumble as I was walking out the door.'" Cruz said that he wished a couple of other people had also been there so they could have killed them too. (24 RT 4339; 25 RT 4405; see 32 RT 5664; 34 RT 6005.)

When they arrived at Willey's house, the group washed the blood from their bodies and clothes. Vieira washed some blood from Cruz's shoes and from the

interior of his car. Then they relaxed in the living room for a little while and discussed alibis. Vieira said he left behind his mask, his Ka-Bar knife, and his bat; Willey said he left behind his mask. Everyone put their remaining weapons and masks on a table. Beck, Willey, and Vieira took the weapons and masks and put them under Willey's house. (20 RT 3525–3526; 24 RT 4248–4254, 4259; 25 RT 4412; see 30 RT 5366; 32 RT 5667; 33 RT 5720–5723; 34 RT 6003, 6005, 6010, 6099–6101.)

A short while later, Cruz, Beck, and Vieira left Willey's house. LaMarsh and Evans spent the night. The next morning, Willey's roommate drove Evans to her grandmother's house in Ripon and drove LaMarsh to his brother's house in Oakdale. (24 RT 4257–4258; see 32 RT 5668, 5670; 34 RT 6014.)

The Post-Murder Evidence

Within an hour of the murders, Alvarez identified LaMarsh in a photographic lineup. (23 RT 4134–4135.)

Later that day, the police searched Cruz's apartment. They seized a receipt dated February 1990, for four masks. A receipt dated March 1990, was for a Ka-Bar knife and another undetermined type of knife. (15 RT 2752–2758; 21 RT 3663–3665; Exhs. 4(a), (b).) However, no actual masks were found in the apartment. Three knives were found, but they were not Ka-Bar or M-9 knives. (35 RT 6338–6340, 6355, 6359, 6362.)

Later that day, Beck visited his friend, Phillip Wallace, and "said 'we' or 'I slit some throats.'" (22 RT 3798.) When Wallace asked if Beck was serious, Beck just smirked. (22 RT 3801.)

That evening Evans overdosed on Valium. She tried to set up an alibi with James Richardson, and then she was arrested by police. During a police interview, Evans admitted she had been at the Elm Street house, but she

repeatedly lied about the details of the murders. (24 RT 4254, 4272, 4280, 4303; see 26 RT 4567–4580; 27 RT 4630–4635; 28 RT 4916–4918, 4944.)

Pursuant to a warrant, the police searched Willey's home. (23 RT 4007.) When Willey arrived, he had scabs on his wrist. The only newspaper in the house was the May 22, 1990, edition of the Modesto Bee; an article about the murders was marked with a red or purple star. (23 RT 4008.) The next day, Willey's girlfriend, Patricia Badgett, admitted that she lied when she said Willey had been with her at the time of the murders. (22 RT 4011.)

A few days later, LaMarsh told his friend, Richard Ciccarelli, that he went to the Elm Street house to pick up some of Evans's belongings, but Raper pulled a knife on him. He grabbed his baseball bat from outside the front door; he swung it at Raper; and he broke Raper's arm. (19 RT 3276, 3295–3296; see 32 RT 5670.) Soon thereafter, LaMarsh was arrested in Oregon. (25 RT 4488; see 32 RT 5671.)

An examination of the Elm Street location turned up numerous pieces of evidence. A baseball bat, "Bianchi" police baton, and Ka-Bar knife were found near tire tread marks that matched the unusual tread found on Cruz's car. (15 RT 2781–2782, 2786–2787; 16 RT 2912–2914, 2920; 24 RT 4221; Exh. 20.) A camouflage mask and knit cap were found on the front lawn. (15 RT 2779, 2847.) Another camouflage mask was found between Ritchey's legs. (15 RT 2780, 2788; 22 RT 3882.)

The doctor who performed the autopsies on the victims testified that the blunt force injuries to Raper's head were most likely caused by a baseball bat rather than a baton. (18 RT 3097, 3118, 3215.) The contusions on Paris's head were most likely caused by a baton. (18 RT 3108, 3220, 3259.) Other experts testified that Paris's blood was found on the bat and Colwell's blood was found on the baton. (15 RT 2781, 2786–2787, 2789; 16 RT 2919, 3047–3048; 22 RT

3878, 3881, 3958; Exh. 14.) Blue fibers on the baton matched the uncommon carpet from Cruz's Zephyr. (22 RT 3972; 3982–3983.)

Cruz's Defense

Michelle Ray Ann Mercer testified that she lived all of her 19 years in Ripon. Evans was not well liked in the community; she had a reputation for not telling the truth and for violence. Evans told her that she helped kill Paris; she loved every minute of what Raper got; and it was "neat" watching Raper die. Evans had also threatened Mercer. (26 RT 4531–4533, 4550–4552.) On cross-examination, Mercer testified that she did not like Evans and Evans had broken up her previous relationship. (26 RT 4557–4558.)

James Lee Richardson testified that in May 1990, Evans enlisted his help in moving furniture. After driving around and collecting some furniture, she told him that she had watched the murders and laughed. Evans said she planned the killings. Later, some Ripon Police Officers arrested Evans. (26 RT 4563, 4567–4568, 4573.) On cross-examination, Richardson testified that he picked up Evans about 24 hours after the murders; he initially lied to Detective Ottoboni about Evans; but he told Detective Deckard the truth when he said he did not think Evans had anything to do with the murders. Evans did not have a reputation for violence. (26 RT 4575, 4579–4581.)

Ripon Police Officer Steven Merchant testified that he found Evans and Richardson loading furniture onto a pickup truck at 1550 West Main Street. He took them both into custody because he knew the Stanislaus County Sheriff's Department was looking for Evans. (27 RT 4630–4633.) At the time, Officer Merchant did not think Evans was under the influence of drugs, but thought she might have been drinking because she seemed depressed, talked slowly, and seemed lethargic. (27 RT 4634–4635.)

Greg Boynton testified that he had an automotive repair store on Salida Boulevard in Salida. There was a vacant lot next door. In 1989, Raper had parked his trailer there and had thrown garbage and syringes on the ground; there was also lots of late-night traffic. (27 RT 4648–4650.) Raper had a confrontation with Boynton's father and Boynton shoved Raper to the ground. Later that night, Raper threw a wine bottle in front of the business. A few days later Raper brought by a big man (probably James "Fat Cat" Smith) and said, "'This guy is going to kill you.'" (27 RT 4651–4652.) Raper often spun donuts in the vacant lot. One time his car stalled and Boynton ran out and hit him in the head and broke his arm. The other man in the car (probably Smith) tried to attack Boynton with a chain. But Boynton's partner, David Anderson, helped Boynton get Smith on the ground. The police came and took Raper to the hospital and Smith to jail. (27 RT 4653–4654.) On cross-examination, Boynton conceded that Raper was not a threat to him because Raper was 50 years old and weighed only 90–100 pounds. (27 RT 4656–4657.)

Dave Anderson testified he co-owned the automotive shop on Salida Boulevard and had troubles with Raper. In 1989, Raper threw rocks at customers' cars and did donuts in the empty lot. (27 RT 4667.) When Raper's car stalled, he, Boynton, and three others charged the car and broke Raper's arm. (27 RT 4666–4672.)

Deborah Ford Walker testified that the week before the murders, Raper and Jarmin told her she could take Miller's clothes from the house, but she did not. (27 RT 4679–4680.) She had been at the Elm Street house the evening of the murders. She went to the store to get cigarettes for herself, Colwell, and Raper. But when she returned at 11:00 p.m., the house was dark and no one answered the door. (27 RT 4674–4676.)

Ronald Lofty testified that Evans was his ex-stepdaughter. A few days before the murders he took Evans to the Elm Street house. Raper and another

man were outside. Evans went inside alone and came back out a few minutes later without incident. (27 RT 4687–4691.)

Stanislaus County Sheriff Detective Gary Deckard testified that he interviewed Evans four times, and also talked to her on the phone. She contradicted herself in a later interview when she admitted she possessed a knife at the time of the murders. She seemed concerned about how it would affect her plea agreement. (27 RT 4700, 4702, 4704.) Detective Deckard interviewed James Richardson, and he said he had lied to Officer Ottoboni regarding Evans' whereabouts the previous day. (27 RT 4705.) When Detective Deckard confronted Evans about statements she had made to Officer Ottoboni about seeing Raper killed, she said those statements were not true. (27 RT 4718–4719.)

Stanislaus County Sheriff Detective Michael Dulaney testified that he arrived at the Elm Street house at 2:30 a.m. on May 21, 1990. (28 RT 4800.) There was a knife laying on stove, but he did not take it into evidence because it had food on it; it did not have blood on it; and it did not appear to have evidentiary value. (28 RT 4809–4812, 4833, 4843.) He helped retrieve the baton, bat, and knife. (28 RT 4816–4817.) He did not test the bat or baton to see if they caused an indentation in the wall. (28 RT 4815, 4824, 4826.) It was not necessary to bag Raper's hands because he did not have any signs of defensive wounds. It was not necessary to bag Colwell and Paris's hands because any material under their fingernails would have already been contaminated by blood. However, Ritchey's hands were bagged. (28 RT 4833–4834, 4848–4850, 4852.)

Stanislaus County Deputy Sheriff Sergeant Jane Irwin testified that at 4:00 a.m. on August 18, 1989, she approached Raper when he was in a car at the Salida AM-PM Market. Irwin saw a knife handle in the console of the car and called for backup. (28 RT 4879.) Raper was not cooperative when she

removed him from the car. After two or three requests, he finally put his hands in sight. He said, "'Go ahead and shoot me.'" Officer Irwin found a survival knife, icepick, straight razor, and curved knife in the car. (28 RT 4880–4883.) Raper was 51 years old, 5 feet 9 inches, and 105 pounds. He was "[a]ll mouth and no actions." (28 RT 4887–4889; see 27 RT 4656–4657.)

James Boynton testified that he had some problems with Raper at his son's shop. In 1989, he had Raper's trailer towed from the vacant lot next to the shop after Raper threatened to kill his son. He saw Raper in Salida often, and Raper threatened to "get" him. (28 RT 4899–4900.)

Robert Bowers testified that he rented Cruz a cottage in the Camp in December 1989, and Cruz lived there until May 1990. Cruz became manager in February or March 1990. (28 RT 4901–4902.) Bowers did not have a rental agreement with Raper and he received complaints from other residents about Raper's unauthorized trailer. (28 RT 4903.) But he never directed Cruz or anyone else to evict Raper. (28 RT 4905.)

Stanislaus County Sheriff Department Detective Darrel Freitas testified that when he booked Cruz, he weighed 350 pounds. The morning of May 21, 1990, he interviewed Kathy Moyers, and she said she saw some fighting in the street. She said all the people appeared big. Earl Creekmore said the person who was larger than the others (Cruz) was 6 foot 3 or 4 inches and 250 pounds. He had short hair and wore a baseball cap and bib overalls. Creekmore described the man with a ponytail (Willey) as 6 foot 1 inch and 170 pounds. (28 RT 4908–4913.).

Stanislaus County Sheriff Detective Mark Ottoboni testified that he interviewed Evans at the Sheriff's Office on May 22, 1990. She appeared intoxicated, but did not smell of alcohol. She said that when she went into the Elm Street house, she went to the back bedroom. Ritchey told her to leave Alvarez alone. Evans said "'Yeah, so I told him, "Fuck you." I said, "This is

my sister's house," and said I was supposed to meet her here.'" (28 RT 4915–4922.) Evans wavered about whether she saw any of the actual assaults. She said she saw blood on the kitchen floor; she saw Paris hiding under the kitchen table; she saw Vieira moving towards Paris; and she heard Paris scream. She said she saw and heard that Raper pulled a knife on LaMarsh. Evans also said Beck was not at the crime scene. (28 RT 4922–4926, 4933–4934.) Evans said that Ritchey and Colwell got out of the house, but Colwell was dragged back inside. (28 RT 4940.) Evans's demeanor was consistent with being on Valium. (28 RT 4944.) Her stories conflicted. (28 RT 4946.) Though she said that Beck was not involved, when he put her in a room with Beck, they discussed the murders in a whisper. (28 RT 4947–4948.)

Pauline Piper testified that Miller and Evans were her granddaughters. She took Miller to the Elm Street house on May 20, 1990. It was late afternoon and Miller needed to get some clothes and papers. Miller went inside for five minutes. (28 RT 4963–4965.)

Laura Dew testified that she lived in the other half of the Elm Street duplex. In May 1990, she saw many cars come to the duplex that she did not recognize. (28 RT 4968–4970.)

Dana Denise DeGeorge testified that she lived in Ripon. On May 22, 1990, she identified some property in a pickup truck that was taken from her patio (presumably by Evans and Richardson). (29 RT 4971–4973.)

Stanislaus County Deputy Sheriff Bryan Grimm testified that he went to the Camp on April 16, 1990. He took a police report from Cruz about Raper. He was called back later and Cruz showed him that a fence and address numbers had been damaged. Cruz made a citizen's arrest and Deputy Grimm took Raper to jail. Raper said that he would soon "be back on the street to harass Mr. Cruz." Deputy Grimm testified that California law requires an officer to accept a citizen arrest regardless of whether it was valid. (28 RT 4974–4980.)

Gerald Cruz testified that he did not kill anyone, nor did he conspire to kill anyone on May 20–21, 1990. (29 RT 5008–5009.)

On cross-examination by the prosecutor, Cruz testified that Beck was his best friend. Vieira and Willey had been his friends for years. Evans and LaMarsh were acquaintances he knew for only a few weeks. (29 RT 5014–5018.)

Raper came to the Camp a month after Cruz did. (29 RT 5019.) Cruz was bothered by fights and drugs at Raper's trailer. (29 RT 5023.) Cruz never personally talked to Raper about their problems. (29 RT 5026.) Beck towed away Raper's trailer. (29 RT 5028.) Cruz was there when they pushed Raper's car from the Camp, but he did not participate; nor was he there when the car was burned. (29 RT 5031.) He and others went to the Elm Street house a few days before the murders to move the refrigerator and furniture. But LaMarsh and Raper got in a fight over a stolen gun, so the group left without taking anything from the house. (29 RT 5034, 5045, 5053.) Five minutes after they got back to the Camp, they saw Colwell driving Raper's car around the block slowly. They pursued the car and caught Colwell. (29 RT 5054, 5056.) Vieira and LaMarsh pushed him around, and Cruz warned Colwell not to prowl around again. Then they let him go. (29 RT 5058–5059.)

The evening of May 20, 1990, Evans told Cruz that she had learned that Raper planned to call his biker friends and tell them to go to the Camp that night and kill everyone. (29 RT 5064.) It "concerned" Cruz, "[b]ut it wasn't something new . . . ." Cruz had Vieira call Willey and ask him to come over to help protect the Camp. Then Beck picked up Willey and brought him back to the Camp. (29 RT 5067–5068.)

The six did not discuss going to the Elm Street house before Evans suddenly asked them to go there and help her get her some clothes and her heirloom bridal gown. She wanted them to come for protection, so they all went in

Cruz's car. (29 RT 5064, 5068–5069.) Cruz drove to the house around midnight with Beck, LaMarsh, Vieira, Willey, and Evans. (29 RT 5059–5060.)

Beck and Willey did not have weapons. Cruz had only his cane. LaMarsh had a bat. Vieira had a Ka-Bar knife and took the baton that was already in the car. Evans had a small bat and she asked for a knife; Cruz gave her his Ka-Bar knife. (29 RT 5069–5070, 5073–5074, 5078.) Cruz owned several masks, but no masks or caps went to the Elm Street house. (29 RT 5076.) They did not bring firearms because they did not want trouble if they were stopped by police. They wanted to have only defensive weapons that could not be used at a distance, so they took bats and knives. (29 RT 5084.)

The plan was for LaMarsh to accompany Evans into house while she got her things. Cruz dropped them off and parked up the hill. (29 RT 5078–5080.) The others got out of the car and started walking to the house. But all of a sudden Willey, Vieira, and Beck started running. Nevertheless, Cruz continued to walk. (29 RT 5089–5091.)

When Cruz reached the house, he saw Willey and Ritchey fighting. (29 RT 5092–5093.) Cruz went into the house and saw that Raper looked incapacitated. (29 RT 5095–5098.) Cruz saw Beck pull Colwell off of Vieira and throw him towards the kitchen. (29 RT 5099–5100.) Cruz told Beck, "'Somebody is out there by Ron [Willey], I don't know if he's going to jump him or not.'" Then Beck ran out the door. (29 RT 5101–5102.)

Cruz saw Vieira hit Colwell with the baton, and Cruz said, "'Let's go.'" Vieira dropped the baton and reached for his Ka-Bar knife. Cruz did not see it, but he assumed that Vieira stabbed Colwell. (29 RT 5102, 5104–5105.) Then Cruz saw Evans pop up from behind the kitchen counter where he had seen Paris. (29 RT 5103.) Cruz had his cane, but he never struck or stabbed anyone. (29 RT 5106.) None of the victims attacked him; so there was no need for self-defense. (29 RT 5125.)

Vieira and Evans passed Cruz as he walked back to the car. Beck arrived at the car at the same time as Cruz. Willey and LaMarsh were already there, and everyone got in the car. (29 RT 5109.) Willey told Cruz to take him to his house in Ceres and he drove them there. LaMarsh wanted to throw out his bat, but did not. They arrived at Willey's house and went inside. (29 RT 5118–5119.) Cruz noticed that Evans had blood sprinkled on her face and her hair was matted. Cruz called Starn and told her to rent a hotel room in Oakdale, and later he met her there. (29 RT 5124, 5126.)

Cruz did not know if anyone was killed and did not report the crime to police. (29 RT 5123–5124.) On May 21, 1990, he told Detective Deckard that he had been at home with his wife and children until 9 p.m.; then they visited his parents in Oakdale; and Beck and Vieira came over later. He also told Detective Deckard that he had not been to the Elm Street house that night. (29 RT 5128–5129.)

On cross-examination by LaMarsh's attorney, Cruz testified that one time Raper threatened him with a Bowie knife in front of Starn and their children. (29 RT 5161–5163.) Raper also threatened him some time after his car was burned. (29 RT 5165.) In fact, Raper repeatedly threatened to kill him. (29 RT 5169.) Sometimes Colwell was with Raper when he threatened Cruz. (29 RT 5170.) When Beck and Vieira came home to the Camp prior to the murders, Cruz told them that Evans told him that Raper was enlisting a motorcycle gang to attack the Camp. (30 RT 5178.) Cruz was not physically fit enough to fight, but he could walk. (30 RT 5185.) Vieira took the baton with him when he left the car. Cruz assumed that Vieira stabbed Colwell, but he did not see it. (30 RT 5186.) Cruz did not believe in using deadly force except in self-defense. (30 RT 5229; see 30 RT 5260.)

On recross-examination by the prosecutor, Cruz testified that he had been aware for weeks that there might be a problem with Raper's biker friends. (30

RT 5234.) The bikers were not a threat on Friday night when they went to get the refrigerator; but they were a threat when they went back on Sunday night. (30 RT 5238.) There were no motorcycles or unknown cars parked in front of the Elm Street house. (30 RT 5240.) Cruz previously bought four paint ball masks from Crescent Supply and other masks by mail order. (30 RT 5253–5254.) The M-9 knife was missing and might have been stolen. (30 RT 5258.)

On recross-examination by LaMarsh's attorney, Cruz reiterated that he did not like violence. (30 RT 5260.) He had his cane with him at the time of the murders. (30 RT 5264.) He did not ask neighbors for help and he did not call 9-1-1 because he did not have a mobile phone. (30 RT 5265–5266.)

Beck's Defense

Beck testified that at the time of the murders, he and Vieira shared a trailer that was parked next to Cruz's home. (30 RT 5287.) On May 20, 1990, he and Vieira worked installing a floor covering. He returned to the Camp at sunset and Cruz and Evans were there. (30 RT 5288–5289.) Evans said that earlier that day Raper had prevented her from retrieving some things from the Elm Street house and Raper had said he would kill her and her friends at the Camp. (30 RT 5290.) At Cruz's request, Beck picked up Willey and brought him back to the Camp to help them protect themselves. LaMarsh returned to the Camp while he was picking up Willey. By 11:30 p.m., Vieira was also there. (30 RT 5291–5293.)

Evans told Beck she urgently needed to get some of her clothes and her sister's wedding gown from the Elm Street house. Evans said she wanted someone to go with her, so they all drove there together. However, Evans did not draw a map of the house; and there was no discussion of attacking or "doing them all [and] leaving no witnesses." The only weapons were the

baseball bats taken by Evans and LaMarsh; the Ka-Bar knife that Vieira always carried; and the baton that Cruz always kept in his car. (30 RT 5294–5297.) Cruz drove, and the only discussion was to drop off Evans and LaMarsh and park away from the house. (30 RT 5298.)

After they dropped them off, Cruz stayed in the car. Beck, Vieira, and Willey got out and walked towards the house. (30 RT 5300.) They wanted to be closer in case something happened. When they heard a girl scream, they ran to the house. When they arrived in the yard a man ran at Willey. (30 RT 5301–5302.) Willey and the man fought, and Beck and Vieira went into the house. In the house Beck saw LaMarsh standing in front of Raper with a baseball bat in his hand. (30 RT 5303–5304.) Raper was slumped down in his chair. Beck saw Evans on Paris's back, holding her around the head and punching her. Beck went towards other noises and saw Colwell on top of Vieira in the living room. Beck pulled Colwell off Vieira and punched him three or four times. Then Cruz came into the living room and said someone was outside near Willey and Beck ran outside. (30 RT 5305–5307.)

Beck saw Willey standing over someone who was laying down. A bystander walked off and Beck told Willey, "'Let's go.'" Willey ran toward the car and Cruz came out of the house. (30 RT 5308.) Beck and Cruz walked back to the car. When they got back to the car, the others were already inside. (30 RT 5309–5310.) Cruz drove them to Willey's house in Ceres. During the car ride LaMarsh said he wanted to throw his bat out the car window. (30 RT 5311–5312.) Beck did not have a knife; he did not have blood on him; he did not say, "'only three guys and a chick, what a waste.'" (30 RT 5313.) He did not see any weapons at Willey's house, and he did not discuss alibis with anyone. He left Willey's house with Cruz and Vieira and they stayed at a motel in Oakdale with Cruz and Starn and their two children. (30 RT 5314–5316.) The next evening Beck learned that Cruz had been arrested. He attempted to

get bail for him that night, but was arrested himself. He did not kill anyone. He lied to police because he did not want to get his friends in trouble. (30 RT 5321–5322.)

During the prosecutor's cross-examination, Beck testified that he did not know anyone died until the next day when Vieira told him the murders were on the television. (30 RT 5322.) He did not wear anything to conceal his head or face. (30 RT 5333.) He was not with Cruz when Cruz bought masks and a Ka-Bar knife at Crescent Supply Company. (30 RT 5334.) He bought an M-9 knife, but he gave it to Cruz. (30 RT 5335.) Vieira always wore a black Ka-Bar knife. (30 RT 5336.) Beck denied laughing and whispering with Evans at the police station. (30 RT 5338; but see 28 RT 4944.) He thought Raper and his buddies were going to come kill him and his friends; but he was not afraid of Raper. (30 RT 5342.) He was concerned for his life when he went to the house, but he did not bring a weapon. (30 RT 5346.) The person who came out of the house immediately ran at Willey and started hitting him. (30 RT 5347.) Vieira had Cruz's baton when he was fighting with Colwell. (30 RT 5352.) No one thought to call the police to have them stand by and keep the peace when they went to the house. (30 RT 5360.) At Willey's house, no one washed their clothes; Vieira did not wash the car; and no one hid weapons. However, the next morning he did discuss with Cruz what story to tell the police. Beck denied telling Wallace that he had slit someone's throat. (30 RT 5366–5367.)

On cross-examination by LaMarsh's attorney, Beck testified that he weighed 260 pounds, but Cruz was bigger. (30 RT 5370.) He had about 20 guns and he was with Cruz when he purchased a baton. (30 RT 5381–5383.) Beck denied meeting in the trailer before the murders and he denied killing Raper, Colwell, Ritchie, or Paris. (30 RT 5386, 5393, 5413.) Beck also denied going into the house through a window. (30 RT 5407.) He did not call the police

when he found out about the murders even though he did nothing wrong. (30 RT 5419.) There was no conversation about what happened. (30 RT 5424.) Even though the group was worried that a motorcycle gang was going to attack the Camp and kill everyone, Beck was not concerned about leaving Starn and her children there because she had guns. (30 RT 5425.)

LaMarsh's Defense

Forensic pathologist Thomas Wayne Rogers testified that he reviewed Raper's autopsy report. (31 RT 5509–5511.) The broken arm was most likely caused by a baseball bat; but the blunt force trauma to Raper's skull was more likely caused by the baton. (31 RT 5513–5516.) On cross-examination, Rogers conceded that the head injuries could have been caused by the handle of the larger bat or the mid-barrel of the smaller bat. (31 RT 5518, 5523–5524.) Nor could he rule-out that either bat caused all the injuries. 31 RT (5535.)

Rosemary McLaughlin testified that she lived with Cruz, Beck, and Vieira for three years. Cruz was the leader of the group, and he and Beck treated Vieira like a servant. (31 RT 5540–5544.) The evening after the murders Beck told her that they went to Willey's house, and Vieira was ordered to clean the blood off of everyone's shoes. (31 RT 5549–5550.) Beck also said that on the way to her house he bought a new pair of shoes because he could not get his clean. (31 RT 5550.) On cross-examination, McLaughlin testified that Beck wore brand new white sneakers and said his old shoes were "covered with blood." He said "they had to do them." (31 RT 5553.) Cruz sometimes ordered Beck to be mentally abusive to others. Beck and Cruz took all the money in the household. (31 RT 5561, 5563.)

Licensed Private Investigator Alan Peacock testified that there were two gouges in the walls at the Elm Street house. They appeared more consistent with a police baton than a bat. But on cross-examination, he conceded that he

could not tell whether the gouges were made on the night of the murders. (31 RT 5568–5579.)

The parties stipulated that a .22 caliber weapon found at Willey's residence on May 23, 1990, was registered to Beck. (32 RT 5589–5590; Exh. 177.) They stipulated that a knife was found next to Raper's body on May 21, 1990. (32 RT 5591; Exh. 176.) They stipulated that the smaller bat was 25 inches long. They stipulated that Cruz's baton was 26.5 inches long. They stipulated that LaMarsh was arrested and found to be left-handed. (32 RT 5592–5593; Exhs. 18, 19.) The parties stipulated that officers found a tooth in the area near where Raper's body was found. (32 RT 5593.)

LaMarsh testified that in May 1990, he lived with his mother, but sometimes he stayed at the Camp with Kevin Brasuell or in a small trailer. (32 RT 5595–5599.) Cruz and Beck urged him to join their group, and eventually he did. To do so, he was required to cut himself and leave a blood print on a piece of paper. (32 RT 5618–5619.) He was friends with Raper before he met Cruz, Beck, and Vieira. One night he passed out in Raper's trailer, and when he woke up Raper and David Jarmin were there, but his .38 caliber gun was missing. Afterward, he did not trust Raper. (32 RT 5620–5621.) One day he got into an argument with Jimmie Smith and hit Raper's trailer with a bat. (32 RT 5623.) He had a fight with Raper at the Elm Street house a week before the murders. (32 RT 5624–5625.)

Beginning at 6 p.m., LaMarsh visited the Camp a few times on May 20, 1990. He picked up Willey and returned to the Camp at 11:30 p.m. (32 RT 5631–5635.) He went to lie down in the small trailer, but Evans, Cruz, and Vieira came in and asked him to come with them while Evans got some clothes and her sister's things from the Elm Street house. (32 RT 5636.) He grabbed his bat in case there was trouble, and they left the trailer. (32 RT 5637–5638.) He also had the gun that Cruz had lent him (which was registered to Beck), but

no one else knew. (32 RT 5644–5646; Exh. 177.) In the car, Vieira had a bat (the one with "Edge" written on it) and his knife on a brown leather belt; Cruz had his baton and a knife on a nylon belt; Evans had no weapon; and Beck had a knife in a sheath. There was no discussion of going there to beat up people. (32 RT 5640–5642.)

Cruz dropped off LaMarsh and Evans at the house and drove on. LaMarsh left his bat outside the front door. (32 RT 5644–5645.) Raper, Paris, and Ritchey were in the kitchen; Colwell was laying on the couch. Raper was sharpening his knife and said to Evans, "'I'll kill you, bitch.'" (32 RT 5647.) Evans went down the hallway and knocked on a door. LaMarsh felt the others' hostility and went to the front bedroom and leaned on a dresser. (32 RT 5648–5649.) Ritchey, Colwell, and Alvarez came into the front bedroom and Ritchey said, "'It's time for you to go and you have to leave.'" He thought Ritchey and Colwell would physically throw him out of the house. LaMarsh pulled out his gun, cocked it, and pointed it at Ritchey. (32 RT 5650–5651.)

After Ritchey, Colwell, and Alvarez fled, LaMarsh put the gun in his pocket and he jumped out the window. He went around to the front of the house and saw Ritchey come out the front door. LaMarsh grabbed his bat, and went in the door because Evans was still inside. (32 RT 5652.) Raper said, "'I'll kill you, you fucking punk,' and he st[ood] up and c[ame] towards [LaMarsh]." (32 RT 5653.) LaMarsh stepped back; Raper had a knife in one hand and reached for the bat with the other hand. LaMarsh swung the bat and broke Raper's arm. (32 RT 5654.) Then LaMarsh backed up some more and Cruz came in and hit Raper on the head with his baton about three times. (32 RT 5656–5657.)

Vieira was trying to pull Paris from underneath a table. Beck stabbed Colwell in the stomach. (32 RT 5657, 5752–5753.) Evans ran down the hallway; she went out the window and ran towards the railroad tracks. LaMarsh jumped out the window too. (32 RT 5658.) He ran after Evans and

followed her to the car. When he got there he hit the ground with his bat. After two minutes, the others arrived. They were out of breath and bloody. (32 RT 5659–5662.) Willey said, "'Take me to my house right fucking now.'" Cruz asked Evans how many people were in the house, and she said there were five. Cruz asked Beck how many they got, and he said four. Cruz was mad they let one get away. Cruz said, "'Well, they're all dead, aren't they?' And then [Beck said],'Yeah.'" LaMarsh said, "'Well, Frank ain't dead.'" (32 RT 5663.) Beck said, "'He's dead. I seen his face crumble on the way out the door.'" (32 RT 5664.)

LaMarsh asked someone to roll down the window so he could throw out his bat, but he was told to hold onto it. He took out his gun and held it because he was afraid the others would kill him and Evans. (32 RT 5664.) When they got to Willey's house, he left the bat at the front gate and went inside. (32 RT 5665.) Everyone washed-off the blood and went inside. (32 RT 5667.) After ten minutes, Beck, Cruz, and Vieira left. LaMarsh and Evans stayed, and he told her he hit Raper in the arm and "it was the worst thing that I've ever seen." (32 RT 5668–5669.)

In the morning, Willey's roommate took LaMarsh to his brother's house in Oakdale. Then he took LaMarsh to the Camp. But there was police there, so he went to his friend Wesley Douglas's house which was across the street. Later, he went to Rick Ciccarelli's motel room and told him he hit Raper. Ciccarelli said he did not want to hear more. (32 RT 5670.) LaMarsh went to Oregon and was arrested there. LaMarsh testified that he did not intend to kill anyone. (32 RT 5671.)

On cross-examination, LaMarsh testified that he thought about going to the Sheriff, but he did not want to. Even though he lived with his mother and was afraid of Beck and Cruz, LaMarsh testified that he went back to the Camp because he had nowhere else to go. (32 RT 5672.) He helped tow away

Raper's trailer; he threw the gas can on Raper's car; and he knew the gas would pour out. He testified that he did not push the car from the Camp, but then he admitted he did help push the car. But it was Vieira who lit the car on fire. (32 RT 5685–5686.) Prior to the murders, LaMarsh had a confrontation with Colwell behind the Camp. He and Willey went up to the car which belonged to Raper; the engine was exposed and Willey pulled the coil wire out. Then Willey pulled Colwell out of the car and hit him in the groin. Cruz told them to bring Colwell to him and Beck beat up Colwell. Willey put the coil back in the car and he and La Marsh drove off. They stopped somewhere and urinated in the back seat. Ten minutes later they returned with the car and gave it to Colwell who was waiting on the street. (32 RT 5688–5690.) About six weeks before the murders, Cruz said he wanted to "do" Raper. (33 RT 5714.) He only took the gun to the Elm Street house because it happened to already be in his pocket. (33 RT 5717.)

When they got to Willey's house, Evans took a survival knife out of her pocket and put it on a table. LaMarsh gave his gun to Willey. (33 RT 5718–5719.) Vieira "had blood everywhere." Beck "had lots of blood on him." (33 RT 5720.) Cruz had blood on his knees, and he had Vieira clean off the blood on his shoes and in the car. (33 RT 5721.) Willey had blood on both hands. There was no blood on Evans. (33 RT 5722.) Cruz said to Beck, "'We're going to have to get an alibi.'" (33 RT 5723.)

Though he was at the Elm Street house to protect Evans, and took the bat so he would not have to use the gun, he did not bring the bat into the house, and he allowed Evans to go unescorted to the other side of the house. (33 RT 5729, 5737, 5741.) LaMarsh had never seen Cruz with a cane. (33 RT 5765.) Willey was the only person with a ponytail. Cruz, Beck, Willey, and Vieira wore camouflage. (33 RT 5766.) Beck wore a mask. (33 RT 5767.) Beck and Cruz

lied about the murders, but the lies did not hurt him. LaMarsh would also lie to save his own life. (33 RT 5876–5877.)

Research Pharmacist Gant Galloway testified that he found alcohol, methamphetamine, amphetamine, and PCP in Raper's blood. (33 RT 5770–5773.) Those drugs make people more paranoid and aggressive. (33 RT 5774.) Valium has some effect like a truth serum. People have difficulty obfuscating and being accurate when under Valium. (33 RT 5781–5782.) A person (such as Evans) would have a hard time keeping a concocted story straight under 50 milligrams of Valium. (33 RT 5779.)

Willey's Defense

Forensic serologist Brian Wraxall testified that scrapings from under fingernails are not rendered useless when immersed in blood. (33 RT 5889–5892.)

Private investigator Jerry K. Kubena testified that if he had conducted the crime investigation, he would have removed the sheetrock from the Elm Street house to preserve the indentations and blood splatters. (33 RT 5907, 5920–5921.)

Jason Williamson testified that he lived with Willey in Ceres in May 1990. He bought the newspaper on May 22, 1990, and he drew the doodles on it. (33 RT 5934–5935.)

Willey testified he had known Beck and Cruz since 1985. Cruz told Beck what to do, and Cruz and Beck told Vieira what to do. Beck beat Vieira when he disobeyed. The first time Willey went to the Camp was early May 1990, and that was the first time he met LaMarsh. Vieira asked him to join Cruz and Beck in the small trailer. LaMarsh signed a piece of paper; said he was joining the group; cut his hand; and put a blood fingerprint on the paper. Willey had done the same thing in 1985. (34 RT 5956–5965.)

A week after LaMarsh joined the group, Willey went back to the Camp and ate and drank beer. Then he and LaMarsh, Cruz, Beck, Vieira, and Evans went to the Elm Street house to move furniture. They brought beer and drank and talked. Ritchey, Colwell, and Raper were there. Cruz said they were bringing beer as a peace offering, but LaMarsh and Raper had a fight. The group stayed fifteen minutes more and Cruz asked if they could come back the next day to move the furniture. Raper said that was fine and they went back to the Camp. (34 RT 5967–5970.)

Later that night, the group saw Colwell drive by slowly. Cruz said he wanted to talk to him and Willey ran over to the car. Colwell cursed Willey and Willey pulled the coil out of the car. Then he pulled Colwell out of the car. Willey kicked Colwell in the groin; then he pushed him over to where Beck and Cruz were. Willey and LaMarsh drove off and urinated in the back seat. When they returned, they gave the car back. Colwell looked like he had been roughed up. (34 RT 5971–5973.)

At about 11 p.m. on May 20, 1990, Willey received a call from Cruz asking him to come over and help move furniture from the Elm Street house. Willey agreed, but then he called Cruz back five minutes later and told him he did not want to come over because he did not feel well. Cruz told him that Beck was already on his way to get him, but he should tell Beck to just return to the Camp. But when Beck arrived, he convinced Willey to come along because Beck needed his help. (34 RT 5976–5978.)

When they got to the Camp, Cruz, Starn, Vieira, and Evans were there. Beck and Willey joined the others in the small trailer. There was no discussion of a plan of attack. Cruz announced it was time to go to the Elm Street house and they left. Willey did not think it was strange that they were going to move furniture in a car; he thought they were going to find out if it was all right to move the furniture first. They dropped LaMarsh and Evans at the house and

drove off. He asked why they were driving away, and Cruz said he was going to park down the road to avoid trouble. Then they all walked to the house. Cruz, Beck, and Vieira all wore camouflage pants and jackets; none wore stocking caps or masks. It was not unusual for them to have weapons and camouflage clothing. Cruz did not have a cane, but he did have a baton; LaMarsh had a baseball bat; Vieira had a baseball bat and a knife. (34 RT 5981–5986, 5991.)

When they arrived at the house, Evans was at the window. Beck and Vieira ran to her and went through the window. Willey continued on with Cruz to the front door. LaMarsh was at the doorway and said, "'Hey , man, the shit's starting.'" Ritchey came out of the house and Willey tackled him and they fought. Ritchey seemed to be trying to leave and had done nothing to Willey. But Willey thought there was a general fight so he wanted to beat up Ritchey. Cruz walked up to them and then walked back to the house. Earl Creekmore said, "'Hey, man, what's going on?'" When Willey looked up, Ritchey pushed Willey off and kicked him in the stomach. Beck knocked Willey off of Ritchey with his shoulder and then fell on top of Ritchey and cut his throat. Willey heard Ritchey choke on his blood. (34 RT 5987–5998.)

Willey saw Cruz standing on the porch and he walked over to him. Willey looked inside the house and saw that Raper was dead. Vieira came out and closed the door. Cruz said, "'Let's go.'" They ran to the car. Evans was already inside and LaMarsh was standing outside. They got in the car and Willey told Cruz to take him home. While they drove there, LaMarsh wanted to throw his baseball bat out the window, but he did not. Willey noticed that Beck had his knife and there was blood all over his arms. Cruz asked Evans, "'How many people were in the house?'" She said there were five. Cruz asked Beck how many people they killed, and he said four. Cruz said, "'Fuck, man, fuck. One of them got away.'" (34 RT 5999–6006.)

After they arrived at his house, Willey went into his bedroom and closed the door. He undressed and went to the bathroom; he washed the blood from his hands; and he told his girlfriend, Patricia Badgett, to stay in bed. Willey returned to the front room. Cruz talked about needing an alibi. Willey showed Cruz to the phone. Cruz called Starn and told her "to get some money, get the kids, and take the van to Oakdale and get a motel room and he'[d] meet her there." Cruz asked Willey for money for a motel room, and he gave Cruz ten dollars. Cruz told Vieira to wipe the blood off Cruz's shoes; make sure there was no blood in the car; and get the gun from the glove compartment. Cruz asked Willey to store his gun and the bat and a knife. Willey went outside, got the weapons, and put them under the house. Then Cruz, Beck, and Vieira left. Willey put his clothes in the washing machine. He rolled a joint and smoked it with Evans. LaMarsh and Evans stayed overnight. (34 RT 6005–6011.)

Willey went to bed and Badgett asked him what was wrong. He told her, "'Nothing went right'" and "'you really don't want to know.'" He put the .380 handgun that Vieira gave him, and the pistol that LaMarsh gave him, in the top of his closet. He put the clip and shells in his fishing tackle box. The next morning he and his roommate, Jason Williamson, drove LaMarsh to Oakdale and Evans to Ripon; then they drove back home to Ceres. Five minutes later, Willey borrowed Williamson's car and drove to the Tuolumne River at Laird Park. He used gasoline to burn his clothes. He put two knives (one from under the house; the other from his living room) under two concrete slabs along the embankment and threw the bat in the river. He went home and did not call the police. He did not tell anyone and he hoped no one would find out he had been at the Elm Street house. He did not do the doodling on the newspaper. There was no discussion of killing people prior to going to the Elm Street house and he did not think anyone would be killed. He did not stab anyone, and he did not kill anyone. (34 RT 6012–6021; Exhs. 87, 177.)

On cross-examination, Willey admitted that he told Detective Deckard he was home all night with his girlfriend. (34 RT 6027.) He wore a ponytail and no one else did. (34 RT 6029.) He believed they were going to move furniture with the pickup truck and van even though the truck was small and the van was full of tools. (34 RT 6045.) He did not think it was strange that they had bats and knives even though no one took weapons with them the first time they went over to move furniture. (34 RT 6047–6048.) Though Willey specifically testified during direct examination that he had blood only on his hands, he admitted during cross-examination that there was also blood on the arm and stomach area of his shirt. And though he testified he did not see anything wrong with Ritchey when he came out of the house, Willey believed Ritchey had already been stabbed in the house before they started to fight. (34 RT 6007, 6099–6100; 35 RT 6212.) In addition to burning his clothes, Willey also washed and burned his shoes. (34 RT 6136.)

The Prosecution's Rebuttal

Stanislaus County Sheriff Lieutenant Myron Larson testified he executed a search warrant on the Camp on May 21, 1990. He searched Cruz's studio cabin and looked for face masks like the ones found at the Elm Street house, but did not find any masks. (35 RT 6338–6340.)

Forensic pathologist Ernoehazy was recalled and LaMarsh demonstrated again how he hit Raper's arm after Raper reached for LaMarsh's bat and came at him with his knife. Dr. Ernoehazy testified that LaMarsh's reenactment was inconsistent with the injury on Raper's arm because the fracture was on the wrong surface. (35 RT 6370–6372.)

Cruz's Surrebuttal

Pete Rarick testified that he was married to Rosemary McLaughlin for two years. He did not trust her because she lied to him and was untruthful. (35 RT 6394–6395.)

Gary Deckard was recalled and testified that when Cruz gave an exemplar of his handwriting, he used his right hand. (35 RT 6397–6398.)

LaMarsh's Surrebuttal

Forensic pathologist Thomas Wayne Rogers was recalled and testified that he reviewed photographs of Raper's broken arm and determined it was broken by blunt force trauma. When both bones in an arm break, it is usually at the same time. He had never been able to determine that one broke first. Raper's arm could have received the injury in innumerable positions. It was also impossible to tell Raper's position when he received blows to his head. All of the injuries could have been inflicted from left, right, or center. (36 RT 6460–6464.) On cross-examination, Doctor Rogers denied that if the ulnar bone (pinky side) were pushed towards the radial bone (thumb side), that suggested the blow came from the ulnar side. (36 RT 6465.)

Beck and Willey did not present surrebuttal evidence. (35 RT 6398.)

Cruz's Penalty Trial

The Prosecution's Case

The trial court instructed the jury that in determining sentence, it should consider all of the evidence presented in all phases of the trial. (41 RT 7501.) The prosecutor argued for the death penalty on the basis of the circumstances of the murders found beyond a reasonable doubt, as well as the special

circumstance of multiple murders. (41 RT 7512–7515; Pen. Code, § 190, subd. (a).)

Jennifer Starn testified that she started a romantic relationship with Cruz in 1987 when she was 16 years old and in high school; Cruz was 25 years old. They moved in together in the summer, but never married. They moved into the Camp in 1989. They had three children together. (39 RT 6979–6983, 6988; see 43 RT 7751 [during Beck's penalty trial, Starn testified that she was 15 years old when she met Cruz].)

Vieira lived with them in three locations. Steven Perkins and Rosemary McLaughlin lived with them occasionally. Cruz often punched Vieira and Perkins in the stomach while ordering them to stand still. He did that about 25 times to Vieira and about 50 times to Perkins. One time Perkins had to go to the hospital. Cruz used a stun gun on Vieira several times and on Starn twice. One time Cruz put a rifle barrel in the mouths of McLaughlin, Vieira, and Starn, and threatened to kill them. Another time he held a rifle against Starn's head. (39 RT 6981–6988, 6992.)

Over the years, Cruz hit Starn on about 100 occasions. Cruz used a variety of objects, including his cane. Cruz often threatened to kill her and said he would kill her if she left him. On January 6, 1990, when she was three months pregnant with their third child, Cruz pushed her to the ground and kicked her in the stomach and between the legs. He kicked her as hard as he could and she bled between her legs. Then Cruz threw her out and she went to a woman's shelter. (39 RT 6989–6992.)

Cruz often hit their eldest daughter, Alexandra, with a fly swatter, ruler, and his hands. The battery left bruises all over Alexandra's body, and when Cruz hit her ears with his hands, it would leave bruises on the inside of her ears. Cruz also often submerged Alexandra in cold water or sprayed her with a water bottle. It was supposed to make her cry, or stop crying, and also make her lungs

stronger. When Alexandra was less than a year old, Cruz often put her in "the rack," which was a kind of swing. Then Cruz would suspend jars of water from Alexandra's legs. It was supposed to make her legs stronger. (39 RT 6992–6995.) Cruz would also put Alexandra in a dark room by herself, and only allowed Starn to tend to her in six-hour intervals. (39 RT 7016.)

On cross-examination, Starn testified that Cruz may have wanted to strengthen Alexandra's lungs because an astrological chart indicated she had weak lungs. Cruz said he beat Vieira and Perkins to make them strong. Cruz said he put the gun in their mouths to make them stronger and better. After Raper was removed from the Camp, he threatened to kill Cruz. Any time Starn tried to stop Cruz from beating Alexandra, Cruz would beat up Starn and beat Alexandra harder. She was ashamed of how Cruz beat her and what he did to their children. She wrote in her diary that she could not express how happy she was with her life, but it was not true. (39 RT 6997–7013.)

Cruz's Defense

Hortencia Cruz testified that Cruz was her son. Prior to Cruz's birth, she had six children with Jesus Hernandez. After they divorced, she moved to Oakdale. She became pregnant with Cruz in 1960. She put Lawrence Jimmy Cox's name on Cruz's birth certificate because she had a kidney infection; she thought she would die; Cruz's real father (Ausencio Cruz) was in Mexico; and she thought Cruz would fare better that way. They lived at a ranch and worked for Mr. Sproul. Ausencio joined them a year later and they married. (39 RT 7021–7029, 7055.)

When Cruz was about seven years old the family purchased a restaurant in Hughson. She was the cook and Cruz sometimes washed dishes. It was a happy time even though the neighboring business was hostile; someone put something in their vehicle which stopped it from operating; and they had to

close down after someone threw a bomb into the restaurant. They went back to work at the ranch, and they lived in a bigger trailer. Later, they bought five lots with a house in Oakdale. (39 RT 7030–7038.)

Hortencia testified that when Cruz was a boy, her daughter Marlene told Hernandez to tell Cruz that Ausencio was not his father. They put Cruz on the phone "[a]nd Mr. Hernandez told him, 'That man is not your father, your father is a drunk man,'" meaning Jimmy Cox. Afterward, Cruz asked Hortencia if she was his mother, and she told him she was. He said as long as he knew who his mother was, he did not care who his father was. Cruz was no trouble as a child and she spanked him only once when he rode his bicycle into a parked car. Sproul said he was going to leave land to Cruz and he would be well off. But Hortencia had to take Sproul to the labor commission because he never paid her. The will that left land to Cruz disappeared from the lawyer's storage box. Cruz was close to his brother Fred, but he died when his wife hit him in the head. Cruz read a lot when he was very young, particularly books about astrology and religion; but Cruz did not socialize much. (39 RT 7041–7060.)

Hortencia testified that Cruz's sister, Hope, married Carlos Sabalos after he put her under a Voodoo spell. Cruz followed them to Los Angeles and tried to get Hope to come back with him, but he was unsuccessful. Later, Hope and Sabalos moved to Hortencia's house. When Sabalos left, Hope was very ill. Cruz was very concerned, and he stayed up with her all night. Cruz needed to learn Voodoo to break the spell. (39 RT 7064–7070.)

On cross-examination, Hortencia testified that Cruz always had plenty of clothes and never went hungry. Sabalos was a witch doctor and he put a Voodoo spell on Hope. But Cruz broke it. (39 RT 7062, 7068–7069.)

Esperanza Hope Castillo Cruz testified that Cruz was her brother. Her father was Jesus Jacques Hernandez, but her family never told Cruz's father, Ausencio Cruz, about her mother's first marriage to Hernandez. It was her idea

to put Jimmy Cox's name on Cruz birth certificate and to tell Ausencio that she and her siblings were Ausencio's nieces and nephews. Cruz was not her child and he correctly assumed they were all siblings. (39 RT 7071–7080.)

Ausencio was surprised when he returned from Mexico and discovered he had a two-year-old son. He left again to work, but sent money to the family. He returned six months later. (39 RT 7083.) They worked for a while at Sproul's ranch in Oakdale. (39 RT 7084.) They started a restaurant in Hughson in 1971. But they took clientele away from the neighboring bar, and some motorcycle people kicked in their door, put sugar in their gas tank, and bombed the restaurant. (39 RT 7087–7089.)

Cruz was close to his brother Fred, who died of an aneurism in 1976 after his wife kicked him in the head. When Cruz was a teenager, he preferred to read religious books rather than to play with friends. (39 RT 7096–7097.)

On January 6, 1990, Hope and Hortencia were on their way to meet Cruz and Starn in Salida when Starn came up to their car. Starn said she had a fight with Cruz. Starn often slapped Alexandra, and one time she threw Alexandra outside. However, Hope never saw Cruz mistreat Alexandra. (39 RT 7105–7108.) Hope told the jury that Cruz's execution would be very hard on her. Cruz was the son she never had, and she still loved him even if he did do what he was convicted of doing. (39 RT 7116–7117.)

Emanuel Furtado, Jr., testified that he met Cruz in school and had known him for at least 15 years. Sometimes kids picked on Cruz because he dressed differently. Cruz was upset when his friend Alan Lutz died in a car crash after he had been drinking with Cruz. When Cruz was a teenager he had an argument with a friend, Al Santos. As a result, Cruz took up karate. (39 RT 7130–7289.)

Ausencio Cruz testified that Cruz was his son. He did not know about Cruz until he was two years old. He and Hortencia never punished Cruz because he

was a good child. Attorney Hartley Bush advised him to adopt Cruz because Cruz had a different last name. As far as he knew, the adoption went through. (40 RT 7166–7171.) He believed that Hortencia and Hope were each other's aunt and niece. (40 RT 7174.) Ausencio told the jury that if it voted for the death penalty, he would feel like dying. (40 RT 7176.)

Attorney Hartley Bush testified that he commenced a stepparent adoption for Ausencio, but it was later dropped. Ausencio and Hortencia were married in 1968. (40 RT 7178–7181; but see 40 RT 7170 [Ausencio testified he married Hortencia in 1961]; see also 40 RT 7194 [Bush testified that Hortencia did not legally divorce Hernandez until 1965].) A letter to the probation department that was handling the adoption asked that there be no mention of Jesus Hernandez because he was living in southern California, but Ausencio had been led to believe he was dead. (40 RT 7185.) The will he drafted for Sproul was lost by his office; but it was probably superceded by a subsequent will. (40 RT 7190.) On cross-examination, Bush testified that the adoption became complicated by the fact that when Cruz was born, Hortencia was still married to Hernandez. Because the California presumption was that the husband was the father, the clients decided to abandon the adoption. (40 RT 7193–7195.)

Charlene Pimentel testified that she was a Stanislaus County Deputy Probation Officer in 1972. She reviewed Ausencio's application for the stepparent adoption of Cruz. Pimentel sent a letter questioning the stability of Hortencia and Ausencio's marriage because it appeared Ausencio did not know Hortencia's birth date, nor that she had been previously married to Hernandez. (40 RT 7200–7203.)

Sharon Dennis testified that she was Cruz's Fourth Grade teacher at Cloverland Elementary School in Oakdale. Cruz did not try hard, but he also did not cause trouble. He probably dressed the same as the other students. (40

RT 7204–7209.) On cross-examination, Dennis testified that Cruz was bright and a good reader, but he did not use his potential. (40 RT 7212.) During a hearing pursuant to section Evidence Code section 401, Dennis testified that Cruz did not realize that his mother was actually his grandmother, and his sister was his mother. (40 RT 7219.) That testimony was subsequently read into evidence. (41 RT 7384–7385.)

Marlene Hernandez testified that Cruz was her brother. She did not notice Hortencia being pregnant before Cruz was born. When Cruz was 14 years old, she told him that Hope was his mother. Marlene also told Cruz that Jim Cox was his father, but that was probably wrong. She believed Hope was the mother because she was gone before the birth, and Hope told her that some lady gave her the baby. Cruz's family was poor when he was young, and he had two mothers who fought over their responsibilities. They lived without heat and running water, and sometimes they lived in barns with dirt floors. Hortencia often hit Cruz on the legs with rope or cords. Cruz was raised in a violent home with lots of yelling. Nevertheless, when Cruz was 14 years old, he was well-mannered and courteous. (40 RT 7239–7252, 7297.) When Cruz was about 18 months old, his mother slit open the belly of a cat to see if she could retrieve the pet canary it had eaten. When Cruz was about 17 years old, he saw his mother chop off a dog's legs when it was trying to flee under a fence. (40 RT 7300–7301.)

On cross-examination, Marlene testified that Hortencia came home with a baby three months before Cruz was born, but that child soon died. Jim Cox lived with them around that time, and Marlene believed that Hope was Cruz's mother and Jim Cox's son, Lawrence, was Cruz's father. Alternatively, Cruz's father could have been Bill Johnson, who was Hope's husband at that time. (40 RT 7257–7263; see 40 RT 7179 [name on birth certificate was "Gerald Dean Lawrence Cox"].)

Armando Hernandez testified that Cruz was his brother. He and Cruz were very close to Drummond Augustus Sproul and thought of him as a grandfather. Cruz was a happy child who got along with others. Sproul counseled Cruz to be kind to animals and people, to not be a "stoolie," and to not falsely accuse anyone. (40 RT 7269–7277.) When Armando visited home, he was told not to call Hortencia "mom" because Ausencio did not know she had been married and did not know he was her son. (40 RT 7285.)

Armando testified that shortly before Cruz was brought home as a baby, Hortencia had another infant. But that baby died and Hortencia and Jim Cox were very sad. At about that same time, Armando brought Hortencia out to a farmhouse where she said she needed to tend to Hope because she was sick in bed. When Hope brought Cruz home, she said some girl gave her the baby. (40 RT 7303–7305.) Hortencia told Armando that she cut open the stomach of his cat to see if it ate the chicken. (40 RT 7302.) On cross-examination, Armando testified that he never saw Cruz mistreated, hungry, or inadequately clothed. (40 RT 7283.)

The parties stipulated that Starn made an agreement with the district attorney that if she testified truthfully in the penalty hearing, two felony charges would be dismissed. The parties stipulated "that prison life is very structured and authoritarian in nature for a person sentenced to life in prison without the possibility of parole." (41 RT 7330.)

Cruz testified that he believed his last name was "Cruz." The first time he heard his last name might be "Cox" was when his first grade teacher yelled at him. In third grade he overheard his teacher speculating about who might be his mother. Schoolmates teased him about his hair, his clothes, his name, and about not having a father. (41 RT 7331–7333.)

Cruz did not complete any of his elementary school years because his family moved often. He had only one friend through fourth grade. One time in

elementary school the teacher spanked him for going to the bathroom without permission and he felt that was unfair. When he was in first grade, two third-graders bullied him. He threw sawdust at them in self-defense, and he was unfairly paddled by the Principal. He did not attend school regularly after eighth grade, and was often suspended for fighting. He dropped out completely in the tenth grade. (41 RT 7337–7344, 7348.)

His mother was strict, but not abusive. Sometimes she hit him with a cord or stick or coat hanger. (41 RT 7346–7347.) He was scared of his mother and Hope. (41 RT 7353.) Ausencio thought that Hortencia's prior children were from her sister. (41 RT 7354.) Cruz thought of Sproul as his grandfather. Sproul considered stool pigeons to be the lowest thing on earth. (41 RT 7349–7350.)

Cruz testified that he felt bad that Paris and Raper were killed. He felt bad about Colwell and Ritchey, but not as bad as he felt for Paris. (41 RT 7356, 7358.)

Alexandra was bowlegged, and the doctor said there was something wrong with her hips and lungs. Cruz had Perkins make the rack to help Alexandra stand and strengthen her legs. He was proud of Alexandra because even when she was a baby, she would never cry. Cruz never hit her for punishment. He did hit her with a flyswatter, but only to help her crawl. Starn turned against him because he gave all his attention to Alexandra and she was mad that Alexandra did not listen to her. (41 RT 7359–7364.)

Cruz never hit Perkins or Vieira except when they mutually sparred. The stun gun was solely as a first aid for a snakebite. The stun gun made a loud noise, but it did not shock, so it became a joke to use it on people, including using it on Starn. (41 RT 7365–7367.)

Cruz received a ticket for driving with his high beams on and he did not attend the court hearing. Later, he was stopped for driving with a blown

taillight. He was arrested on an outstanding warrant. That was the only time he had been previously arrested. (41 RT 7368.)

On cross-examination, Cruz testified that his parentage was a primary concern to him since first grade, but he never thought of getting a blood test because then he would have to bring his concern to his parents' attention. But then he testified that he did bring the matter up with Hortencia and he did ask Hortencia and Hope to provide a blood sample. He never slapped Alexandra. He immediately felt regret for the victims' deaths, but his conviction did not mean he killed them. (41 RT 7373–7377.)

Psychiatrist Hugh Wilson Ridelhuber testified that when a child feels he has been lied to about his parentage, it creates doubt in his mind; he tends not to believe others; and he feels insecure. Moreover, the parents are less able to comfort the child because he does not believe them. Such children grow up to be hyper alert and hyper vigilant, and are quick to react with anger. (41 RT 7392–7395.)

Doctor Ridelhuber reviewed Cruz's case and conducted two four-hour interviews. He also interviewed Cruz's teacher, Sharon Dennis, and Hope, and also did some testing on Cruz. Doctor Ridelhuber's opinion was that Cruz had a reluctance to rely on authorities to protect him. This was fostered by his childhood, especially the insecurity brought on by his doubts about his parentage. (41 RT 7400–7401.) Cruz had several experiences that convinced him that authorities could not protect him. There were also experiences that taught him that the court system and attorneys could not be trusted. (41 RT 7411–7415.) His childhood losses, uncertainty about his parentage, and the failure of authorities to protect him and his family created a tendency to overreact when he felt that family and close friends were threatened. (41 RT 7420–7426, 7432.) Cruz felt that he and his family were threatened by Raper's behavior, and that triggered his insecurity, resulting in irrational behavior.

Because Cruz was an insecure isolationist, he believed his life was in danger. "[H]is fears really were in the realm of being paranoid." (41 RT 7433–7436.) Cruz tried to make himself and people close to him strong out of concern for their welfare. (41 RT 7436.)

Cruz liked an authoritarian structure. (41 RT 7415.) He adapted to jail well, and would continue to do well. He was much smarter than the average inmate. He might be a good intermediary between inmates and prison officials. (41 RT 7416–7420.)

On cross-examination, Doctor Ridelhuber testified that corporal punishment and being whipped with a coat hanger taught Cruz that he could strengthen loved ones with such treatment. However, the accounts of Cruz suffering corporal punishment came only from Cruz himself. (41 RT 7437–7438.) Cruz did not meet the criteria of borderline personality disorder, antisocial personality disorder, nor of being a paranoid. (41 RT 7449–7450.) However, at the time of the murders, Cruz did suffer from the mental defects of paranoia and borderline personality traits. Nevertheless, Cruz knew that killing another person was wrong. (41 RT 7463–7464.)

Beck's Penalty Trial

The Prosecution's Case

Steven James Perkins, Sr. (Perkins, Sr.), testified that his son was Steve Perkins (Perkins). When Perkins left home to live with Beck and Cruz, he was 6 foot 5 inches; he weighed 375 pounds; and he was happy-go-lucky. Perkins, Sr., saw Perkins only once during the eighteen months he lived away from home. Perkins had lost a lot of weight and was very reserved. Later, Perkins came home to install some flooring. But after four days, he was admitted to the hospital with trouble breathing. He had shackle marks on his ankles, severe athletes foot, and big bruises on his chest. In fact, there were so many bruises

that the doctor could not read the X-ray to determine if any ribs were broken. When Perkins came home after the hospital, he was very withdrawn and moody. Unlike before, Perkins became anxious whenever he was in a room with many people or in a room without easy egress. (42 RT 7596–7604.)

Perkins, Sr., testified that Perkins said he did not trust himself to be safe to himself or others and that was why he was admitted to the psychiatric wing of the hospital. When Perkins came back home, he still had a black eye, a mark on his forehead, a chipped tooth, and his feet were so infected that two toes on each foot had grown together. Perkins remained very introverted; he had trouble remembering the day or month, or finishing projects; and he had ulcers. But Perkins did not blame anyone for his health problems; he said it was all from a motorcycle accident. Perkins apparently remained close to Cruz and he continued to receive as many as 15–20 collect phone calls per month since Cruz went to jail. (42 RT 7612–7621; see 44 RT 8159.)

Steven Pershing Perkins (Perkins) testified that he had lived and worked with Beck installing floor coverings. After briefly moving back home with his parents, he went to the hospital because he had a motorcycle accident which caused two black eyes, a shattered nose, a chipped tooth, anemia, chest injuries, and a ruptured spleen. He also had a severe case of athletes foot. The motorcycle accident involved "a shot to the head," and that was why he had psychiatric problems. He could not remember the date and was not even sure of the year. (42 RT 7624–7631, 7634–7636.)

One night he and Vieira came home early and found Starn and her sister Cindy having oral sex. When he returned later, he told Cruz what he saw. Later that night, Cruz and Starn had a fight and Starn denied the incident. A while later he went with Starn to a house where she claimed there was work to be done. After he walked through the door, he was hit in the face with a piece of wood. Some people hit and kicked him; they pulled down his pants and

kicked him in the groin. Then they attached an extension cord to his feet and electrocuted him. This caused two toes on each foot to fuse together, and it left permanent scars. He showed the scars to the jury. (42 RT 7638–7645.)

Perkins testified that when he moved in with Beck, he weighed 348 pounds. When he moved out eight months later, he weighed 250 pounds. He lost the weight by switching to a vegetarian diet. At the time of trial he weighed 416 pounds. The motorcycle accident was a suicide attempt. Beck and Cruz never hit him and Beck never hit Vieira. He was never shocked by a stun gun. Beck and Cruz never directed Vieira to sodomize Perkins and Perkins denied that he ever told anyone that. But then Perkins admitted he had recently told that to a defense investigator. Perkins also acknowledged that after Cruz was incarcerated, he had sex with Starn at Cruz's request. (42 RT 7637–7653, 7663–7664.)

Perkins testified that he cut his thumb and signed a book. He did it along with Cruz, Beck, Willey, Vieira and several others. (42 RT 7673, 7676–7677.) Perkins admitted that he kept a diary, but denied that Exhibit 207 belonged to him or that it contained his handwriting. (42 RT 7665–7672.) The prosecutor had him spell several words to see if his misspellings corresponded to the misspellings in the diary. (42 RT 7684; see 45 RT 8298 [prosecutor argued that Perkins misspelled words in testimony the same way he misspelled them in his diary].)

The prosecutor recalled Perkins, Sr., and he testified that Exhibit 207 was written in Perkins' handwriting; it contained Perkins' style of doodles; and it had misspellings that were characteristic of Perkins. (42 RT 7687–7688.)

Rosemary McLaughlin testified that she had known Beck for ten years and she had been his girlfriend. She had lived with Beck, Perkins, Starn, Vieira, Cruz, and Alexandra. One time she tried to leave Beck, and she hid down the block. When Beck found her, he threw her against his van and then he pushed

her into the van. Beck took her home and dragged her inside and kicked her in the back. Then he sent her to her room. (42 RT 7690–7694.) She and Beck talked about getting married, but he told her she had to marry Cruz. That was the first time she left the group. (42 RT 7713–7714.) Cruz said he would cut off her head and Beck seemed to agree. (42 RT 7722–7723.)

McLaughlin testified that Cruz was the boss and Beck was the enforcer. (42 RT 7710.) Cruz told her he was a church bishop. (42 RT 7713.) Someone cut her finger and she put a bloody fingerprint in a book to show she was part of the group. It also showed that Beck and Cruz owned her. (42 RT 7708–7709.)

One time McLaughlin was with Cruz, Beck, Perkins, Vieira, and Starn. They put a loaded rifle in everyone's mouth except Cruz's. Once she saw them use the stun gun on Vieira twice, and had him stun himself once. Beck ordered Perkins and Vieira around and verbally abused them. She saw Cruz beat Starn. Cruz, Beck, and Perkins made a punishment wheel with different punishments written on it; when they were mad at someone, he or she had to throw it up and where they caught it determined the punishment. Cruz and Beck once locked her in the bathroom for three to four hours. (42 RT 7695–7701.)

McLaughlin testified that they used "the rack of doom" on Alexandra and hung full Gatorade bottles from her legs. They put her in there for hours, and if she cried they poured cold water on her till she stopped. (42 RT 7704, 7706.) Everyone kept a diary because Cruz said it was important for their evolvement toward "The Cause." McLaughlin authenticated Perkins' diary. (42 RT 7711–7712; Exh. 207.)

Cynthia Starn testified that she was Jennifer's sister. She worked with Beck, Vieira, and Perkins installing floors. "The orange line treatment" involved the use of an orange electrical extension cord in which the adapter was removed, exposing the wires. One time Beck and Cruz told her to turn on an outlet switch, and it resulted in Perkins being electrocuted by the extension cord that

was plugged into the controlled outlet. The wires were wrapped around Perkins' toes. Beck and Cruz laughed, and when she realized what was happening, she turned off the switch. Beck hit Perkins in the stomach, head, groin, back, ribs, and arms on more than ten occasions. Beck hit Vieira more than ten different times. They both screamed, but did not fight back. (43 RT 7726–7735.)

On cross-examination, Cynthia testified that Cruz seemed to be in charge of some type of religious activities. Cruz gave the orders, including ordering Beck to beat and threaten the others. Cruz once put a loaded rifle in her mouth and threatened to pull the trigger. She had visited the Camp twice a couple of months before the murders and Cruz was still exercising control over the others. (43 RT 7739–7740, 7742, 7745.) On redirect examination, Cynthia added that Cruz also put a handgun to her head, and Beck did not intercede. (43 RT 7746.)

Jennifer Starn testified that she had an agreement with the district attorney to testify truthfully in exchange for the dismissal of a case against her for possession of a bomb. She became Cruz's girlfriend in 1986 when she was 15 years old. They moved in together the next year, and Beck moved in the year after that. She had three children with Cruz. Cruz and Beck beat Perkins about thirty times. A photograph of Perkins showed injuries from some of those beatings. Typically, they would punch him in the stomach and he would take it. Perkins often had huge black bruises on his stomach and marks all over his body. Sometimes Beck would beat Perkins without direction from Cruz. They also beat Vieira, but not as often as Perkins. They used the orange line treatment on Perkins and Vieira's toes. Beck used a stun gun on Vieira. (43 RT 7749–7760.)

Starn identified a diary as being written by Cruz. At the back were fingerprints and signatures pledging allegiance to "'The Cause.'" She

identified Perkins' diary because she recognized his handwriting; she recognized his nicknames on the cover; and the content related to Perkins' life. She identified the punishment wheel as the "'Wheel of Doom.'" Beck never abused Alexandra, except he did put her in the rack for Cruz, and when Alexandra was eleven months old, Beck blew smoke in her face. Cruz told Perkins to tell anyone who asked that his injuries were from a motorcycle accident, but they were really from beatings by Beck and, to a lesser extent, Cruz. (43 RT 7760–7767, 7792; see Exhs. 145, 207, 209; 43 RT 7728, 7754–7755 [Starn testified that the photograph of Perkins with various bruises depicted injuries Perkins received from beatings by Cruz and Beck]; 22 RT 3829; 42 RT 7618, 7620–7621 [Perkins, Sr., testified that the photograph of Perkins' injuries accurately depicted the way he looked when he came home after living with Cruz and Beck]; 42 RT 7636–7637 [Perkins testified he did not know whether the photograph of him with various bruises was taken before or after the purported motorcycle accident].)

Starn testified that Cruz beat her several times. Cruz and Beck once handcuffed her and left her on the couch for an hour. (43 RT 7770–7771.) She never saw Cruz put a gun in Beck's mouth or beat him. She never set-up Perkins, and she never had him beaten and electrocuted. (43 RT 7791–7792.)

On cross-examination, Starn testified that membership in the group was for life. She did not leave Cruz because she thought he would kill her. Perkins left the group only when he had to go to the hospital. (43 RT 7773, 7778, 7785–7788.)

Beck's Defense

Angela Lynn Morgan testified that Beck was one of her five siblings. Beck attended church regularly and sang in the choir. He liked to read the Bible and he taught the Bible to other children. Their father was sent to prison for

molesting her and her sister. Their mother divorced their father and married his brother. (43 RT 7797–7804.)

Beck had three children with his wife Barbara. Barbara drank a lot, used drugs, and did not care for their children well. Beck was a good parent and never abused his children. However, he was strict and he spanked his children. After Beck and Barbara divorced, Beck had custody for awhile and lived with his parents. But after Beck became close to Cruz, he stopped caring about his family. (43 RT 7810–7817.) On cross-examination, Morgan conceded that she "never really did see Dave too much." (43 RT 7820.)

Steven Hale Beck testified that Beck was his brother. They fished and hunted together; went to church together; and Beck taught him how to install floor coverings. Beck knew the Bible from front to back and he played the trumpet in church. Beck was not aggressive or mean or hostile. Beck was a very good father, but sometimes Barbara did not take care of their children. Cruz tried to get other people to do his dirty work. Beck acted ruder after he befriended Cruz. (43 RT 7825–7835.)

On cross-examination, Steven Beck testified that their father dated Hope Cruz. Beck once threatened to kill their sister Debbie. Beck threatened to put a curse on his children. When Steven visited Beck in jail, Beck said that if he had a chance to do it all over again, he would. (43 RT 7835, 7845–7847.) On redirect examination, Steven testified that it was Cruz's influence that caused Beck to threaten a curse on his children and to say he would do the crimes over again. (43 RT 7851.)

Karen Jeanette Beck testified that she was married to Beck's brother, Steven. Barbara drank a lot of beer, but Beck took good care of their children. Beck was upset after the divorce, and at some point he obtained custody of the children. Beck met Cruz a few months later and he transformed. Beck became secretive and believed he had some kind of power and control. Even Steven

was more secretive and gruff when he had been with Cruz. (43 RT 7855–7865.)

Kevin Scott testified that Beck had been married to his sister, Barbara. They worked together in the oil fields, and Beck was a good worker. He lived with Beck and Barbara and their kids for a couple of years. Beck went to church and read the Bible. Beck was not into camouflage or guns or knives. (43 RT 7870–7876.) However, on cross-examination, Scott conceded that he had not seen Beck since 1987 and he did not know what had happened to Beck since then. (43 RT 7879.)

Lawrence Scott testified that Beck was married to his daughter, Barbara. He sent Beck to oil well drilling school. Beck was a very good father and son-in-law, and was never violent or mean. Beck had been a very good worker, but Scott had not seen him for a long time. (43 RT 7882–7886.) On cross-examination, Scott testified he had not seen Beck since 1987. (43 RT 7888.)

Jeff Beck testified that he was Beck's brother. They spent a lot of time together; they fished and hunted together; Beck always stood up for him; and Beck never caused any problems. The whole family went to church regularly. However, their father was sent to prison for molesting Jeff's sisters. Then their mother married their father's brother. Beck was different after he met Cruz; he did not have time to talk anymore. He never saw Barbara drink to excess. (43 RT 7890–7902.) On cross-examination, Jeff Beck testified that he had not seen Beck in four years. They had a good upbringing, and Beck was intelligent and not disturbed. (43 RT 7903, 7905, 7909.)

Alameda County Deputy Sheriff Robert P. Mendez testified that he oversaw the custodial arrangements for defendants while on trial. Beck had been well behaved. (43 RT 7923–7924.) The parties stipulated that Beck had not been the subject of any disciplinary proceedings while in custody in Alameda County. (43 RT 8001.)

David John Sondeno testified that he met Beck in church around 1970. They performed in choir together and their choir made an album. Beck's family was very involved in the choir. He never saw Beck fight, and he was always outgoing, pleasant, and giving. Beck believed in God and was a born-again Christian. Beck was more of a doer than a leader. (43 RT 7926–7937.)

David N. Sondeno testified that he was David John Sondeno's father. He had known Beck 20 years earlier. Beck was involved in the church, and he never had any trouble or fights. (43 RT 7943–7945.)

Carol Greer testified that she met Beck and his family in church eighteen years earlier. Beck was very involved in church and Bible studies. He always had a Bible with him, and he led church youth groups. Beck had been a happy person; but years later she saw him talking to her husband and he was serious. On cross-examination, Greer estimated that the last time she saw him was in 1989. (43 RT 7946–7954.)

Linda Willis testified that she was Beck's half-sister from their father's previous marriage. They saw each other occasionally over the years. Beck was ashamed about what his father had done to Beck's other sisters. Beck was a good parent; but he was a follower; he tended to take after the people he was with. (43 RT 7955–7961.) Beck's whole belief system changed after he met Cruz. Cruz talked about Satanism and Voodoo, and Beck was a different person around him. Beck spoke only when Cruz allowed him to and Beck became more like Cruz. Beck and Cruz and three others stopped by her house two weeks before the murders. Cruz was in charge of the group; he said he had special powers and he tried to recruit Willis. Cruz said they were going to take care of someone named Raper. Beck and Cruz wore pentagram necklaces, and Cruz did all the talking. Willis felt uncomfortable and asked them to leave. After the others left the house, she told Beck to get away from Cruz because he was trouble. Beck said that if Cruz wanted someone taken out, it would

happen. (43 RT 7963–7971, 7983.) On cross-examination, Willis testified that Beck said that only the people who deserved it would be hurt. Afterward, when she asked about the murders, Beck assured her that Cruz would get them out of trouble. (43 RT 7981–7982.)

G. W. Wingo testified he was a teacher and wrestling coach at Oakdale Union High School. Beck wrestled on the team for four years. Beck was quiet and cooperative and never caused problems. Beck got along well with everyone. (44 RT 7989, 7990, 7993.)

Raymond Greer testified that he met Beck in church and they remained friends for eighteen years. Beck attended prayer meetings, led youth groups, and always carried his Bible. The last time Greer saw him, Beck was disillusioned about his marriage and did not seem to be the same person. (44 RT 7995–7999.) On cross-examination, Greer testified that he had not seen Beck in about five years. (44 RT 8000.)

Jerry Enomoto testified that he was the former Director of the California Department of Corrections. Beck would be an appropriate candidate for housing in the system. (44 RT 8002, 8006.)

Bill Simao testified that he and Beck worked together at the same floor installation company. His children loved Beck. Beck was less sociable when he was with Cruz. When Beck would leave work, it would be at Cruz's direction. After Beck was arrested, Simao sold his trailer for him. Beck told him to give some of the money to Cruz. (44 RT 8026–8032.)

Christy Shulze testified that her father married Beck's mother after she divorced Beck's father (Shulze's father's brother). Barbara was not a good mother; she called her children bad names; she slapped them; and she drank during the day. However, Beck was a very good parent, and he was very good with her children. He was never mean, and he never mistreated any children. Beck was very active in church and Shulze never saw him act violently. (44 RT

8040–8048.) On cross-examination, Shulze testified that Beck had not changed from who he had always been. (44 RT 8049.)

Randy Cerny testified that he was the president of a consulting firm that trained law enforcement personnel how to investigate ritualistic and cult activity. A cult is a group of people bound together by a philosophy and a central leader who utilizes various techniques to control the members. When members join a cult, they have an identity change; they mirror the leader. The "Cruz Group" was a cult. The Camp was essentially a compound. Cruz was the charismatic leader and members perceived him as all-powerful. Cruz controlled Beck. (44 RT 8065–8079, 8092.) On cross-examination, Cerny testified that it appeared from their diaries that Perkins and Vieira were tortured. The majority of diary entries indicated that Beck was the one who administered the punishment. Beck was the enforcer; he was second in command after Cruz. (44 RT 8087–8091.)

Psychotherapist James Charles Moyers testified that Beck came from a Pentecostal fundamentalist Christian background. A person from that background would tend to rely on a leader's opinion to interpret reality. If he broke away from the church, there would be confusion and a huge spiritual vacuum. Afterward, there would be a compulsive search for something to provide meaning. Beck suffered from "shattered faith syndrome." People who experience that syndrome were more susceptible to authority figures who seemed to have ultimate knowledge. (44 RT 8096–8102.) On cross-examination, Moyers testified that Beck knew the difference between right and wrong. (44 RT 8108.)

Clinical psychologist Lowell Cooper testified that he administered psychological tests to Beck. Beck had a hole inside him and an inability to access his emotions. Beck was a follower and did best in structured environments. He did not have an antisocial personality disorder. He was not

psychotic or violent. Beck had the bad luck to meet a very influential person when he was feeling empty and desperate for guidance. Beck's social judgment was his worst area of intellectual functioning, and he remained likely to attach to people who would direct him to do things he knew were wrong. Part of Cruz's attraction was that he spoke of the betterment of mankind. (44 RT 8114–8125.) On cross-examination, Cooper testified that Beck did not suffer from any psychological disorders. Beck would follow prison rules. But he might join a prison gang if directed to do so by someone he trusted. In their interview, Beck showed no remorse for the crimes. (44 RT 8126, 8136.)

Psychologist Daniel Goldstine testified that Beck did not have antisocial personality disorder or any other mental illness. He was an extremely vulnerable person and he was the victim of a despicable cult. Cults can cause people to do anything, including inflicting punishment on others. Cruz exploited the emptiness Beck felt after his divorce. Perkins' testimony was full of lies because he was still following Cruz. Cruz still controlled Beck, but his control would diminish over time. Beck had exhibited remorse on more than one occasion, and he would not join the Aryan Brotherhood because he did not have that kind of viciousness in him. More likely, he would go back to his religious roots. (44 RT 8149–8165.) On cross-examination, Goldstine acknowledged that Cruz's group tried to recruit from Aryan groups, and the diaries referred to their group as "The Cause" and "White Aryan Resistance" (W.A.R.). Beck's testimony about the crimes was a lie and, during their interview, Beck told many lies to protect Cruz. (44 RT 8169–8170, 8177–8178.) On redirect examination, Goldstine testified that Beck denied punishing Perkins or Vieira; denied that Cruz was ever cruel to the group; and denied that Cruz controlled him or told him to do things to other people. In short, Beck was a classic candidate for manipulation, and Cruz took full advantage of that vulnerability. (44 RT 8187–8190.)

Richard J. Ofshe testified that he was a professor of sociology, with a focus on social psychology and techniques of influence and control. Typically, leaders of control groups exercise control over members by opening a psychological wound, keeping the person in pain, and then blaming the person for not working hard enough to heal. (44 RT 8191–8192, 8197–8198.) Cruz was the leader of a high control group. Cruz initially held himself out as an expert on magic who could help others improve themselves. Followers of such leaders endure emotional and physical abuse because they believe somewhere down the road it will lead to personal development and fulfillment. People also stay because they feel they have made an irrevocable commitment to the group and they will die or be killed if they leave. Beck's fundamentalist charismatic Christian background might have made him more susceptible to induction into a high control group. People going through dramatic life changes and who are sensitive to their own shortcomings are also more vulnerable to being recruited into a control group. Beck was used by Cruz like the others; he just fulfilled another function–meting out punishment. Cruz also used Beck for income. The fact that Cruz did not have to use physical force showed that he had more thorough control over Beck. (44 RT 8199–8209, 8213.)

During their interview, Beck refused to tell Ofshe about the history of the Cruz group. Beck's reluctance was due to continued contact and loyalty to Cruz. Ofshe believed that Cruz had communicated to Beck that his children would be harmed if he told the truth about what happened. Cruz's control would not diminish until Beck's contact with him or the group was terminated. But that would be difficult to accomplish because Beck was under very substantial duress–including a general threat of death–to stay with the group. (44 RT 8210–8218.) On cross-examination, Ofshe testified that he was not surprised that several people took oaths and put bloody fingerprints in a book and then left the group with no negative consequences. (44 RT 8220, 8225.)

The People's Rebuttal

Jennifer Starn testified that in 1988, Beck, Cruz, and Vieira made an audiotape of a time they scared Alexandra. While Alexandra drifted off to sleep, they snuck up and screamed at her. It caused her to wake up and scream and cry. The tape was played for the jury. (45 RT 8278–8281; Exh. 246; 10 CT 2445.)

On cross-examination, Starn testified that it had been Cruz's idea. After the murders, Starn had received several threatening phone calls from Cruz and Perkins. She taped some calls from Cruz from earlier in 1992 while Cruz was in custody. An audiotape of two calls was played for the jury. Cruz's tone of voice was ranting and raving, just as it was on other phone calls he made to her. Cruz talked that way to Beck occasionally. She was somewhat afraid of Beck because he would do whatever Cruz told him to do. (45 RT 8282–8285; Exhs. 245, 247; 10 CT 2445.)

The parties stipulated to the admission of hospital records for Steve Perkins. (45 RT 8286.)

ARGUMENT

I.

THE TRIAL COURT PROPERLY DENIED APPELLANTS' MOTIONS TO SEVER THE TRIAL

Appellants claim that the trial court erred by denying their motions to sever the trial.[5] They argue that counsel for codefendants Willey and LaMarsh introduced evidence at trial that was inadmissible as to appellants, and they also made inappropriate and prejudicial argument. As a result, appellants received an unfair trial which violated their Sixth and Eighth Amendment rights to counsel, due process, a fair trial, and a reliable determination of both guilt and penalty.[6] (COB 56; BOB 379.)

This Court should reject appellants' claim because it essentially boils down to a complaint that they were not allowed to manipulate the legal process so they could place all the blame on the other defendants without fear of them giving contrary testimony. (See *Zafiro v. United States* (1993) 506 U.S. 534,

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5. Respondent first addresses Arguments I–XV from Cruz's Opening Brief (COB) and then Arguments I–XX from Beck's Opening Brief (BOB). Consequently, Beck's Arguments I–XX are addressed in Respondent's Arguments XVI–XXXV, respectively.

Pursuant to California Rules of Court, rule 8.200(a)(5), Beck uses the last argument in his opening brief to join eleven of Cruz's arguments: I–V, VII–XI, and XIV. On September 10, 2007, Cruz moved to join fifteen of Beck's arguments: I-A, II–XII, XVII–XIX, corresponding to Respondent's Arguments XVI-A, XVII–XXVII, XXXII–XXXIV, respectively. Respondent will cite Beck's joinder as "BOB 379" and will cite Cruz's joinder as "Cruz Joinder."

6. Appellants also claims that the trial court erred by denying their motion for a mistrial based on "the adversarial, antagonistic and prejudicial tactics of counsel for codefendants Willey and LaMarsh." (COB 56; BOB 379.) However, appellants never identify where in the record such a motion was made; nor do appellants make any argument regarding this claim. (COB 56–89; BOB 379.)

538 ["it is well settled that defendants are not entitled to severance merely because they may have a better chance of acquittal in separate trials . . . . [A] fair trial does not include the right to exclude relevant and competent evidence . . . merely because the witness is also a codefendant."]; *People v. Keenan* (1988) 46 Cal.3d 478, 500, fn. 5 [defendant has no right to "insulate himself, by the tactical device of severance, from the relevant and admissible testimony of his codefendant."].) Cruz concedes that it was proper to join his case with Beck's because their accounts of the crime were coordinated. Appellants would have preferred, however, that LaMarsh and Willey had separate trials so they would have exercised their right not to incriminate themselves at appellants' trial. That way, appellants could have placed the blame for all the murders on the other four assailants–which they did anyway–without Vieira, LaMarsh, and Willey being able to present their version of the facts. As it was, Vieira did receive a separate trial. And, predictably, appellants benefitted from the jury not hearing Vieira's testimony.

For example, appellants both testified that Vieira used the baton during the murders even though all of the assailants–including Cruz, himself–testified that it belonged to Cruz. Both appellants also strongly implied that Vieira stabbed Colwell–in contrast to the prosecutor's theory that Beck stabbed Colwell. (29 RT 5070, 5089, 5102–5105; 30 RT 5306, 5352.) But because Vieira received a separate trial, appellants had no fear that Vieira would testify otherwise. (See *Vieira* (2005) 35 Cal.4th 264, 275–276 [in this Court's statement of facts pertaining to Vieira's automatic appeal, Cruz had the baton, and he gave his knife to Vieira and ordered him to use it to silence Paris; Vieira also confessed to police that he participated in the planning of the murders].)

Appellants would have preferred that LaMarsh and Willey had separate trials so they could likewise blame them without them testifying otherwise. As in many conspiracy trials, appellants wanted separate trials for tactical reasons.

But appellants had no statutory or constitutional right to a trial in which they would not have to face their codefendants. (See *Zafiro v. United States*, *supra*, 506 U.S. at p. 538 ["a fair trial does not include the right to exclude relevant and competent evidence . . . merely because the witness is also a codefendant."]; *People v. Keenan*, *supra*, 46 Cal.3d at p. 500, fn. 5.) Likewise, there was nothing improper about the other codefendants presenting evidence and arguing that appellants led the conspiracy. Nor was it improper to join appellants' case with codefendants who deigned to describe how they personally participated in the murders.

A. Procedural Background

On January 21, 1992, Beck moved for severance from Cruz, LaMarsh, and Willey. The motion was based on evidence that had been ordered suppressed as to Beck. (5 CT 1397–1400.) On January 24, 1992, Cruz filed a motion for severance from LaMarsh and Willey, and for a penalty trial separate from Beck. The motion was based on evidence that was not cross-admissible and prejudicial extrajudicial statements by codefendants. (5 CT 1402–1405.) On January 27, 1992, the prosecution's written opposition argued that Beck failed to include the necessary declarations alleging prejudice. The prosecutor also argued that it was unlikely that any of the specified evidence would be introduced.[7] (5 CT 1415–1417.) On January 29, 1992, the prosecutor filed an opposition to Cruz's motion for severance which incorporated his arguments

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7. Appellants argue that the prosecution's opposition to severance was based "on the ground that denial of severance is almost never reversed on appeal. (5CT: 1415–1416.)" (COB 63; BOB 379.) Not so. Rather than acknowledging the reasons actually given–i.e., that Beck's motion lacked the necessary affidavit and the purportedly prejudicial evidence would not be introduced at trial–appellants cynically reduce the argument to a single nonessential sentence which was in a page-and-a-half single-spaced quote from a practice manual. (5 CT 1416–1417.)

from his opposition to Beck's motion for severance. (6 CT 1481–1482.) On February 6, 1992, Beck filed a declaration in support of the motion for a separate trial. (6 CT 1505.) LaMarsh also joined Cruz's motion for a separate trial. The motion argued that a joint trial would lead the jury to falsely believe that LaMarsh was a member of a cult and that the jury would convict LaMarsh based on his association with Cruz rather than evidence of any wrongdoing. (15 CT 3631–3637.)

The trial court held a hearing on February 10, 1992. Beck submitted his argument on the pleadings. The prosecutor argued that it would not enter any of the evidence that Beck claimed would be prejudicial; he also argued that it was unlikely that the defendants would offer that evidence. The trial court ordered the prosecutor not to use that evidence and denied Beck's motion for severance. (4 RT 794–796; 6 CT 1517.)

The trial court proceeded to Cruz and LaMarsh's joint motion to sever. Cruz filed a sealed declaration, which the trial court read.[8/] (4 RT 796.) Cruz called Detective Gary Deckard to testify. Deckard testified that Michelle Evans and Karen Spratling told him about admissions by LaMarsh. (4 RT 797–802, 808–809.) On cross-examination, Detective Deckard testified that none of the four defendants made any statements to law enforcement personnel that implicated any of the other defendants. (4 RT 805–806.)

Cruz argued that LaMarsh's statements to Evans and Spratling were admissible as admissions against LaMarsh, but would not be admissible in a separate trial against Cruz. Cruz also argued that he had the right to have the

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8. Appellants cite the sealed Clerk's Transcript and assert that it contains an exonerating declaration. (COB 64, citing 17 BCT: 3993–3995; BOB 379.) However, Respondent does not have that portion of the Clerk's Transcript and parties may not discuss the content of sealed records. (See Cal. Rules of Court, rules 2.585 [records filed under seal must not be disclosed without a court order]; rule 8.160(g) ["A record filed publicly in the reviewing court must not disclose material contained in a record that is sealed . . . ."].)

same jury decide guilt and penalty; but the joint guilt trial could prejudice him by causing the penalty jury to impose a harsher sentence based on the bad acts of the other defendants. (4 RT 808–812.) LaMarsh argued that if all four defendants were tried together, none of them would receive a fair trial because some of the evidence was not cross-admissible. He also argued that there was undue risk of being found guilty by association due to the "grotesque" nature of the crimes; that some relevant evidence would be excluded; and that the jury might become confused by the objections of the codefendants' counsel. (4 RT 812–814.)

The prosecutor argued there was no need for separate trials because he would not use any statements by LaMarsh to Evans that would violate *Aranda-Bruton*.[9] Moreover, Spratling was not going to testify. As for the penalty phase, the prosecutor stated that the only evidence against Cruz and Beck would be the circumstances of the murders. He also anticipated that each defendant would receive a separate penalty trial from the same guilt jury. (4 RT 814–818.)

Cruz conceded that if his penalty trial was first, and the prosecutor entered bad character evidence in response to his good character evidence, there would be no prejudice. (4 RT 818.)

After a break, the trial court asked Detective Deckard to explain the circumstances around LaMarsh's two statements to Evans. The first statement was made at Willey's house while Cruz and Beck were present. LaMarsh said that he had pulled out his gun at the Elm Street house. When he came back

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9. In a joint trial, the *Aranda-Bruton* rule forbids the admission of a defendant's out-of-court statement which incriminates a codefendant. (*People v. Aranda* (1965) 63 Cal.2d 518, 529; *Bruton v. United States* (1968) 391 U.S. 123, 135–136; see *People v. Brown* (1978) 79 Cal.App.3d 649, 656 [*Aranda* specifically held that it was a judicially declared rule of practice–not mandated by the Confrontation Clause–and applies to extrajudicial statements even if defendant/declarant testifies at trial].)

inside through the front door, he hit three of the victims with his bat. Evans also told Detective Deckard that Beck never said who he killed. (4 RT 820.) LaMarsh's second statement was made after Cruz and Beck left. According to Evans, LaMarsh said Raper said, "'Don't hit me. Don't hit me.'" LaMarsh said it was "the worst thing he [had] ever seen" and that he broke Raper's arm with his bat. (4 RT 820.) On cross-examination by Cruz, Detective Deckard testified that he asked Evans what Cruz had done. Evans told him that while she was in Willey's home, LaMarsh had said that Cruz "helped him beat" Raper. (4 RT 821.)

Detective Deckard also testified that while the defendants were driving away from the crime scene, Cruz asked about the body count, and Beck said, "it seemed like a waste we only got three dudes and one chick." (4 RT 822.) All of the defendants heard the conversation, and there was no indication that anyone disagreed with the statements.

The trial court denied Cruz and LaMarsh's motions for separate trials:

> So far as inconsistent defenses are concerned, the Court is aware of no rule of law or case decision that says simply because two defendants' defenses don't match, they're entitled to separate trials.
>
> The Court feels that–that if evidence which is admissible is presented and the defendants have a full and fair opportunity to confront and cross-examine that evidence, they're entitled–they're receiving a fair trial. There's no due process violation.
>
> And the only possible statement that the Court has heard evidence of that might cause a problem would be if in fact Mr. LaMarsh's statement by Mr. LaMarsh to Miss Evans was made when Mr. Cruz was not present, and in view of other statements that apparently she heard Mr. LaMarsh give regarding Mr. Cruz while Mr. LaMarsh–excuse me Mr. Cruz was present, the Court feels that that one statement does not give rise to the severing. So the motion to sever is denied.

(4 RT 827; 6 CT 1517.) The trial court also ruled that each defendant would receive a separate penalty trial. (4 RT 825–826; 6 CT 1517.) The prosecutor agreed that if the trial court found that *Aranda-Bruton* applied to any statement, he would not be allowed to admit that statement. (4 RT 828.) The trial court ruled that the order of penalty trials would be Cruz, Beck, LaMarsh, and Willey. (4 RT 829; 6 CT 1517.)

On February 13, 1992, Beck filed supplemental points and authorities for a separate trial. The pleading argued that Beck's penalty phase jury would be tainted by Cruz's testimony in his penalty phase, which was scheduled to take place first. (6 CT 1557–1560; see 5 RT 893–894.)

On February 18, 1992, Beck renewed his motion for severance based on a confidential declaration. (5 RT 961.) His renewed motion did not claim there would be conflicting defenses during the guilt phase; but rather that he would be prejudiced by evidence admitted during the penalty phase. (5 RT 963.)

On February 21, 1992, Beck notified the trial court that the Fifth District Court of Appeal had denied his petition for a writ of mandate regarding the denial of the severance motion. The trial court then denied his request for a continuance so he could seek relief in this Court. (6 RT 1246; see 7 RT 1300; 6 CT 1613.)

On February 25, 1992, Beck renewed his motion for severance. He argued that he could not receive a fair penalty trial because the jury would be prejudiced by evidence in Cruz's penalty trial. The trial court stated that the prosecutor had already indicated he would not use any additional evidence concerning Beck in the penalty trial of Cruz. It denied Beck's renewed motion for severance. (7 RT 1300–1304; 6 CT 1626.)

On March 12, 1992, LaMarsh moved for a continuance and an in camera hearing regarding a newly received document which he contended violated *Brady v. Maryland* (1963) 373 U.S. 83, and might be grounds for severance.

Cruz and Beck argued that the new evidence might raise *Aranda-Bruton* issues and be grounds for severance. (12 RT 2123–2126.) The prosecutor argued that the coded document had been provided to all of the defendants previously, and he provided the translation of the document within a few days of receiving it. He also argued the document was not relevant. (12 RT 2127–2128.) The trial court denied the motion to stay proceedings. (12 RT 2130; 6 CT 1677.)

On March 18, 1992, the trial court unsealed a declaration which Cruz submitted in Starn's trial. (13 RT 2320–2321.) On appeal, appellants discuss this ruling at length. But its relevance as a basis for severance is doubtful since they concede that "the contents of the declaration were not referred to in front of the jury, nor was the declaration introduced into evidence." (COB 67; BOB 379.)

On April 8, 1992, during the prosecution's case-in-chief, LaMarsh's counsel cross-examined Kevin Brasuell and asked if he ever witnessed LaMarsh cut his hand. Cruz requested a sidebar conference and objected that the evidence would lead to evidence of the cult aspects of the group. Cruz also argued it was irrelevant and prejudicial character evidence, and that introduction of such evidence would necessitate a separate trial. (21 RT 3615–3617.) The trial court overruled the objection. It found that the evidence was relevant as to whether LaMarsh knowingly entered the conspiracy, and it was not character evidence. It also found that the evidence was not overly prejudicial to appellants. (21 RT 3620–3621.) Brasuell very briefly testified that he saw LaMarsh cut his finger. But there was no discussion of why he did that or any indication that it was part of an indoctrination ritual. (21 RT 3622–3623.)

On April 9, 1992, the prosecutor made an offer of proof that Phillip Wallace could testify that on the day after the murders, Beck told him that "he" or "we" "cut some throats." The prosecutor proposed to have Wallace testify that Beck said that he knew the victims' throats had been cut to show knowledge of the

details of the murders; but the testimony would avoid specifically implicating any of the other defendants in violation of *Aranda-Bruton.* (22 RT 3737.) LaMarsh and Willey joined the prosecutor's request, but appellants argued it violated *Aranda-Bruton.* (22 RT 3738–3744.) LaMarsh and Willey waived any *Aranda-Bruton* violation. (22 RT 3742–3744.) The trial court ruled that the redacted statement would be admitted. (22 RT 3745.) Appellants argued that the statement raised *Aranda-Bruton* problems; could be grounds for a mistrial; and the issue would not have come up if the defendants had received separate trials. (22 RT 3746.)

The trial court noted there was no violation if the statement did not substantially incriminate the other defendants. Because Wallace's statement did not refer to anyone in particular besides Beck, it did not violate *Aranda-Bruton.* (22 RT 3747.) After Cruz objected that the redacted form changed the meaning, the trial court ruled the statement would be admitted in its unredacted form. Cruz renewed his objection. (22 RT 3748–3749; 7 CT 1743.)

On April 27, 1992, LaMarsh moved for a mistrial based on the contention that Cruz's testimony was so false that the jury would prejudge LaMarsh. Willey joined the motion. The trial court denied the motion. (29 RT 5131–5134; 7 CT 1760.)

On April 28, 1992, Cruz moved for a mistrial after Willey's counsel remarked that if Cruz's counsel did not want Cruz cross-examined, he should not have had him testify. The trial court denied the motion. (30 RT 5220–5221.) A short while later, Beck made the same motion outside the presence of the jury. Cruz and LaMarsh joined the motion, and the trial court denied the motion. (30 RT 5222–5225.)

In order to show that LaMarsh and Willey were not part of the conspiracy, they sought to enter evidence that Cruz, Beck, and Vieira were very close, and that LaMarsh and Willey were not part of that inner circle. On May 4, 1992,

Cruz argued that demonstrating the group's closeness and loyalty through prior acts would unfairly and prejudicially prove propensity, and would entitle him to a separate trial. The trial court ruled, "As to the prior relationship of various parties and the nature of that relationship, it appears that under [Evidence Code section] 1101(b) that would have some probative value as to the identity of the planners of this incident, so that will be admissible there. Obviously, that line of testimony would be prejudicial to Mr. Cruz and Mr. Beck, but the Court feels that the probative value outweighs that prejudicial value." (31 RT 5462–5471; 7 CT 1765.)

Cruz moved for a mistrial on two grounds. First, Willey's attorney asked Rosemary McLaughlin, "Are you afraid of these guys?" Though the trial court sustained Beck's objection, Cruz claimed that the question shook-up McLaughlin and caused her to cry, and that prejudiced Cruz. (31 RT 5563, 5584.) Second, Cruz argued that questions about his and Beck's occult and religious practices were improper. Beck joined the motion. (31 RT 5584–5587.)

The trial court ruled:

> The Court had sustained the objection to those questions. McLaughlin was emotional for more of this proceeding than just following that particular question, and the Court sustained the objection on any occult type questions before any answers were given.
>
> This has been a very long trial with many, many witnesses, and there's been no suggestion by any other witnesses that there is any occult matters going on in this trial. The Court cannot see how the jurors' decision-making process would at all be altered about this question or two to which the objection is sustained.

(32 RT 5585.) The trial court added, "Based on the evidence to date, there will be no argument as to Mrs. McLaughlin is afraid of anybody." (32 RT 5586; 7 CT 1766.) The trial court denied the joint motion. (32 RT 5587; 7 CT 1766.)

On May 5, 1992, while LaMarsh was giving direct testimony, Cruz objected to questions regarding how appellants mistreated Vieira. (32 RT 5600–5602.) After the objection was sustained, LaMarsh argued that he was being penalized for the joint trial. (32 RT 5602.) Appellants renewed their motion for severance, arguing that LaMarsh wanted to bring in character evidence to show their propensity to commit the crimes, and it would be prejudicial to admit it. (32 RT 5602–5608.) The trial court ruled that LaMarsh could ask questions about how Cruz, Beck, and Vieira constituted a group, but could not ask about their occult or white supremacist ideologies. (32 RT 5613.) Appellants objected that it was character evidence, more prejudicial than probative, and violated their Sixth and Eighth Amendment rights. (32 RT 5614–5615.)

On May 11, 1992, the trial court ordered Willey's attorney not to ask Willey any questions that dealt with the occult or Cruz as a spiritual leader; it also ordered Willey not to volunteer information along those lines. (34 RT 5954.) Willey moved for a mistrial and severance, and LaMarsh joined the motion. The trial court denied the joint motion. (34 RT 5954–5955; 7 CT 1770.)

The trial court determined that closing arguments would proceed in the following order: the prosecutor, Cruz, Beck, LaMarsh, Willey, and rebuttal by the prosecutor. On May 18, 1992, Cruz requested permission to make a rebuttal argument between Willey's closing argument and the prosecutor's rebuttal. (36 RT 6454.) He argued that section 1093 set forth the order of argument, but section 1094 gave the trial court discretion to depart from that order. He also argued that he had a constitutional right to rebut the other defendants' arguments. Beck joined the motion, but LaMarsh, Willey, and the prosecutor objected. They all argued that defendants never have the right to rebut the prosecution's rebuttal, so Cruz and Beck had no right to rebut the codefendants' arguments. The trial court denied the motion. (36 RT 6454–6458; 7 CT 1792.)

B. Legal Principles

"The court may, in its discretion, order separate trials '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. Avila* (2006) 38 Cal.4th 491, 574–575, quoting *People v. Massie* (1967) 66 Cal.2d 899, 917.)

However, "[w]hen defendants are charged with having committed 'common crimes involving common events and victims,' as here, the court is presented with a 'classic case' for a joint trial." (*People v. Coffman* (2004) 34 Cal.4th 1, 40, quoting *People v. Keenan*, *supra*, 46 Cal.3d at pp. 499-500.)

> In this state, the court in its discretion may order a separate trial of one or more defendants charged with a public offense. Sec. 1098, Pen. Code. But a separate trial is not a matter of right. *People v. Rocco* [(1930)] 209 Cal. 68; *People v. Tinnin* [(1934)] 136 Cal.App. 301. Even where it appears that evidence will be admissible against one of several defendants which the jury cannot consider as against the others the law does not require separate trials upon demand therefor. *People v. Perry* [(1925)] 195 Cal. 623; *People v. Booth* [(1925)] 72 Cal.App. 160; *People v. Erno* [(1925)] 195 Cal. 272.

(*People v. Eudy* (1938) 12 Cal.2d 41, 45–46.)

> Our Legislature has expressed a preference for joint trials. (*People v. Boyde* (1988) 46 Cal.3d 212, 231.) Section 1098 provides in pertinent part: "When two or more defendants are jointly charged with any public offense, whether felony or misdemeanor, they must be tried jointly, unless the court order[s] separate trials."[10] The court may, in its discretion, order

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10. The full text of section 1098 provides: "When two or more defendants are jointly charged with any public offense, whether felony or misdemeanor, they must be tried jointly, unless the court order separate trials. In ordering separate trials, the court in its discretion may order a separate trial as to one or more defendants, and a joint trial as to the others, or may order any number of the defendants to be tried at one trial, and any number of the others

> separate trials if, among other reasons, there is an incriminating confession by one defendant that implicates a codefendant, or if the defendants will present conflicting defenses. (*People v. Avila* (2006) 38 Cal.4th 491, 574-575; *People v. Massie* (1967) 66 Cal.2d 899, 917.) Additionally, severance may be called for when "there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." (*Zafiro v. United States* (1993) 506 U.S. 534, 539 [addressing severance under Fed. Rules Crim. Proc., rule 14, 18 U.S.C.]; *People v. Coffman and Marlow* [(2004)] 34 Cal.4th [1,] 40.)
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> We review a trial court's denial of a severance motion for abuse of discretion based on the facts as they appeared when the court ruled on the motion. (*People v. Hardy* (1992) 2 Cal.4th 86, 167.) If we conclude the trial court abused its discretion, reversal is required only if it is reasonably probable that the defendant would have obtained a more favorable result at a separate trial. (*People v. Coffman and Marlow*, *supra*, 34 Cal.4th at p. 41; *People v. Keenan* (1988) 46 Cal.3d 478, 503.) If the court's joinder ruling was proper when it was made, however, we may reverse a judgment only on a showing that joinder "'resulted in "gross unfairness" amounting to a denial of due process.'" (*People v. Mendoza* (2000) 24 Cal.4th 130, 162.)

(*People v. Lewis* (2008) 43 Cal.4th 415, 452.)

"The state's interest in joinder gives the court broader discretion in ruling on a motion for severance than it has in ruling on admissibility of evidence." (*People v. Cummings* (1993) 4 Cal.4th 1233, 1284.)

Aranda, *supra*, 63 Cal.2d 518, *Bruton*, *supra*, 391 U.S. 123, and their "progeny provide that if the prosecutor in a joint trial seeks to admit a nontestifying codefendant's extrajudicial statement, either the statement must be redacted to avoid implicating the defendant or the court must sever the

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at different trials, or may order a separate trial for each defendant; provided, that where two or more persons can be jointly tried, the fact that separate accusatory pleadings were filed shall not prevent their joint trial."

trials." (*People v. Hoyos* (2007) 41 Cal.4th 872, 895; *People v. Fletcher* (1996) 13 Cal.4th 451, 464.)

> The court's discretion in ruling on a severance motion is guided by the nonexclusive factors enumerated in *People v. Massie* (1967) 66 Cal.2d 899, 917, such that severance may be appropriate "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." (Fns. omitted.) Another helpful mode of analysis of severance claims appears in *Zafiro v. United States* [1993]506 U.S. 534. There, the high court, ruling on a claim of improper denial of severance under rule 14 of the Federal Rules of Criminal Procedure, observed that severance may be called for when "there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." (*Zafiro, supra*, at p. 539; see Fed. Rules Crim. Proc., rule 14, 18 U.S.C.) The high court noted that less drastic measures than severance, such as limiting instructions, often will suffice to cure any risk of prejudice. (*Zafiro, supra*, at p. 539.)

(*People v. Coffman, supra*, 34 Cal.4th at p. 40.)

> "'[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.]" (*People v. Hardy* [1992] 2 Cal.4th [86,] 168; see also *Zafiro v. United States* (1993) 506 U.S. 534, 538 ["Mutually antagonistic defenses are not prejudicial per se "].)

(*People v. Tafoya* (2007) 42 Cal.4th 147, 162.)

> In *People v. Hardy* [1992] 2 Cal.4th [86,]168, 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." (*Ibid.*, last italics added.) 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. (*Ex parte Hardy* (Ala. 2000) 804 So.2d 298, 305.)

(*People v. Coffman*, *supra*, 34 Cal.4th at p. 41.)

A trial court has no duty to monitor incoming evidence and reconsider its denial of a severance motion sua sponte. (*People v. Alvarez* (1996) 14 Cal.4th 155, 216, fn. 20; *People v. Ervin* (2000) 22 Cal.4th 48, 68 [if further developments occur during trial that defendant believes justify severance, he must renew his motion to sever].) Absent a renewed request for severance, the ruling is evaluated based on the evidence available at the time of the original ruling. (*People v. Hardy* (1992) 2 Cal.4th 86, 167.) Nevertheless, even if the court's joinder ruling was proper when it was made, an appellate court should reverse the judgment if the defendant demonstrates that it "resulted in gross unfairness amounting to a denial of due process." (*People v. Lewis*, *supra*, 43 Cal.4th at p. 452, internal quotation marks omitted.)

C. The Trial Court Did Not Abuse Its Discretion By Denying Appellants' Severance Motions

Appellants' various motions for severance asserted that physical evidence would be introduced that would not have been admissible in a separate trial; they would be prejudiced by extrajudicial statements that were made by LaMarsh (and Beck); evidence that Cruz, Beck, and Vieira constituted a tightly knit group was improper character evidence that proved only criminal propensity; and that they would be prejudiced by a joint penalty trial.

However, much of the evidence at issue was excluded, and appellants have identified precious little other evidence that would not have been admitted if they had received separate trials. The physical evidence that was seized from Beck's residence was excluded. The trial court ruled that LaMarsh's statement to Evans that Cruz helped him beat Raper could be introduced as an admission, i.e., it would not have been admissible against appellants in a separate trial. But that statement was less incriminating than LaMarsh's trial testimony and, more importantly, it was never even introduced into evidence. Appellants complained about extrajudicial statements made to Karen Spratling. But she never testified, and no statements made to Spratling were admitted. Only one extrajudicial statement by Beck was admitted (that was not constructively adopted by the other defendants), and that statement did not specifically implicate anyone besides Beck, himself. Evidence of the close relationship between Cruz, Beck, and Vieira was probative of the conspiracy and was properly admitted. Moreover, even if it was not, LaMarsh and Willey's testimony on that subject was extremely brief. So it could not have been particularly prejudicial. Finally, there was no joint penalty trial, and Cruz's penalty trial took place first, so he could not have suffered any prejudice. Moreover, the prosecutor offered only one witness in Cruz's penalty trial and Beck's name was mentioned only once to remind the witness of the night of the

murders (39 RT 7004), so Beck could not have been prejudiced by being tried second. Thus, there was virtually no basis to grant the severance motions and the trial court properly exercised its broad discretion to carry out the state's preference for a joint trial.[11] (See *People v. Boyde* (1988) 46 Cal.3d 212, 231; § 1098.)

As a further preliminary matter, appellants raise purported problems with the joint guilt trial that stretch from pretrial motions to closing arguments by the prosecutor, LaMarsh, and Willey. However, it is well established that a trial court's denial of a motion for severance is reviewed for an abuse of discretion based on the evidence available at the time of the ruling. (*People v. Lewis*, *supra*, 43 Cal.4th at p. 452.) If further developments occur during trial that a defendant believes justify severance, he must renew his motion to sever. (*People v. Alvarez*, *supra*, 14 Cal.4th at p. 216, fn. 20; *People v. Ervin*, *supra*, 22 Cal.4th at p. 68.) Here, however, appellants attempt to consolidate all of their grounds for severance and have them reviewed for an abuse of discretion based on evidence that was admitted after the rulings. They also complain about aspects of the joint trial that were never objected to at trial. For example, they allege that they were prejudiced by the aggressive argument of codefendants' counsel and "antagonistic" defenses. But appellants never asked for a separate trial on those bases, so they cannot use those claims to show that the trial court abused its discretion.

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11. Appellants claim that the denial of their severance and mistrial motions was a denial of their Sixth Amendment right to counsel. (COB 56; Cruz Joinder.) But they make no argument on this issue and there is no way to tell what appellants mean by this assertion. Because appellants have failed to support the contention with any argument or citation to authority, they have waived the claim on appeal. (*People v. Hodges* (1999) 70 Cal.App.4th 1738, 1357; see also *People v. Turner* (1994) 8 Cal.4th 137, 214, fn. 19 [court considers only those claims that are "sufficiently developed to be cognizable"], overruled on another ground in *People v. Griffin* (2004) 33 Cal.4th 536, 555, fn. 5.)

1. Pretrial Severance Motion

Appellants made one motion for severance prior to trial; they made another motion during the prosecution's case; and they made two more motions during LaMarsh's defense case. The latter three motions concerned the closeness of Cruz, Beck, and Vieira, and how that was circumstantial evidence that only they knew about the conspiracy. The motions made during trial had nothing to do with the original motion (discussed immediately below), and did not purport to renew the original grounds for severance. In any case, all of the evidence that was the basis of the latter three severance motions was either excluded from evidence, or was so insignificant that its admission could not have constituted a prejudicial abuse of discretion–even if it was considered cumulatively with the grounds for the pretrial severance motion.

Prior to trial, appellants moved for severance based on (1) physical evidence that was not cross-admissible; (2) prejudicial extrajudicial statements by LaMarsh to Evans and Karen Spratling; and (3) the prejudicial nature of a joint penalty trial. (5 CT 1402–1405.) However, none of these reasons justified severance.

First, the trial court ruled that the challenged physical evidence would not be admitted. (4 RT 794–796.) So there was no reason to sever the trial on that basis.

Second, Detective Deckard testified in an evidentiary hearing that none of Spratling's statements to LaMarsh regarded appellants. (4 RT 802, 805–808.) The prosecutor stated that Spratling would not testify; Spratling did not, in fact, testify; and no statements to Spratling were admitted. (See 4 RT 815.) So there was no reason to sever the trial on the basis of extrajudicial statements to Spratling.

The court found that LaMarsh's statement about taking out his gun and hitting three people with his bat was made in appellants' presence, so it would have been admissible against appellants as an adoptive admission even in separate trials. (4 RT 820; see Evid. Code, § 1221.)

LaMarsh's other statement–that Cruz helped him beat Raper–might have been inadmissible against appellants under *Aranda-Bruton*. However, the trial court found that one statement was not so prejudicial that it justified severance. (4 RT 827.) That ruling was correct because LaMarsh's extrajudicial statement would be minor and cumulative in light of the fact that LaMarsh would testify to the very same thing at trial. Moreover, Evans had said to Detective Deckard that LaMarsh said that Cruz "helped him beat" Raper. (4 RT 821.) But in his testimony, LaMarsh would give more graphic details about what Cruz did to Raper. Indeed, when LaMarsh testified, he described how Cruz beat Raper on the head with his police baton and at least implied that Cruz was solely responsible for killing Raper. (32 RT 5656–5657.) Thus, LaMarsh's extrajudicial statement that Cruz had "helped" him was not only less inculpating than LaMarsh's testimony would be, it indicated that LaMarsh shared responsibility for Raper's death, while LaMarsh's testimony was that his only action was breaking Raper's arm in self-defense.

More importantly, LaMarsh's statement to Evans was never entered into evidence. Detective Deckard never mentioned it. Evans testified only that LaMarsh told her it was the worst thing he had ever seen. (25 RT 4454.) And LaMarsh testified that he told Evans that he hit Raper in the arm, but did not mention anything about Cruz. (32 RT 5668–5669.) Accordingly, appellants could not have suffered prejudice. (See *People v. Lewis*, *supra*, 43 Cal.4th at p. 452 [reversal is required only if it is reasonably probable that the defendant would have obtained a more favorable result at a separate trial].)

Third, the trial court ruled that the defendants would receive separate penalty trials. Cruz conceded that if his penalty trial was first, he would not suffer any prejudice from serial penalty trials. (4 RT 818–819, 825–826; 6 CT 1517.) Accordingly, since Cruz did go first, he waived his argument and forfeited his right to renew this claim on appeal. Moreover, Cruz could not have been prejudiced. The use of a single jury for both the guilt and punishment trials does not violate any constitutional rights. (*People v. Sand* (1978) 81 Cal.App.3d 448, 452–453; *People v. Osband* (1996) 13 Cal.4th 622, 668.) And since Cruz went first, he could not have been prejudiced by evidence admitted in Beck's subsequent penalty trial. Similarly, Beck could not have been prejudiced because the prosecutor agreed to not enter evidence about Beck in Cruz's penalty trial and, in fact, Beck was never discussed in Cruz's penalty trial.

Appellants claim that the trial court abused its discretion by not holding a hearing to consider "evidence regarding prior acts of LaMarsh's codefendants which [LaMarsh's counsel] intended to introduce, and about which he expected that counsel for codefendants would object vigorously." (COB 81, citing 4 RT 813–814; BOB 379.) However, appellants misread the record. LaMarsh's argument clearly referred to the prejudice that would ensue if such evidence was introduced at a *joint penalty phase* trial:

> I think that the Court should also consider the fact that even though the guilt phase is not severed, the Court could seriously consider a separate penalty phase. There are volumes of discovery that deal with the prior conduct of the remaining co-defendants. It's my intention to bring in those documents, to bring in evidence of prior acts. And I'm sure that counsel will object vigorously, and I think that will prejudice their clients to no end. And also if it is kept out, denies Mr. LaMarsh to present mitigating evidence at a penalty phase.

(4 RT 813.) Since the trial court agreed to hold separate penalty phase trials, it gave LaMarsh what he wanted. Further, because the trial court granted

LaMarsh's request, there was no need to hold the evidentiary hearing. Thus, appellants' complaint that the trial court shirked its responsibility to hear all relevant evidence on the matter makes no sense. There was no reason to hear further evidence regarding the need for separate penalty trials because the trial court ordered separate trials. Moreover, appellants could have suffered no prejudice from the ruling because LaMarsh did not even have a penalty trial.

Appellants claim that the trial court's pretrial denial of their severance motions demonstrated "a misapprehension about the principles governing the determination of whether or not separate trials are necessary. While it is true that 'simply because two defendants' defenses don't match' is not adequate grounds to require severance, neither does it compel joint trials." (COB 80; BOB 379.) However, it is appellants who misapprehend the principles underlying a severance motion. California has expressly indicated that it prefers joint trials. (*People v. Lewis, supra*, 43 Cal.4th at p. 452.) Section 1098 states that codefendants "*must* be tried together" unless the trial court uses its discretion to order separate trials. (Italics added.) Thus, the trial court correctly stated that it would order joint trials unless it was persuaded otherwise. (4 RT 827.) As discussed above, appellants did not provide the trial court with any compelling reason to order separate trials, so they cannot show that the court abused its discretion.

2. Motion For Severance During Prosecution's Case

During the prosecution's case, appellants argued that newly discovered jailhouse communications might raise *Aranda-Bruton* issues and "definitely brings up a severance aspect of it." (12 RT 2125–2126.) Since appellants focused on *Aranda-Bruton* and discovery issues, it is doubtful their passing reference to "a severance aspect" constituted an actual motion for severance. But in any case, the evidence was never admitted. So it could not have been a basis for severance.

During LaMarsh's cross-examination of Kevin Brasuell, counsel asked if Brasuell ever witnessed the cutting of LaMarsh's hand. Appellants objected that the evidence would lead to questions about the group's loyalty ritual and other cult aspects of the group. They also claimed the evidence was irrelevant character evidence, and if it was admitted, appellants were entitled to separate trials. (21 RT 3615–3617.) The trial court overruled the objection, and Brasuell very briefly testified that he saw LaMarsh cut his finger. (21 RT 3620–3623.) But since Brasuell did not explain why LaMarsh cut his finger, and there was no discussion of religion or the fact that it was an initiation ritual, the evidence could not have been prejudicial. Moreover, LaMarsh acted voluntarily; no crime was committed; and there was no reason to blame appellants.

Furthermore, even if the jury realized this was an initiation ritual, the evidence was still probative and admissible. As discussed below, evidence that LaMarsh had close ties to the others in the group helped prove that there was a conspiracy. (*People v. Tinnin* (1934) 136 Cal.App. 301, 319 [proper to introduce evidence of close relationship between codefendants to prove conspiracy]. Therefore, the evidence was admissible as more probative than prejudicial. (See Evid. Code, § 352.) Moreover, there is no possibility that this minor evidence helped convince the jury to convict appellants. (See *People v. Lewis*, *supra*, 43 Cal.4th at p. 452 [reversal is required only if it is reasonably probable that the defendant would have obtained a more favorable result at a separate trial].)

Later, appellants objected to the admission of Beck's statement to Phillip Wallace that "he" or "we" "cut some throats." Cruz argued that the statement violated *Aranda-Bruton*, and "it wouldn't have come out if Mr. Cruz was being tried separately." (22 RT 3746.) Again, it is doubtful that Cruz's observation that the purported *Aranda-Bruton* problem would not have come up if there had

been separate trials constituted an actual motion for severance. So this claim was not preserved on appeal. (See *People v. Lewis*, *supra*, 43 Cal.4th at p. 460.) But even if the issue were preserved, the trial court acted within its discretion to admit the evidence because it was not overly prejudicial. As the trial court noted, the statement did not implicate any particular defendant besides Beck himself. (22 RT 3747.) Nor was there any indication that Beck had talked to Wallace about being with Cruz or any other person. Therefore, when Beck told Wallace "I" or "we" cut some throats, there was no basis to infer who the other assailants might be. Thus, the evidence was very probative of Beck's participation in the murders without being overly prejudicial against Cruz. (See Evid. Code, § 352.)

Moreover, that evidence could not have been particularly prejudicial in light of the testimony of two neutral eyewitnesses who described Cruz's personal participation in the murder of Ritchey (17 RT 2931–2937 [Kathy Moyers]; 20 RT 3417–3419, 3436, 3467 [Earl Creekmore]); Evans' testimony that Cruz planned the crimes; bent over and did "something" to Ritchey; came out of the Elm Street house with the baton that the prosecution's expert identified as one of the weapons used on Paris; and was covered in blood afterward (18 RT 3108, 3119, 3220, 3255, 3259; 24 RT 4207–4216, 4242, 4245); LaMarsh's testimony that Cruz beat Raper with the baton and was bloody when he returned to the car (32 RT 5656–5657, 5662); Willey's testimony that Cruz was disappointed that Alvarez was not killed and then later discussed alibis (34 RT 6005); and Cruz's admission that he lied to police about his whereabouts at the time of the murders (29 RT 5128–5129). Accordingly, the contested evidence was not overly prejudicial. (See *People v. Lewis*, *supra*, 43 Cal.4th at p. 452 [reversal is required only if it is reasonably probable that the defendant would have obtained a more favorable result at a separate trial].)

3. Severance Motions Made During LaMarsh's Defense Case

During LaMarsh's defense, appellants argued that proving the group's closeness and loyalty through prior acts would unfairly and prejudicially prove propensity, and would entitle them to separate trials. (31 RT 5459–5464, 5469–5470.) The trial court ruled that Cruz, Beck, and Vieira's close relationship was admissible because its probative value outweighed the prejudice against appellants. (31 RT 5470–5471; 7 CT 1765.) Contrary to appellants' argument, evidence of Cruz, Beck, and Vieira's close relationship would have been admissible against them in separate trials to prove the conspiracy. (*People v. Tinnin*, *supra*, 136 Cal.App. at p. 319 [proper to introduce evidence of close relationship between codefendants to prove conspiracy]; *People v. Massey* (1957) 151 Cal.App.2d 623, 652–653 [since conspiracy must usually be proven by circumstantial evidence, evidence of the close association and constant contact between codefendants may be relevant].) Because the closeness of conspirators is very probative of a conspiracy charge, the trial court did not abuse its discretion under Evidence Code section 352 by admitting that evidence; nor was that evidence a valid basis for severance.

Appellants moved for mistrial because Willey's attorney asked Rosemary McLaughlin during cross-examination if she was afraid of Cruz's group, and according to appellants, that shook-up McLaughlin and made her cry. Appellants also claimed that questions about occult practices were prejudicial. (31 RT 5563, 5584.) However, appellants never characterized their motion as a renewed motion for severance, so it should not be reviewed as such on appeal. But even if this Court considers appellants' argument as a general challenge to the trial court's ruling, the trial court did not abuse its discretion. (See *People v. Cunningham* (2001) 25 Cal.4th 926, 984 [appellate court reviews the denial of a motion for mistrial under the abuse of discretion standard].)

Appellants repeat Cruz's trial counsel's argument that "when McLaughlin was asked if she was 'afraid of these guys,' she 'visibly became shaken' and 'was crying for, I would say, at least a minute, a minute and a half.'" (COB 70; BOB 379.) Appellants apparently make this argument via a quote of trial counsel's argument because they know it is contradicted by the record. Willey's attorney actually asked McLaughlin why she was crying *before* he asked her if she was afraid. (31 RT 5563; see COB 107 [in Cruz's Argument II, appellants correctly observe that counsel asked McLaughlin if she was afraid *after* he noticed that she was crying].) So appellants' assertion that it was the question about being afraid that caused her to cry is incorrect. In other words, Willey's attorney asked McLaughlin if she was afraid *because* she was crying; his question did not make her cry. (*Ibid.*) Later, when it made its ruling, the trial court noted, "Miss McLaughlin was emotional for more of this proceeding than just following that particular question . . . ." (32 RT 5585.) Moreover, the trial court sustained the objection before McLaughlin answered the question about whether she was afraid. (31 RT 5563.) Therefore, appellants could not have suffered significant prejudice, and there was no basis to grant the motion for a mistrial.

Similarly, appellants moved for a mistrial based on questions concerning their religious interests. But the trial court sustained objections to questions about the occult and ruled that evidence of the occult and McLaughlin's fear would not be admitted. (32 RT 5565–5566, 5585; see also 34 RT 5954.) So those grounds for mistrial were removed. As the trial court noted, a couple of questions that resulted in sustained objections could not have been so prejudicial as to justify a mistrial. (32 RT 5585.) Therefore, the trial court did not abuse its discretion when it denied the motion for mistrial. (See *People v. Cunningham*, *supra*, 25 Cal.4th at p. 984.)

Later, appellants complained about LaMarsh's testimony that they mistreated Vieira. (32 RT 5600–5602.) LaMarsh complained that exclusion of the evidence would penalize him for having a joint trial. (32 RT 5602.) Appellants renewed their motion for severance, arguing that evidence of how they treated Vieira was character evidence; that it would prove propensity; and that it would be prejudicial. Appellants also argued that if they were tried separately, the evidence would be excluded as cumulative of other evidence used to establish the identity of the conspirators. (32 RT 5602–5608, 5614–5615.)

Willey noted that circumstantial evidence was critical to establish the conspiracy. Moreover, the evidence of Cruz, Beck, and Vieira's relationship was not cumulative because Cruz had denied the conspiracy and had denied committing any criminal acts. (32 RT 5608–5610.) The trial court ruled that LaMarsh could ask about the closeness of Cruz, Beck, and Vieira, but not about their interest in the occult or white supremacism. (32 RT 5613.) As discussed above, evidence of Cruz, Beck, and Vieira's close relationship was admissible against appellants to prove the conspiracy. (*People v. Tinnin*, *supra*, 136 Cal.App. at p. 319; *People v. Massey*, *supra*, 151 Cal.App.2d at pp. 652–653.) Moreover, to the extent appellants argued the evidence was cumulative, it had a reduced potential for being prejudicial. Therefore, the evidence was admissible under Evidence Code section 352 and was not a valid basis for severance.

Appellants claim that evidence that they and Vieira had a very close relationship was neither relevant nor admissible against them to show they were part of the conspiracy. (COB 82; BOB 379.) They are mistaken. LaMarsh wanted to show that he was not part of the inner circle to support his contention that he was never privy to the conspiracy. But even though the reason for introducing the evidence was to show LaMarsh was *not* part of the conspiracy,

the evidence was still relevant to show that appellants *were* part of the conspiracy.

In *People v. Carter* (1925) 73 Cal.App. 495, the court held, "[T]he fact that defendant Carter was not only acquainted with defendant Booth, but that they were on terms of intimate friendship was a relevant circumstance in the case tending to prove that a conspiracy existed between them . . . ." (*Id.* at p. 503.) Here, Cruz, Beck, and Vieira lived together or near each other for years; they were extremely close; and they all went to the murder scene. This close relationship was probative of the conspiracy and it was admissible.

Moreover, the evidence that was introduced by LaMarsh about Cruz, Beck, and Vieira's relationship was extremely limited. Again, even if it were cumulative, its incremental prejudicial value was exceedingly minor. Prior to the hearing, LaMarsh briefly testified that he saw Beck yell at Vieira and punch him once with Cruz's authorization. (32 RT 5600–5601.) Afterward, LaMarsh testified how he reluctantly joined the group with a blood fingerprint on a piece of paper. (32 RT 5618–5619.) This evidence was relevant to establish the relationship at the heart of the conspiracy. But it was not so prejudicial that it justified a separate trial for appellants. Accordingly, the trial court did not abuse its discretion by denying the severance motion.

4. Claims Made After Appellants' Last Motion For Severance

By appellants' own account, the last time they renewed their motion for severance was on May 5, 1992. (COB 68, 71, citing 32 RT 5602–5604; BOB 379.) Therefore, appellants cannot rely on any subsequent developments to bolster their argument that the trial court's ruling at that time was an abuse of discretion. Nor can appellants somehow adopt the ground for severance motions by codefendants which they did not join. (See *People v. Mitcham* (1992) 1 Cal.4th 1027, 1048 [defendant waives claim that court erred in denying codefendant's severance motion when defendant did not join in the

motion].) Nevertheless, appellants cite several subsequent objections, court rulings, and other purported bases for severance. But none of these instances can support appellants' claim that the trial court abused its discretion by denying their motions for severance.

The trial court had no duty to sua sponte reconsider its earlier ruling with the introduction of every new piece of evidence; nor did it have a duty to evaluate counsel's closing arguments for possible grounds for severance. (*People v. Alvarez*, *supra*, 14 Cal.4th at p. 216, fn. 20; *People v. Ervin*, *supra*, 22 Cal.4th at p. 68 [if further developments occur during trial that defendant believes justify severance, he must renew his motion to sever].) The determination of whether the trial court abused its discretion was limited to the evidence available at the time of the ruling. (*People v. Hardy*, *supra*, 2 Cal.4th at p. 167.)

For example, appellants complain, "The prosecutor adopted the codefendants' prejudicial characterization of Mr. Cruz, referring to him as 'the Master' (37RT: 6723–6724), and as 'the mastermind of this conspiracy' (37RT: 6728) . . . ." (COB 76; BOB 379.) However, the prosecutor's closing argument took place on May 19, 1992–two weeks after appellants' last motion to sever. Appellants made no contemporaneous objection, and they did not renew their severance motions, so they cannot complain on appeal that the trial court abused its discretion. Moreover, even if appellants had moved for severance at that point, the motion would have had no merit. The prosecutor's theory of the case was always that Cruz was the leader of the group and the one who planned the murders. Evidence that Cruz was the leader of the group was admissible. (See *People v. Manson* (1976) 61 Cal.App.3d 102, 130; see Respondent's Argument II-D, *infra*.) Moreover, Evans, the prosecution's main witness, testified that Cruz had her make a drawing of the Elm Street house, told the conspirators what to do, handed out weapons, and drove everyone to the crime scene. (24 RT 4207–4208.) Thus, the prosecutor did not "adopt"

LaMarsh and Willey's "prejudicial characterization of Mr. Cruz." His argument that Cruz was "the mastermind" was consistent with his theory of the crimes and the evidence.

Similarly, appellants complains that LaMarsh and Willey "sought to tie [Cruz] to Beck, seeking to attribute Beck's action, as well as his statements, to [Cruz]. (32RT:5606.)" (COB 83; BOB 379.) But the existence of a conspiracy "may be established through the use of circumstantial evidence. [Citations.] They may also '"be inferred from the conduct, relationship, interests, and activities of the alleged conspirators before and during the alleged conspiracy."'" (*People v. Herrera* (2000) 83 Cal.App.4th 46, 64.) Here, the evidence showed that appellants were best friends; they lived together or next to each other for years; they shared their income; they shared an interest in collecting various weapons; they both participated in the forcible eviction of Raper and the burning of Raper's car; and they both participated in the apprehension and beating of Colwell. These facts were all relevant to prove the conspiracy, and appellants' argument that it was prejudicial to prove that appellants were "tied" together is incorrect. (See *ibid.*)

Appellants complains that the evidence regarding their relationship with each other and Vieira constituted character evidence and caused the jury to convict them based on prior conduct rather than the evidence of the crimes. (COB 83; BOB 379.) But the evidence against appellants was overwhelming and there is no chance that the convictions were based on evidence of prior bad acts. Moreover, the purported character evidence was probative and not inflammatory. Willey testified that Cruz "ran the show"; Cruz told Vieira what to do; and Cruz beat Vieira or had Beck beat him. All of this testimony was extremely brief. (34 RT 5960–5962.) The trial court actually excluded the vast majority of evidence regarding appellants' domination of the group. It also excluded virtually all of the evidence that they controlled, beat, and tortured

Vieira, and it excluded all evidence that they beat and tortured Steve Perkins. As demonstrated in the penalty trials, there was a great deal of such evidence. (See also *Vieira, supra*, 35 Cal.4th at p. 274 [relationship evidence admitted in guilt trial].) All of the evidence relating to cults and white supremacy was also excluded. In sum, any testimony about Cruz being the leader and Beck being the enforcer was minimal. Moreover, appellants had no statutory or constitutional right to exclude evidence that the group functioned as a unit with a rigid command structure. The little evidence that was admitted was relevant to prove the conspiracy, appellants' leadership, the likelihood that everyone would participate, and the probability that there was a plan rather than spontaneous violence.

Appellants contend that LaMarsh's attorney "repeatedly misrepresented to the jury the meaning of 'malice aforethought,' equating it with ill will or hostility. He argued that LaMarsh had no malice aforethought as to Darlene Paris because 'they were friends.'" (COB 76; see 37 RT 6624–6625.) Appellants are correct that LaMarsh's attitude towards the victims was not particularly relevant to whether he had malice at the time of the murders. Counsel was probably confusing malice with premeditation, since he meant to convey that LaMarsh had no reason to plan the murders. However, appellants have no basis to contend that LaMarsh's argument justified severance because they failed to renew their motions for severance. They also failed to object, so they forfeited any claim of error. (See *People v. Samayoa* (1997) 15 Cal.4th 795, 841 [defendant required to make a contemporaneous objection to preserve claim of improper argument]; *People v. Green* (1980) 27 Cal.3d 1, 27 [failure to object to closing argument forfeits the claim on appeal because "'the trial court should be given an opportunity to correct the abuse and thus, if possible, prevent by suitable instructions the harmful effect upon the minds of the

jury.'"], overruled on another ground in *People v. Martinez* (1999) 20 Cal.4th 225, 235–236.)

Moreover, it is improbable that the jury misunderstood counsel's argument. The point was simply that LaMarsh had no reason to participate in the conspiracy. There is no possibility that jury confusion caused it to improperly convict appellants. If the jury had believed appellants' defenses, then it would have believed there was no conspiracy and appellants did not personally participate in any assaults or murders. Clearly, the jury rejected that theory and accepted the prosecution's theory. There is no possibility that the jury believed that Cruz planned the murders, instructed everyone to"do them all and leave no witnesses" (24 RT 4209), and both appellants personally participated in some of the murders, but they acted without malice.

Further, it is the trial court that instructs the jury on the relevant law. (*People v. Ponce* (1996) 44 Cal.App.4th 1380, 1386.) The jury was instructed that it must apply the law provided by the trial court to the facts that the jury determined to be true. (CALJIC No. 1.00; 8 CT 1839–1840; 34 RT 6468–6469.) The trial court properly instructed the jury on premeditation and malice aforethought regarding the murder charges. (18 CT 1895–1899; 36 RT 6492–6494, 6508.) The trial court also instructed the jury that counsel's arguments were neither evidence nor a statement of the law. The jury was instructed that if anything said by an attorney conflicted with the trial court's instructions on the law, the jury was required to follow the trial court's instructions. (CALJIC No. 1.00; 8 CT 1839–1842; 34 RT 6468–6469.) Appellate courts presume the jury followed the instructions it was given. (*People v. Pinholster* (1992) 1 Cal.4th 865, 919.) Therefore, this Court should assume the jury followed the trial court's instructions and disregarded incorrect arguments by counsel.

5. Antagonistic Defenses

Appellants argue that the trial court "abused its discretion when it denied appellant[s'] motions to sever during the presentation of evidence, when it knew, in no uncertain terms, that the defense of Willey and LaMarsh were extremely antagonistic to appellant[s']." (COB 82; BOB 379.) Appellants never raised this claim in the trial court, so they forfeited it on appeal.[12] (See *People v. Lewis*, *supra*, 43 Cal.4th at p. 460 ["Defendant did not raise the antagonistic defenses issue at trial, however, so the trial court's failure to grant severance on this ground was not an abuse of discretion."]; *People v. Mitcham*, *supra*, 1 Cal.4th at p. 1049 [failure to raise specific argument for severance forfeits that ground on review]; *People v. Greenberger* (1997) 58 Cal.App.4th 298, 348 [party may not challenge the denial of a severance motion with an argument that was not presented to the trial court].)

A trial court must grant a severance motion on the basis of antagonistic defenses only when the defenses are so fundamentally in conflict that the jury will infer that the conflict alone demonstrates all the parties are guilty; or when accepting one defendant's defense would preclude acquittal of the other. (*People v. Coffman*, *supra*, 34 Cal.4th at p. 41; *People v. Lewis*, *supra*, 43 Cal.4th at p. 460.) Appellants never argued that the jury would necessarily find them guilty if it believed the other defendants' defenses. Nor did they argue that the defendants' defenses were so fundamentally in conflict that the jury

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12. Cruz's counsel did state, "As far as the conflicting defenses, I believe that I've well stated that in my declaration–I don't want to go into that in any further detail–as in the trial phase and in the penalty phase." (4 RT 809.) It is unclear what declaration counsel was referring to since there was no declaration attached to the severance motion. (CT 1402–1405.) Most likely, counsel was referring to the sealed declaration he gave to the trial court earlier in the hearing. (See 4 RT 796.) However, since that declaration is sealed, Respondent does not know whether it raised a valid claim of antagonistic defenses. In any case, Respondent has no way to respond to a sealed document.

would infer they were all guilty. Accordingly, appellants forfeited this claim by failing to raise it at the trial court. (See *People v. Lewis*, *supra*, 43 Cal.4th at p. 460.)

Citing *People v. Ervin*, *supra*, 22 Cal.4th at p. 68, appellants claim that the antagonistic nature of their defenses on one hand, and LaMarsh and Willey's defense on the other, meant that the trial court abused its discretion. (COB 79; BOB 379.) However, there is nothing in *Ervin* that supports that proposition. Indeed, at appellants' citation, the *Ervin* Court found that the defendant forfeited his claim by failing to renew his motion for severance. It also held that trial courts had no sua sponte duty to sever a joint trial whenever such grounds developed during trial. (*People v. Ervin*, *supra*, 22 Cal.4th at p. 68.) The same considerations apply here. Appellants never made a generalized motion to sever based on antagonistic defenses, and the trial court had no duty to make that determination sua sponte. (See *United States v. Throckmorton* (9th Cir. 1996) 87 F.3d 1069, 1072 ["Antagonism between defenses or the desire of one defendant to exculpate himself by inculpating a codefendant . . . is insufficient to require severance."].)

Nevertheless, even if the claim of antagonistic defenses were preserved, it fails on the merits. As mentioned above, severance is not required on the basis of conflicting defenses unless it is shown that the conflict is so prejudicial that the defenses are irreconcilable, and the jury will infer that the conflict alone demonstrates that all defendants are guilty; or that by accepting one defendant's defense, the other defendant must necessarily be guilty. (*People v. Coffman*, *supra*, 34 Cal.4th at p. 41; *People v. Lewis*, *supra*, 43 Cal.4th at p. 460.) Moreover, if there is sufficient independent evidence against the moving defendant, and it is not the conflict alone that demonstrates his guilt, then the existence of antagonistic defenses does not compel severance. (*People v. Coffman*, *supra*, 34 Cal.4th at p. 41.) Here, there was an abundance of

evidence that Cruz organized the conspiracy and both appellants personally participated in the conspiracy and murders. There is no possibility that the jury would have convicted them solely on the basis of conflicting defenses.

Appellants argue that "there can be no debate about the antagonistic nature of Willey's and LaMarsh's defenses vis-a-vis appellant's defense . . . . Under these circumstances, the trial court abused its discretion in dismissing appellant[s'] repeated requests to sever." (COB 79; BOB 379.) While appellants complain that the prosecutor teamed-up with LaMarsh and Willey, they ignore a central premise of the prosecutor's case: that all six assailants met in LaMarsh's trailer and planned the murders. LaMarsh and Willey testified that they were not present for any such meeting and did not know about the conspiracy. (32 RT 5636; 34 RT 5983.) In other words, they joined Cruz and Beck in rebutting the main prosecution witness's (Evans') account. Willey also disputed that they wore masks, and he did not implicate Cruz in any of the murders.

Willey did testify that Beck–not Cruz–cut Ritchey's throat. (34 RT 5986, 5998.) But that contradicted the prosecutor's theory of the case. Similarly, LaMarsh did implicate Beck in the stabbing of Colwell, but his testimony that Cruz beat Raper's head contradicted the prosecutor's theory of the case as well as the physical evidence and LaMarsh's admission to Evans. (18 RT 3097, 3215; 24 RT 4396.) Likewise, appellants placed the blame for the murders on Vieira, Evans, LaMarsh, and Willey. But appellants both testified that they never saw anyone murdered and did not know that anyone died until the next day.

Still, the joint trial did not align the defendants against each other as neatly as appellants suggest. The primary defense theory of all the defendants was that there was no conspiracy. LaMarsh and Willey's back-up defense–that if there was a conspiracy they did not know about it–did not change that central claim.

(See *United States v. Throckmorton, supra*, 87 F.3d at p. 1072 ["To be entitled to severance on the basis of mutually antagonistic defenses, a defendant must show that the *core* of the codefendant's defense is so irreconcilable with the *core* of his own defense that the acceptance of the codefendant's theory by the jury precludes acquittal of the defendant," italics added].) Moreover, three out of the four defendants testified they did not see Cruz participate in any murders; and even LaMarsh's testimony left open the possibility that someone else stabbed Raper and also inflicted the fatal blows.[13/]

Moreover, appellants' argument does not make sense. It could not have harmed them to have LaMarsh and Willey corroborate their testimony that there was no conspiracy. (32 RT 5642; 34 RT 5983.) Nor does it help appellants' argument to focus on an element in which all four defendants jointly rebutted the prosecution's key witness. (See *United States v. Throckmorton, supra*, 87 F.3d at p. 1072.) Because all four defendants agreed that there was no conspiracy to kill Raper and his friends, appellants cannot prove that their defense theories were so mutually antagonistic that the joint trial guaranteed that one or more defendants would be convicted. On the contrary, all of the defendants' testimony was consistent with appellants' theory that they went to the Elm Street house without a plan, and violence broke out spontaneously.

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13. LaMarsh testified that Cruz hit Raper on the head three times. (32 RT 5657.) That did not come close to explaining the number of blunt force injuries sustained by Raper; nor did it account for the way Raper's head and face were deformed. (See 18 RT 3088 [Dr. Ernoehazy testified that the outline of Raper's head and his facial features were "distorted"]; 18 RT 3092 [six or seven separate lacerations on the top of Raper's head alone].) Moreover, the evidence showed that Raper received several cuts, and his throat was cut. (18 RT 3088, 3090, 3092–3093, 3145.) Since LaMarsh's testimony clearly fell short of explaining the injuries to Raper, his testimony, if believed, did not even establish who "committed the fatal assault on Raper . . . ." (COB 83; BOB 379.)

Conversely, appellants' "defense and those of his codefendants were not so irreconcilable that only one could be guilty. The prosecution presented independent evidence supporting each defendant's participation in the group's mutual criminal endeavors." (*People v. Lewis*, *supra*, 43 Cal.4th at p. 461.) Thus, the joint trial could have resulted in any variety of verdicts and the joint trial of the defendants did not guarantee that any defendant would be found guilty. Accordingly, it was not an abuse of discretion to deny the severance motions even if the claim based on antagonistic defenses was preserved on appeal. (*Ibid.*)

In *People v. Jackson* (1996) 13 Cal.4th 1164, this Court observed:

> [D]efendant contends that the fact that his and Niles's defenses were antagonistic also weighs in favor of severance. [Citation.] But as we recently stated: "That defendants have inconsistent defenses and may attempt to shift responsibility to each other does not compel severance of their trials [citation], let alone establish abuse of discretion in impaneling separate juries." (*People v. Cummings* [1993] 4 Cal.4th [1233] 1287.) Here, as in *Cummings*, "the defense positions were antagonistic because the identity of the killer was disputed by defendants. That each was involved in the incident was undisputed, however, and the prosecution had offered evidence sufficient to support verdicts convicting both defendants . . . . [T]his was not a case in which only one defendant could be guilty. The prosecution did not charge both and leave it to the defendants to convince the jury that the other was [the guilty] person." (*Ibid.*) In short, the trial court did not abuse its discretion by refusing to sever defendant's and Niles's trial, inconsistent defenses notwithstanding.

(*Id.* at p. 1208.) Similarly, here, it was undisputed that all of the defendants were at the murder scene. The prosecution's theory was that all of the defendants participated in the murders, and the prosecutor presented substantial inculpating evidence against each defendant. Thus, this was not a case where the prosecutor sought to have the defendants sort out their guilt among themselves. The jury rendered its verdicts on the basis of the evidence against each individual, and was not compelled to find any particular defendant guilty.

In *People v. Coffman, supra*, 34 Cal.4th 1, this Court noted that even when defendants cast blame on one another, a separate trial is not required unless the jury would find that the conflict alone is sufficient evidence of guilt. (*Id.* at p. 41.) However, when there is substantial independent evidence of guilt, it is presumed that the jury did not base its verdict on the conflicting defenses. (*Ibid.*) Here, there is simply no doubt that there was substantial evidence of appellants' guilt.

As for Cruz, he admitted that he had engaged in ongoing confrontations with Raper which provided the motive for the conspiracy and murders. Rosemary McLaughlin testified that the night before the murders Cruz told her they were planning a fight for the next day. (31 RT 5548; see Evid. Code, § 1220 [admission of party is not excluded by hearsay rule].) Cruz admitted he drove the assailants to the house and was present during the assaults. His bloody baton was found at the murder scene. His defense theory that he went to the victims' house at midnight with various weapons to retrieve some clothes was implausible on its face. (See 34 RT 5976–5978, 6045 [Willey testified they went to move furniture].)

Similarly, Cruz's claim that they took "defensive" weapons only to avoid problems if they were stopped by police (29 RT 5084) made little sense; however, knives, bats, and a baton–rather than firearms–were consistent with an attack that was designed to avoid arousing the attention of neighbors. Cruz also admitted that he lied to police about his whereabouts at the time of the murder, demonstrating consciousness of guilt. And, of course, Cruz was implicated by four eyewitness: Evans, LaMarsh, and the highly credible neighbors, Kathy Moyers and Earl Creekmore. (See COB 86 [Cruz argues that the only prosecution evidence case linking him to actual murders was the testimony of the neighbors] but see 24 RT 4207–4216, 4241–4242, 4245 [Evans testified she saw Cruz bend over Ritchey and do something to him, and

when he returned to the car he had blood "[a]ll over him."].) Accordingly, Cruz cannot prove that he was convicted solely on the basis of conflicting defenses and, therefore, the trial court did not abuse its discretion by denying the motions for severance–assuming Cruz somehow preserved a severance claim based on conflicting defenses. (See *People v. Coffman*, *supra*, 34 Cal.4th at p. 41.)

Similarly, Evans squarely implicated Beck in the conspiracy and murders. Various witnesses testified that Beck had problems with Raper, and Beck was the one who actually towed away Raper's trailer. William Duval testified that someone resembling Beck left the murder scene with three other assailants who were marching in some kind of military formation. (19 RT 3325–3334.) Beck made extremely incriminating extrajudicial statements to Phillip Wallace and McLaughlin. (22 RT 39798; 31 RT 5550–5553.) Detective Ottoboni testified that when he put Beck in a room with Evans, they discussed the murders in a whisper. (28 RT 4948.) Beck admitted he lied to police about his whereabout; he admitted that he was at the murder scene when the murders occurred; and his claim that he went to the Elm Street house at midnight to retrieve clothes was not plausible. Accordingly, Beck also cannot prove that he was convicted solely on the basis of conflicting defenses and, therefore, the trial court did not abuse its discretion by denying the motions for severance. (See *People v. Coffman*, *supra*, 34 Cal.4th at p. 41.)

Appellants argue that the fact that the jury found them guilty of all counts, but could not reach unanimous verdicts on any of the counts against LaMarsh and Willey proved that "LaMarsh's and Willey's use of the prejudicial and inflammatory character evidence to exonerate themselves . . . ." convinced the jury that Cruz, Beck, and Vieira must have entered into a secret conspiracy that did not include LaMarsh and Willey. (COB 83; BOB 379; see 32 RT 5608 [Cruz's counsel acknowledged that Vieira had made a statement that all six of the original defendants jointly met to discuss the conspiracy; but that evidence

was not admitted].) By this, appellants seem to suggest that the defenses were antagonistic because the jury would necessarily find them guilty solely if it believed LaMarsh and Willey's defenses. (See *People v. Lewis*, *supra*, 43 Cal.4th at p. 460.) Not so.

LaMarsh and Willey's evidence was not prejudicial to appellants because it purported to prove only that if there was a conspiracy, they did not know about it. There are numerous reasons why the jury may have hung on the verdicts for LaMarsh and Willey. But the fact that one or two jurors were not convinced beyond a reasonable doubt that the conspiracy included LaMarsh and Willey (38 RT 6905) does not prove that LaMarsh and Willey's evidence was what swayed the jury to unanimously find appellants guilty of every count. On the contrary, the jury could have believed LaMarsh and Willey's testimony that they did not know about any conspiracy, and also believed appellants' testimony that there was no conspiracy. Since the jury could have believed all of the defendants' defenses, they were not so antagonistic that the trial court abused its discretion by denying the severance motions. (See *People v. Coffman*, *supra*, 34 Cal.4th at p. 41.)

Cruz argues that he suffered prejudice from the joint trial because "LaMarsh's accusation that appellant, rather than he, had committed the fatal assault on Raper, would not have been presented, for it conflicted with the prosecution's theory that LaMarsh killed Raper. Nor would Dr. Rogers's opinion that a baton, rather than a bat, had caused those fatal wounds. Rosemary McLaughlin [also] . . . . would not have testified . . . ." " (COB 83–84.) However, Cruz never moved for severance based on the fact that LaMarsh would incriminate him. He did complain about LaMarsh's extrajudicial statement to Evans, but never about LaMarsh's testimony. (5 CT 1402–1405.) Nor did Cruz argue to the trial court that Dr. Rogers and McLaughlin's testimony were bases for severance. Therefore, Cruz cannot

complain that the trial court abused its discretion on those bases. (See *People v. Lewis*, *supra*, 43 Cal.4th at p. 460.)

Moreover, even if these issues were preserved, they fail on the merits. LaMarsh's testimony was certainly relevant, and Cruz offers no rationale why it would have been excluded in a separate trial. (See *People v. Cummings*, *supra*, 4 Cal.4th at p. 1287; *Zafiro v. United States*, *supra*, 506 U.S. at p. 538; *People v. Keenan*, *supra*, 46 Cal.3d at p. 500, fn. 5 [defendant cannot show that trial court erroneously denied motion for severance because a codefendant "would have exercised his Fifth Amendment privilege not to testify against defendant in a separate trial"].) Similarly, McLaughlin's testimony about the relationship between Cruz, Beck, and Vieira, and also regarding incriminating statements by Beck, was relevant to prove the conspiracy. "That defendants have inconsistent defenses and may attempt to shift responsibility to each other does not compel severance of their trials . . . ." (*People v. Cummings*, *supra*, 4 Cal.4th at p. 1287.)

Furthermore, the prosecution's expert testified that Raper's head was beaten with a bat–not Cruz's baton. (18 RT 3097, 3118, 3215.) Doctor Roger's opinion to the contrary was not credible since he eventually conceded that all of the blunt force injuries could have been caused by a bat. (31 RT 5518, 5523–5524, 5535.) Moreover, if Doctor Roger's opinion had been credible, the prosecutor could have used his testimony in a separate trial to prove that Cruz beat Raper with his baton. (See *In re Sakarias* (2005) 35 Cal.4th 140, 161, fn. 3, citing *Nichols v. Scott* (5th Cir.1995) 69 F.3d 1255, 1271 [not improper to argue at trial that different defendants were responsible for murder when both were liable under the felony murder rule].) Therefore, Cruz benefitted from a joint trial in which the prosecutor chose to assign responsibility for the beating of Raper to LaMarsh.

D. The Trial Court Did Not Abuse Its Discretion By Denying Appellants' Request For Rebuttal Argument

After Cruz present surrebuttal evidence, appellants argued that they should be allowed to make a rebuttal argument after all the defendants made their closing arguments. (36 RT 6454.) On appeal, appellants complain that the trial court "denied appellant[s'] request for rebuttal argument without comment, without any acknowledgment of its discretion to grant the request." (COB 84; BOB 379.) However, appellants again mischaracterize their motion as a basis for severance, and again misstate the presumption. Appellants never argued that they were entitled to severance if the trial court did not afford them the opportunity to make a rebuttal argument, so they have forfeited that claim. (*People v. Mitcham*, *supra*, 1 Cal.4th at p. 1049).

Further, section 1093, subdivision (e), provides the order of argument, and it is up to the parties to persuade the trial court to deviate from that order pursuant to section 1094. Therefore, to the extent appellants imply the trial court had to explain its decision, they are mistaken. It was appellants who had to explain why the trial court should deviate from the order prescribed by statute. Moreover, it is presumed that the trial court knew the statutory and case law and properly performed its judicial duties. (Evid. Code, § 664; *People v. Coddington* (2000) 23 Cal.4th 529, 644, overruled on another ground in *Price v. Superior Court* (2001) 25 Cal.4th 1046.)

Furthermore, it is evident that the trial court did understand its discretion. After appellants raised their motion, the trial court stated, "Unless counsel can point something out to me in the guilt phase, Mr. Brazelton will argue, defense counsel will argue in order, and then Mr. Brazelton will close." (36 RT 6454–6455.) The trial court clearly understood that it could deviate from the prescribed order if appellants made a compelling argument. Appellants simply failed to do so. Appellants argued only that the trial court had discretion to

depart from the standard ordering of closing arguments. (36 RT 6455–6457; see §§ 1093, 1094.) They offered no authority and no argument why the trial court should allow them to make a rebuttal argument. Nor do they offer any authority or argument on appeal, except that the trial court had the discretion to do so. (COB 84–85.) Accordingly, the trial court properly denied the motion because there was no good reason to deviate from the prescribed order, and two codefendants and the prosecutor objected to the variance. (36 RT 6456–6457.) Therefore, appellants cannot show that the trial court abused its discretion by denying the motion. (*People v. Seastone* (1969) 3 Cal.App.3d 60, 67 [the order of procedure at trial is within discretion of trial judge and must stand unless a clear abuse of discretion is shown].)

E. Because The Trial Court Exercised Its Proper Discretion, There Was No Denial Of The Right To Due Process Or A Fair Trial

Appellants claim that "the trial court's repeated denials of appellant[s' severance] motions were an abuse of discretion" and "resulted in a trial so unfair to appellant[s] that [they were] denied due process of law and deprived of the heightened reliability required in capital cases." (COB 85–86; BOB 379.) It is true that "even if the ruling on a severance motion was correct when made, the reviewing court will reverse the decision if a defendant shows that joinder actually resulted in 'gross unfairness,' amounting to a denial of due process." (*People v. Hoyos*, *supra*, 41 Cal.4th at p. 896.) Moreover, *Aranda-Bruton* error mandates reversal unless it is harmless beyond a reasonable doubt. (*People v. Fulks* (1980) 110 Cal.App.3d 609, 617-618.) However, appellants do not support their claims in this section of their argument with any authority other than general references to the state and federal constitutions. Nor do appellants specify which evidence was so prejudicial that it resulted in a denial of due process. (COB 85–87; BOB 379.)

As discussed above, appellants succeeded in excluding a great deal of evidence that LaMarsh and Willey would have liked to admit. The physical evidence from Beck's trailer was excluded. Evidence about how appellants treated Perkins was excluded. LaMarsh's statement to Spratling was excluded. LaMarsh's statement to Evans that Cruz helped him beat Raper was never admitted. And, of course, virtually all of the cult, Voodoo, white supremacist, and torture evidence was excluded.

On the other hand, several statements that Cruz complains about would have been admitted even in a separate trial, including a couple of adoptive admissions. Beck's statement that "I" or "we" "cut some throats" did not identify who might have helped him; all of the defendants conceded that they were at the Elm Street house; and the murders had to have been committed by some of them. Therefore, the statement singled-out only Beck and merely confirmed what everyone already knew–that one or more assailants helped Beck cut the victims' throats. Cruz conceded that if he received a separate penalty trial and went first, there would be no prejudice. Likewise, Beck could not have been prejudiced by Cruz's penalty trial because no evidence against Beck was admitted. Finally, the trial court allowed Brasuell, LaMarsh, and Willey to give very brief testimony about the closeness of Cruz's group. But contrary to appellants' argument, that evidence was probative of the conspiracy and, hence, admissible under Evidence Code section 352. Moreover, the trial court largely excluded evidence that McLaughlin feared Beck and Cruz; that Cruz was the leader of the group; that Beck was the enforcer; and that the group had religious or white-supremacist ideologies. Thus, the contested evidence that was admitted either had a firm legal basis for admission, or was so minimal that it could not have resulted in an unfair trial. Therefore, appellants cannot show that the trial court's rulings resulted in "gross unfairness." (*People v.*

Mendoza (2000) 24 Cal.4th 130, 162; see also *People v. Smith* (2007) 40 Cal.4th 483, 510; *People v. Rogers* (2006) 39 Cal.4th 826, 851.)

Appellants argue that because the jury was not able to reach verdicts on LaMarsh and Willey, at least some of the jurors must have rejected Evans' testimony that all six assailants were present at the meeting before the murders. "Given that logical conclusion, the conspiracy verdict on appellant appears to be based upon the theory of LaMarsh and Willey as to a separate and secret conspiracy by appellant, Beck and Vieira–a theory supported by evidence, argument and innuendo which would have been absent in a severed trial of appellant." (COB 87.) However, even if LaMarsh and Willey's defenses cast some doubt on whether all six assailants were part of the conspiracy, it does not follow that the jury convicted Cruz on the basis of LaMarsh and Willey's defense evidence.

As discussed below in Argument II-D, the trial court could have and, arguably, should have allowed the prosecutor to introduce much more evidence regarding appellants' roles as leader and enforcer. That evidence was relevant and admissible to show that appellants were in charge; they had influence over the others; and if the others participated in the murders, it was more likely that appellants planned those murders. (See, e.g., *People v. Manson*, *supra*, 61 Cal.App.3d at pp. 126–130; see *Vieira*, *supra*, 35 Cal.4th at p. 276 ["the core of [Vieira's] defense was apparently testimony regarding defendant's cult membership and his incapacity to form the requisite criminal intent."].) The small amount of evidence that LaMarsh and Willey entered concerning the relationship between Cruz, Beck, and Vieira was minimal and not prejudicial.

As discussed above, LaMarsh and Willey's primary defense was that there was no conspiracy, so their defense cases actually corroborated and supported appellants' defenses. Even if LaMarsh and Willey did make a fallback argument that there might have been a conspiracy that they were not aware of,

it could not have been prejudicial to appellants because they did not offer any affirmative evidence that appellants orchestrated the conspiracy. At most, they introduced evidence of a close relationship that the trial court should have allowed the prosecutor to admit anyway.

Tellingly, appellants do not offer any citation to the record to support their claim that LaMarsh and Willey's defense theory was that Cruz, Beck, and Vieira had "a separate and secret conspiracy." (COB 87; BOB 379.) Obviously, LaMarsh and Willey could not testify about a secret conspiracy because their position was that they did not know about it. It is true that LaMarsh and Willey entered minimal evidence to show that Cruz, Beck, and Vieira were very close to imply that *if* there was a conspiracy, it did not include them. But they certainly never made that theory the focus of their defense. On the contrary, during closing argument, LaMarsh asserted that no evidence corroborated Evans' testimony that there was a conspiracy. (37 RT 6620.) "I suggest to you that in regard to the drawing up of that map and the inception of that, this conspiracy to go over there, that it's not true. If it's not true, then everything else [that] follows is not true with regard to following a plan." (37 RT 6622.) "You heard Jason LaMarsh testify. He told you that there wasn't a plan." (37 RT 6623.) "Mr. Brazelton has failed to prove beyond a reasonable doubt that Mr. LaMarsh was part of any plan or any agreement." (37 RT 6624.) "*If* they [Cruz, Beck, Vieira] had a separate agenda, Jason didn't know about it. *If* they had a separate agenda, Jason didn't agree to it." (37 RT 6633, italics added.)

Similarly, Willey argued, "The only evidence that you've got of a conspiracy to commit murder is Michelle Evans . . . .." (37 RT 6658.) "Where she's not telling the truth is the idea that all these individuals got together in this little trailer and made a plan to go over and commit mass murder." (37 RT 6659.) "There is no evidence that Ron Willey has entered into any kind of

conspiracy, and that's who I'm talking about here. I'm not talking about these other guys. I'm talking about what Mr. Willey knew and when he knew it." (37 RT 6661.) Willey specifically argued that the jury should infer that there was no meeting in LaMarsh's trailer because Evans, LaMarsh, and Evans would have rejected "this horse shit plan." (37 RT 6664.) Willey also argued that *if* Cruz hatched such a plan, Beck and Vieira would have been the ones to follow it. (37 RT 6665.) And while he speculated that there might have been a conspiracy between Cruz, Beck, and Vieira, he conceded, "I ain't got no proof of this . . . ." (37 RT 6667.) Finally, he reiterated, "There was no conspiracy in that trailer to go commit murder." (37 RT 6669.)

In short, appellants' contention that LaMarsh and Willey's main defense theory was that they had a secret conspiracy with Vieira is pure hyperbole. LaMarsh and Willey's primary defense was that there was no conspiracy, and that theory was consistent with appellants' defenses. To the extent LaMarsh and Willey hypothesized that there might have been a conspiracy they were not privy to, that was not a compelling basis for severance. Since their primary defense was that there was no conspiracy, and that was compatible with appellants' defense, appellants cannot show that the jury would infer guilt merely from the conflict in their defenses. (See *People v. Hardy*, *supra*, 2 Cal.4th at p. 168.)

Appellants assert that the jury did not reach unanimous verdicts against LaMarsh and Willey because some jurors believed their testimony that they were not part of the conspiracy. (COB 86–87; BOB 379.) But even if that were true, it does not follow that Cruz would have received a different result absent their evidence and argument. On the contrary, since LaMarsh and Willey corroborated Cruz and Beck's testimony that there was no conspiracy, their testimony was helpful to appellants. Their defense theory caveat that if there was a conspiracy, they did not know about it, did not make it more likely

that appellants orchestrated that conspiracy. If the jury had believed that LaMarsh and Willey did not know about any conspiracy, then it would have also believed it was less likely that appellants orchestrated any conspiracy at all. After all, people do not generally devise a detailed plan for multiple murders; assemble a group of six assailants; and then fail to tell half the conspirators about the plan. (See 37 RT 6664–6665 [Willey's counsel argued that Evans, LaMarsh, and Willey were too smart to go along with the plan that was purportedly proposed in the trailer].)

In closing argument, LaMarsh's counsel argued that it was not fair to use the conspiracy to hold him responsible for murders that he did not personally commit. (37 RT 6619.) After the trial court declared a mistrial as to LaMarsh and Willey, the trial court polled the jury and the foreperson reported that 11 jurors voted to convict Willey of the conspiracy and the murder of Ritchey. But only 9 jurors were willing to find him guilty of the other three murders. (38 RT 6905.) That shows that two jurors refused to hold Willey responsible for the murders of Raper, Colwell, and Paris even though they believed he was part of the conspiracy. Similarly, it appears that at least one juror was willing to find LaMarsh guilty of conspiracy (and the murder of Raper), but not willing to hold LaMarsh responsible for the murders he did not personally participate in. (38 RT 6903–6904 [jurors voted 10–2 to find LaMarsh guilty of conspiracy and murder of Raper; but only 9–2 for guilt on the other murder counts].)

Thus, contrary to appellants' argument, the jury's verdicts do not prove that it believed LaMarsh and Willey's claims that they were not part of the conspiracy. As many or more jurors voted for guilt on the conspiracy charges as the murder charges. The jury's verdicts prove that at least two jurors voted to nullify the verdicts against Willey and at least one juror voted to nullify the verdicts against LaMarsh by not holding them responsible for murders they did

not personally participate in.[14] (See *People v. Prettyman* (1996) 14 Cal.4th 248, 254 [under the natural and probable consequences doctrine, a criminal defendant who conspires in the commission of a crime may be liable not only for that "target" crime, but also for any other crime the perpetrator commits that is a natural and probable consequence of the target crime]; 36 RT 6500–6501 [trial court instructions].[15]) That LaMarsh and Willey's evidence *may* have instilled some doubt in the minds of one or two jurors regarding the codefendants' knowledge of the conspiracy does not prove that the same evidence caused appellants' convictions.

Finally, appellants argue that their culpability as conspirators "was supported *only* by the inadmissible and substantially prejudicial character/disposition/propensity evidence which was presented or elicited by LaMarsh and Willey, and successfully exploited in their attorneys' closing arguments." (COB 87, italics added; BOB 379.) Here, appellants certainly go too far. They may wish to ignore all of the prosecution's evidence, but this Court should not. As discussed above, Evans testified that Cruz planned the conspiracy, instructed the others on their roles, handed out weapons, and drove them all to the murder scene. Beck and Cruz also testified that Cruz drove them to the murder scene. Moyers and Creekmore were credible uninvolved

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14. It is possible that the holdout jurors did not vote to convict LaMarsh of conspiracy and/or the murder of Raper because the evidence showed that LaMarsh beat Raper's head, but did not establish who stabbed Raper or cut his throat. (See 37 RT 6619 [LaMarsh argued that there was no evidence that he stabbed Raper or cut his throat].)

15. The trial court instructed the jury: "A member of a conspiracy is not only guilty of the particular crime that to his knowledge his confederates agreed to and did commit, but is also liable for the natural and probable consequences of any crime or act of a co-conspirator to further the object of the conspiracy, even though such crime or act was not intended as a part of the agreed upon objective and even though he was not present at the time of the commission of such crime or act." (36 RT 6500–6501.)

neighbors and they identified Cruz as the person who cut Ritchey's throat–immediately after the crimes and also at trial. Two of Cruz's masks were found at the murder scene and he could not explain what happened to the four he owned. Cruz's bloody baton was also found. Appellants admitted the group brought various weapons to the murder scene and Cruz's explanation that they needed "defensive" weapons that could not be used at a distance was obviously concocted for the benefit of the jury. Cruz admitted that he lied to police about his familiarity with the Elm Street house and about his whereabout on the night of the murders. Beck also admitted he lied to police about his whereabouts. Both appellants had implausible stories about why they went to the Elm Street house. And both testified about numerous confrontations with Raper and, thus, corroborated the prosecutor's theory of the motive for the murders.

In sum, appellants' argument that their participation in the conspiracy was proven only by LaMarsh and Willey's defense cases is completely inaccurate; it greatly exaggerates the amount and impact of the pre-murder acts evidence; and it minimizes the overwhelming nature of the prosecution's case against them, which included extremely incriminating extrajudicial statements by Cruz and Beck, two eyewitness accounts of Cruz's murder of Ritchey, and Evans' testimony that all of the defendants were willing participants in the conspiracy. As demonstrated in the penalty trial, appellants benefitted from the exclusion of substantial evidence that they dominated the group and could reasonably be assumed to have led and participated in its assault on Raper and the others. The admission of minor evidence relating to the functioning of that group, and LaMarsh and Willey's somewhat conflicting defenses did not did not result in "gross unfairness." (*People v. Mendoza*, *supra*, 24 Cal.4th at p. 162.) Therefore, the trial court's rulings did not deprive appellants of due process. (*Ibid.*)

F. The Joint Trial Did Not Violate Appellants' Eighth Amendment Rights To A Reliable Determination Of Guilt And Penalty

Appellants claim, "The joint trial further prevented a reliable determination of guilt and penalty . . . ." (COB 85; BOB 379.) But appellants do not make any argument on this point, nor do they offer any authority for their position. In any case, the denial of a defendant's severance motion constitutes a violation of the Eighth or Fourteenth Amendment only when it deprives the defendant of a reliable determination of guilt or causes a trial that was fundamentally unfair. (*People v. Jenkins* (2000) 22 Cal.4th 900, 949.) Appellants cannot show that the jury's unanimous finding of guilt on all counts was unreliable just because there was some antagonism between their defenses and LaMarsh and Willey's defense. (*People v. Coffman*, *supra*, 34 Cal.4th at p. 41.) Further, the evidence that would have been inadmissible in a separate trial was minor and did not violate any constitutional rights. A full airing of the evidence against appellants and their conspirators, as well as their respective defenses, did not make the jury's determination of guilt unreliable. The jury was capable of viewing all of the evidence and weighing the credibility of competing defenses. The verdict was not unreliable merely because the defendants attempted to shift the blame for the murders to each other. "[N]o denial of a fair trial results from the mere fact that . . . defendants who are jointly tried have antagonistic defenses and one defendant gives testimony that is damaging to the other and thus helpful to the prosecution." (*People v. Turner* (1984) 37 Cal.3d 302, 313, overruled on another ground in *People v. Anderson* (1987) 43 Cal.3d 1104, 1149; see also *People v. Morganti* (1996) 43 Cal.App.4th 643, 673; *People v. Box* (2000) 23 Cal.4th 1153, 1196–1197.) Otherwise, "separate trials would appear to be mandatory in almost every case." (*People v. Turner*, *supra*, at p. 313.)

As for the penalty phase, Cruz's counsel stated at trial, "I wouldn't be [prejudiced] if Mr. Cruz went first. Then I don't think I can make any

argument. The Court has taken–Your Honor has taken away my arguments." (4 RT 818; see 4 RT 819, 825–826; 6 CT 1517.) Cruz's penalty trial was separate from Beck's, and it took place first. Accordingly, Cruz has no basis to complain about prejudice from a joint trial. And since he conceded he had no argument at the trial court, he cannot renew the argument on appeal. (See *People v. Cunningham*, *supra*, 25 Cal.4th at p. 984 [failure to press for a ruling on a motion for severance waives that issue on appeal].)

Even if Cruz preserved a claim that his penalty trial was unreliable, both appellants' claims would still fail on the merits. As discussed above, appellants received a fair guilt trial. The use of a single jury for both the guilt and punishment trials did not violate any constitutional rights and appellants wanted the same jury for both stages of the trial. (*People v. Sand*, *supra*, 81 Cal.App.3d at pp. 452–453; *People v. Osband*, *supra*, 13 Cal.4th at p. 668; see 4 RT 809 [Cruz's attorney argued, "And this is my position: Penal Code Section 190.4 states that we're entitled to the same jury who finds the defendants guilty in the guilt phase to determine the punishment or determine the penalty in a penalty phase . . . ."]; 7 RT 1301 [Beck argued he had the "right to have one jury go all the way through the proceedings"]; 7 RT 1303 [Beck argued, "I want the same jury for both phases"].) Moreover, Cruz's penalty trial took place first, and the prosecutor offered only one witness. So Cruz has no basis to claim it was unfair or unreliable. Similarly, Beck's penalty trial was not tainted by Cruz's penalty trial because, as discussed in Argument XVI-D, evidence involving Beck was excluded from Cruz's trial. Since appellants wanted and received separate penalty trials, and they were conducted as fairly as possible, appellants cannot show that there was an unreliable determination of penalty in violation of the Eighth Amendment.

G. Even If The Trial Court Abused Its Discretion, And Even If That Deprived Appellants Of Constitutional Rights, The Error Was Harmless

Appellants have fallen far short of demonstrating the type of prejudice necessary to prove the trial court abused its considerable discretion to jointly try defendants who engaged in a conspiracy and concerted multiple murders. (*People v. Tafoya*, *supra*, 42 Cal.4th at p. 162 [antagonistic defenses are not presumed to be prejudicial].) But even if the trial court's rulings were erroneous, they were harmless.

If appellants had received separate trials, virtually all of the evidence would have been admitted, and the results would have been the same. (See *People v. Keenan*, *supra*, 46 Cal.3d at p. 500, fn. 5 [speculation that codefendants would invoke their Fifth Amendment privilege is not considered in appraisal of severance ruling].)

A trial court's error in denying a motion to sever is reviewed to determine whether it is reasonably probable that the defendant would have received a more favorable result if the trial had been severed. (*People v. Pinholster*, *supra*, 1 Cal.4th at p. 932; *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*).) Reasonably probable in this context "does not mean more likely than not, but merely a reasonable chance, more than an abstract possibility." (*College Hospital Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715.)

Furthermore, even if the trial court abused its discretion and that resulted in a violation of constitutional rights, the error was harmless beyond a reasonable doubt. (See *Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*).)

1. Cruz Would Not Have Received A Better Result In A Separate Trial

As Cruz acknowledges, "the relative weight of the evidence against the defendant is an important factor to consider in assessing the harm from

joinder." (COB at p. 61, citing *United States v. Mayfield* (1999) 189 F.3d 895, 907 [evidence against defendant was not overwhelming].) Here, the prosecution's evidence and Cruz's own testimony were overwhelming evidence of Cruz's guilt on all counts. The evidence showed that Cruz had the most antagonistic relationship with Raper and he had the strongest motive to attack Raper. Cruz testified that he had numerous confrontations with Raper and Raper made several threats–sometimes accompanied by Colwell. One time Raper pulled out a knife and threatened to kill Cruz; Cruz had Raper arrested; Cruz admitted he was present when his friends physically evicted Raper; Cruz was present when they roughed-up Colwell; and Cruz warned Colwell not to come around again. (29 RT 5023, 5031, 5054–5059, 5161–5163, 5170; but see 20 RT 3381 [Mike Wierzbicki testified that Cruz personally participated in the physical eviction of Raper]; 23 RT 4075–4079 [David Jarmin testified that Cruz and others moved Raper's trailer]; 24 RT 4191–4192 [Evans testified that Cruz directed the others to apprehend Colwell after they caught him driving by the Camp]; 28 RT 4978 [Deputy Sheriff Bryan Grimm testified he took Raper to jail after Cruz made a citizen's arrest].) Other witnesses also testified about the friction between Raper and the other residents of the Camp. (See, e.g., 21 RT 3581, 3603.) McLaughlin testified that the night before the murders, she spoke to Cruz on the phone, and he said they were going to get in a fight and settle a score the next day. (31 RT 5547–5548.) There was no reason why the prosecutor could not introduce that evidence in a separate trial.

During his opening statement, Cruz's counsel stated, "Mr. Raper was unpredictable. How do you negotiate? How do you rationalize with somebody who's on PCP? It's not easy . . . . He was removed from the Camp. He wouldn't let it lie. He kept coming back to the Camp. He kept making threats." (26 RT 4522.) Evans testified that Cruz said, "He was tired of Raper ruining everybody's day." (24 RT 4473.) Mike Wierzbicki testified that Cruz told him

he wanted to get his hands on Raper. (20 RT 3398.) And according to Cruz, he believed Raper had enlisted a motorcycle gang to go to the Camp and kill everyone, including his girlfriend and children. (30 RT 5178–5179; see 35 RT 6189 [Cruz's counsel argued that Evans told Cruz about the imminent attack and his "passions were increased"].) Thus, Cruz's motive to kill Raper was clearly established.

Cruz testified that he did not plan the attack. (29 RT 5128.) But Evans testified that Cruz formulated the plan to kill Raper and his associates; Cruz assembled everyone; Cruz instructed Evans to draw a diagram of the Elm Street house; Cruz instructed the others what to do; and Cruz handed out weapons. (24 RT 4200, 4205, 4207–4211, 4215, 4218–4219; see also 31 RT 5547 [McLaughlin testified that Cruz told her he had a score to settle].) Willey's girlfriend, Patricia Badgett, testified that Cruz called late on the evening of the murders and told Willey to come to the Camp. (20 RT 3494, 3500–3502, 3539.) Evans testified that Cruz drove them to the murder scene and Cruz admitted that was true. (24 RT 4223; 29 RT 5060–5061.)

Cruz's claim that there was no plan to attack the people in the Elm Street house was further undermined by Evans' testimony that Cruz, Beck, Vieira, and Willey wore masks; Vieira and Willey left theirs behind; and they hid the other two masks. (24 RT 4232–4233, 4252–4253, 4400; see also 17 RT 2968 [Moyers testified that the four assailants wore ski caps]; 32 RT 5665–5666, 5767; see 36 RT 6531.) Police found two masks at the crime scene. (15 RT 2690; 16 RT 2779–2780, 2788; 22 RT 3881–3884; 35 RT 6349.) A receipt for four masks was found in Cruz's home and Cruz admitted buying them. But no masks were found in Cruz's home and he could not explain what happened to the ones he owned. (15 RT 2757; 29 RT 5076, 5253–5254; 35 RT 6339–6340; see 21 RT 3660–3662, 3676.)

Evidence that there was a plan to attack was also corroborated by Evans' testimony that she opened the back bedroom window for Beck and Vieira. (24 RT 4402, 4411; see 36 RT 6529–6530.) LaMarsh also testified that Beck and Vieira came in through the back window. (32 RT 5657; see *People v. Keenan*, *supra*, 46 Cal.3d at p. 500, fn. 5 [court does not consider possibility that codefendant might invoke his Fifth Amendment privilege if tried separately].) Officers who investigated the crime found that the back bedroom window was open and the screen was removed and placed nearby. (16 RT 2778–2779, 2847.) Evans' testimony that there was a plan was also corroborated by Donna Alvarez who credibly testified that LaMarsh pointed a gun at her and Ritchey and ordered them into the living room. (17 RT 2987–2992, 3000; see 36 RT 6531.) That was consistent with Evans' testimony that the plan was to get all of the victims into the living room. (23 RT 4133–4135; 24 RT 4209.)

Further, two neutral eyewitnesses, Earl Creekmore and Kathy Moyers, identified Cruz as the person who cut Ritchey's throat. (17 RT 2931–2933, 2937; 20 RT 3413–3419, 3421, 3436, 3467; see 30 RT 3431 [Creekmore testified that the heaviest assailant wore a red baseball cap]; 34 RT 6093 [Willey testified that Cruz wore a red baseball cap].) Cruz admitted that he saw someone outside and it was probably Creekmore. (29 RT 5127; see also 34 RT 5994 [Willey testified that Creekmore spoke to him].) Another disinterested neighbor, William Duval, testified that four people left the Elm Street house at the same time, and one of them matched Cruz's physique of 5'10" and 350 pounds. (19 RT 3320, 3327, 3334; see 28 RT 4910 [Detective Darrell Freitas testified that Cruz weighed 350 pounds when he was arrested soon after the murders; 29 RT 5112 [Cruz testified he weighed 350 pounds when arrested].)

Further, Cruz's defense was not tenable. Cruz claimed that on the night of the murders, he believed that Raper had arranged to have a motorcycle gang attack the Camp and kill everyone. But then Cruz left his pregnant girlfriend

at the Camp with their two small children. (29 RT 5064, 5083, 5178.) Cruz claimed that his group brought weapons to the Elm Street house because of the threat of the attack by the motorcycle gang. But that attack was supposed to take place at the Camp. (30 RT 5178.) Moreover, Cruz admitted that he and the others had gone to the Elm Street house three days earlier without weapons even though the threat of attack by the motorcycle gang had been rumored for weeks. (29 RT 5044, 5067, 5234.)

Cruz claimed they went to the Elm Street House because Evans suddenly wanted to retrieve some clothes. (29 RT 5069.) But it was not plausible that Cruz had Willey come over from another town (20 RT 3494; 29 RT) and the six of them piled into a car at midnight to help retrieve some clothes. (See 34 RT 5976–5978, 6045 [Willey testified they went to move furniture].) Cruz claimed they brought "defensive" weapons to avoid problems if they were stopped by police, and to prevent them from initiating any violence or being accused of initiating any violence. (See 29 RT 5084 ["Going over there with a bat or maybe a knife on you, you can't hurt anybody at a distance. The only way you can hurt somebody at a distance is if you're confronted, and that's [an] easy to explain defense."].) But it was not likely that they were preoccupied with being stopped by police since they had to drive just a few blocks to get to the Elm Street house. Nor was it plausible that Cruz's intent was to prevent violence or protect themselves because guns (which they had plenty of) would have been a better deterrent and certainly a better defense against an entire motorcycle gang. In fact, Cruz's claim that they brought those weapons to make it easier to prove their defense (29 RT 5084) appears incredibly disingenuous and self-serving. Moreover, bats, knives, and the baton were more consistent with Evans' testimony that they did not want to use firearms because it would attract the attention of neighbors. (24 RT 4403.)

Similarly, Cruz's testimony that violence broke out spontaneously was not credible. Cruz claimed that Beck and Vieira suddenly started running towards the Elm Street House; but he offered no explanation. (29 RT 5090.) LaMarsh testified that Raper came at him with a knife (32 RT 5654), but that did not explain how violence broke out spontaneously all over the house. Moreover, even Willey admitted that Ritchey was not aggressive–he was just trying to escape. (34 RT 5992–5993.)

Cruz testified that he was present during the attacks, but he claimed he did not see anyone actually killed. (29 RT 5124.) Cruz testified that he saw Willey fighting with Ritchey (29 RT 5092); he saw Vieira fighting with Colwell (29 RT 5099–5102, 5104–5105; see 29 RT 5186); he saw Evans fighting with Paris (29 RT 5103; see 29 RT 5126 [Cruz testified that later, he saw blood sprinkled on Evans' face]); and he saw that Raper was incapacitated (presumably by LaMarsh) (29 RT 5097–5098). Conveniently, however, Cruz was able to implicate the other four assailants without taking any responsibility for seeing murders and doing nothing to help the victims. (See 29 RT 5097 [Cruz testified that he did not call 9-1-1 because he did not have a mobile phone]; 30 RT 5265 [same]; see also 29 RT 5124.)

Contrary to Cruz's testimony that it was Vieira who used the baton (29 RT 5070), Evans testified that Cruz had the baton when they initially got in the car, and still had it when he left the Elm Street house. (24 RT 4218, 4222, 4242.) Moreover, Cruz admitted that the police baton found at the murder scene was his; there was expert testimony that the baton caused some of the injuries to Paris; it had Colwell's blood on it; and the baton had unique fibers from Cruz's car on it. (17 RT 3047–3048; 18 RT 3108, 3119, 3220, 3259, 3261; 22 RT 3878, 3958, 3972, 3977–3983; 24 RT 4242; 29 RT 5179–5180.) Evans and LaMarsh also testified that Cruz was covered in blood after the murders. (24 RT 4245, 4419; 32 RT 5662.)

Finally, Cruz's general credibility was undermined when he admitted that he lied to police about his whereabouts. (29 RT 5128–5129.) It was further compromised when Cruz testified that he did not believe in violence–but the evidence showed that Cruz usually wore military style clothing; he owned a virtual arsenal of weapons; and he directed the others to beat Colwell after they caught him driving by the Camp. (15 RT 2763–2764; 20 RT 3397–3398, 3402; 24 RT 4191–4192, 4314; 29 RT 5056–5067, 5229; 30 RT 5260; 32 RT 5688–5690; 35 RT 6342; Exhs. 6, 7.)

Cruz argues that LaMarsh and Willey acted as "*two* extra prosecutors. Indeed, it is no exaggeration to say that codefendants LaMarsh and Willey were appellant's 'most forceful adversar[ies].'" (COB 87, brackets in original.) Cruz is wrong and he makes a gross exaggeration. As demonstrated above, the prosecution's case against Cruz was overwhelming, while the impact of LaMarsh and Willey's defenses were far more ambivalent.

LaMarsh did blame Cruz for beating Raper three times with his baton. (32 RT 5656–5657.) But the jury would not have convicted Cruz based on that evidence because it conflicted with the prosecution's theory of the case that LaMarsh beat Raper with a bat (37 RT 6748); it was inconsistent with the physical evidence of both the number of blows and the type of weapons used (18 RT 3088–3092, 3097, 3118, 3215); and it was inconsistent with Evans' testimony that LaMarsh bragged that he beat Raper to death (24 RT 4396–4397).

Moreover, as discussed above, LaMarsh and Willey's primary defense was that there was no conspiracy, and that corroborated both Cruz and Beck's defense. In addition, Willey testified that it was Beck–rather than Cruz–who cut Ritchey's throat. (34 RT 5997–5998; see 34 RT 6003 [Willey also testified that Beck had blood on his arms].) Thus, LaMarsh and Willey not only supported Cruz's defense against the conspiracy charge, but Willey directly

undermined the most damning account of Cruz's participation in the killings. So, contrary to Cruz's argument, LaMarsh and Willey were not his "most forceful adversaries." They did provide incriminating testimony; but just as importantly, they corroborated Cruz and Beck's primary defense and helped raise doubts about the prosecution's evidence. (32 RT 5636, 5642, 5671, 5700; 34 RT 5983–5984, 6021.)

LaMarsh and Willey also provided other exculpating evidence. For example, Cruz testified that they went to the Elm Street house to protect Evans while she retrieved some clothing. (29 RT 5061). Cruz's defense depended on that farfetched explanation, and LaMarsh corroborated it. (32 RT 5636.) Cruz testified they did not wear masks, and he dropped off Evans and LaMarsh and drove down the street to avoid stirring up trouble. (29 RT 5076, 5080.) Willey corroborated both assertions. (34 RT 5985–5986.) Though Cruz ignores how LaMarsh and Willey's defenses helped him, and resorts to hyperbole to describe the conflicts in their defenses, this Court should not be fooled. The evidence against Cruz would have been overwhelming even if LaMarsh and Willey had received separate trials.

In sum, there was no likelihood that in a separate trial the jury would have believed Cruz's testimony that he was merely a passive observer and did not even know anyone had been killed. The prosecution's evidence unequivocally showed that Cruz planned the assault, assembled the assailants and weapons, drove them all to the crime scene, participated in some of the murders, drove the assailants away, disposed of evidence, and provided police with a false alibi. Accordingly, Cruz would have been found guilty of the conspiracy and murders even if he had received a separate trial; therefore, he cannot show that he was prejudiced by the joinder. (See *United States v. Mayfield*, *supra*, 189 F.3d at p. 907.) Moreover, even if the denial of the severance motions constituted a denial of Cruz's due process and other federal constitutional rights, for the

reasons discussed above, the error was harmless beyond a reasonable doubt. (See Chapman, *supra*, 386 U.S. at p. 24; *People v. Lewis*, *supra*, 43 Cal.4th at p. 456.)

2. Beck Would Not Have Received A Better Result In A Separate Trial

There was also overwhelming evidence of Beck's guilt, and his only exonerating evidence came from his and Cruz's implausible testimony. Several people testified that Beck was the one who towed away Raper's van, and he participated in the burning of Raper's car. (20 RT 3398–3399; 21 RT 3586–3587; 23 RT 4075–4082.) So Beck clearly had animosity towards Raper and a motive for the crimes.

A clerk at a gun store in Modesto testified that he sold a police baton to Beck and Cruz a week before the murders. (21 RT 3691–3692.) That baton was later found near the crime scene with Colwell's blood on it. (22 RT 3878, 3958.)

Evans, of course, testified that Beck was present when Cruz explained the plan to go to the Elm Street house and kill everyone there, including witnesses. Evans and LaMarsh were supposed to get everyone into the living room, and then Evans would open the back bedroom window and let in Beck and Vieira. (24 RT 4205.) Beck contends that "Evans supplied the only evidence supporting the conspiracy charge." (BOB 15.) By this, Beck suggests that his conviction hung on a tenuous thread. However, eyewitness testimony of a coconspirator is powerful evidence that requires only minor corroboration to support a conviction. Beck's attempt to trivialize it does not change that fact. Conspiracy charges are typically proven by circumstantial evidence, so the testimony of a coconspirator made this case that much stronger. Moreover, the conspiracy charge was proven by more than Evans' testimony. There was also a great deal of uncontested circumstantial evidence that supported the

conspiracy. For example, all of the defendants admitted that Cruz had Willey come to the Camp from out of town; they drove to the murder scene in the middle of the night; they were armed with a police baton, bats, and knives even though they went to the same house a few days earlier unarmed; two of them went into the house first and moved the residents into the living room; and all of them were present during the murders. Contrary to Beck's argument, the circumstantial evidence combined with Evans' incriminating testimony made a potent case for the conspiracy.

More specifically, Evans testified that, as planned, she moved someone (Alvarez) to the living room. (24 RT 4230, 4232.) Even LaMarsh, who denied there was a conspiracy, testified that he effectively chased three people back into the living room–just as required by the plan described by Evans. (32 RT 5650–5652.) Evans testified that she then opened the back bedroom window and Vieira and Beck came in wearing masks. (24 RT 4230, 4232; see 32 RT 5767 [LaMarsh testified that Beck wore a mask].) As soon as Beck got inside, he pulled out his M-9 knife and headed down the hall. (24 RT 4218, 4235.) Beck admitted that he punched Colwell in the ribs three or four times. (32 RT 5305–5306.)

William Duval testified that four people left the Elm Street house in a single-file trot, and one of the men matched Beck's physique. He also testified that the back bedroom window was open and the screen had been removed–which corroborated Evans' testimony that, as part of the plan, she opened the window and let in Beck and Vieira. (19 RT 3325–3334.)

Evans testified that when Beck got back to the car, he was still holding his knife, and he and the knife were covered in blood. (24 RT 4245–4248.) On the ride to Willey's house, Beck "said it was a waste that they only got three dudes and a chick." (24 RT 4249.)

Rosemary McLaughlin testified that the night before the murders, Cruz called on the phone and told her "the guys were going to go even a score, get in a fight."[16] (31 RT 5547.) That showed that the attack was planned, and not spontaneous as claimed by all the defendants. Other evidence that Cruz and Beck were close would have helped prove that Beck was part of the conspiracy.

Phillip Wallace testified that Beck came to his house later the next evening and "said 'we' or 'I slit some throats.'" (22 RT 3798.) When Wallace asked Beck if he was serious, Beck smiled or smirked. (22 RT 3801.)

McLaughlin also testified that Beck came to her house the day after the murders. He told her that Vieira had to wipe the blood off of everyone's shoes. Beck smiled while he explained that his shoes would not come clean, so he had to buy a new pair. (31 RT 5549–5550.) Beck was wearing "[b]rand new white sneakers" and he told her his old ones "were covered with blood." Beck also told McLaughlin, "they had to do them," echoing Evan's testimony that Cruz said the plan was to "do them all and leave no witnesses." (24 RT 4209; 31 RT 5553.)

LaMarsh and Willey also gave inculpating testimony. LaMarsh testified that he and Evans were dropped off at the house and forced everyone into the living room. (32 RT 5644–5645, 5648–5652.) He testified that Beck had a knife and he saw Beck stab Colwell in the stomach. (32 RT 5657, 5703, 5752–5753.) He also testified that Beck wore a mask like the ones retrieved from the murder scene. (32 RT 5666, 5767.) And afterward, Beck "had lots of blood on him." (32 RT 5720.) Contrary to the prosecutor's theory of the crimes, Willey

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16. This evidence was admissible against Cruz as a party admission. (Evid. Code, § 1220.) Beck did not object at trial, so he forfeited any claim of error he might have raised. (See *People v. Hill* (1992) 3 Cal.4th 959, 994-995 [failure to make *Aranda-Bruton* objection below waived the claim on appeal]. Further, Beck cannot demonstrate prejudice because he contends that this evidence had no persuasive value. (See BOB 217 ["this statement does not reveal a conspiracy to commit murder"].)

testified that Beck knocked him off of Ritchey and cut Ritchey's throat. (34 RT 5997–5998.) When they got back in the car, Beck had his knife and he was covered in blood. (34 RT 6003–6004.)

Even if Beck had received a separate trial, LaMarsh and Willey could have still testified about Beck's role in the murders. There was no basis for Beck to exclude that testimony. However, LaMarsh and Willey would have probably invoked their privilege not to incriminate themselves–which, of course, was the real point of separate trials. Nevertheless, even if the trial had not been severed, but all of the evidence challenged by Beck as more prejudicial than probative had been excluded, the portions of LaMarsh and Willey's testimony concerning Beck's participation in the murders would have still been admitted, and the result would have been the same. (See *Zafiro v. United States*, *supra*, 506 U.S. at p. 538 ["a fair trial does not include the right to exclude relevant and competent evidence . . . merely because the witness is also a codefendant."]; *People v. Keenan*, *supra*, 46 Cal.3d at p. 500, fn. 5 [it is not a basis for severance that a codefendant "would have exercised his Fifth Amendment privilege not to testify against defendant in a separate trial . . . .; [a defendant has no] right to insulate himself, by the tactical device of severance, from the relevant and admissible testimony of his codefendant."]; *People v. Lewis*, *supra*, 43 Cal.4th at p. 456.)

Similarly, even if Beck had received a separate trial and LaMarsh and Willey did not testify, eyewitness and circumstantial evidence established without doubt that he was part of the conspiracy and participated in the murders. Therefore, any error in failing to grant the severance motions was harmless under any standard. (See *People v. Pinholster*, *supra*, 1 Cal.4th at p. 932; *Chapman*, *supra*, 386 U.S. at p. 24.)

Finally, Beck acknowledges that the jury signed his and Cruz's verdicts after only six days of deliberations, but claims it may have continued to deliberate on

his verdicts for four more days–up until when the trial court declared a mistrial as to LaMarsh and Willey. "[T]here is no telling when in fact the jurors finally decided its verdict against Beck." (BOB 5, fn. 5.) Beck is mistaken. The foreman would not have signed the verdicts for Cruz and Beck if the jury was still deliberating on their counts. Moreover, when the trial court took those verdicts it asked, "I note that the verdicts are dated May the 29th. Today is June the 4th. Can I assume that you arrived at these verdicts on May the 29th and have been deliberating on the other two defendants since then?" The foreman replied, "Yes." (38 RT 6882; see BOB 378 [Beck concedes in his cumulative error argument that the jury may have deliberated for as little as four days].) Thus, the jury probably deliberated on all four defendants for a while. When it realized that there was disagreement over LaMarsh and Willey, it dispatched the verdicts against Cruz and Beck so it could focus on the more difficult verdicts. That shows that the case against Beck was strong and convincing.

Similarly, the penalty jury had little difficulty returning five death verdicts. It deliberated for less than two hours. (45 RT 8360-8363, 8366–8371.)

Thus, for all the foregoing reasons, any error in failing to sever the trials was harmless beyond a reasonable doubt. (See *Chapman*, *supra*, 386 U.S. at p. 24; *People v. Lewis*, *supra*, 43 Cal.4th at p. 456.)

II.

EVIDENCE THAT CRUZ, BECK, AND VIEIRA HAD NUMEROUS FIREARMS AND WERE A TIGHTKNIT GROUP WAS PROBATIVE OF THE CONSPIRACY AND WAS NOT PREJUDICIAL

Appellants complain that the trial court improperly admitted evidence that they and Vieira had many firearms and formed a tightknit group with some peculiar practices. They contend that this evidence was irrelevant and served only to impeach their character and suggest that they had a propensity to

commit the crimes charged. (COB 98; BOB 379.) However, appellants gloss over the fact that they did not object to most of the firearms evidence. Indeed, Cruz's attorney conceded that some of that evidence was relevant and admissible. Moreover, the evidence of the group's extensive firearms collection was properly admitted. It was relevant to the prosecution's case to establish the group's military mentality to prove the assault was planned and carried out in military fashion. It was relevant to LaMarsh and Willey's defense because it supported the inference that there was no plan to attack the Elm Street house because, if there were, they would have used the far superior weaponry at their disposal.

Appellants also overlook the fact that the trial court excluded the vast majority of evidence concerning the more eccentric aspects of their group's functioning. The evidence that was admitted pertained primarily to prior altercations with Raper and the tightknit relationship between Cruz, Beck, and Vieira. The prior conflict with Raper was relevant to prove the motive for the crimes charged. The closeness of the assailants was relevant to prove the conspiracy.

Finally, appellants complain about the admission of evidence that Cruz was the leader, Beck was the enforcer, and they both mistreated Vieira. But the trial court allowed in very little of this evidence. As seen in the penalty phase trial, the evidence that was admitted barely scratched the surface of Cruz's domination of the group or appellants' viciousness. For example, the penalty phase trial revealed that appellants repeatedly beat–and sometimes electrocuted–Vieira and Steve Perkins. But the only evidence of violence that was admitted at the guilt phase was Evans' brief testimony that appellants smacked around Vieira and LaMarsh's brief testimony that one time he saw Beck yell at Vieira and tell him to stand at attention; then Beck punched Vieira. The only cult-type evidence was LaMarsh and Willey's testimony that they had

to cut their hands and put a blood fingerprint on a document to join the group. (32 RT 5600–5601, 5619; 34 RT 5965.) This evidence was probative of the intimacy of the group and their likelihood of forming a conspiracy. In light of the gruesome nature of the crimes charged and the overwhelming and extensive nature of the incriminating evidence, the minimal amount of challenged evidence could not have been so inflammatory that it was more prejudicial than probative under Evidence Code section 352.

A. Procedural History

On March 31, 1992, Willey's counsel made his opening statement. He said, "The evidence . . . . will show that there was no plans or talk of murder that night." (15 RT 2700.) "Ronald Willey didn't commit murder, didn't join in a conspiracy to commit murder, didn't know anybody was going to be murdered, did not arm himself or allow anyone else to arm him, did not kill, did not help kill." (15 RT 2703.)

Later that same day, outside the presence of the jury, Cruz objected to Willey introducing two photographs of firearms that were seized at the Camp. (15 RT 2761.) He objected that the evidence was not relevant and more prejudicial than probative under Evidence Code section 352. (*Ibid.*) LaMarsh and Willey argued the relevance was that "they had at their disposal a veritable arsenal, including many semiautomatic assault rifles, that would have been much more suited to the purpose if that indeed was their intent." (15 RT 2762.) In other words, they argued that the weapons were relevant to show that if there was a conspiracy to go to the Elm Street house and kill everyone there, they would have taken the firearms they had at their disposal because they would have been much more effective. Cruz's counsel argued that LaMarsh and Willey could bring in evidence that the defendants had guns without "showing the entire arsenal." (15 RT 2762.) After determining that Beck did not wish to make any argument, the trial court overruled the objection. (15 RT 2763.)

Later, Detective Freitas testified that one of the weapons found at Cruz's residence might have been stolen, but he was unable to confirm that, and all the weapons appeared to be possessed legally. (15 RT 2767.) Appellants did not object. (*Ibid.*)

On April 8, 1992, Steve Miller, a gun store clerk, testified that he sold a lot of guns to appellants. (21 RT 3694.) Appellants did not object. (*Ibid.*) Miller identified several of appellants' semiautomatic assault rifles from a photograph and the trial court overruled Cruz's relevance objection. (21 RT 3699–3700; Def. Exh. 7.) Miller also testified that it would be very difficult to make any of the semiautomatic rifles fully automatic.[17] (21 RT 3701.)

On April 14, 1992, LaMarsh elicited testimony from Evans that appellants treated Vieira like a slave and slapped him around. (24 RT 4312; but see 30 RT 5227–5228 [Cruz denied that he treated Vieira like a slave].) The trial court overruled appellants' objections that the evidence was not relevant and was prejudicial. (24 RT 4312–4313.) Evans also testified that at Cruz's home she saw M-16s and "automatic weapons and Uzis and .45s and all kinds of handguns and grenades and just all kinds of guns." (24 RT 4314.) "I said [to LaMarsh] it was kind of nuts. There's only four guys. They got so many guns, weapons, that they have enough to have their own little war. And there's only four of them; why would they need so many?" (*Ibid.*) Appellants did not object. (*Ibid.*)

On April 28, 1992, Willey cross-examined Cruz and asked if he was aware that some of his weapons could probably be converted to automatic weapons. (30 RT 5193.) After Cruz made a relevance objection, Willey's counsel argued, "The relevance, as I explained before, is to discredit the idea that there was a

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17. Contrary to appellants' argument that this evidence was entered over Cruz's objection, Cruz did not object to Miller's testimony about converting the weapons. (See COB 99, citing 21 RT 3700–3701; BOB 379.)

conspiracy to commit murder. If people had weapons that could be converted to automatic weapons or had been converted to automatic weapons, it is totally illogical to go over there and kill people with bats and knives." (30 RT 5194.) The trial court overruled the objection. (*Ibid.*) Cruz asked the trial court's permission to answer with an explanation, and he gave lengthy testimony about the process and difficulty of making weapons fully automatic. (30 RT 5195–5196.)

On April 30, 1992, LaMarsh's counsel asked Beck several questions about his guns. Beck testified that he had about twenty guns. The trial court sustained Cruz's relevance objections to a question about what Beck did with the guns and whether he would buy an (illegal) automatic weapon. (30 RT 5381, 5384.) The trial court also sustained objections by Beck's attorney to four questions regarding whether Beck was careful with his guns and would be careful not to buy an automatic firearm. (30 RT 5383–5384.) The trial court sustained Cruz's objection to the "entire line of questioning," and counsel moved on to another topic. (30 RT 5384.)

On May 4, 1992, Willey's attorney argued that he should be allowed to have Rosemary McLaughlin testify about the relationship between Cruz, Beck, and Vieira:

> I intend to try to explore this whole area, the relationship to Mr. Cruz, Mr. Beck, and Mr. Vieira. The thrust of my defense is entirely–that it is totally illogical that Mr. Cruz could have sat five other people down and told them that they were going to commit mass murder. However, the evidence from Miss McLaughlin will indicate that there were two people present who would blindly follow Mr. Cruz's every order, regardless what that order was, including mass murder; and only by bringing out the history of Mr. Cruz, Mr. Beck, and Mr. Vieira, as Miss McLaughlin personally observed it, can that be shown to the jury.

(31 RT 5457–5458.)

LaMarsh's counsel argued:

> Mr. Beck and Mr. Cruz have indicated that there was no conspiracy; and the fact of the matter is, Mr. LaMarsh was not involved in the conspiracy. But I think based on the relationship of those three individuals, Miss McLaughlin can demonstrate that they acted secretly, they often did things at cross purposes to other individuals. They operated behind people's backs, never telling what they were doing. They were secretive.
>
> And clearly I believe that there's enough, based on what I know of the case, to suggest that those three had a separate conversation out of the presence of Mr. Willey, out of the presence of Miss Evans, and out of the presence of Mr. LaMarsh, and engaged in a plan to do something inappropriate.

(31 RT 5465.)

A short time later, LaMarsh's counsel made his opening statement:

> I'll . . . . show you through testimony of other witnesses that Mr. LaMarsh did not know Mr. Cruz, Mr. Beck, Mr. Vieira very well. He had only known them for a short period of time. You've already heard evidence to that effect. And we'll also have evidence showing that Mr. Beck, Mr. Cruz, and Mr. Vieira had known each other for quite some time and in fact had a very close relationship.

(31 RT 5479.)

> [I]n the short period that [LaMarsh] knew Mr. Beck, Mr. Cruz, and Mr. Vieira, he learned a number of things. One of them, they had all types of weapons. They had semiautomatic weapons. They had rifles, shotguns, knives. And he believes that they have a LAWS rocket or a LAWS rocket launcher–he doesn't know the difference–and he will explain to you what he thought it was . . . .
>
> [LaMarsh] goes over in a group with them. He has no idea what they have planned. And I mentioned the weapons beforehand because as they're getting into the car they, of course, have weapons. And you would say, "Well, doesn't this cause you alarm? Doesn't this cause you some concern about why were you going over there with these weapons?" The fact of the matter is that they were walking arsenals so it meant little to him that they had other weapons.

(31 RT 5481–5482.) "The evidence will show you through testimony of Jason LaMarsh he did not plan, that he did not agree, he did not enter into an agreement to harm, injure, kill anyone." (31 RT 5488.)

On May 5, 1992, during direct examination, McLaughlin testified that Cruz and Beck treated Vieira as a "subservient individual." "They'd tell him what to do and he did it on command." (31 RT 5542–5543.) She testified that Cruz was the leader of Beck and Vieira. (31 RT 5544.) When she lived with Cruz, Beck, Vieira, and Steve Perkins, Cruz did not work, but he and Beck controlled all of their money. (31 RT 5562–5563.) She never saw Cruz discipline Vieira "because he was always very obedient." (31 RT 5563.) But she did see Vieira stand at attention for hours waiting for instructions from Cruz. (31 RT 5563–5564.)

LaMarsh testified that once he saw Beck yell at Vieira, and after Cruz said "'Okay,'" Beck punched Vieira in the stomach and knocked the wind out of him. (32 RT 5600–5601.) The trial court ruled that counsel could question LaMarsh about bad acts he had seen committed by the four defendants. LaMarsh testified that Cruz, Beck, and Vieira appeared to constitute a "survivalist group." (32 RT 5615.) LaMarsh's attorney asked LaMarsh if Cruz had anything that looked like a "LAWS" rocket, but the trial court sustained Cruz's relevance objection as more prejudicial than probative under Evidence Code section 352. (32 RT 5616–5617.) LaMarsh testified that he joined the group by cutting his hand and marking a piece of paper with a blood fingerprint. (32 RT 5618–5619.)

On May 11, 1992, during direct examination, Willey testified that Cruz told Beck and Vieira what to do. Cruz treated Beck as his best friends, but he treated Vieira like a child. Beck also told Vieira what to do, and he slapped or punched Vieira when he disobeyed. (34 RT 5960–5961.) Willey testified that he saw LaMarsh join the group by signing a paper and putting a blood

fingerprint on it. Previously, Willey had done the same thing. (34 RT 5965.)

On May 19, 1992, during closing argument, LaMarsh's counsel did not specifically argue that the availability of firearms proved there was no conspiracy. However, Willey's counsel did argue that the real reason they did not take guns is because it would have made Willey (and possibly LaMarsh and Evans) realize that there was a plan to kill the people in the Elm Street house. (37 RT 6665–6666.) He also argued that when Willey saw the others run into the house, "That's the natural time for him to draw the weapon and prepare himself; but he didn't, because he didn't have a weapon . . . . He was not in on any conspiracy to kill." (37 RT 6686.) In other words, the availability of guns, and the fact that they did not take them, proved that Willey was not part of the conspiracy. Moreover, counsel for both LaMarsh and Willey argued that Cruz, Beck, and Vieira had been together for years and their relationship was consistent with them forming a conspiracy that did not involve LaMarsh and Willey. (37 RT 6633–6634, 6665.)

On May 18, 1992, the trial court instructed the jury on the use of prior acts evidence. (36 RT 6480–6482; CALJIC Nos. 2.50 [Evidence of Other Crimes], 2.50.1 [Evidence of Other Crimes by the Defendant Proved by a Preponderance of the Evidence], 2.50.2 [Definition of Preponderance of the Evidence].) Among other things, the instructions advised the jury:

> Evidence has been introduced for the purpose of showing that one or more of the defendants committed acts similar to those constituting crimes other than that for which he is on trial.
>
> Such evidence, if believed, was not received and may not be considered by you to prove that the defendant is a person of bad character or that he has a disposition to commit crimes.
>
> Such evidence is received and may be considered by you only for the limited purpose of determining if it tends to show [intent, identity, motive, knowledge, and the existence of a conspiracy] . . . .

> For the limited purpose for which you may consider such evidence, you must weigh it in the same manner as you do all other evidence in the case.
>
> You are not permitted to consider such evidence for any other purpose.

(36 RT 6480–6481.)

B. Legal Principles

"No evidence is admissible except relevant evidence." (Evid. Code, § 350.)

"Except as otherwise provided by statute, all relevant evidence is admissible." (Evid. Code, § 351.)

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

> "[A]n appellate court applies the abuse of discretion standard of review to any ruling by a trial court on the admissibility of evidence, including one that turns on the relative probativeness and prejudice of the evidence in question [citations]. Evidence is substantially more prejudicial than probative (see Evid. Code, § 352) if, broadly stated, it poses an intolerable 'risk to the fairness of the proceedings or the reliability of the outcome' (*People v. Alvarez* [(1996)] 14 Cal.4th [155], 204, fn. 14)." (*People v. Waidla* (2000) 22 Cal.4th 690, 724.) "The admission of relevant evidence will not offend due process unless the evidence is so prejudicial as to render the defendant's trial fundamentally unfair." (*People v. Falsetta* (1999) 21 Cal.4th 903, 913.)

(*People v. Jablonski* (2006) 37 Cal.4th 774, 805.)

Evidence Code section 1101 provides:

> (a) Except as provided in this section and in Sections 1102, 1103, 1108, and 1109, evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of

> reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion.
>
> (b) Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act.

The trial court does not abuse its discretion by admitting prior acts evidence that is relevant and material, so long as the evidence is not merely cumulative or admitted solely to establish the defendant's criminal propensity. (*People v. Harris* (1977) 71 Cal.App.3d 959, 964.)

> "Evidence that a defendant committed crimes other than those for which he is on trial is admissible when it is logically, naturally, and by reasonable inference relevant to prove some fact at issue, such as motive, intent, preparation or identity. (*People v. Durham* (1969) 70 Cal.2d 171, 186; Evid. Code, § 1101, subd. (b).) The trial court judge has the discretion to admit such evidence after weighing the probative value against the prejudicial effect. (*People v. DeRango* (1981) 115 Cal.App.3d 583, 589, citing *People v. Matson* (1974) 13 Cal.3d 35, 40.) When reviewing the admission of evidence of other offenses, a court must consider: (1) the materiality of the fact to be proved or disproved, (2) the probative value of the other crime evidence to prove or disprove the fact, and (3) the existence of any rule or policy requiring exclusion even if the evidence is relevant. (*People v. Thompson* (1980) 27 Cal.3d 303, 315.) Because this type of evidence can be so damaging, '[i]f the connection between the uncharged offense and the ultimate fact in dispute is not clear, the evidence should be excluded.' (*Id.* at p. 316.)" (*People v. Daniels* (1991) 52 Cal.3d 815, 856.) "We review for abuse of discretion a trial court's rulings on relevance and admission or exclusion of evidence under Evidence Code sections 1101 and 352." (*People v. Cole* (2004) 33 Cal.4th 1158, 1195.)

> The Supreme Court has held that "[a]s long as there is a direct relationship between the prior offense and an element of the charged offense, introduction of that evidence is proper. [Citations.]" (*People v. Daniels*, *supra*, 52 Cal.3d at p. 857.)

(*People v. Butler* (2005) 127 Cal.App.4th 49, 60–61.)

> "[E]vidence of other crimes is inadmissible as regards guilt when it is offered solely to prove criminal disposition because the probative value of such evidence as to the crime charged is outweighed by its prejudicial effect. However, such evidence may be properly admissible if it is offered to prove a fact material to the charged crime and meets the general tests of relevancy as to such fact. '[T]he general test of admissibility of evidence in a criminal case is whether it tends logically, naturally, and by reasonable inference, to establish any fact material for the people or to overcome any material matter sought to be proved by the defense.' [Citations.]"

(*People v. Manson*, *supra*, 61 Cal.App.3d at p. 130 (*Manson*), quoting *People v. Durham* (1969) 70 Cal.2d 171, 186.)

C. The Firearms Evidence Was Relevant To Show Planning And Conspiracy

Appellants argue that all of the firearms evidence was irrelevant because it did not help prove "who was involved in the events of May 20, 1992, what their intent was in going over to 5223 Elm, or what actions they took there or elsewhere after the homicides." (COB 113; BOB 379.) They also argue the evidence was not relevant because there was no similarity between the firearms evidence and the weapons used in the murders; it was not admissible to impeach appellants; and it was not admissible to rebut appellants' testimony. (COB 113–114; BOB 379.) However, none of these arguments were put forth at trial to justify introduction of the firearms evidence.

The prosecutor argued that appellants' collection of guns and military gear corroborated testimony that the assailants acted like they were carrying out a military operation. And if it was executed that way, it was more likely to be

planned rather than spontaneous. As appellants belatedly acknowledge, LaMarsh and Willey argued that the evidence helped prove there was no conspiracy because, if there had been one, they would have taken the more lethal and effective weapons at their disposal. (COB 116–117; BOB 379; see 15 RT 2762; 30 RT 5194; 31 RT 5481–5482; 37 RT 6665–6666, 6686.)

All four defendants claimed that there was no conspiracy to go to the Elm Street house and kill people. LaMarsh and Willey added that if there were such a plan, they were not told about it. To prove that there was no such plan, LaMarsh and Willey elicited evidence that Cruz, Beck, and Vieira had a substantial stockpile of firearms and other weapons which were far better suited to such a plan than the knives and bats that they took to the murder scene. Contrary to appellants' argument, evidence of the firearms was relevant and admissible to demonstrate the lack of a conspiracy. The evidence was not more prejudicial than probative, and the trial court acted within its discretion because the evidence was not admitted merely to establish appellants' criminal propensity. (Evid. Code, § 352; *People v. Harris*, *supra*, 71 Cal.App.3d at p. 964.)

It is natural to assume that if a group planned to attack a house full of people and kill those people and any witnesses, they would take along the most effective weapons they had. According to appellants, they believed that Raper had enlisted a motorcycle gang to kill everyone at the Camp that night. So it would be reasonable to expect that the gang might be with Raper. Thus, it was not too great a leap to infer that if appellants intended to attack the Elm Street house, they would have brought firearms. Conversely, evidence that appellants had numerous firearms, but did not bring them, was probative that there was not a conspiracy. Accordingly, the trial court acted within its discretion to admit that evidence. (See *People v. Harris*, *supra*, 71 Cal.App.3d at p. 964.)

Though this was the main justification for admitting the evidence below, appellants barely address it. Appellants argue, "To the extent, arguendo, that [the theory the firearms showed there was no plan to commit murders] justified any evidence about the availability of firearms, the evidence which the trial court allowed went substantially further than was necessary to make that point." (COB 117; BOB 379.) However, appellants exaggerate the amount of firearms evidence that was admitted by repeatedly citing the same evidence paragraph after paragraph. (COB 98–101; BOB 379.) Indeed, appellants essentially summarize all of that evidence in the first paragraph of their review, and merely refer to that evidence again and again to give the impression that it was a significant part of the trial. (*Ibid.*) It was not. In a trial that lasted almost two months, a few witnesses' brief descriptions of the group's firearm collection was not excessive or cumulative.

Though Cruz's attorney conceded that some evidence of appellants' firearms was relevant and admissible (15 RT 2762 ["I certainly think that it can be brought out that guns were found, that the defendants had guns"]), appellants make no distinction between evidence that was admitted without objection and evidence that was admitted over objection. Similarly, appellants attempt to inflate the gravity of the admitted evidence by repeatedly referring to questions about firearms that resulted in sustained objections.

For example, appellants argue that LaMarsh's counsel "questioned LaMarsh as to whether there was a 'LAWS rocket.' Although appellant's relevance objection was sustained, LaMarsh described, in answer to his counsel's question, that appellant had 'a plastic tube and a smaller tube with balsa wood fins on it, a thing on the head . . . a rocket on the back." (COB 99, citing 32 RT 5616–5617; BOB 379.) By this, appellants seem to imply that the answer was admitted. It was not. Since the objection was sustained, the evidence was excluded. Moreover, appellants cannot complain on appeal about sustained

objections because they did not ask the trial court to admonish the jury. (*People v. Carter* (2003) 30 Cal.4th 1166, 1207; *People v. Stitely* (2005) 35 Cal.4th 514, 559, fn. 21.) Furthermore, a week before the question about LAWS rockets was asked, the trial court instructed the jury that it should disregard questions in which the objection was sustained. (30 RT 5229–5230 ["Ladies and gentlemen, when an objection is sustained you are to disregard either the question that was asked or if an answer was given, also the answer."].) Prior to deliberations, the trial court also gave the standard instruction on disregarding questions and answers to sustained objections. (36 RT 6470; CALJIC No. 1.02.) Since this court presumes that the jury followed the trial court's instruction, it should presume there was no prejudice. (See *People v. Welch* (1999) 20 Cal.4th 701, 773, overruled on other grounds in *People v. Blakeley* (2000) 23 Cal.4th 82, 89, 96.)

Further, evidence that the group decorated their area with military netting, had masks for paintball "war games," usually wore camouflage clothing, frequented gun supply stores, and owned a large collection of weapons was relevant to validate the testimony of eyewitness William Duval. (20 RT 3397, 3402; 21 RT 3562, 3638, 3665–3669, 3687, 3694; 24 RT 4314; 29 RT 5075–5076, 5113; 30 RT 5254; 34 RT 5963; see 19 RT 2689.) Duval testified that he saw four men leave the Elm Street house at the same time. They trotted single-file, "double-time" or "dogtrot" west towards the railroad tracks, and "[t]hey were holding their hands at port arms position." (19 RT 3325, 3328.) That evidence was important to prove the conspiracy since it showed they were operating in concert. The fact that they acted in military-style rather than haphazardly disproved appellants' claim that the violence happened spontaneously. Cruz denied carrying his cane (or anything else) at port arms position, and claimed he returned to the car only with Beck to the side of him. (29 RT 5107–5109; 30 RT 5271.) But evidence that the group frequented gun

stores, collected weapons, routinely dressed in camouflage clothing, and decorated their compound with camouflage netting gave credibility to Duval's testimony. (See 44 RT 8079 [in Beck's penalty trial, his expert referred to the Camp as a compound].) As the prosecutor argued, "Bill Duval, says that he sees the four people dogtrotting single file down Mason Avenue towards the railroad tracks, military-type formation, port arms, that type thing. Fits right in with the militaristic organization." (37 RT 6736.) That was probative of the conspiracy, which was not only relevant to the conspiracy charge, itself, but as vicarious liability for the four murder charges.

Cruz's trial counsel conceded that evidence that Cruz and his group had firearms was relevant. (15 RT 2761.) On appeal, however, appellants claim that LaMarsh and Willey's justification was a pretext as shown by the fact that neither one argued that theory in closing argument. (COB 117; BOB 379.) But during his opening statement, LaMarsh's counsel asserted that Cruz's cache of firearms explained why LaMarsh was not concerned when he saw that the others had bats and knives when they headed to the Elm Street house. (31 RT 5481–5482.) Similarly, during closing argument, Willey's attorney argued that Cruz, Beck, and Vieira had an "arsenal" at their disposal, but did not take any firearms because they did not want to alert the others that they were going to commit murders. (37 RT 6665–6666; see also 37 RT 6686 [Willey's counsel argued that Willey did not have a weapon because he did not know about the conspiracy to kill].) Willey's counsel made a reasonable argument that if the goal was to commit murders without drawing the attention of neighbors, the easiest way to do that would have been to kill the victims as quickly as possible, i.e., with firearms. Similarly, counsel argued that the decision not to take firearms would leave the group ill prepared to handle the situation if there were many people at the house. (37 RT 6665.)

The arguments that the conspiracy was incompatible with the knives and bats that the group took to the murder scene were grounded in inferences that were possible only with evidence of the availability of appellants' numerous firearms. As the evidence demonstrated, the assailants did not know who or how many people would be present in the Elm Street house when they attacked. As it was, one person (Donna Alvarez) escaped. If the assailants had been outnumbered, more targets would have inevitably escaped or called for help. Therefore, it was logical to argue that Cruz's weapons trove proved there was no plan to commit murders because one would expect that people who have easy access to highly effective weapons would use them when going into an unknown and deadly situation. Given the evidence of Raper's aggressiveness and LaMarsh's belief that Raper stole his gun, the group certainly would have been justified in suspecting that Raper might have a firearm. Evidence that Cruz's group brought only bats and knives–even though there was a reasonable chance they would encounter armed opposition–was probative of there not being a plan of attack.

Appellants argue that several questions concerning converting or possessing automatic weapons were irrelevant to even the theory put forth by LaMarsh and Willey. (COB 117; BOB 379; see 30 RT 5194.) But if the point was to show how much easier they could have committed the crimes with more advanced weapons, then that theory was indeed advanced by such evidence. If it had been established that appellants had automatic firearms, then it would suggest there was no plan to attack the Elm Street house because such weapons would have been far more effective than knives and bats.

Appellants argue that the evidence was more prejudicial than probative under Evidence Code section 352 because it "was overwhelmingly cumulative, and presented in a manner which suggested to the jury that appellant[s] w[ere] 'gun nut[s],' or [] survivalist[s] . . . ." (COB 118; BOB 379.) However, as

LaMarsh and Willey contended, evidence that appellants owned many firearms–but did not take any to the house–also cut the other way. It was probative of there not being a conspiracy. Moreover, even if the arsenal did suggest that appellants were "gun nuts," that inference was mitigated by the fact that they did not bring guns to the Elm Street house and the evidence suggested that all of the weapons were owned legally. Appellants' collection of semiautomatic assault rifles did not prove they had a propensity for violence. On the contrary, the conspiracy to kill several people was the perfect opportunity for "gun nuts" to use those weapons. Since appellants did not bring them, it suggested either there was no conspiracy or appellants were not so fanatical about their guns.

In any case, as discussed above, evidence that appellants had many firearms which they did not use was relevant, and its probity was not "substantially outweighed by the probability that its admission [would] . . . . create substantial danger of undue prejudice." (Evid. Code, § 352.) The prejudice referred to in Evidence Code section 352 is "not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence." (*People v. Karis* (1988) 46 Cal.3d 612, 638.) Rather, evidence is unduly prejudicial within the meaning of section 352 if it "'uniquely tends to evoke an emotional bias against the defendant as an individual . . . .'" (*Ibid.*, quoting *People v. Yu* (1983) 143 Cal.App.3d 358, 377.) Here, there was no evidence that any of the weapons were illegal. Appellants were engaged in the lawful and commonplace pursuit of gun and weapons collecting. They may have gone further than many gun collectors, but they broke no laws and did not hurt anyone with their firearms. Therefore, the evidence could not have inflamed the jury against them and it was not substantially more prejudicial than probative. (See Evid. Code, § 352.)

Nevertheless, appellants argue the firearms evidence was prejudicial because it suggested criminal propensity. (COB 119; BOB 379.) However, engaging

in a legal activity does not prove propensity to commit criminal activity or violence. Moreover, only LaMarsh took a gun to the Elm Street house, and the uncontradicted evidence was that appellants did not know LaMarsh had that gun. Further, no guns were fired during the attack. So any suggestion that appellants' firearms collection proved their propensity for violence was mitigated by the fact that, given the "perfect" opportunity to use those guns, they did not.

In addition, a state court's application of ordinary rules of evidence–including the rule stated in Evidence Code section 352–generally does not infringe upon defendants' federal constitutional rights. (*People v. Benavides* (2005) 35 Cal.4th 69, 91 ["generally, violations of state evidentiary rules do not rise to the level of federal constitutional error"]; *People v. Cornwell* (2005) 37 Cal.4th 50, 82.) Therefore, appellants cannot prove their due process rights were violated.

D. Evidence Regarding Cruz, Beck, And Vieira's Relationship Was Relevant To Prove The Conspiracy

Appellants argue that none of the evidence of their relationship with each other and Vieira had any tendency to prove that they conspired with anyone to commit murder. (COB 119; BOB 379.) Appellants are mistaken. Evidence that the assailants lived together, ate together, worked together, shared their money, had an initiation ritual, and enforced a command hierarchy was probative of whether they committed the murders spontaneously–or by design.

Specifically, the evidence showed that Cruz, Beck, and Vieira had a close relationship that far surpassed typical friendships (29 RT 5013, 5015, 5135; 31 RT 5541; 32 RT 5601–5602); they worked together and pooled their money (29 RT 5017; 30 RT 5288; 31 RT 5563;); they lived together for years (29 RT 5014–5015; 30 RT 5288); and they all participated in prior serious confrontations with two of the victims–Raper and Colwell (15 RT 2724; 20 RT

3398–3399; 21 RT 3586–3587, 3710; 23 RT 4073–4082; 24 RT 4191–4193). Moreover, all of the defendants admitted they were at the Elm Street house while the murders were committed (29 RT 5068–5069; 30 RT 5297–5304; 32 RT 5636; 34 RT 5982–5983); witnesses testified that Vieira always did what Cruz and Beck told him to do (24 RT 4312–4313;31 RT 5543–5544, 5560–5564; 32 RT 5600–5601; 34 RT 5960–5961; see *Vieira*, *supra*, 35 Cal.4th at p. 307, conc. and dis. opn., J. Kennard [evidence in Vieira's trial showed that Vieira killed Paris after Cruz handed him his knife and ordered Vieira to make Paris shut up]); and Cruz and Beck both implied in their testimony that Vieira killed Colwell (29 RT 5089, 5099, 5104; 30 RT 5305, 5352). Taken together, this evidence was probative that the murders were planned.

As discussed in Argument I, it was appropriate to prove the conspiracy with evidence of the conspirators' close relationship prior to committing the crimes. The existence of a conspiracy "may be established through the use of circumstantial evidence. [Citations.] They may also '"be inferred from the conduct, relationship, interests, and activities of the alleged conspirators before and during the alleged conspiracy."'" (*People v. Herrera*, *supra*, 83 Cal.App.4th at p. 64.) As the court stated in the infamous Charles Manson trial in which the defendants were charged with conspiracy to commit murder, "The very nature of this case and the theory of the prosecution *compel* reference to circumstantial evidence of the conduct and relationship of the parties." (*Manson*, *supra*, 61 Cal.App.3d at p. 126, italics added.) Here, evidence that Cruz, Beck, and Vieira operated as a cohesive unit, living and working together, and visiting gun shops, were all relevant to prove the conspiracy, and appellants' argument that it was prejudicial to prove that they were "tied" together is incorrect. (See *ibid.*)

Appellants contend that the evidence regarding their relationship with each other and Vieira constituted character evidence and they complain that Willey and LaMarsh "attempt[ed] to establish that the group was a cult . . . ." (COB 122.) However, the vast majority of such evidence was excluded from the guilt trial–as demonstrated by the penalty trials. The trial court repeatedly excluded evidence that they were a cult or had occult practices or were white supremacists or that Cruz was a spiritual leader. (2 RT 353; 24 RT 4316; 29 RT 5153; 31 RT 5506–5507, 5585; 32 RT 5613; 33 RT 5946; 34 RT 5954.) More importantly, as the trial court observed, the evidence was not character evidence. It was relevant to establish the intent to commit a conspiracy, and its admissibility was properly evaluated under Evidence Code section 352. (21 RT 3620–3621.)

Moreover, appellants had no statutory or constitutional right to exclude evidence that they had influence over Vieira when that was relevant to show that Cruz devised the conspiracy and appellants led the execution of the conspiracy.[18] The *Manson* case is instructive. There, the trial court admitted evidence that Manson commanded his "family" to perform bizarre sexual acts. (*Manson, supra*, 61 Cal.App.3d at p. 130.) "To amplify the extent of Manson's

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18. In *Vieira, supra*, 35 Cal.4th 264, this Court summarized similar evidence from Vieira's guilt trial: "Cruz was the acknowledged leader of this informal group. Beck was generally in charge of discipline. Everyone in the group pooled their money. Ron Willey was also associated with the group, but did not live at the Camp during the relevant time period. Defendant held a low status within the group. Michelle Evans, who was also involved in the group and was for a time LaMarsh's girlfriend, testified that defendant was a 'slave' to the other members of the group, and was given such tasks as cooking, bathing Cruz's children, and undertaking various repairs. According to her testimony, defendant was beaten by Beck, at Cruz's order, for various deficiencies in his work. He was also given the task of guarding the camp late into the night, as well as often spending days doing construction work." (*Id.* at p. 274, footnote omitted.)

influence on the Family, testimony of certain sexual activities was presented." (*Ibid.*) The court concluded:

> Although the evidence concerning these events was indeed dramatic, it nevertheless reasonably tended to show Manson's leadership of the Family, the inference being that if Manson could induce bizarre sexual activities, he could induce homicidal conduct. While the evidence is less than flattering, its prejudicial character is outweighed by its evidentiary value showing Manson's involvement in the murders.

(*Id.* at p. 131, footnote omitted.) By the same token, here, evidence that Cruz controlled Beck, and both appellants controlled Vieira, was relevant to show that they "could induce homicidal conduct." (See *ibid.*) The sexual acts described by the *Manson* court were far more likely to induce the jury to find that Manson had a bad character. But that evidence was still admissible because it proved that he likely had a leading role in instigating the murders. (See 42 RT 7651–7653 [during Beck's penalty trial, Perkins admitted he told a defense investigator that appellants directed Vieira to sodomize him; he also testified that Cruz directed Perkins to have sex with Starn while Cruz was incarcerated].) Likewise, evidence that Cruz and Beck could control Vieira and the others was relevant and admissible to prove that appellants were not passive bystanders during the murders, but rather they were likely to have controlled the conspiracy from start to finish. (See 24 RT 4200, 4207–4211 4215, 4218 [Evans testified that Cruz had her draw a map of the Elm Street house, told the others the plan of attack, and handed out weapons]; 34 RT 5983 [Willey testified it was Cruz who announced it was time to go to the Elm Street house]; 29 RT 5069, 5079 [Cruz admitted he drove the assailants to the Elm Street house and dropped off Evans and LaMarsh at the front door]; 29 RT 5102 [Cruz testified he said to Vieira, "'Let's go.'"]; 29 RT 5095; 42 CT 10700 [Cruz motioned with his hand to leave]; 30 RT 5291 [Beck testified that he

went to Ceres and picked up Willey]; 34 RT 6000 [Willey testified that Cruz told him when it was time to go].)

As the *Manson* court observed, "At trial . . . . [a]n *enormous amount of evidence* bearing on the societal association between Manson, Atkins, Krenwinkel, Van Houten and certain third persons was introduced [to prove the conspiracy]. The scope of these relationships in terms of time and intensity is germane." (*People v. Manson, supra*, 61 Cal.App.3d at p. 126, italics added.) "The very nature of this case and the theory of the prosecution compel reference to circumstantial evidence of the conduct and relationship of the parties." (*Ibid.*) The evidence at trial showed that, "[w]ithout doubt, Manson was the leader of the Family. The scope of his influence ranged from the most simple to the most complex of matters. He decided where the Family would stay; where they would sleep; what clothing they would have, and when they would wear it; when they would take their evening meal; and when they would move." (*Manson, supra*, 61 Cal.App.3d at p. 127; cf *Vieira, supra*, 35 Cal.4th at p. 306, conc. and dis. opn., J. Kennard ["Defendant acted as the cult's "slave," doing household chores, cooking, bathing Cruz's children, acting as a handyman, and staying up at night to guard the cultists' camp. He sought Cruz's permission for even the most trivial of matters."].) The court observed, "Manson's position of authority was firmly acknowledged. It was understood that membership in the Family required giving up everything to Manson and never disobeying him. His followers, including the co-appellants, were compliant. They regarded him as infallible and believed that he was a 'God man' or Christ. Family member Danny DeCarlo testified that each co-appellant said that 'Charlie sees all and knows all.' Kasabian was told by the others 'We never question Charlie. We know that what he is doing is right.'" (*Manson, supra*, 61 Cal.App.3d at p. 128.) The court further noted that evidence was properly admitted that Manson decided who his followers had sex with, prohibited children from being cared

for by their parents, and ordered a gang rape of a 16-year-old girl and the oral copulation of a woman. (*Manson, supra*, 61 Cal.App.3d at pp. 127–129.)

As was evident in the penalty phase trials of the current matter, similarly offensive evidence was available for the guilt phase trial–particularly the torture and sexual manipulation of Vieira and Perkins and Cruz's repeated abuse of his girlfriend and eldest daughter. But the trial court excluded the vast majority of this evidence from the guilt phase.[19] If there was no error in admitting extensive evidence that Manson was the leader of a deranged cult; exercised absolute control over his followers; and required them to perform bizarre sexual acts, including rape; then there could not have been any error in admitting a few brief references to the tightknit quality of Cruz's group; appellants' leadership position; and Vieira's subservient role. Moreover, in *Manson*, the court found that the trial court properly admitted evidence that Manson convinced his followers that he was a Christ figure; that there would be a race war between the whites and blacks; that it was their role to instigate the war; and that he would redeem the white race after the war. (*Manson, supra*, 61 Cal.App.3d at pp. 128–130.) Here, on the other hand, the trial court excluded evidence that

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19. This Court is already familiar with the type of evidence that could have been admitted in appellants' trial. Justice Kennard's concurring and dissenting opinion in *Vieira* described Vieira's role in Cruz's group: "[D]efendant was 21 years old and a submissive member of an occult, satanic cult headed by codefendant Gerald Cruz. Defendant was subjected to a process of mind control that included regular sleep deprivation, severe physical punishment, sexual humiliation, and minimization of contact with his family. Defendant acted as the cult's 'slave,' doing household chores, cooking, bathing Cruz's children, acting as a handyman, and staying up at night to guard the cultists' camp. He sought Cruz's permission for even the most trivial of matters. Defendant's diary showed that he had internalized many of Cruz's values: Defendant wrote of the desire to sacrifice himself so that Cruz's health would improve and he expressed gratitude for Cruz being 'merciful' when Cruz refrained from having him beaten." (*Vieira, supra*, 35 Cal.4th at pp. 306–307, concurring and dissenting opn. by Kennard, J.) Virtually none of this evidence was admitted into appellants' guilt trial.

Cruz was a spiritual leader, had a religious philosophy called "The Cause," and espoused a type of white supremacy. Thus, appellants' trial was far more sanitized than the court found proper in *Manson*.

Evidence that Cruz always told Beck and Vieira what to do was relevant to prove a conspiracy in which it was alleged that Cruz told the other conspirators what to do. That did not prove that Cruz had a criminal propensity; it proved his intent (as well as Beck and Vieira's) to join a conspiracy. Moreover, the trial court instructed the jury that prior acts evidence could not be used to infer criminal disposition, but only to determine whether an element of the crime charged had been proven. (36 RT 6480–6481; CALJIC No. 2.50.) Since this Court presumes the jury followed the trial court's instructions, it should presume the jury did not use the prior acts evidence in an improper fashion. (See *People v. Pinholster*, *supra*, 1 Cal.4th at p. 919.)

Moreover, as this Court stated in *People v. Wilson*:

> CALJIC No. 2.50 limited the jury's use of the other crimes evidence to the issue of identity and emphasized that the jury was "not permitted to consider such evidence for any other purpose." We conclude that the evidence of solicitation here was "so highly relevant to the central issue, . . . that there was little, if any, danger that the jury would consider such evidence for any of the improper purposes proposed by defendant, including general criminal disposition."

(*People v. Wilson* (2005) 36 Cal.4th 309, 328, quoting *People v. Bunyard* (1988) 45 Cal.3d 1189, 1226.) Similarly, here, evidence of the group's close relationship was so highly relevant to the conspiracy charge that there was little danger the jury would use it to infer general criminal disposition. (See *ibid.*)

Nor was the evidence more prejudicial than probative under Evidence Code section 352. As discussed at length above, very little of the available evidence was actually admitted during the guilt phase. Moreover, there was no doubt that appellants armed themselves and drove to the Elm Street house at midnight; and at least some member of the group committed the murders using, among

other things, Cruz's baton. Therefore, the main issue at trial was who committed the murders and whether there was a conspiracy to commit the murders. Since there was so much conflicting evidence, the prosecution's most persuasive ground for conviction was joint liability based on the conspiracy theory. Thus, evidence of the conspiracy was very important to the prosecution's case, and evidence of the defendants' close relationship was very probative.

On the other hand, evidence of the closeness of Cruz's group was not particularly prejudicial. The evidence was brief relative to a two-month trial. Little of the evidence was criminal in nature. The evidence that Cruz ordered Beck to punch Vieira was cursory. There was no possibility that the jury convicted appellants of four counts of first degree murder to punish them for prior acts. And the evidence was not so inflammatory that it caused the jury to convict appellants because of their bad character. (See *People v. Karis*, *supra*, 46 Cal.3d at p. 638 [Evidence Code section 352 refers to prejudice from evidence that uniquely evokes an emotional bias against the defendant].) Accordingly, the trial court acted within its discretion because the evidence was not more prejudicial than probative. (See *People v. Jablonski*, *supra*, 37 Cal.4th at p. 805.)

Appellants claim the trial court deprived them of due process and a fair trial by erroneously weighing the relative probity and prejudice of the evidence. (See COB 124; BOB 379.) But since the trial court's analysis and rulings were reasonable, there was no constitutional error. (*People v. Benavides*, *supra*, 35 Cal.4th at p. 91.) Moreover, appellants cannot show that they had a constitutional right to exclude evidence of the relationship they had with each other and others they enlisted to carry out multiple murders.

E. The Trial Court Properly Denied Appellants' Motions For Mistrial

Appellants claim that the trial court erred by denying their motions for mistrial based on the admission of evidence regarding their firearms and their relationship with Vieira. However, appellants never cite to the record or otherwise identify what motions for mistrial they are referring to. (COB 125–126; BOB 379; see Respondent's Argument XXII-A [mistrial motion concerning Willey's attorney's comment that Cruz's attorney should not have had Cruz testify if he did not want Cruz to answer questions].) As discussed above, appellants did move for mistrial on a couple of occasions. The first time concerned a specific remark by Willey's counsel–not anything to do with firearms or appellants' relationship with Vieira. (30 RT 5220–5221.) The second time regarded when Willey's attorney asked McLaughlin if she was afraid of the defendants and asked about Beck's occult and religious practices. (31 RT 5563, 5584.) However, as the trial court noted, it sustained objections to all of those questions. (31 RT 5585.) Since appellants did not ask the trial court to admonish the jury, they have no basis to complain on appeal.

More importantly, appellants offer no rationale or authority to bootstrap their current argument onto those motions for mistrial. Those motions addressed very specific questions by counsel which either did not relate to the current issue, or in which the objection was sustained.

This Court reviews the denial of a motion for mistrial under the abuse of discretion standard. (*People v. Cunningham*, *supra*, 25 Cal.4th at p. 984.) A motion for mistrial is directed to the sound discretion of the trial court. "A mistrial should be granted if the court is apprised of prejudice that it judges incurable by admonition or instruction. [Citation.] Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the

trial court is vested with considerable discretion in ruling on mistrial motions." (*People v. Haskett* (1982) 30 Cal.3d 841, 854.)

Here, appellants' mistrial motions dealt only tangentially with the issues raised in the current argument. So the trial court could not have erred by failing to address issues not raised until this appeal. (*People v. Hardy, supra*, 2 Cal.4th at p. 167 [the determination of whether the trial court abused its discretion is limited to the evidence available at the time of the ruling].) Moreover, as discussed above, the firearms and relationship evidence was relevant and not overly prejudicial. Thus, to the extent appellants' current argument has anything to do with their motions for mistrial below, appellants cannot show that the trial court abused its discretion. (See *People v. Haskett, supra*, 30 Cal.3d at p. 854.)

F. The Trial Court Properly Instructed The Jury On The Use Of Prior Acts Evidence

The trial court instructed the jury pursuant to CALJIC No. 2.50. (36 RT 6480–6481.) Appellants contend the improper firearms and relationship evidence was "compounded" by this instruction. (COB 126; BOB 379.) But this Court has found that CALJIC No. 2.50 "'was and is a correct statement of the law.'" (*People v. Wilson, supra*, 36 Cal.4th at p. 328, quoting *People v. Linkenauger* (1995) 32 Cal.App.4th 1603, 1615.) Moreover, this Court has held that this instruction *protects* defendants by prohibiting the jury from using other acts evidence to find propensity. (See *People v. Wilson, supra*, 36 Cal.4th at p. 328.)

Nevertheless, appellants contend that the instruction "heightened the prejudicial effect of this improper evidence" because the trial court modified it so instead of referring to "other crimes," it referred to "acts similar to those

constituting crimes other than that for which he is on trial."[20] (COB 126; BOB 379.) Appellants claim the instruction misled the jury to regard the firearms evidence and appellants' treatment of Vieira as prior criminal acts. However, as appellants concede, "there was no evidence that appellant's possession of various weapons violated any laws . . . ." (COB 126; BOB 379.) Therefore, is it pure speculation that the instruction caused the jury to conclude that possession of those weapons was similar to committing a crime. (*Ibid.*) Nor do appellants explain how the minor change in the instruction, which this Court has found prevents juries from using such evidence to find criminal propensity, somehow "heightened the prejudicial effect of . . . improper evidence . . . ." (COB 126; BOB 379.)

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20. The trial court instructed the jury as follows:

"Evidence has been introduced for the purpose of showing that one or more of the defendants committed acts similar to those constituting crimes other than that for which he is on trial.

Such evidence, if believed, was not received and may not be considered by you to prove that the defendant is a person of bad character or that he has a disposition to commit crimes.

Such evidence is received and may be considered by you only for the limited purpose of determining if it tends to show:

The existence of the intent which is a necessary element of the crime charged.

The identity of the person who committed the crime, if any, for which the defendant is accused.

A motive for the commission of the crime charged.

The defendant had knowledge or possessed the means that might have been useful or necessary for the commission of the crime charged.

The crime charged is a part of a larger continuing plan, scheme, or conspiracy.

The existence of a conspiracy.

For the limited purpose for which you may consider such evidence, you must weigh it in the same manner as you do all other evidence in the case.

You are not permitted to consider such evidence for any other purpose." (36 RT 6480–6481.)

Similarly, appellants contend that the instruction persuaded the jury to improperly use evidence that Cruz ordered Beck to hit Vieira; evidence that Cruz and Beck treated Vieira as a slave; and evidence that Cruz and Beck controlled the group's money. But, again, appellants do not explain how an instruction that told the jury it could not use evidence to find propensity somehow misled the jury to do just that. Moreover, even if these acts were "similar to those constituting crimes," the instruction helped appellants by directing the jury to use that evidence only as it related to specific proper purposes and that it was "not permitted to consider such evidence for any other purpose." (36 RT 6481.)

As discussed at length above, the instruction was appropriate because the evidence was relevant to prove the intent to join the conspiracy. Appellants also concede the instruction properly directed the jury to consider this evidence to find the defendants were in "possession of the means useful or necessary for the commission of the crime." (COB 127; BOB 379.) In addition, all of the other elements and factors addressed by the instruction related to other prior acts evidence. For example, several acts were not only similar to crimes, but were similar to the actual crimes charged, including the same perpetrators and two of the same victims: LaMarsh assaulted Raper's trailer with his bat; LaMarsh beat-up Raper after accusing him of stealing his gun; Beck towed Raper's trailer away from the Camp and someone from the group burned Raper's car; and Cruz's group caught Colwell, pulled him from his car, and beat him. Accordingly, there can be no doubt that the instruction was necessary and properly given. (See *People v. Wilson*, *supra*, 36 Cal.4th at p. 328.)

G. Any Error In Admitting The Firearms And Prior Acts Evidence Was Harmless

Appellants claim that admission of the firearms and relationship evidence was prejudicial error that requires reversal of the judgments. Though they

concede that they were present at the Elm Street house at the time of the murders, appellants claim the only evidence of Cruz's actual participation in the killings was the questionable testimony of eyewitnesses Earl Creekmore and Kathy Moyers that Cruz cut Ritchey's throat. Further, appellants contend this evidence was undermined by Willey's testimony that *Beck* cut Ritchey's throat. The prosecutor's theory, however, was that Beck stabbed and killed only *Colwell*. Thus, appellants conclude that the jury must have based its murder convictions on the theory that they were involved in a conspiracy. (COB 129; BOB 379.) Though it is true that there was not evidence that appellants personally killed every victim; and the jury did find them guilty of all the murders plus conspiracy; appellants are incorrect that the conspiracy theory was somehow tenuous or weak.

Appellants ignore a great deal of evidence. Rather than repeating itself, Respondent asks this Court to refer to Arguments VII-A-2 and XXV for a detailed discussion of all the evidence supporting the conspiracy convictions. Here, Respondent will briefly respond to appellants' specific claims.

Appellants claim that Creekmore and Moyer's identification of Cruz was unreliable. However, both witnesses' descriptions of Cruz and Willey accurately described their physical appearance. In particular, they both indicated that one of the assailants attacking Ritchey was quite large, and the other one had a ponytail; and they both testified that Cruz and Willey appeared to be the persons they saw. (17 RT 2931–2937, 2941; 20 RT 3413–3427, 3436–3437, 3467.) Even Cruz conceded that he saw someone watching the assault on Ritchey, and it was probably Creekmore. (29 RT 5127.) Willey also testified that Creekmore walked up to him while he was fighting Ritchey. (34 RT 5994.) In addition, Creekmore and Moyers' testimony was corroborated by Evans, who testified that she heard Cruz tell Willey to get Ritchey; that she saw Cruz bend over and do something to Ritchey, and that a few minutes later she

saw that Cruz had blood all over him. (24 RT 4239, 4242, 4245, 4247, 4419.)

Appellants complain that LaMarsh and Willey "disingenuously" sought to enter the firearms and relationship evidence on the pretext of proving they were not involved in any conspiracy, but actually sought to introduce that evidence to prove appellants' bad character. (COB 117; BOB 379.) But later, appellants complain that the jury's verdicts "track[ed] LaMarsh's and Willey's use of the evidence, including its improper use to establish a separate, secret conspiracy." (COB 131; BOB 379.) Appellants cannot have it both ways. If the evidence persuaded one or two jurors that LaMarsh and Willey were not part of the conspiracy, then that evidence must have been probative in just the way LaMarsh and Willey argued it would be. But if all it did was prove appellants' bad character, then that would not be a reason to find LaMarsh and Willey not guilty. In short, the evidence had probative value and was, thus, not likely to be substantially more prejudicial than probative. (See Evid. Code, § 352.)

Furthermore, even if some jurors believed that the firearms and relationship evidence added credibility to LaMarsh and Willey's claim that they were not part of the conspiracy, that does not mean that evidence played any role in convincing the jury that appellants were in on the conspiracy. Appellants overlook the fact that they testified that they had known and lived with each other and Vieira for years. But they had known LaMarsh (and Evans) for only a few weeks, and Willey lived in another town. (29 RT 5014–5018; 30 RT 5288, 5291; 30 RT 5375 [Beck testified it took an hour to drive to Ceres and return with Willey]; see also 20 RT 3492; 23 RT 4007; 24 RT 4247.) Therefore, it was self-evident that Willey, Evans, and LaMarsh were not as close to appellants and Vieira. So even if one or two jurors had some doubt that LaMarsh and Willey were part of the conspiracy, that did not diminish the evidence that appellants were so close that it was likely they conspired together. (See 38 RT 6905 [one juror voted to find Willey not guilty of conspiracy, and

two jurors voted that way for LaMarsh].)

Moreover, the holdout jurors may have simply found LaMarsh and Willey's testimony more credible. For example, Willey admitted that he beat Ritchey and had blood all over his arms. (34 RT 5992–5994, 6099–6001.) His corroborated testimony that he told Cruz to take him home immediately after the crimes had the air of a statement made by someone who was not prepared for what had happened. (29 RT 5118; 32 RT 5663; 34 RT 6002.) Similarly, LaMarsh admitted that he pulled a gun on Ritchey and Paris, and that he broke Raper's arm with his bat. (32 RT 5650, 5654.) His corroborated testimony that he pounded the ground with his bat after he returned to the car also suggested that he had not been prepared for what had happened. (24 RT 4244; 32 RT 5651.) The holdout jurors may have found that Willey and LaMarsh's admissions and conduct made them more believable. On the other hand, Cruz admitted that he drove the assailants to and from the Elm Street house, but claimed he merely ran around the scene while the others committed four murders and he never touched a victim. Likewise, Beck admitted he punched Colwell three times, but claimed it was just to help Vieira. Appellants' claims that they never used their knives or Cruz's baton was not believable and the jury justifiably and unanimously rejected it.

Appellants argue that "character evidence played a substantial part in this trial," and claim that counsel for LaMarsh and Willey both disparaged appellants' characters with the challenged relationship evidence. (COB 130; BOB 379.) They offer no citation to the record, but refer back to Cruz's Argument I-B-1-d. However, in that discussion, the only such reference to appellants' character was LaMarsh's closing argument in which he stated that "there are three individuals that have been together for a number of years. They're very tight. And we know what kind of behavior they engaged in. One of them, Ricky Vieira, is the subject of abuse, the subject of degradation."

(COB 78, quoting 37 RT 6633; BOB 379.) As discussed above, evidence that appellants and Vieira were "tight" was probative of the conspiracy and was implicit in appellants' own testimony. As for the references to Vieira's abuse, it could not have been more brief.

In contrast to the overwhelming nature of the evidence against appellants, the firearms and relationship evidence was minor. A few witnesses briefly testified that Cruz, Beck, and Vieira had a tightknit relationship; Cruz told the others what to do; and appellants smacked Vieira around. Such group dynamics might have been unusual, but men who live together often adopt various roles, with some becoming more dominant and others becoming more submissive.

Finally, as discussed above, the trial court specifically instructed the jury not to use prior acts evidence to infer criminal propensity. In light of a two month trial with dozens of witnesses and numerous exhibits, it is not reasonably probable that appellants would have received more favorable results if the challenged evidence had been excluded. (See *People v. Felix* (1993) 14 Cal.App.4th 997, 1007–1008 [the "[e]rroneous admission of other crimes evidence is prejudicial if it appears reasonably probable that, absent the error, a result more favorable to the defendant would have been reached."]; *Watson*, *supra*, 46 Cal.2d at pp. 836-837.) As discussed above, the trial court did not abuse its discretion under Evidence Code section 352 by admitting the challenged evidence. Thus, there could have been no federal Constitutional violation. But even if there were, the evidence was so overwhelming–and appellants' defenses were so implausible–that any error was harmless beyond a reasonable doubt. (See *Chapman*, *supra*, 386 U.S. at p. 24.)

III.

THE TRIAL COURT PROPERLY EXCUSED FOR CAUSE JUROR DOBEL BECAUSE SHE STATED THAT HER VIEWS ON THE DEATH PENALTY WOULD SUBSTANTIALLY INTERFERE WITH HER ABILITY TO FUNCTION AS A JUROR

It is well established that a trial court may excuse a prospective juror when his views regarding capital punishment would substantially impair his ability to perform his duties as a juror. (*Wainwright v Witt* (1985) 469 U.S. 412, 424.) Here, the trial court excused prospective juror Dobel because she specifically stated that her feelings about the death penalty would substantially interfere with her ability to function as a juror. She also stated that those feelings might prevent her from finding the special circumstance allegation true; she did not believe she had the right to participate in the imposition of the death penalty; and the death penalty was never appropriate for first-time offenders. (See 41 RT 7367–7368 [Cruz testified in penalty trial that prior to this case, he had never been convicted of a felony and the only time he had been arrested was on a warrant for an outstanding traffic ticket]; 45 RT 8290 [trial court instructed Beck penalty jury that it could use lack of evidence of a prior felony as a factor in mitigation].) Nevertheless, appellants contend that the record does not show that Dobel's ability to function as a juror was impaired. (COB 133; BOB 379.) Appellants are wrong.

Dobel's responses were sufficient for the trial court to find that she would not abide by its instructions and she would not perform her duties as a juror. Since Dobel clearly indicated that she thought that capital punishment was wrong, and she was not willing or able to set aside her beliefs, the trial court properly excused her. Moreover, there was no need for the trial court to ask additional follow-up questions because Dobel's responses unequivocally

indicated that she could not be trusted to apply the law as given by the trial court.

In addition to the discussion below, Respondent also asks that this Court refer to its Arguments V-C, XIX-A, and XX for additional responses to appellants' arguments.

A. Procedural History

The trial court conducted voir dire from March 3, 1992, through March 23, 1992. (6 CT 1631, 1712.) After the trial the trial court lost or discarded most of the voir dire questionnaires. The record was almost completely reconstructed from trial counsel's records. However, a few questionnaires were never recovered–including the one filled-out by Dobel; and some of counsel's written follow-up questions were recovered. (10 RT 1858 [trial court noted that only Cruz submitted written follow-up questions]; 6 CT 1636–1673 [Cruz's follow-up questions]; 19 CT 4449, 4462, 4464, 4595; 42 CT 10710; see also stipulation to augment record with missing jury questionnaire approved by this Court on January 25, 2008.) However, the Reporter's Transcript of the entire jury voir dire is preserved. Presumably, this included many of the other written follow-up questions that were submitted by defense counsel. (See, e.g., 6 RT 1262 [prior to commencing voir dire, trial court indicated it would ask defense counsel's written follow-up questions]; 10 RT 1922–1923 [after Beck's counsel complained that the trial court had asked only some of the written questions submitted by Cruz, the trial court replied, "The Court feels that it has asked all of the follow-up questions necessary to assist counsel in exercising challenges to cause"]; see Argument XVIII-A [further examples of follow-up questioning by the trial court]; but see 42 CT 10710 [trial court's order settling the record found "it cannot be determined whether or not the questions asked were the questions actually submitted."].)

As for prospective Juror Dobel, the trial court read significant portions of her questionnaire answers into the record. The full text of the voir dire of Dobel follows:

> THE COURT: Q. Miss Dobel, I gather you were here a week ago Tuesday when I addressed the jurors–prospective jurors as a group?
>
> A. Yes, I was.
>
> Q. And do you believe what I said about the law that may apply to this case?
>
> A. Yes.
>
> Q. Were there any of those particular rules of law that you disagree with?
>
> A. No.
>
> Q. Would you hold it against a defendant if he chose not to testify in this case?
>
> A. No.
>
> Q. Would you automatically accept or reject the testimony of a witness who had entered into a plea bargain with the prosecutor simply because of that plea bargain?
>
> A. No.
>
> Q. Would you be able to view some unpleasant graphic slides or videos of human bodies?
>
> A. Yes.
>
> Q. Okay. Apparently, you were the victim of a crime at one time. About how long ago was that?
>
> A. October of '90.
>
> Q. And were you hurt during that?

A. Well, I was hit, but, no, I wasn't hurt badly at all.

Q. Was anybody caught or prosecuted?

A. No.

Q. Anything about that incident that would in any way affect your ability to be a fair and impartial juror in this case?

A. No.

Q. What type of law does your mother practice?

A. Special education law.

Q. And your stepfather also is an attorney?

A. Yes.

Q. What type of law does he practice?

A. At this time he's not practicing except for–well, rarely does he do any more legal practice, but he was involved with criminal law for quite a number of years during, I guess, the '70's and parts of the '80's, and then he moved into entertainment law after that.

Q. Was he a prosecutor or a defense attorney?

A. He was a defense attorney.

Q. Anything about that that would cause you to lean either towards the defense side or the prosecution side?

A. Well, probably not, although I was used to–he represented a number of people who were involved in police brutality cases, people who had been–people who were not police and being prosecuted. So I grew up in a[n] atmosphere where people in power in the law sometimes abuse their–their privileges.

Q. Assuming that you were asked to sit as a juror in a case in which there was no contention of any type of police brutality, do you think your father's type of practice would in any way affect your ability to be a fair and impartial juror?

A. No.

Q. THE COURT: What are your feelings about the death penalty?

A. I am against the death penalty.

Q. If called upon as a juror in this case or if you are selected as a juror in this case and the jury got to the place where the penalty was to be decided, and that if after hearing all the law and the evidence you felt that the death penalty was the appropriate disposition, would you be able to vote for it?

A. If I felt it was appropriate, yes. I guess the thing is whether or not I would believe it was appropriate.

Q. Do you believe there are any circumstances, any types of murders, where the death penalty could be appropriate?

A. Yes.

Q. Can you explain those, please?

A. Well, I–I'm not sure if I wrote it in the questionnaire. I think that somebody such as someone like Jeffrey Dahmer, if the death penalty had been appropriate in his case, I may be able to go with the death penalty. Severe human crimes, mass murders of numbers, lots of different people, and other, I guess, heinous circumstances involved would lead me to impose the death penalty; but it would have to be something very extreme and very severe. Otherwise, I really am not–I do not believe that the death penalty serves any purpose.

Q. Are your feelings about the death penalty so strong that you would never vote for first degree murder?

A. No.

Q. Are your feelings about the death penalty so strong that you would never find a special circumstance to be true?

A. Possibly.

Q. Are your feelings about the death penalty so strong that you would never impose a death penalty in any case whatsoever?

A. No.

Q. Are your feelings about the death penalty so strong that you would impose it in every case in which you had the opportunity to do so?

A. No.

Q. Do you believe your feelings about the death penalty are so strong that they would substantially interfere with your ability to function as a juror in this case?

A. Yes.

Q. Do you believe that a person who was convicted of successfully planning the murder of or murdering multiple victims should automatically receive the death penalty?

A. No.

Q. When you say you feel that your beliefs are so strong that it would substantially interfere with your ability to function as a juror in this case, can you explain that further to me?

A. Yes, I would be fine during the guilt phase of the proceeding; but once we got to the penalty phase, I'm sure that it would–it would take a lot–it would take really a serious leap of some sort–and I'm not sure I'd be able to make it–to impose the death penalty.

Q. Did you understand what I said about the factors of mitigation and the factors of aggravation and the situation

where–the only situation where a jury can only consider imposing the death penalty?

A. Yes.

Q. Do you understand that if you got to the penalty phase and you heard aggravating and mitigating factors and you decided that the mitigating factors outweighed the aggravating factors, you would have to impose the death penalty, you would have to impose life? Obviously, I assume would you agree with that.

A. Um-hmm.

Q. And you further understand that if they were essentially equal, you would still then again have to impose a life sentence?

A. Um-hmm.

Q. Do you understand that if the aggravating factors were so bad in comparison with the mitigating factors, that death was warranted, that you could impose the death penalty?

A. I understand.

Q. If you sat as a juror in this case where you were called upon to determine a penalty of life or death and the only evidence presented in the penalty phase were aggravating factors, bad things about the defendants, and they were very bad, would you be able to vote for the death penalty?

A. Well, when you say very bad, it would have to be very bad. I mean, it's a qualitative statement. What is very bad? You know, what's very bad to me is probably different from what's very bad to someone else, and we may have the same feelings about what is very bad, but I would still believe it was not to right to have a part in the death of someone else in this manner.

Q. In your last part of your answer that you don't believe that you have a right to take part in–let me see if I understood your last answer.

Is your belief such that you do not believe that you have the right to take part in a decision which would deprive a person of his life?

A. Yes.

Q. Do you believe that you could ever participate in a decision that would result in the taking of a person's life?

A. In a courtroom or –

Q. In a courtroom, yes.

A. Possibly, the case I mentioned before. It would have to be something very bad.

THE COURT: Okay. Mr. Brazelton?

MR. BRAZELTON: Your Honor, in light of case law on the subject and Miss Dobel's answers to Question Nos. 88, 108, 114, 116, 118, 122, 123, 127, 128, 129 and 130, the People would challenge Miss Dobel as a juror in this case. She's indicated both orally and in writing in her questionnaire in response to Question No. 130 that her verdict would be affected if she was asked to vote on the death penalty. She's indicated that her views would substantially interfere with her ability to function as a juror in this case.

And I cite the Court to the case of *Wainwright versus Witt*,[21] and it's pro[geny]. The People would exercise–or, I'm sorry, would excuse Miss Dobel.

THE COURT: Mr. Amster?

MR. AMSTER: Your Honor, I strongly object to that challenge. I feel that this juror has stated the proper things that passes her for cause. She has given an example to the Court where she would vote for the death penalty. I think that the

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21. *Wainwright v. Witt, supra*, 469 U.S. 412.

Court should now allow either *Hovey*[22] voir dire or allow us to ask further questions of her, and I think the Court has opened that door by asking her the question of "what you would consider to be very bad" or if she could do it if it would be very bad. And I specifically request that the Court give her a hypothetical of the Dahmer case and see if she would consider that would be very bad where she would look for the death penalty.

We're not looking for jurors, Your Honor, that are just going to go forward and do this like a machine. She has stated that she is going to look at it, that she is going to weigh the decision. It might be a tough decision for her, but she's going to weigh it. And I think that's what we want when it comes to life and death situations. I think as such, by the aspect that she has mentioned, the Dahmer case, where it would be a situation where she saw it was very bad, the way she answered the questionnaire, I would say by not allowing follow-up questions or not allowing a *Hovey* voir dire is an absolute violation of my client's 6th, 8th, and 14th rights under the Constitution.

THE COURT: Do you have any written follow-up questions that you wish asked?

MR. AMSTER: Yes.

THE COURT: Okay. Mr. Faulkner?

MR. FAULKNER: Your Honor, I think this juror has passed the *Witherspoon-Witt* challenge.[23] She's indicated that it would be very difficult for her to impose the death penalty, and I think that everyone in this courtroom–I'm sure Mr. Brazelton doesn't want people who would find it easy to impose the death penalty. I think he wants everyone to be able to have to do some work to get there, if that's what it says.

MR. BRAZELTON: Your Honor, I'm going to object to any commentary --

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22. *Hovey v. Superior Court* (1980) 28 Cal.3d 1.

23. *Witherspoon v. Illinois* (1968) 391 U.S. 510.

MR. FAULKNER: Excuse me, Mr. Brazelton.

MR. BRAZELTON: –by counsel at this point.

THE COURT: Counsel can make their objection, but comments about what somebody else thinks are not appropriate.

MR. FAULKNER: Thank you, Your Honor.

As I was saying, I believe she's passed the *Witherspoon-Witt* threshhold, and I believe she's not challangeable for cause.

THE COURT: Mr. Magana?

MR. MAGANA: I join in the objection, Your Honor. The Court, I'm sure, has read all of these questionnaires; and of all the questionnaires, I believe this individual has given a great deal of thought and depth to her responses. And I believe because the Court has deprived us of a *Hovey* voir dire, we could not go into this type of analysis with other jurors and that has deprived my client of due process. I believe this individual stands out in the type of answers that are given, and No. 129[24] clearly indicates that she passes the *Witherspoon-Witt* questions. And, again, I object to the fact that we were deprived of the opportunity to obtain these kinds of answers with other jurors because of the Court's denial of *Hovey*. And I object to challenge for cause.

THE COURT: Mr. Miller?

MR. MILLER: I join in the objections of counsel. I pass this juror for cause and for the record will state that I have been joining in the objections that we have not been allowed to do the voir dire of individual jurors. Instead of repeating that each time, will the Court take that as a continuing objection?

THE COURT: As long as you note that you're making your continuing objection.

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24. "Could you set aside your own personal feelings regarding what you think the law should be regarding the death penalty, and follow the law the Court instructs you?" (E.g. 29 CT 7302.)

MR. MILLER: So noted.

MR. MAGANA: I would join Mr. Miller's request.

MR. AMSTER: Does the Court want my follow-up questions? . . . .

THE COURT: All right. The Court will not ask the additional follow-up questions.

Miss Dobel in her questionnaire has stated that–the Question No.75,[25] she felt she could be fair to both parties, she was an unbiased person. This obviously–this questionnaire was obviously answered after Miss Dobel knew the nature of this case.

She has set forth in the questionnaire, Question 127,[26] a situation where the death penalty could be appropriate, multiple murders, if no remorse or promise of rehabilitation. She has set forth in there she could follow the law, although it would not be easy for her to sentence someone to death.

Those answers would suggest that she is not challangeable for cause.

She has further answered that, in Question No. 108[27]–that she does not believe in the death penalty except in extreme Dahmer-type cases, where a death penalty should not be entirely ruled out.

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25. "If you were in the position of the defendants or the prosecutor, would you be satisfied to have your case tried with 12 jurors of your present frame of mind?" (E.g. 29 CT 7282.)

26. "Under what circumstances, if any, do you believe that the death penalty is appropriate?" (E.g. 29 CT 7301–7302.)

27. "What are your GENERAL FEELINGS regarding the death penalty?" (E.g. 29 CT 7296.)

115[28] she strongly opposes the death penalty.

And 116[29] you answer that the death penalty as a punishment–the purpose of the death penalty is punishment, but it hurts more than it helps. What did you mean by that, "it hurts more than it helps"?

A. Well, I believe in rehabilitation. I think that it's possible for individuals to be rehabilitated. I think that's the purpose of prison. I think some good things come of going to prison. People deserve to go to jail. But taking away someone's life is not rehabilitative. You know, it's shutting off all possibilities for the person saying "there's no reason for you to be here," serve–I don't believe that that is a positive thing.

And I also believe the death penalty has shown in various examples in different states in this country that it is not a deterrent, which is why I did not say–I don't think it's a deterrent.

THE COURT: Okay. Even further, Miss Dobel has answered Question No. 118,[30] a death penalty should only rarely be imposed when there is absolutely no help of rehabilitation–no hope of rehabilitation, she would vote against the death penalty were it on a ballot. Those answers don't particularly suggest whether she should or should not be excused for cause.

Question No. 88,[31] Dobel has answered that she does not believe in the death penalty.

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28. "Check the entry which best describes your feeling about the death penalty . . . ." (E.g. 29 CT 7298.)

29. "What purpose do you believe the death penalty serves?" (E.g. 29 CT 7298.)

30. "Do you feel the death sentence is imposed: [Too often] [Too seldom] [Randomly]."

31. "Do you have any beliefs about the guilt or innocence of the defendants or the penalty, if any, they should receive if found guilty?" (E.g. 29 CT 7286.)

Question No. 114,[32] she has answered that life without possibility of parole is okay for the most heinous crimes imaginable.

123,[33] Miss Dobel acknowledges that the death penalty may be appropriate for only repeat offenders.

128,[34] the death penalty is never appropriate for first time offender.

Miss Dobel has answered questions in court. She does have some concern about the ability to perform as a juror because of her feelings about the death penalty. The Court feels that perhaps the most–and that the Court is most seriously going to take into consideration an answer that Miss Dobel put down without the Court or counsel suggesting anything to Miss Dobel, and that's to No. 130,[35] "Is there anything about your present state of mind that you feel any of the attorneys would like to know? If so, please explain."

The answer: "I doubt seriously that I would impose a death penalty. My verdict would be affected if I was asked to vote guilty with a punishment of death as opposed to guilty with life imprisonment."

I would find that answer, coupled with the remaining answers that I have given–the Court finds that Miss Dobel's current state of mind is such that her feelings against the death penalty would substantially interfere with her ability to perform

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32. "What are your feelings about the punishment of life imprisonment without the possibility of parole?" (E.g. 29 CT 7298.)

33. "Do you believe the state should impose the death penalty on everyone who, for whatever reason, murders another human being?" (E.g. 29 CT 7300.)

34. "Under what circumstances, if any, do you believe that the death penalty is not appropriate?" (E.g. 29 CT 7302.)

35. "Is there anything about your present state of mind that you feel any of the attorneys would like to know?" (E.g. 29 CT 7302.)

as a juror in a case in which the death penalty was a possible penalty.

Thank you, ma'am. You are now excused.

MR. MAGANA: Your Honor, I'm objecting again. You've deprived us of an opportunity to rehabilitate this juror. You've deprived us of *Hovey*. I don't believe that there's sufficient answers to make a determination that you indicate upon reflection of your review of these questionnaires. If there is doubt as to each one of those answers that I asked, I ask that she be asked individually in camera as to those responses.

THE COURT: As far as the Court depriving counsel of *Hovey* voir dire, we are following Proposition 115–

MR. AMSTER: And I join in the objections of Mr. Magana, based on the 6th, 8th and 14th Amendments.

(14 RT 2418–2431.)

B. Legal Principles

The Sixth Amendment right to an impartial jury is protected when the standard utilized for excusing a prospective juror for cause based on his or her views regarding capital punishment is "whether the [prospective] juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" (*Wainwright v. Witt*, *supra*, 469 U.S. at p. 424.) The *Witt* standard superseded one where it had to be "unmistakably clear" that the prospective juror would "automatically vote against imposition of capital punishment without regard to any evidence that might be developed at the trial of the case." (See *Witherspoon v. Illinois*, *supra*, 391 U.S. at p. 522, fn. 21.)

In *People v. Ghent* (1987) 43 Cal.3d 739, 767, California "adopted the Witt standard as the test for determining whether a defendant's right to an impartial jury under article I, section 16 of the state Constitution was violated by an

excusal for cause based on a prospective juror's views on capital punishment." (*People v. Moon* (2005) 37 Cal.4th 1, 13, quoting *People v. Griffin, supra*, 33 Cal.4th at p. 558, internal quotation marks omitted.) A trial court is not compelled to accept the stipulation of the parties to excuse a potential juror for cause. (*People v. Ledesma* (2006) 39 Cal.4th 641, 668-669.) The determinant is "whether the juror's views about capital punishment would prevent or impair the juror's ability to return a verdict of death in the case before the juror. (*People v. Ochoa* (2001) 26 Cal.4th 398, 431 [quoting other cases].)" (*People v. Cash* (2002) 28 Cal.4th 703, 719-720, internal quotation marks omitted.)

A criminal defendant facing the death penalty has the right to "an impartial jury drawn from a venire that has not been tilted in favor of capital punishment by selective prosecutorial challenges for cause." (*Uttecht v. Brown* (2007) ___ U.S. ___ [127 S.Ct. 2218, 2224].) A state "has a strong interest in having jurors who are able to apply capital punishment within the framework state law prescribes." (*Ibid.*) "[T]o balance these interests, a juror who is substantially impaired in his or her ability to impose the death penalty under the state-law framework can be excused for cause; but if the juror is not substantially impaired, removal for cause is impermissible." (*Ibid.*) Case law does not require a prospective juror to be automatically excused if he or she expresses personal opposition to the death penalty. Those who firmly oppose the death penalty may nevertheless serve as jurors in a capital case as long as they state clearly that they are willing to temporarily set aside their own beliefs and follow the law. (*Lockhart v. McCree* (1986) 476 U.S. 162, 176; *People v. Avila, supra*, 38 Cal.4th at p. 529.)

"Voir dire plays a critical role in assuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored. Without adequate voir dire, the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the

evidence cannot be fulfilled." (*Rosales Lopez v. United States* (1981) 451 U.S. 182, 188; *People v Bolden* (2002) 29 Cal.4th 515, 538.) Excusing jurors unable or unwilling to vote for the death penalty under any circumstances does not compromise the constitutional right to an unbiased jury. (*People v. Avena* (1996) 13 Cal.4th 394, 412.) Death qualification of the jury does not result in a death-oriented jury. (*People v. Pinholster, supra*, 1 Cal.4th at p. 913; *People v. Stankewitz* (1990) 51 Cal.3d 72, 104; *People v. Clark* (1990) 50 Cal.3d 583, 597.) Exclusion of jurors with scruples against the death penalty does not create a guilt-prone jury. (*Lockhart v. McCree, supra*, 476 U.S. at p. 165; *People v. Mayfield* (1993) 5 Cal.4th 142, 169-170; *People v. Cummings, supra*, 4 Cal.4th at p. 1280; *Hovey v. Superior Court, supra*, 28 Cal.3d at pp. 68-69.)

A trial court "possesse[s] discretion to conduct oral voir dire as necessary and to allow attorney participation and questioning as appropriate." (*People v. Robinson* (2006) 37 Cal.4th 592, 614; *People v. Carter* (2005) 36 Cal.4th 1215, 1250 [manner of conducting voir dire not basis for reversal unless it makes resulting trial fundamentally unfair].) The trial court has the duty to know and follow proper procedure and to devote sufficient time and effort to death-qualifying voir dire, such that the court and counsel have sufficient information regarding the prospective juror's state of mind to permit a reliable determination of whether the juror's views on capital punishment would prevent or substantially impair the performance of his or her duties. (*People v. Stitely, supra*, 35 Cal.4th at p. 539.) Nonetheless, the trial court has broad discretion over the number and nature of questions on voir dire about the death penalty. (*Id.* at p. 540.)

A trial court has discretion to deny all questioning by counsel when a prospective juror gives "unequivocally disqualifying answer[s]," and may subject to reasonable limitation further voir dire of a juror who has expressed disqualifying answers. (*People v. Samayoa, supra*, 15 Cal.4th at p. 823.) The

court has discretion to refuse to allow defense counsel to question jurors for the purpose of rehabilitation if their answers made their disqualification unmistakably clear. (*People v. Carpenter* (1997) 15 Cal.4th 312, 355.)

"[P]art of the guarantee of a defendant's right to an impartial jury is adequate voir dire to identify unqualified jurors." (*Morgan v. Illinois* (1992) 504 U.S. 719, 729.) The demeanor of a juror is an appropriate consideration for the trial court in determining whether to grant a challenge for cause. (*Uttecht v. Brown*, *supra*, 127 S.Ct. at p. 2224.) A juror who would automatically vote for the death penalty in every case will fail to follow his or her duty. Defense counsel is entitled to ask whether a juror will vote for death in every case. (*Morgan v. Illinois*, *supra*, 504 U.S. at p. 729.) The *Witt* standard also applies to someone excusable for bias in favor of the death penalty. (*People v. Danielson* (1992) 3 Cal.4th 691, 712-713, overruled on another ground in *Price v. Superior* Court, *supra*, 25 Cal.4th at p. 1069, fn. 13.) It is not improper to ask a juror to promise to vote for death if the juror determines that death is the appropriate punishment. (*People v. Ochoa* (1998) 19 Cal.4th 353, 428.) Questions directed to jurors' attitudes toward particular facts of a case are not relevant to the death-qualification process. (*People v. DeSantis* (1992) 2 Cal.4th 1198, 1217; *People v. Pinholster*, *supra*, 1 Cal.4th at p. 917.) However, a juror's attitude toward the case is not irrelevant to a challenge for cause. (*People v. Cummings*, *supra*, 4 Cal.4th at p. 1282.)

The trial court has wide discretion to determine the qualifications of jurors. (*People v. Carpenter*, *supra*, 15 Cal.4th at p. 358.) It does not predispose the jury in favor of imposing the death penalty when the trial court conducts voir dire which only asks jurors if their views on the death penalty would prevent them from imposing a sentence of death. (*People v. Champion* (1995) 9 Cal.4th 879, 908-909.) Nevertheless, a trial court should be evenhanded in questioning prospective jurors during death-qualification and should inquire

into the jurors' attitudes both for and against the death penalty. (*Ibid.*) "A prospective juror who would invariably vote either for or against the death penalty because of one or more circumstances likely to be present in the case being tried" is subject to challenge for cause whether or not the particular circumstance is alleged in the charging document. (*People v Kirkpatrick* (1994) 7 Cal.4th 988, 1005; *People v. Ledesma, supra,* 39 Cal.4th at p. 671.) The trial court may excuse a juror who would automatically vote against the death penalty in the case before him regardless of his willingness to consider the penalty in another case. (*People v. Fields* (1983) 35 Cal.3d 329, 357-358.)

In determining the juror's willingness to impose the death penalty in an appropriate case, hypothetical questions must necessarily assume the accused is guilty. Claims that such hypotheticals improperly bias the jury toward conviction are meritless. (*People v. Wader* (1993) 5 Cal.4th 610, 647-648.) In addition, trial courts may properly preclude defense counsel from asking hypothetical questions during death qualification which preview the evidence, as such questions raise the danger of indoctrinating the jury on a particular view of the facts. (*People v. Sanders* (1995) 11 Cal.4th 475, 539.) Trial courts may also prohibit voir dire on actual or hypothetical cases not before the jury. (*People v. Fields, supra,* 35 Cal.3d at pp. 357-358.)

C. The Trial Court Properly Excused Dobel For Cause

Appellants claim "the record does not support the trial court's ruling that prospective juror Dobel was unqualified to sit as a juror in this case." (COB 150; BOB 379.) They are mistaken. There was ample support for the trial court's ruling. To the extent appellants cite Dobel's statements that she would follow the trial court's instructions, they merely raise an ambiguity in her position. Since this Court defers to the trial court's resolution of such ambiguities (*People v. Wilson* (2008) 43 Cal.4th 1, 14), and the trial court's

ruling was supported by several statements that cast doubt on Dobel's ability to carry out her duties as a juror, this Court should reject appellants' claim.

The trial court properly excused Dobel because she was biased against the death penalty and believed it served no purpose. (See *People v. Lewis*, *supra*, 26 Cal.4th at p. 353.) Dobel stated she was "against" the death penalty. (14 RT 2415.) She said, "I do not believe that the death penalty serves any purpose." (14 RT 2421.) The trial court asked Dobel, "Are your feelings about the death penalty so strong that you would never find a special circumstance to be true?" She answered, "Possibly." (*Ibid.*) The trial court asked Dobel, "Do you believe your feelings about the death penalty are so strong that they would substantially interfere with your ability to function as a juror in this case?" She answered, "Yes . . . . [I]t would take really a serious leap of some sort–and I'm not sure I'd be able to make it–to impose the death penalty." (14 RT 2422.) She stated she might be willing to impose the death penalty if the crime were "very bad, but I would still believe it was not to[o] right to have a part in the death of someone else in this manner." (14 RT 2423.) The trial court asked a follow-up question: "Is your belief such that you do not believe that you have the right to take part in a decision which would deprive a person of his life?" She answered, "Yes." (14 RT 2424.) The trial court noted that Dobel also indicated in her questionnaire that she did not believe in the death penalty; "'it hurts more than it helps'"; and she "strongly opposes the death penalty" except in extreme "Dahmer-type cases." (14 RT 2428.) She also answered that she seriously doubted she would ever impose the death penalty and her feelings would affect her ability to find the defendants guilty. (14 RT 2430.) All of these reasons were sufficient for the trial court to excuse Dobel. (See *People v. Lewis*, *supra*, 26 Cal.4th at p. 353.)

The trial court also properly excused Dobel because she indicated she would automatically vote against the death penalty in the current matter (even though

she might vote for it in another matter if the facts were more egregious). (See *People v. Fields*, *supra*, 35 Cal.3d at pp. 357-358.) Dobel stated she could vote for the death penalty if she "felt it was appropriate," but stated it was only appropriate in the most extreme "Jeffrey Dahmer"-type cases. (14 RT 2420–2411.) Despite the brutality of the current murders, they did not rise to the level of Dahmer's ghastly serial murders. Dobel also answered on the questionnaire that "the death penalty is never appropriate for first time offenders." (14 RT 2429.) Appellants were first-time offenders. (41 RT 7368; 45 RT 8290.) So, in effect, Dobel indicated she would not impose the death penalty on appellants under any circumstances. That, alone, was sufficient reason to excuse her for cause. (See *People v. Fields*, *supra*, 35 Cal.3d at pp. 357-358.)

Appellants argue that "based upon LaMarsh's counsel's description of her answer to Question No. 129, it is a reasonable inference that Dobel answered that question to reflect that she would be able to set aside her personal views regarding the death penalty and follow the trial court's instructions." (COB 151; BOB 379.) Appellants are mistaken in two respects. First, counsel did not "describe" Dobel's answer to Question No. 129. He merely made the conclusory statement that "No. 129 clearly indicates that she passes the *Witherspoon-Witt* questions." (14 RT 2426.) Counsel's biased conclusion about the significance of a single answer proves nothing. Second, the prosecutor also cited Dobel's answer to Question No. 129–but as a basis for *excusing* her for cause. (14 RT 2424.) Nevertheless, it is proper to give appellants the benefit of the doubt and assume Dobel's answer was that she would set aside her personal feelings. (See *People v. Haley* (2004) 34 Cal.4th 283, 305 [defendant has the burden of proving his ability to prosecute appeal has been prejudiced by the missing questionnaires].) However, Dobel's other

responses still gave the trial court a sound basis to doubt her willingness to apply the law.

Appellants claim this Court should not give as much weight to Dobel's answers on the questionnaire because, at that point, she did not understand that there would be a separate trial for guilt and penalty. (COB 151–152; BOB 379.) That is doubtful, since Dobel's bias against the death penalty disqualified her regardless of which stage of the trial it might manifest itself. (See *People v. Carpenter*, *supra*, 15 Cal.4th at p. 355 [trial court has discretion to refuse further questioning for rehabilitation if prospective juror's answers made his disqualification unmistakably clear].) Appellants argue that more weight should be given to Dobel's oral answers because "the procedure of the penalty determination [had been] clarified somewhat . . . ." (COB 152; BOB 379.) Appellants claim that these answers indicated she could impose the death penalty in the current case because it fit the limited criteria she set forth as justifying that punishment, i.e., extreme cases with multiple murders and no chance of rehabilitation. (COB 152–153; BOB 379.) Appellants are wrong. As discussed above, this case did not fit Dobel's criteria because it was not on the level of the Dahmer murders, and appellants were first-time offenders. Moreover, it is doubtful that appellants actually believe that Dobel might impose the death penalty because they had "no chance of rehabilitation." They certainly testified otherwise at the penalty trial. (See, e.g., 41 RT 7356–7358, 7375.)

Further, Dobel stated during voir dire that it was possible her feelings about the death penalty would prevent her from ever finding a special circumstance true. (14 RT 2421.) She affirmatively stated that her feelings were so strong that they would substantially interfere with her ability to function as a juror–essentially answering the *Witt* criteria in a nutshell. (14 RT 2422; see *Wainwright v. Witt*, *supra*, 469 U.S. at p. 424 [suitability to serve as juror

depends on "whether the [prospective] juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'"]; *People v. Kelly* (2007) 42 Cal.4th 763, 778 [proper to excuse for cause juror who stated he would have trouble abandoning his moral opposition to the death penalty].) Finally, Dobel stated that she did not believe she had the right to participate in the decision to "deprive a person of his life." (14 RT 2423–2424.) Thus, contrary to appellants' argument that all of Dobel's problematic answers occurred in the questionnaire before she understood how the trial would take place, Dobel provided ample grounds to be excused for cause during voir dire.

"'"On appeal, [this Court] will uphold the trial court's ruling if it is fairly supported by the record, accepting as binding the trial court's determination as to the prospective juror's true state of mind when the prospective juror has made statements that are conflicting or ambiguous."'" (*People v. Chatman* (2006) 38 Cal.4th 344, 365, quoting *People v. Smith* (2003) 30 Cal.4th 581, 601-602, and citing *Wainwright v. Witt*, *supra*, 469 U.S. 412.) Here, the trial court weighed Dobel's conflicting answers and reasonably found that her "true state of mind" would interfere with her ability to impose the death penalty. In *People v. Haley*, each of the challenged jurors gave equivocal or conflicting statements regarding their ability to impose the death penalty. (34 Cal.4th at p. 305.) This Court held, "This alone is a sufficient basis to uphold the determination of the trial court as to these jurors' actual state of mind. (*People v. Carpenter* (1997) 15 Cal.4th 312, 357 (*Carpenter*) ['if the juror's statements [regarding the death penalty] are equivocal or conflicting, the trial court's determination of the juror's state of mind is binding'].)" (*Ibid.*, brackets in original.)

As the trial court below stated, it gave the most weight to Dobel's answer to the open-ended question on the questionnaire: "'Is there anything about your

present state of mind that you feel any of the attorneys would like to know?'" (14 RT 2430.) Even though Dobel could have said anything or nothing at all, she chose to reply, "'I doubt seriously that I would impose a death penalty. My verdict would be affected if I was asked to vote guilty with a punishment of death . . . ." (*Ibid.*) Although Dobel may have given the expected response when asked if she would follow the law, when asked a more general question, she replied that she could not be relied upon to apply the law. It was reasonable for the trial court to give more weight to the answer that Dobel volunteered than those in which the "appropriate" answers were suggested by the questions. In *People v. Crowe*, this Court observed, "a biased juror may be unwilling to confess that bias openly, and that questions to which there is a 'right' and a 'wrong' answer may be less likely to reveal such bias than more open-ended questions." (8 Cal.3d 815, 831, fn. 31, other ground superceded by statute in *People v. Bittaker* (1989) 48 Cal.3d 1046, 1083, fn. 21; approved in *People v. Williams* (1981) 29 Cal.3d 392, 402–403, other ground superceded by statute in *People v. Leung* (1992) 5 Cal.App.4th 482, 494.)

Here, it was reasonable for the trial court to conclude that the answer to the open-ended question was more revealing than all of the other specific questions. Indeed, a reasonable conclusion was that after wrestling with all of the specific questions, Dobel finally resolved her feelings and used the open-ended question to express her most honest answer: that she had serious doubts she could follow the law and apply the death penalty. To the extent appellants complain that the appellate record is incomplete, Dobel's final answer is dispositive of the issue. Even if her answers to the specific questions about capital punishment all suggested she could set aside her personal feelings and apply the law, she still revealed her true position when she answered an open-ended question by stating she doubted she could apply the law and impose the death penalty. (See *People v. Roldan* (2005) 35 Cal.4th 646, 697 [it is permissible to excuse for

cause a prospective juror who states he would find it difficult to vote for the death penalty]; *People v. Harrison* (2005) 35 Cal.4th 208, 228 [a trial court may excuse a juror because her doubts about the death penalty "would substantially impair her ability to follow the court's instructions . . . .[W]e have held that the state and federal Constitutions permit such 'death qualification'"] quoting *People v. Jackson*, *supra*, 13 Cal.4th at p. 1199.)

"'If the prospective juror's responses to voir dire questions are conflicting or equivocal, the trial court's determination of the juror's true state of mind is binding upon the reviewing court.'" (*People v. Lewis*, *supra*, 26 Cal.4th at p. 353, quoting *People v. Bradford* (1997) 15 Cal.4th 1229, 1319.) Since this Court defers to the trial court's resolution of prospective juror's conflicting statements (*ibid.*; *People v. Wilson*, *supra*, 43 Cal.4th at p. 14), this Court should find the trial court acted within its discretion regardless of whatever else Dobel may have said that suggested she would apply the law as given to her. (See *ibid.* ["The trial court's determination of the juror's state of mind is binding on appeal if the juror's statements are equivocal or conflicting'"], quoting *People v. Harrison*, *supra*, 35 Cal.4th at p. 227.) Moreover, as discussed above, Dobel continued to provide answers which cast doubt on her willingness to follow the trial court's instruction until the very end of voir dire. Thus, the trial court did not abuse its broad discretion by merely taking Dobel at her word that she doubted she could impose the death penalty. (See *People v. Wilson*, *supra*, 43 Cal.4th at p. 14 ["A trial court may excuse for cause a juror whose views on the death penalty 'would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath."'"], quoting *Wainwright v. Witt*, *supra*, 469 U.S. at p. 424; see also *People v. Mayfield* (1997) 14 Cal.4th 668, 727.)

Appellants claim that this Court should not follow its own oft-repeated standard of giving the trial court's ruling deference. (COB 155–161; BOB

379.) But the trial court, of course, was in a much better position to evaluate the jurors than this Court. It would turn the entire appellate process on its head to not give deference to the trial court's ruling when it is supported by the record.

Appellants cite *Uttecht v. Brown*, *supra*, 127 S.Ct. at page 2218, as "[t]he Supreme Court's most recent opinion relating to death qualification of jurors . . . ." (COB 159; BOB 379.) Though appellants acknowledge that there, the Court again found that such deference was appropriate, they attempt to distinguish that case from the present matter. (*Ibid.*) But citing a case that stands for a well established and general principle–just to distinguish it on a narrow ground–accomplishes nothing. In *Uttecht*, the Supreme Court unambiguously stated:

> [I]n determining whether the removal of a potential juror would vindicate the State's interest without violating the defendant's right, the trial court makes a judgment based in part on the demeanor of the juror, a judgment owed deference by reviewing courts. [Citation.]
>
> Deference to the trial court is appropriate because it is in a position to assess the demeanor of the venire, and of the individuals who compose it, a factor of critical importance in assessing the attitude and qualifications of potential jurors.

(*Uttecht v. Brown*, *supra*, 127 S.Ct. at p. 2224.)

There can be no doubt that if this Court affords the trial court the slightest deference, it must find that Dobel's responses justified the trial court's excusal for cause. But even if this Court finds that Dobel gave conflicting responses, and reviews the record de novo, it still must find that the trial court acted properly. Dobel clearly wrestled with how to reconcile her beliefs and her desire to follow the law. She waffled between saying she could follow the trial court's instructions and saying she would have a difficult time doing so. It was reasonable to find that Dobel's last responses were the most predictive, since

she had had time to think about the issue by then. (See *People v. Abilez* (2007) 41 Cal.4th 472, 493–494 [proper for trial court to ask prospective jurors if any of their views about the death penalty had changed prior to seating the jury].) It was also reasonable to excuse a juror whose feelings were so conflicted because there was a substantial chance that, over the course of the long trial, she would resolve her internal conflict on the side of following her conscience. Indeed, it was foreseeable that after weeks of sitting and thinking, Dobel might come to a very firm decision to not impose the death penalty.

The trial court weighed its ruling carefully and came to a reasonable conclusion. It reviewed answers which suggested Dobel was not challengeable for cause. (14 RT 2428.) It reviewed answers which did not "particularly suggest whether she should or should not be excused for cause." (14 RT 2429.) And it reviewed answers which did suggest Dobel would not perform her duties as a juror. (14 RT 2428–2430.) Finally, it ruled that Dobel's "feelings against the death penalty would substantially interfere with her ability to perform as a juror in a case in which the death penalty was a possible penalty." (14 RT 2430.) The trial court's ruling was reasonable; it was supported by the record; and it was not an abuse of discretion. (See *People v. Smith*, *supra*, 30 Cal.4th at pp. 601-602.)

IV.

THE TRIAL COURT CONDUCTED JURY SELECTION FAIRLY

Appellants contend that the trial court violated their constitutional rights by: (1) denying their motion to conduct sequestered voir dire; (2) denying their request to include in the juror questionnaire a question about prospective jurors' understanding of the meaning of the term of life without the possibility of parole; (3) denying their request to ask certain follow-up questions during voir dire to help counsel evaluate whether to exercise peremptory challenges; and

(4) conducting inadequate voir dire of three prospective jurors who were excused for cause. (COB 163–196; BOB 379.)

As for the first two claims, appellants concede that the trial court's procedures complied with this Court's jurisprudence, and they offer no compelling reason for this Court to reconsider its earlier opinions. As for appellants' third claim, the trial court had broad discretion to administer voir dire, and it had no obligation to ask questions that could help counsel decide whether to exercise peremptory challenges. Regarding appellants' fourth claim, the trial court conducted sufficient voir dire of the three prospective jurors to properly determine they should be excused for cause. Finally, as for appellants' third and fourth claims, Respondent asks that this Court refer to Arguments III and XIX-A for additional arguments.

A. The Trial Court Properly Denied Appellants' Request For Sequestered Voir Dire

Appellants joined LaMarsh's motion for sequestered voir dire pursuant to *Hovey v. Superior Court*, *supra*, 28 Cal.3d 1. (6 RT 1251–1260.) The trial court denied the motion. (6 RT 1260–1262.) Appellants contend the process of conducting voir dire in the presence of all jurors "was constitutionally erroneous." (COB 163; BOB 379.) However, by enacting Code of Civil Procedure section 223,[36] Proposition 115 "'abrogated'" *Hovey* and expressly

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36. Code of Civil Procedure section 223 provides:
In a criminal case, the court shall conduct an initial examination of prospective jurors. The court may submit to the prospective jurors additional questions requested by the parties as it deems proper. Upon completion of the court's initial examination, counsel for each party shall have the right to examine, by oral and direct questioning, any or all of the prospective jurors. The court may, in the exercise of its discretion, limit the oral and direct questioning of prospective jurors by counsel. The court may specify the maximum amount of time that counsel for each party may question an individual juror, or may specify an aggregate amount of time for each party, which can then be allocated among the prospective jurors by counsel. Voir dire of any prospective jurors

authorized trial courts to conduct voir dire in open court. (*People v. Waidla* (2000) 22 Cal.4th 690, 713–714; *People v. Hoyos*, *supra*, 41 Cal.4th at pp. 898–899.)

The trial court's ruling clearly indicates that it understood its discretion under the law and reasonably chose to conduct voir dire as prescribed by Code of Civil Procedure section 223:

> I'm going to deny the request for a sequestered voir dire, voir dire by counsel. Prop 115 provides that the Court shall do the voir dire, although the Court does have the discretion to allow counsel to do additional voir dire either orally or by written questions submitted to the Court. And Proposition 115 also provides that to the extent practical, the voir dire shall be done in the presence of all jurors.
>
> In the–so far as practice, in the facilities that are available to us, we'll not be able to voir dire all of the jurors in the presence of all of the other jurors. The courtroom probably handles 50 to 75 prospective jurors at one time. To assure as best as possible without sequestered voir dire that the answer of any one prospective juror does not contaminate the remainder of the voir dire, if there is an answer or answers in a particular juror's written questionnaire that suggests that they might say something in the presence of other prospective jurors that would taint the entire panel, the Court would find it's not practical to ask that prospective juror certain questions in the presence of the other

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shall, where practicable, occur in the presence of the other jurors in all criminal cases, including death penalty cases. Examination of prospective jurors shall be conducted only in aid of the exercise of challenges for cause.

The trial court's exercise of its discretion in the manner in which voir dire is conducted, including any limitation on the time which will be allowed for direct questioning of prospective jurors by counsel and any determination that a question is not in aid of the exercise of challenges for cause, shall not cause any conviction to be reversed unless the exercise of that discretion has resulted in a miscarriage of justice, as specified in Section 13 of Article VI of the California Constitution.

jurors, and that prospective juror under those circumstances would be asked certain questions in a sequestered manner.

Counsel have been given the opportunity to have a written questionnaire answered by the prospective jurors, and I would say that in excess of the 99 percent questions asked by counsel are going to be given to the prospective jurors. Those are answered under penalty of perjury and they're not answered in the presence of the other prospective jurors. I should think that this would answer counsel's concern that certain jurors would be afraid to answer fully and truthfully in the presence of other prospective jurors.

If–okay. As obviously there may be some follow-up questions, there may be some questions, especially the *Witherspoon-Witt* type, that are answered–excuse me, that are asked of the jurors. If the juror answers in his written questionnaire that he's going to impose the death penalty each and every time he gets a chance to and orally he's never going to impose it, it would appear that for jurors who might fall under that category, it again would be impractical to question them further in the presence of other jurors, and under those circumstances follow-up questions as to why there's such a discrepancy in their answers ought to be done in a sequestered manner.

The Court will give counsel full opportunity to submit additional questions in writing to the Court after reviewing the questionnaire, also after hearing oral answers, whether initiated originally by the Court or as follow-up questions given by the Court as requested by counsel.

The Court will again give, as I said, each attorney the full opportunity to submit further follow-up questions.

(6 RT 1260–1262; see 7 RT 1490 [trial court noted that the jury room held only 75 prospective jurors at a time, so the venire of 500 people would be conducted in smaller segments].)

Appellants concede that this Court has rejected their claim that defendants have the right to sequestered voir dire. (COB 163; BOB 379.) In *People v. Waidla*, *supra*, 22 Cal.4th 690, this Court explained:

> Section 223 of the Code of Civil Procedure provides, among other things, that, "[i]n a criminal case," the trial court has "discretion in the manner in which" it conducts the voir dire of prospective jurors. (Code Civ. Proc., § 223.) But it also provides that, in all such cases, including those involving the death penalty, the trial court must conduct the voir dire of "any prospective jurors . . ., where practicable, . . . in the presence of the other" prospective "jurors . . . ." (*Ibid.*) In doing so, it "abrogates" (*Covarrubias v. Superior Court* (1998) 60 Cal.App.4th 1168, 1171) the holding of *Hovey v. Superior Court* (1980) 28 Cal.3d 1], wherein we "declare[d], pursuant to [our] supervisory authority over California criminal procedure, that in future capital cases that portion of the voir dire of each prospective juror which deals with" his views on the death penalty "should be done individually and in sequestration" (*id.* at p. 80, fn. omitted).
>
> Waidla moved the superior court to conduct the voir dire of the prospective jurors concerning their views on the death penalty individually and in sequestration, in accordance with *Hovey*. The superior court denied the motion. In setting out its reasons, it stated that section 223 of the Code of Civil Procedure "abrogated" *Hovey*; under the provision's terms, it had the authority to conduct individual and sequestered voir dire in the "exercise" of its "discretion"; except in areas that were "sensitive in nature," it chose not to do so; it believed that individual and sequestered voir dire was simply not "necessary in this case"; it also believed that it had "fulfill[ed]" any "policy" underlying individual and sequestered voir dire by obtaining from each prospective juror, on its order, a completed 25-page questionnaire answered in writing under penalty of perjury, wherein he expressed, inter alia, his "opinion on the death penalty," "individually" and "in private."
>
> Waidla contends that the superior court erred under California statutory law by denying his motion to conduct the voir dire of the prospective jurors concerning their views on the

> death penalty individually and in sequestration, in accordance with *Hovey*.
>
> An appellate court applies the abuse of discretion standard of review to a trial court's granting or denial of a motion on the conduct of the voir dire of prospective jurors. (See Code Civ. Proc., § 223.) A trial court abuses its discretion when its ruling "fall[s] 'outside the bounds of reason.'" (*People v. Ochoa* (1998) 19 Cal.4th 353, 408, quoting *People v. DeSantis* (1992) 2 Cal.4th 1198, 1226.)
>
> Employing that test, we find no error. The superior court's denial of Waidla's motion to conduct the voir dire of the prospective jurors concerning their views on the death penalty individually and in sequestration, in accordance with *Hovey*, was not unreasonable. We shall assume that the superior court might have conducted the voir dire as requested. But we cannot conclude that it had to do so.

(*People v. Waidla*, *supra*, 22 Cal.4th at pp. 713 -714.)

This Court recently reaffirmed its decision in *Waidla*. In *People v. Hoyos*, this Court observed:

> Defendant claims the trial court erred in denying his motion for individual and sequestered juror voir dire, and thus violated his right to trial by an impartial jury and to due process of law under the Sixth and Fourteenth Amendments to the United States Constitution . . . . [¶]
>
> Defendant's claim fails on the merits, however, because, as defendant concedes, Code of Civil Procedure section 223, enacted as part of Proposition 115, abrogated the former individual voir dire procedure directed by *Hovey v. Superior Court* (1980) 28 Cal.3d 1, 80.

(*People v. Hoyos*, *supra*, 41 Cal.4th at pp. 898–899, citing *People v. Waidla*, *supra*, 22 Cal.4th at p. 713.)

Appellants do not discuss any characteristics of their trial that made it inappropriate or impracticable for the trial court to comply with the procedure set forth in Code of Civil Procedure section 223. Accordingly, there is no

reason for this Court to reconsider its earlier opinions. (See *People v. Brasure* (2008) 42 Cal.4th 1037, 1050–1053; *Vieira, supra*, 35 Cal.4th at p. 288 [reaffirmed that Code of Civil Procedure section 223 was intended to overrule *Hovey's* holding that sequestered voir dire was required to death qualify a jury]; *People v. Box, supra*, 23 Cal.4th at pp. 1180–1181 [defendant failed to assert any persuasive reason why group voir dire regarding death qualification was inappropriate in his case].)

B. The Trial Court Properly Denied Appellants' Request To Include In The Questionnaire A Question About Prospective Jurors' Understanding Of The Meaning Of Life Without The Possibility Of Parole

All of the defendants argued that the jury questionnaire should include a question about the prospective jurors' perception of the meaning of the term "life without the possibility of parole." (6 RT 1175–1177.) The trial court cited six cases from this Court and one case from the United States Supreme Court for the proposition that it was preferable to not put that concern in the prospective jurors' minds, and stated it would address that issue only if it were independently raised by a prospective juror. (6 RT 1177.) On appeal, appellants claim, "Subsequently, defense counsel asked the trial court to reconsider its ruling . . . ." (COB 166, citing 10 RT 1914; BOB 379.) However, it was actually the prosecutor who raised the issue after Beck's counsel asked the trial court to ask a prospective juror if "he understands that a life without possibility of parole means exactly that?" (10 RT 1901–1902, 1913.)

Appellants contend that the question was necessary because "California capital jurors erroneously believe that a life-without-parole sentence does not foreclose the possibility of parole." (COB 167; BOB 379.) However, that belief is not erroneous. The Governor has the constitutional power to commute death sentences and grant such defendants parole. (*People v. Arias* (1996) 13

Cal.4th 92, 172 ["The Governor may ameliorate any sentence by use of the commutation or pardon power, and it is thus incorrect to tell the jury the penalty of . . . life without possibility of parole will inexorably be carried out."], internal quotation marks omitted; *People v. Gordon* (1990) 50 Cal.3d 1223, 1277]; *People v. Beames* (2007) 40 Cal.4th 907, 931 ["It is now firmly established that a court in a capital case does not err when it answers a jury question generally related to the commutation power by instructing . . . that the Governor may commute either a death sentence or a life without possibility of parole sentence, but that the jury must not consider the possibility of commutation in determining the appropriate sentence."]; see § 190.3 ["The trier of fact shall be instructed that a sentence of confinement to state prison for a term of life without the possibility of parole may in [the] future after sentence is imposed, be commuted or modified to a sentence that includes the possibility of parole by the Governor of the State of California."].)

In any case, as appellants concede, this Court has repeatedly rejected the claim that trial courts must ask prospective jurors if they understand the meaning of the term "life without the possibility of parole." (See, e.g., *People v. Kennedy* (2005) 36 Cal.4th 595, 641; *People v. Jones* (1997) 15 Cal.4th 119, 189–190, overruled on another ground in *People v. Hill* (1998) 17 Cal.4th 800, 822; *People v. Arias*, *supra*, 13 Cal.4th at p. 172; COB 167.) Since appellants have not offered any new rationale for this Court to reconsider its earlier opinions, this Court should reject the claim.

C. The Trial Court Acted Within Its Discretion When It Declined To Ask Follow-up Questions Which Might Uncover Bases For Peremptory Challenges

Appellants argue that the trial court erred by not asking questions which they believed would help determine whether to use peremptory challenges. They note that trial counsel argued that Code of Civil Procedure section 223

afforded such a right, and appellants claim on appeal that the denial of that right violated their constitutional rights. (COB 168–169; BOB 379.) However, Code of Civil Procedure section 223 specifically states, "Examination of prospective jurors shall be conducted only in aid of the exercise of challenges for cause." Thus, the trial court was correct that it was obligated only to ask questions that were relevant to determine whether there was *cause* to excuse the prospective jurors.

Moreover, Code of Civil Procedure section 223 provides the trial court with broad discretion to limit such questions:

> The trial court's exercise of its discretion in the manner in which voir dire is conducted, including any limitation on the time which will be allowed for direct questioning of prospective jurors by counsel and any determination that a question is not in aid of the exercise of challenges for cause, shall not cause any conviction to be reversed unless the exercise of that discretion has resulted in a miscarriage of justice, as specified in Section 13 of Article VI of the California Constitution.

(Code Civ. Proc., § 223.)

Further, a trial court has the discretion to determine the form and number of questions asked of prospective jurors regarding their views on capital punishment. (*People v. Roldan, supra*, 35 Cal.4th at p. 695.) Here, there were well over one hundred questions on the jury questionnaire and the trial court routinely asked many oral questions. As the trial court stated to the venire before handing out the questionnaire, "The questionnaire in this matter is quite long, very long as a matter of fact." (7 RT 1492.)

Since there is no limit to the areas of inquiry that might lead an attorney to decide to use a peremptory challenge, trial courts must retain broad discretion to limit fishing expeditions. Attorneys cannot expect to investigate every avenue that is tangentially related to the case. Here, appellants complain that they were not allowed to ask questions relating to marijuana and skinning animals. (COB 168; BOB 379.) But these topics were far from the main issues

of the case. Defense counsel were permitted to submit a large number of questions to the venire. The trial court acted within its discretion to limit follow-up questions that were designed solely to help counsel exercise peremptory challenges.

To the extent appellants contend the federal Constitution "guarantees voir dire adequate to enable the defense to intelligently exercise peremptory challenges" (COB 169; BOB 379), they offer no binding authority for that proposition and overlook the reality that the trial court must have discretion to impose limits on the process. Here, the trial court permitted defense counsel to ask numerous questions. As it observed, "Counsel have been given the opportunity to have a written questionnaire answered by the prospective jurors, and I would say that in excess of the 99 . . . questions asked by counsel are going to be given to the prospective jurors." (6 RT 1261.) Appellants cannot show that the process was inadequate.

Moreover, prior to Proposition 115, in *People v. Williams*, *supra*, 29 Cal.3d 392, this Court held that trial courts could not restrict voir dire to questions addressing challenges for cause. (*Id.* at pp. 407–412; but see *People v. Ferlin* (1928) 203 Cal. 587, 598 ["It is now well settled in this state that a juror may not be examined on voir dire solely for the purpose of laying the foundation for the exercise of a peremptory challenge."]; see also *People v. Riordan* (1926) 79 Cal.App. 488, 495 [same].) But that rule was specifically abrogated by Code of Civil Procedure section 223. (See *People v. Noguera* (1992) 4 Cal.4th 599, 646 ["Code of Civil Procedure section 223 now provides that 'Examination of prospective jurors shall be conducted only in aid of the exercise of challenges for cause.'"]; *People v. Edwards* (1991) 54 Cal.3d 787, 829, fn. 9 ["The passage of Proposition 115 has significantly changed the law [stated in *People v. Williams*, *supra*, 29 Cal.3d 392]."]; *People v. Leung*, *supra*, 5 Cal.App.4th at p. 493.) Moreover, in *Williams*, it was implicit that the "restriction of voir

dire in support of peremptory challenges does not violate the U.S. Constitution." (*People v. Leung*, *supra*, 5 Cal.App.4th at p. 493.) Accordingly, appellants' claim that they had a constitutional right to ask questions to help them determine whether to exercise peremptory challenges is unavailing.

Finally, even under the old standard espoused in *People v. Williams*, *supra*, 29 Cal.3d 392, this Court left "intact the considerable discretion of the trial court to contain voir dire within reasonable limits." (*Id.* at p. 408.) As discussed above, the trial court permitted defense counsel to ask numerous questions of the venire and its control of the voir dire process was not an abuse of discretion. (See *People v. Ashmus* (1991) 54 Cal.3d 932, 959 [trial court's limitation of examination of prospective jurors is reviewable for abuse of discretion], abrogated on another ground in *People v. Yeoman* (2003) 31 Cal.4th 93, 117; see also *People v. Cardenas* (1997) 53 Cal.App.4th 240, 247 ["'The exercise of discretion by trial judges under the new system of court-conducted voir dire is accorded considerable deference by appellate courts.'"].) Nor have appellants shown that the trial court violated any of their constitutional rights by exercising reasonable control over the voir dire process. (See *People v. Roldan*, *supra*, 35 Cal.4th at p. 695.)

D. The Trial Court Conducted Adequate Voir Dire Of Prospective Jurors Dobel, Davis, And Flores

Appellants claim the voir dire of prospective jurors Dobel, Davis, and Flores "was constitutionally inadequate" because it was "superficial," "perfunctory," and did not permit sufficient follow-up questions. (COB 171; BOB 379.) However, the questionnaire was 41 pages long and contained 133 questions. In addition, the trial court asked about fifteen standard follow-up questions–except when the prospective juror's answers precluded the need to go that far. It also asked individualized follow-up questions whenever the prospective jurors' answers merited further inquiry. By way of comparison, this

Court recently characterized a capital case jury questionnaire that was 30 pages long and contained 135 questions as "very thorough." (*People v. Carter, supra*, 36 Cal.4th at p. 1251, fn. 25; see COB 188; BOB 379 [appellants acknowledge that 21 questions on the questionnaire concerned the death penalty].)

Accordingly, there is simply no basis to appellants' suggestion that asking each juror to answer over 150 questions–many of which were submitted by defense counsel–was superficial or inadequate. The trial court had no obligation to allow defense counsel to rehabilitate prospective jurors, nor did the trial court have any duty to inquire further after it determined that the prospective jurors' beliefs would substantially interfere with their ability to fulfill their duties as jurors. (*People v. Stitely*, *supra*, 35 Cal.4th at pp. 539–540; *People v. Samayoa, supra*, 15 Cal.4th at p. 823; *People v. Carpenter*, *supra*, 15 Cal.4th at p. 355.) Once the trial court found there was a substantial likelihood that the jurors would be unable to impose the death penalty, it properly excused the jurors. (See *People v. Haley, supra*, 34 Cal.4th at p. 305 [prospective jurors' equivocal or conflicting statements about ability to impose death penalty was sufficient basis to uphold trial court's ruling to excuse them for cause].)

1. Prospective Juror Dobel Stated That Her Feelings Against The Death Penalty Would Substantially Interfere With Her Ability To Function As A Juror

Appellants repeat their contention that the trial court failed to adequately investigate Dobel's "ambiguous" answers. (COB 171; BOB 379.) However, as discussed in Arguments III and XIX-A, Dobel's answers made it clear that she could not be counted on to follow the law as set forth in the trial court's instructions. Dobel stated she was "against" the death penalty; the death penalty was never appropriate for first time offenders (like appellants); her feelings might prevent her from finding the special circumstance true; her

feelings might prevent her from finding the defendant guilty; her feelings would substantially interfere with her ability to function as a juror; she did not feel she had the right to participate in the decision to deprive a person of his life; and she doubted she would ever vote to impose the death penalty. (14 RT 2415, 2421–2422, 2424, 2429–2430.) Because Dobel's answers made it unmistakably clear that she would have difficulty fulfilling her duty as a juror, the trial court had the discretion to refuse to allow defense counsel to submit any further questions. (See *People v. Carpenter*, *supra*, 15 Cal.4th at p. 355; *People v. Fields*, *supra*, 35 Cal.3d at pp. 357-358 [trial court may excuse a juror who would automatically vote against the death penalty in the case before him]; 14 RT 2428–2430 [trial court stated it would not ask counsel's follow-up questions because it had already determined that Dobel's beliefs would substantially interfere with her ability to perform as a juror].)

Contrary to appellants' argument that Dobel's answers were "ambiguous," she consistently expressed reservations about her ability to follow the law and impose the death penalty. When Dobel answered the open-ended question regarding what she wanted counsel to know, she chose to address the death penalty and responded, "'I doubt seriously that I would impose a death penalty.'" (14 RT 2430.) When the trial court asked Dobel directly if her feeling would interfere with her ability to function as a juror, she answered, "Yes." (14 RT 2422.) Furthermore, the trial court's questioning was more than adequate. It asked Dobel about twenty oral questions–many of which were intended to probe her earlier answers. (14 RT 2418–2424.) Accordingly, the trial court acted within its discretion to decline further questioning and excuse Dobel for cause. (See *People v. Ashmus*, *supra*, 54 Cal.3d at p. 959; *People v. Haley*, *supra*, 34 Cal.4th at p. 305 [trial court may excuse for cause prospective jurors who are equivocal about ability to impose death penalty].)

2. Prospective Juror Brad Davis Stated He Did Not Believe In The Death Penalty And Would Never Impose It

Appellants contend that the trial court denied their constitutional rights by failing to adequately voir dire prospective juror Brad Davis to resolve his "conflicting" and missing answers. (COB 177; BOB 379.) However, Davis stated that he did not believe the death penalty was ever appropriate; he would not change his opinion; and he would never impose the death penalty. According to appellants, these answers were balanced out by answers to more generic questions about following the law. They are mistaken. The trial court could not have abused its discretion by excusing a prospective juror who said he would not follow the law as given to him and would not, under any circumstances, impose the death penalty. (*People v. Harrison*, *supra*, 35 Cal.4th at pp. 227–228 [prospective juror properly excused for cause because "maybe" she could not vote for the death penalty]; *People v. Roldan*, *supra*, 35 Cal.4th at p. 697 [permissible to excuse for cause a prospective juror who states he would find it difficult to vote for the death penalty]; see Respondent's Argument XIX-B-3.)

Davis' questionnaire is located at 29 CT 7347–7388. He indicated it was not his place to sit in judgment of his fellow human being (29 CT 7353); he would hold it against a defendant for not testifying (29 CT 7366); his general feelings about the death penalty was "undecided" (29 CT 7380); a jury should not determine punishment (29 CT 7381); the death penalty was appropriate in no circumstances (29 CT 7386); the death penalty was not appropriate in all circumstances (29 CT 7386); and he could not set aside his personal feelings about the death penalty (29 CT 7386). Though Davis answered virtually every other question, he left numerous questions relating to the death penalty blank.

During voir dire, Davis stated (contrary to his written answers) that he would not hold it against a defendant if he did not testify and would not

automatically reject testimony from a witness who testified pursuant to a plea bargain. (13 RT 2276; but see 29 CT 7364, 7366.) He also stated he opposed the death penalty (13 RT 2278); the death penalty was imposed "randomly" (13 RT 2279); he did not believe in the death penalty and did not believe it was his place to judge another person (13 RT 2279); his feelings about the death penalty were so strong that he would never impose it (13 RT 2280); and his feelings about the death penalty would substantially interfere with his ability to function as a juror (13 RT 2280).

The prosecutor challenged Davis for cause based on his oral answers and his answers to questions 127 (the death penalty was appropriate in no circumstances), 128 (the death penalty was not appropriate in all circumstances), and 129 (he could not set aside his personal feelings about the death penalty). (29 CT 7386.) Cruz's counsel opposed the challenge, and the other defense attorneys joined. The trial court denied LaMarsh and Cruz's request to submit follow-up questions. (13 RT 2280–2281.)

The trial court ruled that Davis would be excused for cause:

> Question No. 127, he answered he believed the death penalty was appropriate in no circumstances.
>
> No. 128, he answered that he believed the death penalty was not appropriate in all cases.
>
> Question No. 129, he cannot change his opinion regarding the death penalty.
>
> His failure to answer a number of death penalty related questions, the Court feels that those answers indicate a very strong opinion, feeling against the death penalty, which far outweighs his undecided answer in Question No. 108. His general feelings about the death penalty–his feelings I believe are confirmed by his answers orally in court, that he would never impose the death penalty under any circumstances whatsoever.

> Accordingly, the Court concludes that Mr. Davis has feelings about the death penalty that are so strong that he would–his ability to serve as a juror in this case would be substantially impaired if he were to come to the point where he had to vote on which sentence were appropriate, death or life without the possibility of parole.
>
> So, Mr. Davis, you are excused. Thank you, sir. You are free to leave.
>
> MR. BRAZELTON: Your Honor, I might add to the record 129, Mr. Davis indicated he would not follow the laws the Court instructed.
>
> THE COURT: Correct.

(13 RT 2281–2283.)

Appellants contend that Davis gave conflicting answers that should have been clarified with further questioning. However, the trial court had the discretion to deny counsel's request for further questioning when it was clear that the prospective juror would have trouble carrying out his duties. (See Code Civ. Proc., § 223; *People v. Ashmus*, *supra*, 54 Cal.3d at p. 959.) Here, even if Davis answered some questions that indicated he would follow the trial court's instructions, his statements that he could not impose the death penalty still gave the court substantial doubt that he would fulfill his duties as a juror. (See *People v. Haley*, *supra*, 34 Cal.4th at p. 305 [trial court may excuse for cause prospective jurors who are equivocal about ability to impose death penalty].) As this Court explained in *People v. Harrison*, *supra*, 35 Cal.4th 208, a trial court does not excuse a juror because he or she has doubts about the death penalty, "but because it found that those doubts would substantially impair her ability to follow the court's instructions . . . ." (*Id.* at p. 228, quoting *People v. Jackson*, *supra*, 13 Cal.4th at p. 1199.) Thus, even if this Court found that Davis' answers were conflicting, it should still defer to the trial court's determination that there was a substantial likelihood that he would

not follow the trial court's instructions. (*People v. Lewis*, *supra*, 26 Cal.4th at p. 353 ["'trial court's determination of the juror's true state of mind is binding upon the reviewing court'"].)

The only real conflict identified by appellants is Davis' indication in the questionnaire that he was "undecided" about the death penalty. (COB 184, citing 29 CT 7380; BOB 379; 13 RT 2279.) However, during voir dire, Davis stated that he was against the death penalty and that when he indicated in the questionnaire that he was undecided, "At that point I just didn't really know." (13 RT 2279.) In other words, after thinking about the matter, Davis resolved the conflict and decided he was opposed to the death penalty. (See COB 151–152 [appellants claimed in previous argument that this Court should give more weight to voir dire than the questionnaire because the prospective jurors understood the criminal process better by then]; BOB 379.) Thus, the trial court could reasonably conclude that any conflict had been resolved, and Davis had firmly decided to not impose the death penalty.

In any case, it was up to the trial court to ascertain the prospective juror's true state of mind. (*People v. Chatman*, *supra*, 38 Cal.4th at p. 365.) Since Davis indicated on the questionnaire and repeated during voir dire that he was opposed to the death penalty, it was never appropriate, and he would never impose it on someone; the trial court did not abuse its discretion by excusing Davis for cause. (See *People v. Harrison*, *supra*, 35 Cal.4th at pp. 227–228 [trial court properly excused for cause a prospective juror who said "maybe" she could not vote for the death penalty].)

3. Prospective Juror Carol Flores

The questionnaire for Carol Flores was lost by the trial court. (See 19 CT 4449, 4462, 4464, 4595.) However, Flores' answers to the trial court's questions about the death penalty were sufficient to establish that the trial court acted within its broad discretion to excuse her for cause:

[BY THE COURT:] In answering the questionnaire, you said that your feelings about the death penalty were very mixed. Will you tell us what those mixed feelings are?

A. I would have a hard time going for the death penalty.

Q. And what's the reasoning behind that thought or the reason–yes, the reason behind that thought?

A. I don't really think it's the ultimate answer.

Q. Do you have any religious or other reasons that you feel that you could not sit in judgment on the conduct of a fellow human being?

A. No.

Q. What are your feelings about punishment of life in prison without the possibility of parole?

A. I could handle that.

MR. BRAZELTON: Sorry, I didn't hear that.

THE COURT: She said, yes, she could handle that.

MR. BRAZELTON: Okay. Thank you.

THE COURT: Q. What purpose do you believe the death penalty serves?

A. I don't think it serves any purpose.

Q. If you were selected as a juror and the case came to the point where the jury had to decide whether the penalty should be life or death, what information would you like to have to help you make that decision?

A. All the evidence.

Q. Anything in particular that you would want the attorneys to present to you?

A. All the facts.

Q. Can you tell us any circumstances where you think the death penalty is appropriate and not appropriate?

A. I don't think it's appropriate.

Q. Is there any situation in which you believe the death penalty is appropriate?

A. No.

Q. Do you have feelings about the death penalty which are so strong that you would never be able to vote for first degree murder?

A. Yes.

Q. Do you have feelings about the death penalty which are so strong that would you never find a special circumstance to be true?

A. Yes.

Q. Do you have feelings about the death penalty which are so strong that you would never impose the death penalty in any case whatsoever?

A. Yes.

Q. Do you have feelings about the death penalty which are so strong that you would always impose the death penalty in every case in which you had the opportunity to do so?

A. No.

Q. Do you have feelings about the death penalty which you believe would substantially interfere with your ability to function as a juror in this case?

A. Yes.

Q. Do you believe that a person who is convicted of successfully planning the murder of or murdering multiple victims should automatically receive the death penalty?

A. No.

THE COURT: Mr. Brazelton, any challenge?

MR. BRAZELTON: Yes, Your Honor. I would challenge for cause, Your Honor.

THE COURT: Mr. Amster, any response?

MR. AMSTER: Yes, Your Honor. I'd ask a *Hovey* voir dire; otherwise, a violation of 6, 8, and 14 [A]mendment rights of my client.

I'd also like to be given the opportunity of giving follow-up questions on this point.

THE COURT: Mr. Faulkner?

MR. FAULKNER: I join in the request.

THE COURT: Mr. Magana?

MR. MAGANA: Join.

THE COURT: Mr. Miller?

MR. MILLER: I'll join.

THE COURT: The Court feels that the answers given here in open court clearly reflect Mrs. Flores's state of mind and belief against the death penalty. She would never impose it. She feels it so strongly, she would never even vote for a first degree murder conviction. Her ability to perform her duties as a juror in this type of case would be substantially impaired.

The Court finds in the written questionnaire, her answer to 108 she had mixed feelings, 110 she did not feel that the death penalty should be automatic for any particular type of crime, No.

> 123 she answered "no" to the question "do you believe the state should impose a death penalty on everyone"–strike that.
>
> All of those answers clearly reflect her feeling, and the Court finds that those feelings and beliefs are not diminished by the one answer to 115 that she would consider the death penalty.
>
> So, thank you, ma'am. I'll find that because of your beliefs, you would not be able to sit as a juror in this case. And thank you. You're free to leave.

(13 RT 2337–2341.)

Appellants contend that the trial court failed to resolve the conflict between Flores' oral answers and her responses on the questionnaire that her feelings about the death penalty were "mixed" and would consider it as an option. (COB 193; BOB 379.) Appellants correctly point out that having "mixed" feelings about the death penalty is not a basis for disqualification. However, Flores did not leave it at that. She made it clear that those mixed feelings would interfere with her ability to fulfill her duties as a juror. Flores said she thought the death penalty was never appropriate; she would never vote for a special circumstance; she would never vote for the death penalty; and her feelings would prevent her from functioning as a juror. (13 RT 2339; see Respondent's Argument XIX-B-5.) Thus, Flores told the trial court that her feelings would prevent her from following its instructions and from applying the law. While it is not proper for a trial court to excuse a juror because of doubts about the death penalty, it is certainly with the trial court's discretion to excuse a juror whose doubts will substantially interfere with her ability to follow the court's instructions. (*People v. Harrison*, *supra*, 35 Cal.4th at p. 228.) Nor did the trial court have any duty to inquire further after it determined that Flores' feelings would substantially interfere with her ability to fulfill her duty as a juror. (See *People v. Stitely*, *supra*, 35 Cal.4th at pp. 539–540; *People*

v. Samayoa, supra, 15 Cal.4th at p. 823; *People v. Carpenter, supra*, 15 Cal.4th at p. 355.)

Appellants contend that the absence of Flores' questionnaire makes reliable appellate review impossible. (COB 195; BOB 379.) But the trial court's comments belie that argument. The trial court expressly stated that its decision to excuse Flores was based on her oral answers–which *are* contained in the record on appeal. "The Court feels that the answers given here in open court clearly reflect Mrs. Flores's state of mind and belief against the death penalty. She would never impose it." (13 RT 2340.) To the extent appellants imply there might have been rehabilitative answers in the questionnaire, the trial court stated that there was only one such answer: Flores indicated in Question No. 115 that she would consider imposing the death penalty. (13 RT 2341.) However, the trial court reasonably determined that one answer on the questionnaire was outweighed by many other answers–both written and oral. Moreover, counsel made absolutely no argument and did not identify any answers in the questionnaire which supported their opposition to Flores being excused for cause. Cruz's counsel made his standard request for *Hovey* voir dire, and the other defendants joined. But none of them made any argument that specifically addressed Flores. (13 RT 2340.) Thus, this Court can safely assume there was nothing else in the questionnaire that would have substantially undermined the trial court's determination.

Furthermore, even if this Court assumed that all of Flores' answers on the questionnaire indicated that she was willing to follow the court's instructions, the trial court still acted within its discretion. It is simply impossible to imagine anything Flores could have written on the questionnaire that would have overridden her subsequent statements that she thought the death penalty was never appropriate, she would never vote for it, and her feelings would prevent her from functioning as a juror. (13 RT 2339; see *People v. Haley, supra*, 34

Cal.4th at p. 305 [defendant has the burden of proving his ability to prosecute appeal has been prejudiced by the missing questionnaires].)

In *People v. Harris* (2005) 37 Cal.4th 310, three prospective jurors stated they would always reject the death penalty, but two of them also gave some conflicting answers in their questionnaires. (*Id.* at pp. 330–331.) The defendant claimed on appeal that the trial court did not ask enough questions to resolve the purported conflict. (*Id.* at p. 331.) This Court disagreed. "The record supports the court's findings that each of these prospective jurors lacked either the ability or the willingness to engage in the performance of duties as jurors in a death penalty case, and we defer to its decision that no further questions were necessary." (*Ibid.*) The same deference is due here. Since the trial court expressly weighed Flores' answers and reasonably concluded that she would never vote for the death penalty and could not fulfill her duties as a juror (13 RT 2340–2341), it did not abuse its discretion by excusing her. (See *People v. Ashmus*, *supra*, 54 Cal.3d at p. 959 [trial court has discretion to decline further questioning when it is apparent that prospective juror will not follow its instructions]; *People v. Haley*, *supra*, 34 Cal.4th at p. 305 [trial court may excuse for cause prospective jurors who are equivocal about ability to impose death penalty].)

E. Any Error Was Harmless

As appellants concede, this Court has repeatedly denied arguments that trial courts erred by denying motions to conduct sequestered voir dire; this Court has also denied requests to include in juror questionnaires a question about prospective jurors' understanding of the meaning of the term of life without the possibility of parole. Similarly, this Court has recognized that Code of Civil Procedure section 223 properly permits trial courts to limit voir dire to areas necessary to ascertain whether a prospective juror could be challenged for cause. (*People v. Noguera*, *supra*, 4 Cal.4th at p. 646.) Thus, the trial court

could not have erred by denying appellants' requests to ask follow-up questions that were specifically geared towards helping counsel decide whether to exercise peremptory challenges.

Appellants' fourth claim–that the trial court conducted inadequate voir dire of prospective jurors Dobel, Davis, and Flores–is similarly baseless. The trial court could not have abused its broad discretion by excusing three jurors who stated the death penalty was never appropriate and their feelings would prevent them from functioning as a juror. Accordingly, the trial court did not abuse its discretion; there was nothing improper about the jury selection process; and the trial court did not deprive appellants of any constitutional rights.

Finally, even if there were error, it was harmless beyond a reasonable doubt. In *People v. Robinson*, this Court found that the trial court should have asked additional questions to discover whether the prospective jurors had any racial bias. (37 Cal.4th at p. 621.) However, this Court found the error did not warrant reversal:

> Even if we were to agree that the voir dire examination was flawed, we would not find any reversible error. Addressing this same issue in another capital case, *People v. Holt* (1997) 15 Cal.4th 619, 661 (*Holt*), we rejected the claim of error, observing that "[u]nless the voir dire by a court is so inadequate that the reviewing court can say that the resulting trial was fundamentally unfair, the manner in which voir dire is conducted is not a basis for reversal."

(*People v. Robinson*, *supra*, 37 Cal.4th at p. 620; *People v. Carter*, *supra*, 36 Cal.4th at p. 1250.) Similarly, here, any flaws in the voir dire process were minimal and did not render the trial fundamentally unfair. The jury was properly death-qualified; the jurors who were excused expressly indicated their inability to follow the trial court's instructions; and appellants raise no claims regarding the jurors who were actually seated on the jury. Accordingly, any error did not undermine confidence in the jury's neutrality and was harmless. (*Ibid.*)

V.

THE MISSING JUROR QUESTIONNAIRES DO NOT RENDER THE RECORD INADEQUATE FOR REVIEW

The trial court conducted voir dire from March 3, 1992, through March 23, 1992. (6 CT 1631, 1712.) After the trial the trial court lost or discarded most of the voir dire questionnaires. The record was substantially reconstructed from trial counsel's records. However, a few questionnaires were never recovered; and an official list record of counsel's written follow-up questions were not recovered. (19 CT 4449, 4462, 4464, 4595; see also stipulation to augment record with missing jury questionnaire granted by this Court on January 23, 2008; but see 6 CT 1636–1673 ["Questions Requested To Be Asked Of Jurors" filed by Cruz on March 10, 1992].) Nevertheless, the trial court consistently asked about fifteen follow-up questions that were recorded in the Reporter's Transcript. Some of these were certainly from the questions submitted by defense counsel. (See Respondent's Argument XVIII-A; 6 CT 1636–1673; 10 RT 1858.) Though, in settling the record, the trial court declined to make that finding.[37] (42 CT 10710.)

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37. The trial court issued an order settling the record on August 13, 2004. (42 CT 10693.) With regard to the missing voir dire documents, that order provided:

"**Juror Questionnaires:** [¶] Trial counsel, counsel on appeal and the court have made diligent efforts to obtain the jury questionnaires in this case. The record will be augmented to include all questionnaires which have been located. As to any missing questionnaires, no findings as to the content of those questionnaires is possible.

Follow-up questions: [¶] During court-conducted voir dire, the trial attorneys submitted written questions to the trial court, requesting follow-up questions to either the court's voir dire or the responses on juror questionnaires. After submission of the written questions, the trial court sometimes asked prospective jurors additional questions, and other times denied the requested follow-up, either explicitly or by not asking the requested questions. The written questions which were submitted cannot be located. The content of the written questions was not read into the record, and cannot be reliably recreated.

Nevertheless, appellants have the burden of proving they were prejudiced by the missing record (*People v. Haley*, *supra*, 34 Cal.4th at p. 305), and it is a burden they cannot carry. As discussed in Arguments III, IV, and XX, all of the challenged jurors gave numerous answers which indicated there was a substantial likelihood that they would not impose the death penalty under any circumstances. Regardless of any other answers the jurors may have given in the missing juror questionnaires, the responses on the record would have, at a minimum, created a conflict or ambiguity in their willingness to impose the death penalty. Since trial courts have discretion to excuse prospective jurors who express conflicting or ambiguous answers regarding their willingness to impose the death penalty, appellants cannot show that they were prejudiced by the missing jury questionnaires. (See *ibid.*)

A. Legal Principles

"All records and papers maintained or compiled by the jury commissioner in connection with the selection or service of a juror . . . shall be preserved for at least three years after the list used in their selection is prepared, or for any longer period ordered by the court or the jury commissioner." (Code Civ. Proc., § 207, subd. (c).)

> Both the United States Constitution and the California Constitution entitle a criminal defendant to a record on appeal sufficiently complete to permit meaningful appellate review. (*People v. Howard* (1992) 1 Cal.4th 1132, 1165.) In *People v. Ayala* (2000) 24 Cal.4th 243, 270 (*Ayala*), and *People v. Alvarez* (1996) 14 Cal.4th 155, 196, footnote 8 (*Alvarez*), we held that lost juror questionnaires did not impede meaningful appellate review: "The record on appeal is inadequate . . . only if the

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Where additional questions were asked by the court following submission of a written question, it cannot be determined whether or not the questions asked were the questions actually submitted." (42 CT 10710; but see 6 CT 1636–1673 [Cruz's written follow-up questions]; 10 RT 1858 [trial court noted that only Cruz had submitted written follow-up questions].)

> complained-of deficiency is prejudicial to the defendant's ability to prosecute his appeal. [Citation.] It is the defendant's burden to show prejudice of this sort . . . ."

(*People v. Haley*, *supra*, 34 Cal.4th at p. 305.)

When the record on appeal shows that the challenged jurors gave equivocal or conflicting statements as to whether they could impose the death penalty, that "alone is a sufficient basis to uphold the determination of the trial court as to these jurors' actual state of mind. (*People v. Carpenter* (1997) 15 Cal.4th 312, 357 (*Carpenter*) ['if the juror's statements [regarding the death penalty] are equivocal or conflicting, the trial court's determination of the juror's state of mind is binding'].)" (*People v. Haley*, *supra*, 34 Cal.4th at p. 305.)

> A trial judge may properly exclude a prospective juror in a capital case if the juror's views on capital punishment would prevent or substantially impair the performance of his or her duties as a juror in accordance with the court's instructions and the juror's oath. (*Wainwright v. Witt* (1985) 469 U.S. 412, 424; *People v. Jones* (2003) 29 Cal.4th 1229, 1246; *People v. Guzman* (1988) 45 Cal.3d 915, 955.) The determination of a juror's qualifications falls "'within the wide discretion of the trial court, seldom disturbed on appeal.'" (*People v. Kaurish* (1990) 52 Cal.3d 648, 675.) There is no requirement that a prospective juror's bias against the death penalty be proven with unmistakable clarity. (*People v. Carpenter* (1999) 21 Cal.4th 1016, 1035.) Instead, "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. Jones*, *supra*, 29 Cal.4th at pp. 1246-1247.) "On review, if the juror's statements [regarding the death penalty] are equivocal or conflicting, the trial court's determination of the juror's state of mind is binding. If there is no inconsistency, we will uphold the court's ruling if it is supported by substantial evidence." (*Carpenter*, *supra*, 15 Cal.4th at p. 357.)

(*People v. Haley*, *supra*, 34 Cal.4th at p. 306.)

B. The Record On Appeal Is Adequate To Allow Appellants To Prosecute Their Appeal Without Prejudice

Appellants contend that the record is inadequate for review because it is missing the questionnaires for prospective jurors Dobel and Flores as well as defense counsel's written follow-up questions. (COB 201–202; BOB 379.) However, appellants have failed to carry their burden of proving that these missing records have prevented them from effectively prosecuting their appeal. (See *People v. Haley*, *supra*, 34 Cal.4th at p. 305.) As discussed in the previous two arguments, the record on appeal shows that the challenged jurors repeatedly expressed their reluctance to impose the death penalty. Since the missing juror questionnaires could, at best, demonstrate only a conflict in the jurors' statements, and a trial court's resolution of conflicting statements about a prospective juror's ability to impose the death penalty are resolved in favor of the trial court's ruling (*People v. Carpenter*, *supra*, 15 Cal.4th at p. 357), appellants cannot show the missing records have prejudiced them.

In addition, Respondent asks that this Court refer to its Argument XX for further discussion of the adequacy of the record on appeal.

Appellants argue that "this Court has addressed the issue of missing juror questionnaires in three cases: *People v. Ayala* (2000) 24 Cal.4th 243, 270; *People v. Alvarez*, *supra*, 14 Cal.4th at p. 196, footnote 8; and *People v. Haley*, *supra*, 34 Cal.4th at pp. 304–308. In each, this Court held that lost juror questionnaires did not impede meaningful appellate review." (COB 200.) Appellants omits *People v. Heard* (2003) 31 Cal.4th 946 from the list even though they cite it elsewhere. (COB 171; BOB 146, 379.) Like the other cases, *Heard* also found that there was no basis for reversal even though the questionnaires for *all* prospective jurors except those actually seated were lost. (*People v. Heard*, *supra* 31 Cal.4th at p. 969.) Indeed, appellants fail to cite a

single case in which lost questionnaires was held to render the record inadequate for review. The same result is appropriate here.

Prospective juror Dobel told the trial court that she was "against" the death penalty; the death penalty was never appropriate for first time offenders (like Cruz); her feelings might prevent her from finding the special circumstance true; her feelings might prevent her from finding the defendant guilty; her feelings would substantially interfere with her ability to function as a juror; she did not feel she had the right to participate in the decision to deprive a person of his life; and she doubted she would ever vote to impose the death penalty. (14 RT 2415, 2421–2422, 2424, 2429–2430.) Because it is inconceivable that Dobel's answers on her questionnaire would have removed the trial court's reasonable doubt that she would follow its instructions and impose the death penalty if appropriate, appellants cannot show that they were prejudiced by the missing questionnaire. (See *People v. Carpenter*, *supra*, 15 Cal.4th at p. 357.)

Similarly, appellants cannot show prejudice from the loss of prospective juror Flores' questionnaire. Flores told the trial court that she thought the death penalty was never appropriate; she would never vote for a special circumstance; she would never vote for the death penalty; and her feelings would prevent her from functioning as a juror. (13 RT 2339.) Because it is inconceivable that Flores could have written anything on her questionnaire that would erase the trial court's reasonable doubt that she would follow the court's instructions, appellants cannot show they were prejudiced by the missing questionnaire. (*People v. Harrison*, *supra*, 35 Cal.4th at p. 228; *People v. Carpenter*, *supra*, 15 Cal.4th at p. 357.)

Moreover, Dobel and Flores's oral answers were given after they had completed the questionnaire. The trial court could reasonably conclude that the oral answers, given after they had had the opportunity to reflect on the matter, were a better indicator of their true feelings. (See *People v. Abilez*, *supra*, 41

Cal.4th at p. 493–494 [noting that jurors' views can change over the course of a long voir dire process]; see also COB 151–152 [appellants asserted in a previous argument that the prospective jurors' oral answers were more intelligently made because they had a better understanding of the process than they did when they answered the questionnaire]; BOB 379.)

Appellants argue that, unlike in *People v. Haley*, *supra*, 34 Cal.4th at page 305, and similar cases decided by this Court, defense counsel were not permitted to ask follow-up questions after the trial court completed its questioning of the prospective jurors. They suggest that the record here, therefore, is less complete because counsel were not permitted to elicit further details from the challenged jurors. (COB 200–20; BOB 379.) While it is not clear which questions came from the court and which were actually written follow-up questions from counsel, the trial court stopped asking follow-up questions only when it was evident that the prospective jurors were not able or willing to fulfill their duties. Moreover, the defendants were permitted to round out the record with argument by defense counsel. The trial court invited each attorney to state his reasons why it should not grant the prosecutor's motion to excuse Dobel and Flores for cause. The attorneys' arguments suggest there was little in the missing questionnaires that was worth mentioning. With only one exception, the attorneys did not point out anything which supported their opposition.

LaMarsh's counsel did argue that Dobel's answer to Question No. 129[38] suggested that she could fulfill her function as a juror. (14 RT 2426.) However, LaMarsh raised that point only after the prosecutor had cited that same answer as a basis to excuse Dobel (14 RT 2424), and only after Cruz–who

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38. Question 129 asked, "Could you set aside your own personal feelings regarding what you think the law should be regarding the death penalty, and follow the law the Court instructs you?" (E.g., 29 CT 7302.)

had been the first defendant to oppose the challenge for cause–had failed to argue that anything in the questionnaire supported his argument. (14 RT 2424–2425.) The fact that both the prosecutor and LaMarsh relied on Question No. 129 does not, however, prove that the record is inadequate. Since this Court can simply assume that Dobel answered Question 129 in the affirmative, there is no prejudice.

More importantly, that was the only questionnaire answer that was identified by any defense attorney in support of their opposition to excusing Dobel and Flores. (13 RT 2340 [argument concerning Flores]; 14 RT 2424–2428 [argument concerning Dobel].) Only one defense attorney mentioned it, and none of them discussed it. So Dobel must not have given an answer that was very helpful for the defendants' opposition. Though appellants suggest that there might be answers in the questionnaires that might show that the trial court abused its discretion, trial counsel's arguments suggest otherwise. Further, as already discussed, it is inconceivable that Dobel or Flores could have written *anything* in their questionnaires that would have eliminated the concerns raised by their oral answers. But if they had written something that was unusually powerful and persuasive, it is reasonable to expect that defense counsel would have mentioned it in their argument.

Appellants argue, "The trial court did not cite a single answer from Flores's questionnaire which actually supported its ruling." (COB 205; BOB 379; but see COB 206 [appellants argued, "The trial court cited only two of Flores' questionnaire answers in support of its ruling . . . ."].) Not so. The trial court made numerous references to Flores' questionnaire answers. (13 RT 2335–2338.) In its ruling, it expressly weighed three questionnaire answers which indicated she could not fulfill her duties as a juror against one question that suggested otherwise. (13 RT 2340–2341.) The trial court also relied on her oral answers, stating that "the answers given here in open court clearly

reflect Mrs. Flores's state of mind and belief against the death penalty." (13 RT 2340.)

It was actually the defendants who failed to "cite a single answer from Flores's questionnaire which actually supported" their opposition to the trial court's ruling. (COB 205; BOB 379; 13 RT 2340.) Thus, the trial court followed-up on Flores' answers to the questionnaire and gave a reasonable explanation for excusing Flores. It was trial counsel that cited nothing in either the questionnaire or voir dire to support their position.

Appellants argue that they have been prejudiced by the loss of defense counsel's written follow-up questions. That is debatable since Cruz's written follow-up questions are in the record and the trial court noted that no one else had submitted follow-up questions. (6 CT 1636–1673; 10 RT 1858.) However, even if appellants were correct, it is difficult to see how they could benefit from showing this Court what written follow-up questions went unasked. (See 13 RT 2340–2341; 14 RT 2428.) It is inconceivable that appellants had such incredibly insightful follow-up questions that if this Court could just see them, it would realize that the voir dire was inadequate.

Further, it is quite certain that some of the many questions that the trial court repeatedly asked the prospective jurors were counsel's written follow-up questions. (See Respondent's Argument XVIII-A.) The trial court stated that it would give counsel a "full opportunity" to submit written follow-up questions. (See 6 RT 1262.) And the record demonstrates that the trial court did, in fact, ask many of those questions. (See COB 201 [according to appellants, the trial court "asked some but not all of the questions which trial counsel submitted to the court to ask"]; BOB 379.) Respondent asks that this Court refer to Argument XVIII-A for a detailed analysis of follow-up questions. But regardless of whether the attorneys' written questions were ever asked,

there was no need for further questioning of Dobel and Flores because they made it clear they would not fulfill their duties as jurors.

Again, the questions that *were* asked are contained in the Reporter's Transcript. The only part of the record that is missing is questions that were submitted but never used. That could not be prejudicial because even if this Court had those questions, it would not provide any additional insight into the prospective jurors' state of mind.

In *People v. Roldan*, *supra*, 35 Cal.4th 646, this Court rejected the defendant's claim that the trial court's voir dire procedure was inadequate, in part, because he failed to explain how additional questions would have improved the process. (*Id.* at p. 692.) Appellants contend that their claim is stronger because there was a record of follow-up questions in *Roldan*, but through no fault of their own, those questions are not available to "demonstrat[e] the inadequacy of the trial court's voir dire . . . ." (COB 205; BOB 379.) However, the opposite is actually true. Because Cruz's written follow-up questions are in the record, appellants can not only argue about the questions that we know were not asked, but can also speculate about missing questions that could have been asked. But appellants' argument still fails because they cannot show that *any* unasked follow-up questions would have somehow rehabilitated prospective jurors who had made clear their inability to follow the law.

In sum, once the jurors stated they would not impose the death penalty, the trial court was justified in excusing them for cause. Further, even if the jurors gave conflicting or ambiguous answers regarding their willingness to impose the death penalty, this Court has clearly stated that "'the trial court's determination of the juror's state of mind is binding.'" (*People v. Haley*, *supra*, 34 Cal.4th at p. 305, quoting *People v. Carpenter*, *supra*, 15 Cal.4th at p. 357.) At most, the missing questionnaires could have given appellants fodder for

arguing that the jurors gave conflicting answers. But since this Court defers to the trial court's resolution of conflicting or ambiguous answers (*ibid.*), and there was ample support for excusing the jurors, recovery of the missing questionnaires would change nothing. Further, nothing in the missing follow-up questions could somehow make the jurors' express statements that they would not impose the death penalty seem less dispositive. Due process requires only that the state provide a "defendant with a record sufficient to permit adequate and effective appellate review." (*People v. Rogers*, *supra*, 39 Cal.4th at pp. 857-858; accord, *People v. Rundle* (2008) 43 Cal.4th 76, 110-111.) Because appellants fail to show that the record is inadequate, they cannot demonstrate a violation of their constitutional rights. (*Ibid.*)

VI.

THE TRIAL COURT PROPERLY DENIED CRUZ'S MOTION TO SUPPRESS EVIDENCE TAKEN FROM HIS APARTMENT

Detective Deckard arrived at the Elm Street house an hour or two after the murders. He interviewed Alvarez, and she said "Jason" (LaMarsh) pointed a gun at her; he was white and had afro-type hair. Two people informed Deckard that LaMarsh lived in a group of apartments at the Camp. At the Camp, Kevin Brasuell told Deckard that LaMarsh frequently visited Apartment 7; however, no one was home at that time. Based on these facts, Deckard made an affidavit and obtained a warrant to search Apartment 7 and surrounding trailers. When Deckard returned to the Camp with the warrant, Jennifer Starn informed him that she and Cruz and their children lived in Apartment 7, and LaMarsh lived in the trailer a few feet away.

Deckard believed Starn, but he also had information that there had been four assailants, and the people who lived at the Camp lived and ate together and might even be some type of cult. Consequently, Deckard believed he still had

probable cause to search Apartment 7, LaMarsh's trailer, and the larger trailer which belonged to Beck and Vieira. Deckard conducted the search because he did not see any reason to delay the investigation to obtain another warrant when he already had one that authorized the search of Apartment 7 and associated trailers.

At trial, Cruz argued that once Deckard learned that LaMarsh lived in a separate trailer, he should have known he no longer had probable cause to search Apartment 7. However, the trial court denied the motion to suppress all evidence from Cruz's apartment because Deckard had a good faith belief that the warrant was still valid. The trial court's ruling was proper. Deckard believed that he could still search Apartment 7 because the warrant specifically authorized that search based on LaMarsh frequenting that apartment, and the information that four other people lived there did not change that understanding. Moreover, Deckard had received information that the group was a cult which ate and lived together; two people had told Deckard that LaMarsh went to Apartment 7 frequently; there was no bathroom in LaMarsh's trailer, so he had to have free access to someone else's home; and there was an electrical extension cord that connected LaMarsh's trailer to Apartment 7. Taken together, this evidence supported the trial court's ruling that Deckard had a good faith belief that LaMarsh was part of a group that lived together and shared all of the buildings. As the prosecutor argued, the trailers functioned as bedrooms for the main house which had the electricity and toilet facilities. Therefore, Deckard could still reasonably believe that evidence of LaMarsh's participation in the crimes could be found in Apartment 7.

Though the trial court ruled that there would be no blanket suppression of evidence from Cruz's apartment, it did suppress numerous articles from that search. It also suppressed all evidence from Beck's trailer.

On appeal, Cruz renews his argument that Deckard should have known he did not have probable cause to search Apartment 7 once he learned that LaMarsh lived in a separate trailer. (COB 209.) However, this Court should affirm the trial court's ruling because Deckard had a good faith belief that the warrant was valid and based on probable cause. Further, as the trial court noted, if Deckard had gone back to the magistrate with the new information, he would have still had probable cause to obtain a warrant to search Apartment 7.

This Court should also affirm the ruling under the doctrine of inevitable discovery. After Deckard left the Camp to obtain the warrant, officers secured the property and arrested Cruz. Because Cruz was later identified as a perpetrator, Deckard would have easily procured a valid warrant to search Apartment 7. Moreover, since the property had been secured, there is no possibility that evidence could have been removed in the interim. Accordingly, all of the evidence would have been inevitably discovered, and denial of the suppression motion was proper.

Finally, none of the property from Apartment 7 that was actually offered into evidence was particularly important to the prosecution. The evidence corroborated testimony that was either independently credible or had to do with tangential matters. Therefore, even if the trial court's denial of Cruz's suppression motion was erroneous, it was harmless beyond a reasonable doubt.

A. Procedural History

1. Search Warrant Affidavit

According to his Affidavit For Search Warrant, Detective Gary Deckard arrived at the Elm Street house at about 2:00 a.m. on May 21, 1990–an hour or two after the murders. Deckard examined the four victims and determined that

Raper "had been killed by some type of blunt instrument and/or with a knife." He did not determine the cause of death of the other victims. Donna Alvarez told him that she had been sleeping in the house earlier in the evening and a woman with blond hair ordered her to leave the bedroom. Alvarez went to the living room, and then to another bedroom. A man pointed a gun at her and ordered her to return to the living room. She ran out of the bedroom and eventually escaped through the garage. The man was white, 20–25 years old, six feet tall, with a medium build and brown afro-type hair. (42 CT 10738–10740.)

An hour later, Deckard spoke to Kenneth Tumelson outside the house. He said that someone named "Jason" was 21 years old, had brown afro-type hair, and "frequent[ed]" the Elm Street house. Tumelson also said that "Jason is staying in a group of apartments located across the street from the laundromat on Finney Road." (42 CT 10740.)

An hour later, Deckard spoke to Raper's son, Frank Raper, Jr. (Frank). Frank told Deckard that Raper had told him that he had been having problems with someone named Jason; Jason had set his car on fire a month earlier; and Raper had asked Frank for a gun to protect himself. Frank also said that Jason was living across from the laundromat in an apartment which was toward the rear of a group of apartments; there was a large amount of camouflage ("camo") material draped in front of the residence. (42 CT 10740.)

An hour later, Deckard and other officers went to the Camp. There was a large piece of camouflage material in front of Apartment 7. No one was home, but Deckard spoke to Kevin Brasuell, the tenant in Apartment 2 of the adjoining property. Brasuell told Deckard that someone named "Jerald" was the apartment manager and lived in Apartment 7; but "a white male with a brown afro type hair[] frequents that residence . . . ." Brasuell also told Deckard that a 1975 Chevy Van and a 1980 Chevrolet belonged either to Jerald

or one of the "several people coming and going out of the manager's apartment . . . ." (42 CT 10740–10741.)

Detective Deckard submitted the Affidavit For Search Warrant to a magistrate of Stanislaus County. (42 CT 10736–10741; see 42 CT 10733, 10780 [trial court order settling record].) In the affidavit, Deckard declared that he had been an officer for fifteen years and had extensive education and experience investigating homicides and other felonies. (42 CT 10738.)

The search warrant was apparently destroyed. (42 CT 10732, 10780.) However, according to Deckard's affidavit, the magistrate signed the warrant at 10:19 a.m. (42 CT 10737.) According to the affidavit, the warrant authorized the police to search Apartment 7 at the Camp, which was described as:

> a single story structure, beige in color with wood siding. This structure has a composition roof and has a carport type structure on the west side of the residence with a camouflaged type netting draped over the carport type structure. Attached to the carport is a wood sign stating manager. The residence of 4510 Finney Road, Apartment 7, in Salida, California, is bordered on the west side of the property [by] 4825 Sequoia Road, Apartment 2, in Salida. All rooms, attics, basements, closets, cupboards, cabinets, any luggage, trunks, valises, boxes and any containers therein, and any garages, storage rooms, outbuildings, trailers and trash containers of any kind located on the above described premises.

(42 CT 10736.)

The warrant authorized the search of a Black Chevrolet van with California license plate number 370 TAU and a White 1980 Chevy with California license plate number 1PMK026. (42 CT 10736.) It also listed various items to be seized, including firearms, ammunition, associated receipts, articles to establish identification, fingerprints, blood splatters, hair fibers, various documents that might show a motive for the killings, and any items used to treat wounds suffered by the perpetrators. (42 CT 10737.)

Two weeks after conducting the search, Deckard executed The Return On Search Warrant. It listed 51 items or groups of items that were seized during the search of Apartment 7. (42 CT 10742–10745.)

2. Motion To Suppress And Opposition

On November 1, 1991, Cruz moved to suppress evidence seized from Apartment 7. (4 CT 1063–1073.) In his written motion, Cruz alleged that there was not probable cause to issue the warrant because the facts did not establish that LaMarsh lived in Apartment 7 and there was no reason to believe evidence related to the crimes would be found there; the warrant was "vague" in its description of the property sought; it was not executed properly; and the search was warrantless because it took place before the warrant was issued. (4 CT 1064–1066.) Cruz also moved to suppress evidence from the May 30, 1990, search of two storage lockers at 2100 East F Street in Oakdale. (4 CT 1074–1089.)

On November 19, 1991, Beck joined Cruz's motion to suppress evidence from both searches. (4 CT 1143–1144; see 2 RT 138.) On November 26, 1991, LaMarsh joined Cruz's motion to suppress evidence obtained from Apartment 7. (15 CT 3551–3553; see 2 RT 138.)

The People filed its opposition on November 27, 1991. (5 CT 1153–1182.) The prosecutor argued that the defendants did not have standing to challenge the searches; the evidence should not be suppressed because Deckard had a good faith belief the warrant was valid; the magistrate had probable cause to issue the warrant; the warrant described the property to be seized with reasonable particularity; and the defendants' attempt to traverse the warrant was inadequate because they did not make a prima facie case that the supporting affidavit was willfully false. (5 CT 1153–1177.)

3. Suppression Hearing

The first part of the suppression hearing was held on December 13, and the hearing was concluded on December 26, 1991. (5 CT 1212, 1217–1218; 2 RT 139–347.) Cruz began the hearing by arguing that the warrant was legally inadequate because it was directed towards LaMarsh; the affidavit asserted only that LaMarsh lived at the Camp and "frequented" Apartment 7; and there was no reason to believe that LaMarsh stored anything related to the crimes in Apartment 7. (2 RT 140–141.)

Cruz called Jennifer Starn to testify. Starn had been charged in another matter along with Cruz and was present with counsel. (2 RT 138, 142; see 2 RT 355 [prosecutor noted that Starn and Cruz were charged with possession of a bomb]; 39 RT 7127–7128 [parties stipulated at penalty trial that Starn had two charges pending against her for possessing a bomb–though only one of the charges stemmed from activity that took place before Cruz was arrested]; see also 10 CT 2645.) She testified that she lived in Apartment 7. (2 RT 143.) On cross-examination, Starn testified that it was a studio apartment, and she lived there with Cruz and their two children. There were two modular homes nearby which did not have separate addresses. (2 RT 143–144.) Beck lived in the larger trailer and LaMarsh lived in the smaller trailer. They visited her home about twice a week. (2 RT 145–146, 150, 153.) She and Cruz stored items in the small trailer, but moved it out before LaMarsh moved in. (2 RT 158–160.) LaMarsh had exclusive use of the small trailer. It did not have a toilet. The electricity was supplied by an electrical extension cord from Apartment 7. (2 RT 165–166, 170.) LaMarsh relied on the toilet in her and Brasuell's apartments. (2 RT 170.)

The prosecutor argued that Tumelson and Frank both told Deckard that LaMarsh was "'staying'" at "the group of apartments located across the street from the laundromat on Finney Road . . . ." (2 RT 173.) Deckard "was

reasonable in relying on the fact that the warrant was valid when he and his other officers served it and carried it out." (2 RT 175.)

Cruz called Deckard to testify. (2 RT 178.) Deckard testified that he interviewed Brasuell to find out who lived at the Camp. Next to Brasuell's apartment were three or four studio apartments and two trailers. One of the studios had camouflage netting and a "'Manager'" sign on the front. No one was home at Apartment 7. Some officers forced open the door to the large trailer. (2 RT 178–180.) Brasuell told Deckard that LaMarsh "frequented" Apartment 7 and the small trailer. But LaMarsh did not live in Apartment 7; "Gerald and his wife" lived there. Then Deckard went back to his office to get a search warrant. (2 RT 182–183, 192, 198–201.)

Starn and Cruz came to Apartment 7 while Deckard was away. Officers took Cruz away, but Starn was still there when Deckard returned with the warrant. There were also some officers securing the scene. (2 RT 184.) Deckard interviewed Starn and she said LaMarsh slept in the small trailer. Then Deckard and other detectives entered Apartment 7. (2 RT 186, 189, 191.)

When Deckard went to the magistrate for a search warrant, he believed that Ritchey had died from blunt force trauma and the others might have died from gunshots. He did not believe the trailers were separate living accommodations. He believed that the trailers "were part and parcel of unit No. 7." He also believed that the warrant had been issued upon probable cause and was valid. However, after talking to Starn, he formed the opinion that LaMarsh stayed in the small trailer and Beck and Vieira stayed in the larger trailer. (2 RT 195, 197–198.) When Deckard executed the search warrant he believed there were at least four assailants. He believed that LaMarsh was involved with a group that frequented both the trailers and Apartment 7. (2 RT 202.)

Brasuell testified he saw Starn and Cruz arrive the morning of the search. He also saw officers search the larger trailer. (2 RT 205.) He told Deckard that

Cruz (and possibly that Starn) lived in the studio apartment and that LaMarsh "frequently" stayed in the small trailer. Brasuell testified that the studio and two trailers "was all one unit close together, basically." He told Deckard that the people who lived in the studio and trailers "all lived together . . .," "all in one unit," and that Cruz, Starn and Jason all lived together. They all had access to each other's residences. (2 RT 208–215, 217, 224.) "They were always together basically." (2 RT 226.) They also ate together under the camouflage canopy. (2 RT 224–225.) He did not tell Deckard that LaMarsh lived in the small trailer until that second conversation. (2 RT 221.)

When the hearing resumed on December 26, 1991, Cruz called Detective Michael Luiz to testify. (2 RT 237.) Luiz arrived at the Camp in the early afternoon; Starn was there, but Cruz was not. He helped search Apartment 7 and found components for a pipe bomb. (2 RT 239–240.)

Dee Messinger testified that she lived at the Camp with Brasuell. Deckard and other officers came to her door in the morning and spoke to her. She saw Cruz later that day. (2 RT 244–245, 252–253.) There was a camouflage net over the door to Apartment 7. (2 RT 258.)

Deputy Sheriff Steven Owens testified that he arrived at the Camp at 11:00 a.m. and helped search Apartment 7 and both trailers. He did not find anything in the trailers, but in Apartment 7 he found miscellaneous items. He did not see Deckard or Cruz while he was at the Camp. (2 RT 262–263.)

Detective Darrell Freitas testified he first arrived at the Camp at 5:30 a.m. They searched for suspects, but did not find any. He and two other officers secured the area. Cruz and Starn came home with their children. Some officers returned with the warrant at 11:45 a.m. After they gave Starn a copy and discussed it with her, they conducted the search. Freitas kept a log of the items seized. (2 RT 265–266, 268.) Freitas testified that when he executed the warrant, he believed it was valid and based upon probable cause. "I was

advised that the trailers were associated with the residence and that the warrant included those trailers." (2 RT 279.) "There was people staying in the trailers I was told, but they belonged to the same residence." (2 RT 286.)

Sergeant Myron Larson testified he went to the Camp around 5:00 a.m. He knocked on the door at Apartment 7, but there was no reply. He instructed Detective Freitas to secure the area. (2 RT 290.) The officers broke into the larger trailer to make sure there were no suspects there who could shoot them while they were waiting in front of Apartment 7 for the warrant. (2 RT 292–293, 298.) He had information that four males had run from the crime scene in "military type fashion"; one of the suspects was named "Jason" and another one was a heavyset white male. (2 RT 299, 304.) He directed Deckard to apply for a search warrant. (2 RT 303.) Sergeant Larson believed both trailers were "part and parcel of Apartment No. 7." He also believed the search warrant was valid and based upon probable cause. (2 RT 306.) Larson had information that the people at the Camp were living together as a group, sharing all of the living spaces, and possibly functioning as a cult. (2 RT 308–309.) In response to questions by the trial court, Larson testified that he believed the trailers were part of Apartment 7 because of what he observed at the Camp; for example, an extension cord went from Apartment 7 to the larger trailer. But if the trailers had not been listed in the warrant, he would not have believed he could search them. (2 RT 310–311.)

Deputy Charlie Corle testified he helped secure Apartment 7 and the trailers. He entered the small trailer to make sure no one was inside. (2 RT 314.)

Cruz argued that Deckard misled the magistrate when he indicated that LaMarsh "frequented" Apartment 7 because he already knew that LaMarsh did not live there. The officers did not comply with the knock and notice rule. The property seized went beyond the scope of the warrant. And the affidavit was insufficient to establish probable cause because LaMarsh only visited

Apartment 7 and there was no evidence he stored anything there. (2 RT 318–321.)

The trial court made some preliminary rulings: (1) the affidavit provided probable cause to search Apartment 7; (2) if Deckard had had the information about where LaMarsh lived when he completed his affidavit, that would have provided more probable cause to add the trailers to the warrant; it would not have diminished the probable cause to search Apartment 7; (3) LaMarsh had standing to challenge the search of Apartment 7 and the small trailer; (4) and the knock-notice was not necessary because the officers had already established that no one was home in either Apartment 7 or the trailers, Cruz was no longer there, and Starn was outside. (2 RT 326–328.)

The prosecutor argued that the warrant authorized the search of "'outbuildings and trailers.'" When Deckard went to get the warrant, he believed the trailers were part of Apartment 7 and LaMarsh belonged to a group who frequented both the apartment and trailers. "I would submit to the Court that these trailers were nothing more than sleeping quarters for the individuals–nothing more than a bedroom would be in any other situation." (2 RT 329–330.) The prosecutor argued that it was "clear from the testimony that the trailers were not just separate housing units, completely apart from No. 7 . . . . [B]oth of those trailers had been used by she and Mr. Cruz as storage for their particular items." (2 RT 331.) Detective Freitas also testified that when he executed the search warrant, he believed the buildings were all one unit and they were connected together. (2 RT 332.)

The prosecutor argued that when Deckard returned to the Camp with the warrant, he developed further information which supplied probable cause to search the trailers in addition to Apartment 7. Since he believed he already had a warrant that authorized that search, he saw no need to return to the magistrate for a second warrant. Therefore, if Deckard had believed he needed a second

warrant, he could have gotten one, and there would be no question that the officers could have searched all the buildings and would have inevitably discovered all the evidence. (2 RT 333.) The prosecutor argued there was no reason to believe Deckard made any intentional or material misrepresentations on his affidavit; and at a minimum, the good faith exception applied. (2 RT 334.) The prosecutor denied the trial court's suggestion that upon his return, Deckard learned that LaMarsh had a separate residence in the small trailer. The prosecutor argued the evidence showed the officers always believed the group shared the residences and ate together, and LaMarsh relied on the electricity and toilet in Apartment 7. (2 RT 334.) The prosecutor argued that Deckard also had reason to believe that the group might share everything at the Camp because he had information it functioned as a cult and the suspects were seen leaving the crime scene in military type fashion, i.e., suggesting they functioned as a group. (2 RT 340.)

4. Trial Court's Ruling

On December 26, 1991, the trial court ruled:

> If there was anything found in the two vehicles I would order it suppressed in that there is certainly nothing in the affidavit that suggests that those vehicles are significantly enough connected to any of the defendants or the crime to justify a search.
>
> Secondly, the early entry into the large trailer before the search warrant was issued, the Court has heard no evidence whatsoever that anything was found in there at that time leading to the obtaining of a search warrant for the large trailer and thus the subsequent obtaining of that search warrant was not the fruit of any poisonous tree and so the early entry of that trailer does not–would not preclude the–would in no way preclude the issuance of a search warrant.

Next, with regard to good faith and *Leon*,[39] good faith action has to be by Mr. Deckard. Mr. Deckard was the one who obtained the search warrant, prepared the affidavit. If he was not acting in good faith he could not simply hand off the search warrant to another officer and say, "Go do it." All right. Nothing in Mr. Deckard's affidavit suggests that there was any reason to believe that Mr. LaMarsh lived in either or in fact any trailer or hid or stored property in either trailer or had any connection with either trailer.

The last sentence on page one of Exhibit One is mere boilerplate language, and I quote: "All rooms, attics, basements, closets, cupboards, cabinets, luggage, trunks, ballasts, boxes and any containers therein and any garages, storage rooms, outbuildings, trailers and trash containers of any kind," and I emphasize, "located on the above premises."

What was sought to be searched was 4510 Finney Road, Apartment 7, Salida, California. Apartment 7 was described as a single story structure and a carport. Two trailers were not located on quote "these premises," unquote. Thus the search warrant does not cover the two trailers.

Mr. Deckard obtained the search warrant. He did know that there were two trailers near Apartment 7. He had no idea that they were separate residential units. Were this a single residential piece of property, then the Court under the good faith rule of *Leon* easily could sustain the search of the two trailers and find that Mr. Deckard with his experience knew that a search warrant for such trailers would routinely be granted, had the boilerplate paragraph generally found in the affiant's affidavit about the affiant's experience and how suspects hide property in various locations on the location allowed to be searched had been included in the affidavit. However, with this being essentially a multi-residential piece of property, Mr. Deckard could not reasonably assume that a magistrate would have authorized the search of every trailer, garage, storage room or outbuilding at 4510 Finney Road.

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39. *United States v. Leon* (1984) 468 U.S. 897 (*Leon*).

As one or more defense counsel have pointed out, there was nothing in the affidavit and the search warrant or on the property itself which defined geographical limits of the officers' search except the officers' own discretion. However, the District Attorney argues that under the inevitable discovery rule a later search warrant for the trailers would have been obtained.

Based on the evidence presented at this hearing, by the time Mr. Deckard returned with the search warrant information had been developed which certainly would authorize the search of the small trailer as being Mr. LaMarsh's residence and a search warrant for that trailer would reasonably have been obtained and the property therein seized under inevitable discovery. Thus under the inevitable discovery theory and that theory alone, the property found in the small trailer and which is adequately described in the search warrant is not suppressed. However, the same cannot be said for the large trailer.

By the time Mr. Deckard was executing the search warrant the large trailer had been separated from any connection with Mr. LaMarsh and no information had yet been developed suggesting that Mr. Beck was involved in the crimes. It's just too speculative to state whether or not or when a search warrant for the large trailer would have been obtained and what property there would have been in the large trailer at such time any such search warrant would have been executed. Accordingly, anything found in the large trailer is ordered suppressed [as to Beck].

Of the three pieces of property searched, the actual Apartment No. 7 has caused the Court the most difficulty. As I previously commented, Mr. Deckard, in the Court's opinion, had probable cause to obtain a search warrant for Apartment 7 and he properly did so. However, by the time he returned with the search warrant to search Apartment 7, he knew now or by then that it was a separate residential accommodation and he knew that Mr. LaMarsh actually lived in the small trailer. However, he also knew that Mr. LaMarsh frequented Apartment No. 7 and may in fact have stayed in it at times, and he did have a search warrant authorizing its search. Here the Court did not say that Mr. Deckard was not acting in good faith and reasonably believing that if he had returned to the magistrate with the

> additional information that Mr. LaMarsh actually lived in the trailer right next to the apartment and connected to that apartment with an extension cord, that the magistrate would also have authorized a search of the trailer in addition to the apartment rather than just substituting the trailer for the apartment. Thus on the *Leon* good faith doctrine and on that doctrine only, the search of Apartment 7 is ruled valid and what is adequately described in the search warrant is not suppressed.

(2 RT 344–347.)

After denying the defendants' motion to suppress all evidence from Apartment 7, the trial court addressed the admissibility of individual items from that search. The Return On Search Warrant listed 51 items or groups of items that were seized.[40] (42 CT 10742–10744.) The vast majority of these items were either suppressed, excluded, or not offered into evidence. (See 2 RT 344–357; 5 CT 1217–1218 [only six items from the return were expressly ordered not suppressed at the hearing].) However, Cruz identifies the following

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40. A list of items that were found in Apartment 7 was referred to by the trial court and parties as Exhibit 4. (2 RT 268–270, 350; see 5 CT 1218.) According to the order settling the record, "This list is separate from the Search Warrant Return for that address, which Return is part of Exhibit 1. (RT 176.)" (42 CT 10733.) However, it appears that Exhibit 4 was copied verbatim from the Search Warrant Return. After the trial court denied the motion to suppress all evidence from Apartment 7, it made individual rulings on the admissibility of seized property. The Search Warrant Return and Exhibit 4 both had 51 items. (2 RT 271; 42 CT 10744.) The trial court described a large number of items from Exhibit 4 using the exact same language used in the Search Warrant Return. With one typographical exception, the identification numbers of the items referred to in Exhibit 4 corresponded to the numbers in the Search Warrant Return. (Compare 2 RT 348–357 with 42 CT 10742–10744; see also 2 RT 320–321.) The only exception was when the trial court referred to "two spiral notebooks containing weapons and inventories" as item "13." (2 RT 357.) However, it is clear that the trial court actually was referring to item 31 because it had just finished discussing item 30; immediately after discussing item "13" it stated that item 31 was under submission; the description matched the description of item 31 from the Search Warrant Return word-for-word (just like all the other descriptions); and transposition of characters is a common typographical error.

admitted items as consequential: (1) Receipts from Crescent Supply Company for knives and camouflage masks[41] (2 RT 356; 15 RT 2756–2758; 10 CT 2452; Exhs. 4a, 4b; see also 21 RT 3658–3660 [employee of Crescent Supply testified he saw Cruz in store three or four times and sold him a knife and mask]); (2) photographs of firearms taken during the search (15 RT 2763–2765; 10 CT 2452; Exhs. 6, 7); (3) two sais martial arts weapons (15 RT 2756–2757; 10 CT 2452; Exh. 5); (4) three bayonets (35 RT 6355, 6358–6359, 6362, 6365; 10 CT 2461; Exhs. 188, 189; and (5) a stun gun (2 RT 351–352; 39 RT 6984–6987, 7020 [admitted only in penalty phase]; 10 CT 2461; Exh. 192). (See COB 218–220.)

5. The Motion For Reconsideration

On January 6, 1992, Cruz filed a motion for reconsideration. Cruz argued that he had items stored in the large trailer and, therefore, he also had standing to have the evidence seized from that trailer suppressed as to him. (5 CT 1266–1270.) The People filed its opposition on January 15, 1992. (5 CT 1355–1361.) On January 17, 1991, the trial court denied the motion. (3 RT 379–386.)

B. Legal Principles

To prevail on a motion to traverse a search warrant, the defendant must demonstrate: (1) "the affidavit included a false statement made knowingly and intentionally, or with reckless disregard for the truth"; and (2) "the allegedly false statement was necessary to the finding of probable cause." (*People v. Luera* (2001) 86 Cal.App.4th 513, 524-525; *Franks v. Delaware* (1978) 438 U.S. 154, 155-156; *People v. Hobbs* (1994) 7 Cal.4th 948, 974.) "If the court finds the search warrant affidavit was not materially false, the court simply

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41. The trial court suppressed a gas mask that was found. (2 RT 353; 5 CT 1218 [item 18].)

reports this conclusion to the defendant and enters an order denying his [or her] motion to traverse the warrant." (*Luera, supra*, 86 Cal.App.4th at p. 525; see also *Hobbs, supra*, 7 Cal.4th at p. 974.) "If the defendant moves to quash a search warrant, the reviewing court must determine whether, under the totality of the circumstances presented to the magistrate, there was a fair probability that contraband or evidence of a crime would be found at the location named in the warrant." (*Luera, supra*, 86 Cal.App.4th at p. 525; *Hobbs, supra*, 7 Cal.4th at p. 975.)

On review of a trial court's denial of a motion to suppress evidence, appellate courts defer to the trial court's factual findings when supported by substantial evidence. (*People v. Williams* (1988) 45 Cal.3d 1268, 1301, overruled on another ground in *People v. Guiuan* (1998) 18 Cal.4th 558, 569.) The reviewing court exercises its "independent judgment to determine whether, on the facts found, the search and seizure was reasonable under the Fourth Amendment standards of reasonableness." (*People v. Avila* (1997) 58 Cal.App.4th 1069, 1074.) The admission of evidence obtained in an illegal search is reviewed for prejudice under the *Chapman* standard. (*People v. Siripongs* (1988) 45 Cal.3d 548, 567.) Under that standard, error requires reversal unless it was harmless beyond a reasonable doubt. (*Chapman, supra*, 386 U.S. at p. 24.)

"In the absence of an allegation that the magistrate abandoned his detached and neutral role, suppression is appropriate only if the officers were dishonest or reckless in preparing their affidavit or could not have harbored an objectively reasonable belief in the existence of probable cause." (*Leon, supra*, 468 U.S. at p. 926.) Absent a showing of dishonesty or recklessness, or a warrant that is facially deficient in identifying the place to be searched or items to be seized, defendants must overcome the presumption that an officer who obtained a

warrant acted in good faith. (*People v. MacAvory* (1985) 162 Cal.App.3d 746, 759–763.)

> [T]he doctrine of inevitable discovery [provides] that if the prosecution can establish by a preponderance of the evidence that the information inevitably would have been discovered by lawful means, then the exclusionary rule will not apply. (*Nix v. Williams* (1984) 467 U.S. 431, 443-444.) This is so because the rule is intended to ensure that the prosecution is not placed in a better position than it would have been had no illegality occurred; the rule does not require it be put in a worse one. (*Ibid.*)

(*People v. Coffman, supra*, 34 Cal.4th at p. 62.)

> Under the inevitable discovery doctrine, illegally seized evidence may be used where it would have been discovered by the police through lawful means. As the United States Supreme Court has explained, the doctrine "is in reality an extrapolation from the independent source doctrine: Since the tainted evidence would be admissible if in fact discovered through an independent source, it should be admissible if it inevitably would have been discovered." (*Murray v. United States* (1988) 487 U.S. 533, 539.) The purpose of the inevitable discovery rule is to prevent the setting aside of convictions that would have been obtained without police misconduct. (*Nix v. Williams* (1984) 467 U.S. 431, 443, fn. 4.) The burden of establishing that illegally seized evidence is admissible under the rule rests upon the government.[fn.] (*People v. Superior Court* (*Tunch*) (1978) 80 Cal.App.3d 665, 682; see *Nix v. Williams* [(1984)] 467 U.S. [431,] 444.)
>
> Footnote: Although the inevitable discovery doctrine was not presented to the trial court below, it may be applied on appeal if the factual basis for the theory is fully set forth in the record. (*Green v. Superior Court* (1985) 40 Cal.3d 126, 137-138; see *People v. Clark* (1993) 5 Cal.4th 950, 993, fn. 19.)

(*People v. Robles* (2000) 23 Cal.4th 789, 800 & fn. 7.)

C. Detective Deckard's Affidavit Provided Probable Cause To Search Apartment 7

Cruz contends that the affidavit failed to establish a reasonable suspicion that Apartment 7 contained any evidence relating to the murders. (COB 225.) However, as the trial court stated, there was probable cause to issue the warrant because Deckard had information that LaMarsh was one of the assailants and he often stayed in Apartment 7. (2 RT 326–327, 347.)

"Probable cause to search is 'a fair probability that contraband or evidence of a crime will be found in a particular place' (*Illinois v. Gates* (1983) 462 U.S. 213, 238) and, while by nature a fluid concept incapable of '"finely-tuned standards,' "is said to exist 'where the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found' (*Ornelas v. United States* [(1996)] 517 U.S. [690,] 696)." (*People v. Hunter* (2005) 133 Cal.App.4th 371, 378.) Whether probable cause exists depends on a consideration of the totality of the circumstances leading up to the issuance of the warrant. (*Illinois v. Gates* (1983) 462 U.S. 213, 238.)

According to Deckard's affidavit, Alvarez told him that one of the perpetrators was a white male with afro-style hair. (42 CT 10739.) Tumelson told Deckard that someone fitting that description was named "Jason," had visited the crime scene before, and lived at the Camp. (42 CT 10740.) Frank told Deckard that Raper had told him of troubles with Jason, and that Jason lived in a unit with camouflage material over the entrance. (*Ibid.*) Deckard went to the Camp and found that Apartment 7 had camouflage material in front as described by Frank. (42 CT 10741.) At the Camp, Brasuell confirmed that someone fitting Jason's description "frequented" Apartment 7, but someone named "Jerald" lived there. (*Ibid.*)

Thus, Deckard sought the warrant because he believed one of the perpetrators frequented Apartment 7 often enough for Tumelson to identify the Camp as his residence; enough for Frank to say he lived in the unit with the Camouflage material over the entrance; and for Brasuell to recognize the physical description as someone who visited often. Thus, Deckard quickly had three witnesses who placed LaMarsh in the Camp; two of whom said LaMarsh lived at the Camp; and one of which specifically said LaMarsh lived in Apartment 7, i.e., the one with camouflage over the entrance. In other words, Deckard could reasonably infer that even if LaMarsh did not live in Apartment 7, he must have visited there very often. In short, there was substantial evidence that LaMarsh spent a significant amount of time at Apartment 7. Contrary to Cruz's argument, Deckard never indicated in his affidavit (or at the hearing) that he had determined that LaMarsh resided at Apartment 7. Nor did he mislead the magistrate in that regard. He knew and told the magistrate only that LaMarsh "frequented" Apartment 7. Since the facts suggested that LaMarsh had participated in the murders just a few hours earlier, it was not unreasonable for the magistrate to conclude that there was a fair probability that evidence of the crimes would be found in Apartment 7. (See *Illinois v. Gates*, *supra*, 462 U.S. at p. 238.)

The fact was that LaMarsh lived in several places, and it was reasonable for Deckard to believe that LaMarsh spent at least as much time at Apartment 7 as anywhere else. Deckard testified that Brasuell told him that the apartment and trailers were all one unit and the residents all lived together. As Cruz, himself, argues, LaMarsh was "described as frequenting both 5223 Elm Street and No. 7, i.e., . . . according to the affidavit, was no more likely to have lived at No. 7 than he was to have lived at 5223 Elm." (COB 230.) Similarly, LaMarsh testified at trial that he stayed at the small trailer, but he really lived with his mother. (32 RT 5595–5596.) After the murders, LaMarsh went or moved to

Oregon–theoretically abandoning any home or homes he had in California. (25 RT 4488; 32 RT 5671.) Obviously, these additional facts were not contained in the affidavit. But they illustrate that different people could have different opinions about where LaMarsh lived. Indeed, lawyers could probably debate for hours which of the locations was LaMarsh's "true" residence. But at 5:30 on the morning of the killings, after talking to three people who associated LaMarsh with the Camp, Deckard had enough information to honestly represent to the magistrate that LaMarsh spent enough time at Apartment 7 to believe that evidence would be found there.

Nevertheless, Cruz argues there were insufficient facts in the affidavit to demonstrate a reasonable probability that evidence of the murders would be found in Apartment 7. (COB 232.) However, the facts showed that LaMarsh frequented Apartment 7 and participated in murders a few hours earlier. It was reasonable to infer that LaMarsh had spent a great deal of time in the apartment because his trailer was small, it did not have a bathroom or its own electricity, and Brasuell said that the residents all lived together. Moreover, it is elementary that evidence of a crime is often found where a person resides or spends a great deal of time. Furthermore, it was likely that the crime was planned or staged from that location, since it was just a few blocks away from the crime scene, and Raper's son had said the main suspect had been staying there. That was sufficient to establish that there was a fair probability that evidence of the crimes would be found there. (See *Illinois v. Gates*, *supra*, 462 U.S. at p. 238.)

Cruz complains that the general description of the items to be seized failed to comply with the particularity requirement of the Fourth Amendment. However, it is not uncommon to issue a search warrant based on little more than the identity of a perpetrator and an educated guess about the property to be seized. Nor is there anything inherently suspect about using boilerplate

language over and over again in similar circumstances. For example, the Supreme Court has found "general dominion and control clauses in warrants" to be constitutional. (*People v. Varghese* (2008) 162 Cal.App.4th 1084, 1102, citing *People v. Alcala* (1992) 4 Cal.4th 742, 799–800.)

In *People v. Varghese*, the court observed:

> While it is true dominion and control can be demonstrated by a host of items, and while the nature of those items allows for relatively broad searches, establishing dominion and control of a place where incriminating evidence is found is reasonable and appropriate . . . .
>
> The search warrant for appellant's case was sought within hours of the discovery of the murder. Unavoidably, much was unknown or unclear at that early point in the investigation. Because the officers believed evidence concerning the murder could be found at a location which they believed was appellant's residence, they were entitled to secure items at the location relevant to more clearly establish his dominion and control.

(*People v. Varghese*, *supra*, 162 Cal.App.4th at p. 1102.) The same considerations apply here. The warrant described the place and items to be seized with as much particularity as feasible under the circumstances.

D. Detective Deckard's Affidavit Was Not Misleading

Detective Deckard indicated in his affidavit that Cruz "resided" in Apartment 7, and LaMarsh "frequented" that apartment. (42 CT 10741.) Cruz claims that Detective Deckard deliberately, or with reckless disregard, withheld from the magistrate the fact that Cruz and Starn lived in the apartment with their two children. Further he contends that this information would have "undercut any conclusion that 'Jason' lived in No. 7.'" (COB 240.) Cruz is wrong on two fundamental points. First, Deckard never based his application for the search warrant on the fact that LaMarsh "lived in No. 7." According to Deckard's affidavit, Tumelson said that LaMarsh "stayed" at the Camp; Frank said that LaMarsh "stayed" at the residence with the camouflage material in

front; and Brasuell said that LaMarsh "frequented" Apartment 7, but "Jerald" "resided" there. (42 CT 10740–10741; see 2 RT 199 [Deckard testified that his conversation with Brasuell led him to believe that LaMarsh "frequented"–but did not "live"–in Apartment 7].) The detective's choice of words made a clear distinction between LaMarsh visiting the apartment and Cruz living there.

Second, Deckard did not learn that Cruz and Starn's children lived in Apartment 7 until he returned to the Camp with the search warrant and spoke to Starn. (2 RT 192, 198.) That was also when Starn and Brasuell informed Deckard that LaMarsh lived in the small trailer.[42/] (2 RT 189.) Thus, Cruz's claim that Deckard withheld the fact that a family of four lived in the studio apartment to avoid the inference that LaMarsh could not have also lived there is simply false. Deckard never claimed in his affidavit that LaMarsh lived in Apartment 7, and the fact that Cruz's wife lived there would not have made it any less probable that LaMarsh frequented or stayed at the apartment.

Cruz claims that Deckard misled the magistrate by withhold information that there were two trailers near Apartment 7 which functioned as separate residences. (COB 240–241.) However, it is clear from the fact that the unit had an apartment number and was twice described as being located in "a group of apartments" (42 RT 10740) that it was surrounded by other residences. Further,

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42. Cruz cites 2 RT 192, 199–200, 221, 230 for the proposition that Brasuell told Deckard that Cruz's children lived with them before Deckard applied for the warrant. (COB 240.) Cruz is mistaken. Deckard spoke to Brasuell before and after obtaining the warrant. Deckard testified that Brasuell told him only that "Gerald and his wife" lived in Apartment 7 during the first conversation. (2 RT 192.) Moreover, Brasuell had a hard time remembering in which conversation he told Deckard which facts; but he thought he told Deckard that LaMarsh lived in the small trailer during the second conversation. (2 RT 221.) The only time Brasuell stated that he told Deckard about Cruz's children was when he was describing the second conversation when he told Deckard that LaMarsh lived in the small trailer. (2 RT 230.) Nowhere in Cruz's citations to the record did Brasuell state that during the first conversation he said that Cruz had–or lived with–children.

Detectives Deckard and Freitas testified that they believed the trailers were associated with Apartment 7. (2 RT 279.) Brasuell also repeatedly testified that he told Deckard that the apartment and trailers "was all one unit close together" and that the people living there "all lived together" "all in one unit" and "were always together." (2 RT 208–215, 224–226.)

When asked why he did not include the trailers in the affidavits, Deckard stated, "I can't give you a reason, what was going through my mind almost two years ago, other than oversight." (2 RT 188.) Thus, Deckard may have been so focused on the apartment that he forgot to mention the trailers. Or he might have thought it was unnecessary because he believed all three structures were part of the same address since they were in close proximity, connected by electrical extension cords, and the trailers did not have separate addresses. (See 2 RT 195 [Deckard testified that he believed the trailers "were part and parcel of unit No. 7"].) He may also have thought that the trailers were covered by the boilerplate language referring to outbuildings and trailers. (See 42 CT 10737.) Thus, there were multiple benign explanations for why Deckard did not describe the trailers and the trial court found that Deckard acted in good faith. (2 RT 347; see *Franks v. Delaware*, *supra*, 438 U.S. at p. 171 ["Allegations of negligence or innocent mistake are insufficient" to defeat a warrant].) Therefore, Cruz cannot show that Deckard's affidavit was so deficient that it demonstrated a reckless disregard for the truth. (See *People v. Luera*, *supra*, 86 Cal.App.4th at pp. 524-525.)

Cruz claims, "It was not reasonable for Deckard to omit from the affidavit the readily apparent evidence that the two trailers were each a separate residence from No. 7." (COB 241.) Cruz is mistaken. Both trailers were dependent on the apartment for electricity, and LaMarsh's trailer had no toilet. So LaMarsh's trailer was, by definition, not an independent residence. Cruz argues that it was evident the trailers were separate units because they had

independently locking doors. But rooms in houses often have separately locking doors and that does not make them separate residence. Moreover, the physical separation of the apartment and trailers necessitated individual locking doors. A detached garage does not become a separate residence just because someone sleeps there and locks the door. Deckard could reasonably believe that the trailers were integrally connected to the apartment because they were in close proximity; they depended on the apartment for electricity and were literally connected to it by extension cords; and Brasuell had said that the residents all lived together and had full access to all of the structures. (2 RT 214.) Therefore, Cruz cannot overcome the presumption that the affidavit was valid. (See *Franks v. Delaware*, *supra*, 438 U.S. at p. 171.)

E. Detective Deckard Acted In Good Faith When He Searched Apartment 7

The trial court reasonably found that the evidence from the search of Apartment 7 should not be suppressed because Detective Deckard acted in good faith.

> Evidence obtained by police officers acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate is ordinarily not excluded under the Fourth Amendment, even if a reviewing court ultimately determines the warrant is not supported by probable cause. (*United States v. Leon* (1984) 468 U.S. 897, 900.) This is commonly referred to as the good faith exception to the exclusionary rule. However, the good faith exception to the exclusionary rule is inapplicable if "the affidavit was '"so lacking in indicia of probable cause"' that it would be '"entirely unreasonable"' for an officer to believe such cause existed." (*People v. Camarella* (1991) 54 Cal.3d 592, 596, italics omitted.) "The question is whether 'a well-trained officer should reasonably have known that the affidavit failed to establish probable cause (and hence that the officer should not have sought a warrant).' [Citation.] An officer applying for a warrant must exercise reasonable professional judgment and have a reasonable knowledge of what the law prohibits. [Citations.] If the officer 'reasonably could have believed that the affidavit

> presented a close or debatable question on the issue of probable cause,' the seized evidence need not be suppressed." (*People v. Pressey* (2002) 102 Cal.App.4th 1178, 1190-1191.)

(*People v. Garcia* (2003) 111 Cal.App.4th 715, 723.) Whether an officer's reliance on the facially valid search warrant was reasonable is a mixed question of fact and law and is presumably reviewed de novo. (See *United States v. Freitas* (9th Cir. 1986) 800 F.2d 1451, 1454.)

> "If the teachings of the [Supreme] Court's cases are to be followed and the constitutional policy served, affidavits for search warrants, . . . must be tested and interpreted by magistrates and courts in a common-sense and realistic fashion. They are normally drafted by nonlawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area. A grudging or negative attitude by reviewing courts toward warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting." ([*United States v. Ventresca* (1965) 380 U.S. 102,] 108.) Thus, ". . . in a doubtful or marginal case a search under a warrant may be sustainable where without one it would fall." (*Id.*, at p. 106; *Leon*, *supra*, 468 U.S. at p. 915.)

(*People v. Smith* (1994) 21 Cal.App.4th 942, 948-949.)

> Even if it were determined that the warrant was improvidently issued because there was insufficient probable cause, the . . . officers executed the warrant in good faith. "'[S]earches pursuant to a warrant will rarely require any deep inquiry into reasonableness,' [citation], for 'a warrant issued by a magistrate normally suffices to establish' that a law enforcement officer has 'acted in good faith in conducting the search.' " (*United States v. Leon* (1984) 468 U.S. 897, 922.)

(*People v. Von Villas* (1992) 11 Cal.App.4th 175, 218.)

As the case law makes abundantly clear, the primary reason this Court should presume that Deckard acted in good faith is because he obtained a warrant. (See *People v. Von Villas*, *supra*, 11 Cal.App.4th at p. 218.) As discussed above, Deckard did not mislead the magistrate. He acknowledged in his affidavit that Cruz lived in Apartment 7 and said only that LaMarsh "stayed"

or "frequented" the apartment. Therefore, contrary to Cruz's argument (COB 250), Deckard did not know that his affidavit was false and, in fact, it was not false or inaccurate. Consequently, the presumption that an officer who obtains a warrant is acting in good faith applies here. (*Ibid.*; *People v. MacAvory*, *supra*, 162 Cal.App.3d at pp. 759–763 [application to a judge for a search warrant is prima facie evidence that the officer acted in good faith]; *United States v. Koerth* (7th Cir. 2002) 312 F.3d 862, 868.)

The second reason this Court should find that Deckard acted in good faith is that Deckard had been told that the residents of the apartment and trailer "lived together" and had free access to all of the structures. (2 RT 208–217, 224, 226.) There was also evidence that there were four assailants who marched together in a military fashion, and that further supported the inference that the group at the Camp that lived around the camouflage canopy shared their living quarters like a cult or commune. (2 RT 304, 308–309; see 44 RT 8079 [Beck's expert testified at his penalty trial that the Camp was essentially a cult compound].) Therefore, Deckard could reasonably believe that LaMarsh spent sufficient time at the apartment that there was a fair probability that evidence of the crimes would be found there.

Third, a reasonable person could believe that the small trailer where LaMarsh slept was "part and parcel" of Apartment 7 because they were in close proximity; they were connected by an electrical extension cord; and anyone residing in the trailer would have to frequent the apartment because the trailer had no bathroom.

Contrary to Cruz's argument, evidence that LaMarsh lived in the small trailer did not eliminate the probable cause to search Apartment 7 because Deckard never based his request to search Apartment 7 on the fact that LaMarsh lived there. However, the fact that LaMarsh lived a few feet away, and used that apartment's electricity and bathroom, did support the other

evidence that the group lived together. It also supported the inference that the person who resided in the small trailer visited the apartment very often. As the trial court stated, knowing that LaMarsh slept in the small trailer "provided more probable cause to add the trailers to the warrant; it would not have diminished the probable cause to search Apartment 7." (2 RT 327.) For the same reasons, Cruz's argument that *Maryland v. Garrison* (1987) 480 U.S. 79 shows that the officers should have limited their search to wherever LaMarsh was determined to reside is off the mark. (See COB 253.) Since the magistrate issued the warrant on the basis of LaMarsh "frequenting" Apartment 7, subsequent evidence that LaMarsh slept a few feet away from the apartment hardly undermined that basis. It made it more likely that he could treat Apartment 7 as a second home.

Cruz claims that the trial court's ruling that Deckard acted in good faith was undermined by the trial court's erroneous determination that "'LaMarsh frequented No. 7 and may in fact have stayed in it at times . . . .'" (COB 248, quoting 2 RT 347.) According to Cruz, "[T]here was no evidence that LaMarsh stayed in No. 7 at any time." (COB 248.) But as Cruz acknowledges, Frank told Deckard that LaMarsh was "supposed to be staying" at the Camp in a unit with camouflage over the entrance. (42 CT 10740.) When Deckard got to the Camp, he identified that unit as Apartment 7. That is why the warrant was made out for Apartment 7. Further, Brasuell testified that when Deckard returned with the warrant, he told Deckard that the apartment and trailers were one functional unit and everyone lived together. (2 RT 208–215, 217, 224.) Thus, the trial court's determination that LaMarsh "may" have stayed in Apartment 7 was supported by the evidence.

Finally, none of the caveats set forth in *Leon* apply here. First, "There is no evidence that in issuing the warrant the magistrate 'was misled by information in an affidavit that the affiant knew was false or would have known was false

except for his reckless disregard of the truth.'" (*People v. Von Villas*, *supra*, 11 Cal.App.4th at p. 218, quoting *Leon*, 468 U.S. at p. 923.) Second, there is "no evidence that the issuing magistrate abandoned his role as a neutral and detached judicial officer in signing the search warrant." (*Ibid.*, citing *Leon*, 468 U.S. at p. 923.) Third, Cruz did not prove "that the officers were 'relying on a warrant based on an affidavit "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable."'" (*Ibid.*, quoting *Leon*, 468 U.S. at p. 923.) Fourth, Cruz "did not demonstrate in any way that the warrant was 'so facially deficient–i.e., in failing to particularize the place to be searched or the things to be seized–that the executing officers cannot reasonably [have] presume[d] it to be valid.'" (*Id.* at p. 219, quoting *Leon*, 468 U.S. at p. 923.)

Thus, for the foregoing reasons, this Court should affirm the trial court's determination that Deckard executed the search warrant in a good faith belief that there was probable cause to search Apartment 7.

F. The Evidence From The Search Was Admissible Under The Doctrine Of Inevitable Discovery

Early in the suppression hearing, the prosecutor argued, "Your Honor, I'm just trying to show that those trailers are nothing more than bedrooms for this living arrangement. They ate at the main house. They did other things at the main house .... At some point we may get to the issue of inevitable discovery in any event and it would be very relevant then." (2 RT 225.) However, the prosecutor never revisited that argument for the search of Apartment 7. The trial court ruled that the inevitable discovery doctrine applied to the smaller trailer, but not to the larger one. (2 RT 346–347.) However, it never addressed whether it applied to Apartment 7 because it found the search was valid under the good faith exception.

If this Court finds that there was not probable cause to issue the warrant, or that Detective Deckard did not act in good faith, it should still find that the evidence from Apartment 7 was properly admitted under the doctrine of inevitable discovery articulated in *Nix v. Williams* (1984) 467 U.S. 431, 444. (See also *People v. Carpenter* (1999) 21 Cal.4th 1016, 1040.) Under that doctrine, where evidence obtained by illegal means would ultimately or inevitably have been discovered by lawful means, the evidence is admissible, regardless of whether the police acted in good faith. The doctrine of inevitable discovery has been applied by reviewing courts even where it was not urged as a theory of admissibility in the trial court, provided that the evidence supporting the theory was developed in the trial court, or, as in this case, the accused had an opportunity to cross-examine regarding the relevant facts. (*Green v. Superior Court* (1985) 40 Cal.3d 126, 137–139 [inevitable discovery doctrine applies on appeal because "a correct decision of the trial court must be affirmed on appeal even if it is based on erroneous reasoning"]; *People v. Coffman*, *supra*, 34 Cal.4th at p. 62; see also *People v. Clark* (1993) 5 Cal.4th 950, 993, fn. 19.)

Although *Nix* rejected the idea that the nature of the issues posed by the exception requires an unusually high burden of proof on the prosecution, and applies only to the preponderance of the evidence standard (*Nix v. Williams*, *supra*, 467 U.S. at p. 444), it has been said that application of the doctrine of inevitable discovery "require[s] proof that the prosecution would–not might, or could–have obtained the challenged evidence in a proper manner." (1 McCormick on Evid. (6th ed. 2006) Improperly Obtained Evidence, § 181, p. 715, fn. omitted.)

Prior to obtaining the search warrant, the officers secured the area around Apartment 7 and the two trailers, thereby preserving the evidence until whatever time the warrant was obtained. (2 RT 184, 266.) Before Deckard

returned with the warrant, Cruz came home and was arrested and taken away–presumably to the sheriff's station. (2 RT 184, 245, 268; see 5 RT 967 [Detective Deckard testified in an in limine motion that he interviewed Cruz later that day].) Though Cruz may have been arrested on the bomb charge (see 2 RT 355, 30 RT 5224), he still would have come under immediate suspicion because he lived in the apartment originally attributed to LaMarsh. No doubt, the officers would have also recognized that Cruz fit the description of one of the suspects as a heavyset white male. (2 RT 299, 304.) At that point, it was inevitable that the officers would obtain a warrant to search Apartment 7 based on Cruz's residency.

There is no doubt that even if Deckard had decided that he could not execute the warrant once he found out that LaMarsh slept in the small trailer, he would have easily obtained a new warrant based on the proximity and dependence of LaMarsh's residence on the apartment, as well as the apartment's connection to Cruz, himself. (See 2 RT 326–328, 347 [trial court ruled that information that LaMarsh slept in the small trailer would have provided cause to search small trailer, but would not have diminished probable cause to search Apartment 7].) Because Apartment 7 was secured and Cruz was in custody, this Court should find the evidence was properly admitted under the inevitable discovery doctrine. (See *People v. Coffman*, *supra*, 34 Cal.4th at p. 62.)

G. Any Error In Admitting The Evidence Was Harmless Beyond A Reasonable Doubt

Even if the trial court erred by denying Cruz's suppression motion, the error was harmless beyond a reasonable doubt. (See *Chapman*, *supra*, 386 U.S. at p. 24; *People v. Siripongs*, *supra*, 45 Cal.3d at p. 567.)

Cruz claims he was prejudiced by the introduction of five items: (1) receipts from Crescent Supply Company for knives and camouflage masks; (2)

photographs of firearms taken during the search; (3) two sais martial arts weapons; (4) three bayonets; and (5) a stun gun. (See COB 218–220, 255.) However, even if these items were erroneously introduced, it was harmless.

First, even if the receipts from Crescent Supply Company had been suppressed, the same evidence that Cruz bought knives and camouflage masks was entered through testimony of an employee. Sylvia Zavala testified that she saw Cruz in the store a few times and sold him a knife and mask. (21 RT 3658–3660.) She also remembered selling specific items to LaMarsh, Beck, and Willey. (21 RT 3668-3676.) Therefore, while the receipts corroborated that testimony, the jury would have returned the same verdicts without that evidence.

Second, even if the photographs of weapons had been suppressed, that evidence was adequately conveyed by testimony. For example, Evans testified that Cruz had automatic weapons, Uzis, .45s, handguns, and grenades. (24 RT 4314.) In addition, Cruz himself testified that he had three hunting knives, a police baton, and a semiautomatic pistol. (29 RT 5162–5163, 5166; 30 RT 5179, 5251.) In addition, all of the defendants testified about the specific weapons that were taken to–and used–at the Elm Street house. Thus, there was sufficient evidence to establish that the group had the weapons that were used in the crimes. Moreover, Cruz argues that the evidence of other weapons was not relevant. Therefore, even if Cruz were correct, the jury would have returned the same verdicts if the photographs had been excluded.

Third, Cruz argues that the sais martial arts weapons corroborated Evans' account of "loud music and Willey dancing with swords prior to the six codefendants going over to 5223 Elm Street on the night of the homicides." (COB 254.) However, all of the defendants acknowledged that they were at the Camp before the murders, went to the Elm Street house, and were present during the murders. So Evans hardly had to prove the defendants' presence by

recounting that Willey danced with sais. Moreover, even Cruz acknowledged during closing argument that Evans would add as many truthful details to her testimony as possible to make it more credible. (36 RT 6567–6568.) Therefore, the fact that Cruz had sais weapons was tangential, and even if that weapon had been suppressed, the jury would have returned the same verdicts.

Fourth, there was no evidence or argument that the three bayonets were used in the murders, and the jury was instructed not to use that evidence to find propensity, so admission of that evidence could not have been prejudicial.

Finally, the stun gun was admitted only in the penalty phase, so it could not have affected the guilt trial. At the penalty trial, Starn testified that Cruz used the stun gun on Vieira several times and on her twice. (39 RT 6985.) The testimony of Cruz's former girlfriend and the mother of his three children had inherent credibility. Moreover, even Cruz confirmed that he used the stun gun–but as a joke because it did not work. (41 RT 7365–7367.) Therefore, once Cruz conceded that the stun gun existed, the presence of the physical weapon in court lost its significance and could not have been prejudicial. Thus, the result would have been the same even if the actual stun gun had been suppressed.[43]

In conclusion, none of the challenged evidence was particularly important to the prosecution. It either corroborated or repeated tangential evidence. In light of the other overwhelming evidence against Cruz, it could not have made any difference to the verdicts. Accordingly, even if all of the challenged

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43. If evidence of the stun gun had been suppressed, and if that evidence had really been important to the prosecution's penalty case, the prosecutor might have substituted Starn's far more disturbing testimony from Beck's penalty trial. Starn testified that Cruz would sometimes use the exposed wires from an electrical extension cord to electrocute Vieira and Perkins. (43 RT 7726–7735.) Rosemary McLaughlin also testified in Beck's penalty trial that she saw Cruz use the stun gun on Vieira twice, and had Vieira stun himself once. (See 42 RT 7696.)

evidence should have been suppressed, the error was harmless beyond a reasonable doubt. (See *People v. Siripongs*, *supra*, 45 Cal.3d at p. 567.)

VII.

THE TRIAL COURT SHOULD HAVE INSTRUCTED THE JURY THAT CONSPIRACY TO COMMIT MURDER REQUIRED THE MENTAL STATE OF *EXPRESS* MALICE, BUT THE ERROR WAS HARMLESS; THE TRIAL COURT DID, HOWEVER, PROPERLY INSTRUCT THE JURY THAT IF APPELLANTS WERE NOT THE ACTUAL KILLERS, IT COULD FIND THE MULTIPLE-MURDER SPECIAL CIRCUMSTANCE ALLEGATION TRUE ONLY IF IT ALSO FOUND THAT THEY HARBORED INTENT TO KILL

The trial court instructed the jury that in order to convict the defendants of conspiracy to commit murder it had to find that they harbored malice aforethought. Appellants correctly argue that conspiracy to commit murder must be based on express malice, i.e., an intent to kill. Therefore, the instruction that the jury could find appellants guilty of conspiracy to commit murder based on "malice" was erroneous because that term improperly encompassed implied malice. (COB 257; BOB 379.) However, the error was harmless beyond a reasonable doubt because the jury made other findings which clearly indicated it found that appellants harbored the intent to kill.

Appellants also argue that the trial court improperly instructed the jury that it could find the multiple murder special circumstance true based on aiding and abetting or conspiracy even if it did not find an intent to kill. They are mistaken. The trial court properly instructed the jury pursuant to CALJIC No. 8.80 that if it found that appellants were the actual killer of at least two victims it did not need to find the intent to kill; or, in the case of vicarious liability, that it did have to find that appellants harbored an intent to kill for each of those murders. Further, Cruz requested that same instruction, and Beck failed to

object, so they both forfeited their claim of error. Moreover, any error was harmless beyond a reasonable doubt because the jury found under other proper instructions that appellants harbored the intent to kill and the evidence of express malice was overwhelming.

A. The Trial Court Erroneously Instructed The Jury On Conspiracy To Commit Murder, But The Error Was Harmless

1. The Instruction Erroneously Referred To "Malice" Rather Than "Express Malice" Or Intent To Kill

Conspiracy to commit murder requires an intent to kill; therefore, the jury must be instructed that only express malice is sufficient to support the charge. (*People v. Swain* (1996) 12 Cal.4th 593, 599–607.) Accordingly, it is error to instruct a jury on the principles of implied malice as a basis for conspiracy to commit murder. Here, the trial court erroneously instructed the jury on the principles of express and implied malice as it applied to first and second degree murder.[44] (36 RT 6492; 8 CT 1896; CALJIC No. 8.11.) Then it instructed the jury that it could find appellants guilty of conspiracy to commit first or second

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44. The trial court instructed the jury:

> "Malice" may be either express or implied.
> Malice is express when there is manifested an intention unlawfully to kill a human being.
> Malice is implied when:
> One, the killing resulted from an intentional act.
> Two, the natural consequences of the act are dangerous to human life. And,
> Three, the act was deliberately performed with knowledge of the danger to, and with conscious disregard for, human life.

(36 RT 6492; 8 CT 1896; CALJIC No. 8.11.)

degree murder with the mental state of malice aforethought.[45] (36 RT 6507–6508; 8 CT 1938; CALJIC No. 3.31.5.) This was error because it suggested that either express or implied malice was sufficient, whereas only express malice was a proper basis for the conviction. (See *People v. Swain*, *supra*, 12 Cal.4th at p. 607.) Though the instructions referred to conspiracy to commit first and second degree murder, the verdict form correctly identified the crime charged as "conspiracy to commit murder" and did not purport to define the degree.[46] (9 CT 2293–2294.) However, the jury could have reached that

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45. The trial court instructed the jury:

> In each of the crimes charged in the information, namely, murder and conspiracy to commit murder, there must exist a certain mental state in the mind of the perpetrator. Unless such mental state exists, the crime to which it relates is not committed.
>
> In the crimes of first degree murder and conspiracy to commit first degree murder, the necessary mental states are malice aforethought, premeditation, and deliberation.
>
> In the crime of second degree murder and conspiracy to commit second degree murder, the necessary mental state is malice aforethought.

(36 RT 6507–6508.)

46. Cruz argued that the trial court should instruct the jury on "conspiracy to enter into manslaughter." (35 RT 6263–6264.) Later, the prosecutor asked, "There's no conspiracy to commit voluntary manslaughter; is that correct?" Willey doubted there was such a crime. The trial court said there was, but there was insufficient evidence to instruct on it. Cruz stated, "I would want the record to reflect that I'm requesting such an instruction." (35 RT 6314–6315; see 45 RT 8407.) The trial court did give the instruction: "As to all defendants, the crime of voluntary manslaughter are lesser to that of murder in Counts I through IV, and the crime of conspiracy to commit voluntary manslaughter are lesser to that of conspiracy to commit murder in Count V." (36 RT 6504.) During closing argument, Cruz argued that if the

verdict pursuant to the instructions for either conspiracy to commit first or second degree murder. Therefore, it is not certain from this instruction that the jury found the premeditation and deliberation required for "conspiracy to commit first degree murder." However, as discussed below, the jury did make that finding regarding the murder charges.

2. The Erroneous Instruction Was Harmless Beyond A Reasonable Doubt

The misinstruction on the mental state necessary for the conspiracy conviction was harmless if it can "be determined beyond a reasonable doubt that the erroneous implied malice murder instructions did not contribute to the convictions on the conspiracy counts." (See *People v. Swain*, *supra*, 12 Cal.4th at p. 607.) That determination can be based on other verdicts that would enable this Court to conclude that the jury necessarily found appellants guilty of conspiracy to commit murder on a proper theory, i.e., express malice or intent to kill. (*Ibid.*) Alternatively, harmlessness can be shown by overwhelming evidence that appellants harbored the required mental state. (*People v. Bolden*, *supra*, 29 Cal.4th at p. 560; *Neder v. United States* (1999) 527 U.S. 1, 7–10.)

Appellants contend that the jury made no findings that would enable this Court to determine that the jury found that they harbored an intent to kill. (COB 263; BOB 379.) The assertion is easily refuted.

Preliminarily, it simply does not make sense that the jury found appellants guilty of conspiring to commit murder, but did not think they harbored an intent to kill. The trial court instructed the jury, "A conspiracy is an agreement

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jury found that Cruz entered into a conspiracy, it should find it was a conspiracy to commit manslaughter. (36 RT 6577–6578, 6583.) However, there is no such crime, so appellants received a windfall from that instruction. (See *People v. Cortez* (1998) 18 Cal.4th 1223, 1232 ["all murder conspiracies are conspiracies to commit first degree murder"].)

entered into between two or more persons with the specific intent to agree to commit the public offense of murder . . . ." (36 RT 6499; 8 CT 1914.) The jury could not have complied with the instructions and found that appellants had the specific intent to *agree* to commit murder without also finding an intent to *actually* commit murder. (*People v. Jurado* (2006) 38 Cal.4th 72, 123 ["For a conspiracy to commit murder, intent to commit the target offense means an intent to kill."].) Further, it is common sense that one cannot plan to commit murder without intending to kill.

Second, the jury found appellants guilty of four counts of first degree murder. (9 CT 2288–2299.) The trial court instructed the jury that in order to return first-degree verdicts, it had to find that the murders were "perpetrated by any kind of willful, deliberate and premeditated killing with *express* malice aforethought" (36 RT 6493, italics added; 9 CT 1898.) It also instructed the jury that it must return a second-degree verdict if the evidence of malice was "insufficient to establish deliberation and premeditation." (36 RT 6494; 9 CT 1901.) Therefore, the jury could not have convicted appellants of four counts of first degree murder unless it found that they harbored express malice, and acted with deliberation and premeditation. Since the jury clearly found that appellants harbored express malice, the erroneous conspiracy instruction had to be harmless.

Similarly, appellants could not have participated in the killings with deliberation and premeditation without also harboring an intent to kill. The trial court instructed the jury:

> The word "deliberate" means formed or arrived at or determined upon as the 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 preexisting reflection and not under a sudden heat of passion or other condition precluding the idea of deliberation, it is murder of the first degree.

(36 RT 6493.) The jury could not find appellants guilty of first degree murder without finding that the they acted with premeditation and deliberation. (*Ibid.*; see 9 CT 2288–2299.) According to the foregoing instruction, the deliberation and premeditation concerned the "deliberate intent on the part of the defendant to kill . . . ." (36 RT 6493.) Therefore, by finding appellants guilty of four counts of premeditated first degree murder, the jury necessarily found that they acted with express malice.

Appellants argue that since the jury may have convicted them of first degree murder as aiders or abettors or conspirators, its verdicts do not demonstrate a finding of express malice. (COB 263; BOB 236–237, 379; Cruz Joinder.) Appellants are mistaken. The target crime was murder, and the jury was instructed that to find appellants culpable as aiders and abettors or accomplices, they had to share the intent to commit the murder. (36 RT 6485 [trial court instructed the jury that culpability as an aider and abettor required finding that appellants had "the intent or purpose of committing, encouraging, or facilitating the commission of the [target] crime"]; 36 RT 6486–6487 ["a person who assents to, or aids, or assists in, the commission of a crime without such knowledge and without such intent or purpose is not an accomplice in the commission of such crime"]; 9 CT 1876–1877, 1882 .)

Likewise, the jury could not find appellants guilty of murder as a conspirator, without finding they had the specific intent to commit murder. (36 RT 6499 ["A conspiracy is an agreement entered into between two or more persons with the specific intent to agree to commit the public offense of murder"]; 9 CT 1914.) Similarly, even if the jury found appellants guilty of some of the murders under the "natural and probable consequences" doctrine,

the conspiracy still had to be predicated on an original intent to commit murder. (36 RT 6498 [trial court instructed jury that the target crime was murder]; see also 36 RT 6500 [member of a conspiracy is "guilty of the particular crime that to his knowledge his confederates agreed to and did commit . . . ."]; 9 CT 1916.)

It is true that in *People v. Williams* (1997) 16 Cal.4th 635, this Court held, "A defendant guilty as an aider and abettor under the 'natural and probable consequences' doctrine need not share the perpetrator's intent to kill." (*Id.* at p. 691, citing *People v. Prettyman*, *supra*, 14 Cal.4th 248.) However, that case is distinguishable because the target offense was never identified. As a result, there was no way to determine what crime the jury believed the defendant agreed to facilitate. (*Id.* at p. 674.) In the context of the instruction on natural and probable consequences, this Court found the failure of the trial court to describe the target offense as harmless because there were only two possible target offenses, and both would invariably yield a natural and probable consequence of murder. (*Id.* at pp. 674–675.) However, in the context of the multiple-murder special circumstance allegation, the first degree murder verdicts did not necessarily establish that the jury had found an intent to kill because neither of the two possible target crimes was murder. (*Id.* at pp. 674, 691.)

Here, on the other hand, the trial court expressly instructed the jury that the target offense was murder. (36 RT 6498 [defendants charged with "willfully, unlawfully, and feloniously conspir[ing], combin[ing] and agree[ing] together and with other persons to commit the crime of murder]; 36 RT 6499 ["A conspiracy is an agreement entered into between two or more persons with the specific intent to agree to commit the public offense of murder and with the further specific intent to commit such offense followed by an overt act . . . ."]; 9 CT 1912, 1914; see also 36 RT 6487; 9 CT 1883.) Since the predicate

offense, itself, required the jury to find an intent to commit murder, then there is no possibility that the jury based its first degree murder verdicts on vicarious liability absent an intent to kill.

Third, the trial court's instructions and verdict form required that the jury find that appellants were part of the conspiracy when at least one of five enumerated overt acts was committed. (36 RT 6499.) The jury found that appellants were part of the conspiracy when *all five* of the overt acts were committed: the defendants armed themselves; they drove to the scene of the murders; they put on a mask to conceal their identities; they entered the Elm Street house; and they killed the four victims. (9 CT 2293–2294, 2300–2301.) The jury also specifically found for each murder charge and the conspiracy charge that appellants personally used a dangerous weapon. (9 CT 2288–2291, 2296–2299.) No reasonable jury could find that appellants participated in all the stages of the conspiracy to commit murder, but did not intend to kill the victims. This Court stated in *People v. Jurado*:

> [D]efendant does not identify any evidence in the record that could lead a rational juror to conclude that [the coconspirators] agreed to kill [the victim] with the specific intent to agree to do so, but without a specific intent to actually kill her. Because we find in the record no evidence that could rationally lead to such a finding, we are satisfied that the instructional error was harmless beyond a reasonable doubt.

(*People v. Jurado*, *supra*, 38 Cal.4th at p. 123.)

Similarly, in *People v. Cortez*, this Court noted:

> [W]here two or more persons conspire to commit murder–i.e., intend to agree or conspire, further intend to commit the target offense of murder, and perform one or more overt acts in furtherance of the planned murder–each has acted with a state of mind "functionally indistinguishable from the mental state of premeditating the target offense of murder." [Citation.] The mental state required for conviction of conspiracy to commit murder necessarily establishes premeditation and deliberation of

> the target offense of murder–hence all murder conspiracies are conspiracies to commit first degree murder . . . .

(*People v. Cortez*, *supra*, 18 Cal.4th at p. 1232.) Likewise, here, the jury's determination that appellants drove to the murder scene and donned masks before personally using a deadly weapon demonstrates that appellants conspired to commit murder and must have harbored an intent to kill. If appellants planned to go to the Elm Street house and kill Raper and his associates, they had to have had the intent to kill. Therefore, since the jury specifically found that the overt acts of the conspiracy were true, it had to also believe that appellants' intent was to commit first degree murder. (See *ibid.*)

Furthermore, "Conspiracy 'is the classic example of a continuing offense because by its nature it lasts until the final overt act is complete. [Citations.]' [Citation.] 'The general rule is that a "conspiracy usually comes to an end when the substantive crime for which the coconspirators are being tried is either attained or defeated."'" (*People v. Quiroz* (2007) 155 Cal.App.4th 1420, 1429, quoting *People v. Hardy* (1992) 2 Cal.4th 86, 143.) Here, the jury specifically found that appellants were actively participating in the conspiracy when the overt act of killing the four victims was committed. (9 CT 2285, 2301.) The evidence showed that after beating and stabbing each victim numerous times, the assailants cut the throat of every victim virtually from ear to ear and down to the vertebra. Since the conspiracy was still in effect at that point, and no reasonable jury could have doubted that the method used to kill the victims indicated that the conspirators intended to kill their victims, there is no doubt that the conspiracy was committed with an intent to kill. Therefore, as discussed in Argument VII-A-2, the erroneous instruction was harmless beyond a reasonable doubt. (*Chapman*, *supra*, 386 U.S. at p. 24; *Neder v. United States*, *supra*, 527 U.S. at pp. 7–10.)

Appellants complain that "the jury was never instructed that [they] had to have specific intent to kill at the time of the alleged agreement to commit the

murder[s] . . . ." (BOB 233; Cruz Joinder.) However, the jury specifically found that "The defendants killed Franklin Raper, Richard Ritchey, Emmie Darlene Paris, and Dennis Colwell *in furtherance of the conspiracy.*" (36 RT 6491, italics added; 7 CT 1820; 9 CT 2270–2287.) If the murders were "in furtherance of the conspiracy," then the intent of the conspiracy had to include the murders. Therefore, the jury had to have found that appellants had the intent to kill at the time of the conspiracy. Moreover, appellants cannot explain how the jury could have found that appellants agreed to commit murders without having the specific intent to commit murders.

Appellants contend that "the jurors obviously were confused about the relationship between the conspiracy instruction and the substantive murder charges" because during deliberations they asked the trial court, "'If we find a defendant guilty of conspiracy to commit murder and proceed to completing the individual murder counts, does the finding of first, second degree murder need or have to be the same for all four counts?'" (BOB 233–234, citing 37 RT 6833; Cruz Joinder.) However, appellants fail to show how the jury's question about how to reconcile different verdicts was related to an erroneous instruction on malice. Further, appellants cite a subsequent question which demonstrates the issue the jury was struggling with was how to consider individual murder charges when some jurors believed the defendant was guilty of the conspiracy and some did not. (BOB 234–235, citing 37 RT 6877–6878; Cruz Joinder.) That was a reasonable question and it showed that the jury was struggling with how to address the murder charges–not the instructions for the conspiracy charge.

Citing *People v. Ramos* (1982) 30 Cal.3d 553 and *People v. Murtishaw* (1981) 29 Cal.3d 773, appellants claim that conspiracy to commit murder cannot rest on the mental state of "the intent to commit murder, because that concept is much broader than an intent to kill." (BOB 227; Cruz Joinder.)

Appellants offer no pinpoint cite for their proposition and they are mistaken. Both cases clearly hold that intent to commit murder, intent to kill, and express malice are all different ways of expressing the same idea, and all are sufficient bases for a conviction on conspiracy to commit murder. The error discussed in those cases was not that the trial court instructed the jury on "intent to commit murder," but that, as in the present case, it suggested that the intent could be predicated on implied malice. (*People v. Ramos*, *supra*, 30 Cal.3d at p. 583; *People v. Murtishaw*, *supra*, 29 Cal.3d at pp. 764–765.)

Despite the fact that *Ramos* and *Murtishaw* do not support appellants' proposition that it is error to instruct on "intent to commit murder," they do demonstrate how the type of error that occurred here was harmless. In *Murtishaw*, the defendant was convicted of assault with intent to commit murder and three counts of first degree murder. (*People v. Murtishaw*, *supra*, 29 Cal.3d at p. 762.) The instruction on assault with intent incorrectly told the jury that the crime could be predicated on implied malice, express malice, or felony murder. (*Id.* at p. 763.) However, in light of the three first-degree murder convictions, and the weight of the evidence, the court found the erroneous instruction harmless because it was "virtually certain" that the defendant intended to kill the victims. (*Id.* at p. 765.) Similarly, in *Ramos*, the defendant was charged with attempted murder, but the trial court failed to instruct the jury that a conviction required the specific intent to kill. (*People v. Ramos*, *supra*, 30 Cal.3d at p. 583.) The court observed, "The instant case also resembles Murtishaw, however, in that we are unable to accept appellant's contention that the instructional error complained of was prejudicial." (*People v. Ramos*, *supra*, 30 Cal.3d at p. at p. 584.)

Thus, these cases support the conclusion that the jury necessarily found that appellants harbored express malice intent to kill. In sum, it would be illogical to find that appellants conspired to commit murder, but did not have an intent

to kill. The jury found each appellant guilty of four counts of first-degree murder with premeditation and express malice; therefore, it clearly found that appellants harbored the intent to kill. The jury specifically found that appellants participated in all five overt acts of the conspiracy and personally used deadly weapons. No jury could believe appellants drove to the crime scene in the middle of the night with knives and bats; donned masks; and killed four people in furtherance of the conspiracy; but did not actually have the intent to kill.

Furthermore, as indicated in *Ramos* and *Murtishaw*, the weight of the evidence against appellants makes it "virtually certain" that the error was not prejudicial. There are several categories of evidence which typically establish a premeditated and deliberate intent to kill, including (1) facts about a defendant's behavior before the incident that showed planning; (2) facts about any prior relationship or conduct with the victim from which the jury could infer motive; and (3) facts about the manner of the killing from which the jury could infer the defendant intended to kill the victim according to a preconceived plan. (*People v. Welch*, *supra*, 20 Cal.4th at p. 758.)

Here, there was overwhelming evidence that Cruz planned the killings. It was undisputed that he arranged to bring Willey to the Camp. Evans testified that Cruz had her draw a map of the Elm Street house; Cruz devised the plan, handed out assignments, and distributed weapons; and the plan was to kill everyone. (24 RT 4200, 4205–4216.) There was also substantial evidence that Beck agreed to the plan and brought Willey to the Camp to participate.

Likewise, the overwhelming evidence concerning the way in which the assailants prepared for the murders, drove to the Elm Street house late at night, and committed the murders, proved that the conspiracy was premeditated and deliberate. The defendants testified that they brought various weapons with them. (29 RT 5609 [Cruz claimed that Vieira took Cruz's baton and Cruz took only his cane to the house; 29 RT 5610 [Cruz testified that LaMarsh had a bat

and Evans had a bat and knife]; 30 RT 5296 [Beck testified that Evans and LaMarsh had bats and Vieira had a knife]; 32 RT 5639–5641, 5644 [LaMarsh testified he had a bat and handgun, Vieira had a knife and bat, Cruz had his baton, and Beck had a knife]; 34 RT 5991, 6004 [Willey testified that Cruz had his baton, Beck had a knife, LaMarsh had a bat, and Vieira had a bat and knife.) As discussed in previous arguments, this was evidence of the group's intent to attack the people in the Elm Street house. Appellants' claim that they suddenly decided to go to the house at midnight to retrieve clothes was not credible. (See 34 RT 5976–5978, 6045 [Willey testified they went to move furniture].)

Several witnesses testified that the assailants wore masks; Cruz admitted he had purchased four camouflage masks; two masks were found at the murder scene; and Cruz could not explain why none of his camouflage masks could be found at this house. (15 RT 2690, 2757; 16 RT 2779–2780, 2788; 17 RT 2934 [Moyers testified that the heavy person beating Ritchey on the front lawn appeared to be wearing a ski cap]; 2942 [Moyers also testified that all four people who came out of the house wore ski masks]; 20 RT 3415 [Creekmore testified that the heavy person beating Ritchey appeared to be wearing a baseball cap]; 21 RT 3660–3663; 22 RT 3881–3883; 24 RT 4232–4233 [Evans testified that Cruz, Beck, Willey, and Vieira wore masks]; 24 RT 4252, 4400 [Evans testified that Cruz lifted the mask over his face and it looked like a cap]; 29 RT 5076 [Cruz testified he owned several masks], 5253; 33 RT 5767 [LaMarsh testified that Beck wore a mask].) In addition, Cruz admitted that he drove the assailants to the murder scene.

There was also overwhelming evidence that appellants' prior contact with Raper provided the motive for the murders. It was undisputed that Cruz's group was upset with Raper's drug-dealing; they towed away his trailer and they burned his car. Cruz also testified that Raper threatened his life several times, and appellants both testified they believed Raper had engaged a

motorcycle gang to kill everyone at the Camp. (29 RT 5023–5031, 5064, 5067; 30 RT 5290.) In addition, Rosemary McLaughlin testified that the night before the murders, Cruz told her over the phone that he had a score to settle with Jimmy Smith and there would be a fight. (31 RT 5548.) And Evans testified that Cruz said he hoped that Smith and Smelser would be at the Elm Street house so he could kill them, too. (24 RT 4209, 4401.)

There was also overwhelming evidence that the murders were carried out in a way that showed there had been a preconceived plan. Cruz, himself, testified that the conspirators intentionally took knives and bats as opposed to firearms. (29 RT 5084.) Those weapons were consistent with Evans' testimony that the plan was to not use firearms to avoid attracting the attention of neighbors. (24 RT 4403.) Moreover, two neighbors identified Cruz and Willey as the ones who attacked Ritchey, and Creekmore specifically testified that Cruz walked over to Ritchey, picked him off the ground, and slit his throat. (17 RT 2932–2937; 20 RT 3413–3419, 3428, 3435.) Forensic evidence established that the cut severed Ritchey's jugular veins, carotid artery, and windpipe, and it extended all the way to the cervical vertebrae. (18 RT 3077.) The jury could not have believed Cruz inflicted that wound without intending to kill Ritchey. In fact, all of the victims' throats were cut. That was not a coincidence. Clearly, all the assailants had agreed to kill the victims. They may have even agreed on that method to ensure death.

All of the conspirators testified that Cruz dropped off Evans and LaMarsh and parked up the road to avoid arousing suspicion. Evans explained that this was part of the plan to corral the victims in the living room before the other assailants attacked. (24 RT 4209.) That testimony was corroborated by Alvarez, who testified that Evans forced her from the back bedroom into the living room, and then LaMarsh forced her from the front bedroom back into the living room. (17 RT 2984, 2992.)

Furthermore, the evidence established that appellants personally participated in the murders and had to have harbored an intent to kill. Cruz admitted that the police baton that was found near the murder scene belonged to him. (29 RT 5073.) Though appellants claimed that Vieira used the baton, Evans, LaMarsh, and Willey testified that Cruz had it at the time of the murders. (24 RT 4218; 30 RT 5352; 32 RT 5641, 5720; 34 RT 5991.) Moreover, the physical evidence showed that Cruz's baton was used to beat Paris. (15 RT 2728; 16 RT 3018–3021; 18 RT 3104, 3108–3109, 3119, 3212, 3220, 3259, 3261; 22 RT 3880; 24 RT 4237; 25 RT 4409; see 28 RT 4924; 32 RT 5657; 36 RT 6548). Not only did eyewitness accounts established that Cruz slit Ritchey's throat (18 RT 3075, 3077; 20 RT 3419, 3436–3437; see 34 RT 5997), the physical evidence suggested that Cruz slit Raper's throat. (18 RT 3088, 3090, 3092; see also 24 RT 4249 [Evans testified that Cruz reassured LaMarsh that Raper was dead].) Beck testified that he punched Colwell three or four times and LaMarsh testified that Beck stabbed Colwell in the stomach. (30 RT 5305; 32 RT 5657, 5752–5753.) In addition, Evans, LaMarsh, and Willey testified that appellants had lots of blood on them after the murders. (24 RT 4245, 4247, 4419; 32 RT 5662, 5721; 34 RT 6003, 6009.)

Evans, LaMarsh, and Willey testified that when they were driving away from the murder scene, Cruz became upset when he found out that Alvarez had escaped. Beck expressed disappointment that they had not killed more people. (24 RT 4249–4250; 32 RT 5663; 34 RT 6005.) That corroborated Evans' testimony that there had been a plan to kill everyone and leave no witnesses. (24 RT 4209.)

Finally, the prosecutor did not compound the error by arguing that the jury could base its conspiracy conviction on implied malice. (36 RT 6527–6533.) Rather, he repeatedly and consistently argued, from the beginning, that the plan was to kill Raper and anyone who happened to be with him. (See, e.g., 15 RT

2692 [prosecutor told jury in opening statement that Evans would testify that Cruz said, "'We're going to go over there and do them all and leave no witnesses . . . .'"]; 24 RT 4209, 4211 [Evans testified that when Cruz said "do" the victims, he meant to kill them]; 36 RT 6527.) During closing argument, the prosecutor emphasized that the jury had to find the specific intent to commit murder:

> Now, we have in Count V a conspiracy alleged, conspiracy to commit murder. And, again, conspiracy has certain elements. *You must have a meeting of the minds, an agreement, specific intent to agree and specific intent to commit the murders.* Again, you have the meeting in the trailer–and we'll talk about that some more–the meeting with all six of the people, four defendants here, plus Ricky Vieira, plus Michelle Evans, wherein the plan was made to go over and do the people and leave no witnesses.

(36 RT 6527, italics added.)

Thus, the target crime was murder and the prosecutor never suggested that the conspiracy charge could be predicated on anything less than an intent to commit murder. So when the jury found appellants guilty of conspiring to commit murder, there is no possibility it based that verdict on any mental state other than intent to kill. In short, the jury's various findings, the overwhelming evidence, and the prosecutor's argument all demonstrate beyond a reasonable doubt that the jury found that appellants harbored the intent to kill. Moreover, simple logic dictates that the jury could not have found that appellants conspired to commit murder without intending to kill. Accordingly, the erroneous instruction was harmless. (*Chapman*, *supra*, 386 U.S. at p. 24; *Neder v. United States*, *supra*, 527 U.S. at pp. 7–10.)

B. The Trial Court Properly Instructed The Jury That Even If Appellants Were Not The Actual Killers Of Some Of The Victims, It Could Find The Multiple-murder Special Circumstance Allegation True If They Harbored The Intent To Kill; Moreover, Appellants Forfeited This Claim By Requesting The Same Instruction Or Failing To Object; And Any Error Was Harmless

When a defendant is convicted of first degree murder as an aider and abettor, intent to kill is an element of the multiple-murder special circumstance allegation; however, it is not necessary to find intent to kill when the defendant is the actual killer. (*People v. Williams*, *supra*, 16 Cal.4th at pp. 687–688.) Here, the prosecutor's theory was that appellants agreed to the conspiracy to commit the murders and personally participated in the killings. The evidence showed that Cruz participated in the murders of Ritchey, Raper, and Paris–and possibly Colwell. Beck participated in the murder of Colwell–and possibly Ritchey.

The trial court instructed the jury that it could find appellants guilty of each of the four murders as the actual killer, a conspirator, or as an aider and abettor. Regarding the multiple-murder special circumstance, the trial court instructed the jury that if it found that a defendant was the actual killer, it did not have to find an intent to kill. But if it could not decide whether a defendant was the actual killer, a co-conspirator, or an aider and abettor, it had to find that the defendant's participation as a conspirator or aider and abettor was accompanied by an intent to kill.

Appellants argue that the instruction told the jury what to do if they were the actual killer; and what to do if it could not decide whether they were the actual killer, a conspirator, or an aider and abettor; but it did not require the jury to find an intent to kill if it found that appellants were liable only as a conspirator or aider and abettor. (COB 264; BOB 379.) Appellants are mistaken. Though the instruction was not as clear as it could have been, a reasonably intelligent

jury would have understood that it had to find the intent to kill if appellants were not the actual killer. Moreover, Cruz forfeited his claim of error by requesting the same instruction that he challenges on appeal. Beck forfeited his claim by failing to object to the instruction. Any error was also harmless beyond a reasonable doubt.

1. Cruz Forfeited This Claim By Requesting The Same Instruction; Beck Forfeited This Claim By Failing To Object

According to Cruz, he proposed two instructions regarding the intent-to-kill element of the special circumstance, including "an unmodified version of CALJIC No. 8.80." (COB 259, fn. 95, citing 9 CT 2225.) Because the instruction that was given was also taken from CALJIC No. 8.80, and Cruz did not request that the trial court augment the instruction it proposed, Cruz has forfeited his claim of error. Likewise, Beck forfeited his claim of error by failing to object to the instruction.

During discussions about the proposed jury instructions, the trial court stated that both the prosecutor and Cruz had requested that it instruct the jury pursuant to CALJIC No. 8.80, and it had decided to use the version submitted by the prosecutor. (35 RT 6320.) Cruz's attorney asked the trial court, "The bracketed portions concerning the co-conspirator and intent to kill, are you going to give it[?]" The trial court responded, "I plan on giving it as submitted by the district attorney." (*Ibid.*) After asking to look at the instruction, Cruz's attorney did not object and he did not argue that his proposed version was different or superior to the one offered by the prosecutor. (35 RT 6320–6321.) Presumably, he saw that the instruction did include "the bracketed portions concerning the co-conspirator and intent to kill."

Though the trial court elected to use the prosecutor's version, there is no meaningful difference between the two. The relevant portion of CALJIC No. 8.80 provided:

> [If you find beyond a reasonable doubt that the defendant was [a co-conspirator] [or] [an aider or abettor] [either [the actual killer] [a co-conspirator] or an aider or abettor, but you are unable to decide which], then you must also find beyond a reasonable doubt that the defendant with intent to kill [participated as a co-conspirator with] [or] [aided [and abetted]] an actor in commission of the murder in the first degree, in order to find the special circumstance to be true.] [On the other hand, if you find beyond a reasonable doubt that the defendant was the actual killer, you need not find that the defendant intended to kill a human being in order to find the special circumstance to be true.]

(Version of CALJIC No. 8.80 used for murders committed before June 6, 1990.)

The actual instruction provided:

> If you find beyond a reasonable doubt that a defendant was either the actual killer, a co-conspirator, or an aider and abettor, but you are unable to decide which, then you must also find beyond a reasonable doubt that the defendant, with intent to kill, participated as a co-conspirator with or aided and abetted an actor in the commission of at least one murder in the first degree and in at least one additional murder of the first or second degree in order to find the special circumstances to be true. On the other hand, if you find beyond a reasonable doubt that defendant was the actual killer of at least one person in the first degree and at least one additional person in the first or second degree, you need not find that the defendant intended to kill a human being in order to find the special circumstance to be true.

(36 RT 6511–6512.)

As can be plainly seen, the instructions are almost indistinguishable. There are minor deviations in the language, but they are stylistic and insignificant. Therefore, by requesting "an unmodified version of CALJIC No. 8.80," Cruz requested the same instruction which he now attacks on appeal.

This Court has repeatedly held, "'"The doctrine of invited error bars a defendant from challenging an instruction given by the trial court when the defendant has made a 'conscious and deliberate tactical choice' to 'request' the

instruction. [Citations.]"'" (*People v. Thornton* (2007) 41 Cal.4th 391, 436, quoting from *People v. Weaver* (2001) 26 Cal.4th 876, 970, which quoted *People v. Lucero* (2000) 23 Cal.4th 692, 723 and *People v. Wader*, *supra*, 5 Cal.4th at p. 658.) The *Thornton* court continued, "Accordingly, defendant may not complain on appeal about the giving of the modified version of CALJIC No. 8.80." (41 Cal.4th at p. 436.)

Cruz did not object to CALJIC No. 8.80, and he made no argument at trial or on appeal that the instruction that was given deviated from the standard CALJIC instruction that he requested. Therefore, the rule most recently repeated in *People v. Thornton* applies here. Because Cruz made a conscious choice to request the instruction, any error was invited by Cruz and his claim is forfeited on appeal. (See *People v. Thornton*, *supra*, 41 Cal.4th at p. 436.)

Similarly, Beck did not object to the instruction. (35 RT 6320.) Therefore, he also forfeited his claim. (*People v. Andersen* (1994) 26 Cal.App.4th 1241, 1249.)

2. The Trial Court Properly Instructed The Jury That If Appellants Were Not The Actual Killers, It Had To Find Intent To Kill

Former section 190.2 provided that the multiple-murder special circumstance applied only to a defendant who was the actual killer or to an aider and abettor if he had the intent to kill. (*People v. Anderson*, *supra*, 43 Cal.3d at pp. 1150–1151 ["intent to kill is not an element of the multiple-murder special circumstance; but when the defendant is an aider and abetter rather than the actual killer, intent must be proved."].) Proposition 115 modified section 190.2 to make the multiple-murder special circumstance apply to a defendant who was not the actual killer even if he did not have the intent to kill–so long as he was a major participant and acted with implied malice. (*Tapia v. Superior Court* (1991) 53 Cal.3d 282, 297–299; § 190.2, subd. (d).)

However, the change only applied to murders committed after Proposition 115 was passed, i.e., after June 5, 1990.[47] (*Ibid.*) Here, the murders were committed on May 20 or 21, 1990–two weeks before the effective date of Proposition 115.

Appellants claim that the multiple-murder special circumstance instruction told the jury that it "was required to find an intent to kill only if [it] could not decide whether appellant was the actual killer, an aider and abettor, or a coconspirator. If the jury did determine that appellant was guilty as an aider and abettor, or as a coconspirator, this instruction required no finding of intent to kill." (COB 264; BOB 379.) Appellants misread the instruction.

> The relevant question in reviewing defendant's challenge is whether there is a "'reasonable likelihood'" that the jury understood the charge as defendant asserts. (*People v. Kelly* (1992) 1 Cal.4th 495, 525; *Estelle v. McGuire* (1991) 502 U.S. 62.) "In addressing this question, we consider the specific language under challenge and, if necessary, the charge in its entirety. [Citation.] Finally, we determine whether the instruction, so understood, states the applicable law correctly." (*People v. Warren* (1988) 45 Cal.3d 471, 487.)

(*People v. Petznick* (2003) 114 Cal.App.4th 663, 678.)

Here, the gravamen of the instruction was that if the jury could not agree whether a defendant was the actual killer, it had to find that when he participated as a conspirator or aider and abettor, he had the intent to kill. But if the jury did decide that a defendant was the actual killer, there was no need to find intent to kill. Though the instruction did not spell it out, the underlying premise was that intent to kill was an additional element if a defendant was a conspirator or aider and abettor, but not if he was the actual killer.

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47. The Use Note for CALJIC No. 8.80 advises, "This instruction is for a crime of murder committed before June 5, 1990. For murder committed on or after June 6, 1990, use CALJIC 8.80.1."

Contrary to appellants' argument, the instruction did not merely state that if the jury could not decide if they were actual killers, it had to find an intent to kill. Rather, it stated if the jury could not decide whether a defendant was the actual killer, the jury had to find that a defendant, "with intent to kill, participated as a co-conspirator with or aided and abetted an actor in the commission of at least one murder in the first degree and in at least one additional murder of the first or second degree . . . ." (36 RT 6511, italics added; see *People v. Beardslee* (1991) 53 Cal.3d 68, 92–93 [jurors not required to agree whether defendant was guilty of murder as actual killer or aider and abettor].) That is, it had to find an intent to kill only with regard to culpability as a conspirator or as an aider and abettor. That implied that while a defendant could be liable under any of the three theories, only culpability as a conspirator or aider and abettor required the additional finding of intent to kill.

Likewise, the next part of the instruction told the jury, "On the other hand, if you find beyond a reasonable doubt that defendant was the actual killer of at least one person in the first degree and at least one additional person in the first or second degree, you need not find that the defendant intended to kill a human being in order to find the special circumstance to be true." (36 RT 6511–6512.) That confirmed the fact that the intent-to-kill element was required if a defendant was a conspirator or aider and abettor, but not if he was an actual killer.

The language was not ideal, and it would have been better if the instruction expressly stated that if appellants were culpable as conspirators or aider and abettors, the jury had to find intent to kill. But appellants are incorrect when they assert, "If the jury did determine that appellant was guilty as an aider and abettor, or as a coconspirator, this instruction required no finding of intent to kill." (COB 264; BOB 379.) The jury understood that it could find the special circumstance true even if it could not agree on a theory of culpability provided

that each juror found that a defendant was either the actual killer, a conspirator with intent to kill, or an aider or abettor with intent to kill. A reasonably intelligent juror would understand that the intent-to-kill requirement did not apply *only* if the jury was divided over the theory of culpability. But rather that it was a further precondition for finding a defendant culpable as a conspirator or aider and abettor.

Appellants' interpretation of the instruction is not logical. According to appellants, the instruction told the jurors that it should find the special circumstance true if a defendant was the actual killer, a conspirator, or an aider and abettor. But if the jury could not decide which of the three theories applied, the additional requirement of intent to kill was added. In other words, appellants claim the jury would have believed that if it found that a defendant was an aider and abettor it did not have to find intent to kill. But if it was not sure whether a defendant was an aider and abettor or the actual killer, it suddenly had to find the additional element of intent to kill–even though neither theory independently required a finding of intent to kill. That does not make sense. Logically, if none of the theories independently required an intent to kill, there was no need to add that element when deciding between the three. However, the instruction expressly stated that if the jury found that a defendant was the actual killer, there was no need to find intent to kill. Therefore, the only reason to require a finding of intent to kill in the context of deciding between theories was that–unlike the actual-killer theory–the conspirator and aider-and-abettor theories *did* require finding an intent to kill. That requirement was also supported by the fact that the instruction specifically stated that the intent-to-kill element applied only to the conspiracy and aider and abettor theories.

"When considering a challenge to a jury instruction, [an appellate court does] not view the instruction in artificial isolation but rather in the context of

the overall charge. [Citation.] For ambiguous instructions, the test is whether there is a reasonable likelihood that the jury misunderstood and misapplied the instruction." (*People v. Mayfield*, *supra*, 14 Cal.4th at p. 777.) Here, even if the challenged instruction was ambiguous, there is not a reasonable likelihood that the jury misunderstood and misapplied the law. As discussed above, the jury would have understood the underlying premise that it needed to find intent to kill if a defendant was not the actual killer. The jury would not have thought that it was required to find intent-to-kill for the two vicarious liability theories only when the third theory–which expressly did not require a finding of intent to kill–was added as an alternative. (*People v. Carey* (2007) 41 Cal.4th 109, 130 [this Court presumes the jurors were intelligent people who could understand the instructions and apply them to the facts of the case].) Therefore, because there is not a reasonable likelihood that the jury misapplied the law, this Court should find there was no error. (See *People v. Mayfield*, *supra*, 14 Cal.4th at p. 777; *Estelle v. McGuire* (1991) 502 U.S. 62, 72.)

3. Any Error Was Harmless Beyond A Reasonable Doubt

Even if the instruction pursuant to CALJIC No. 8.80 was erroneous, the error was harmless. As discussed in subsection A-2 of this argument, the jury's other findings, as well as the overwhelming evidence, ensures that the jury found that appellants harbored the intent to kill. Therefore, even if the instruction on the multiple-murder special circumstance was inadequate, it was harmless beyond a reasonable doubt.

In *People v. Carter*, this Court observed:

> "We have consistently held that when a trial court fails to instruct the jury on an element of a special circumstance allegation, the prejudicial effect of the error must be measured under the test set forth in *Chapman v. California* [, *supra*,] 386 U.S. 18, 24. [Citations.] Under that test, an error is harmless only when, beyond a reasonable doubt, it did not contribute to the verdict. (*Chapman*, *supra*, at p. 24.)" (*People v. Williams* (1997) 16

> Cal.4th 635, 689.) We have held that "'error in failing to instruct that a special circumstance contains a requirement of the intent to kill is harmless [beyond a reasonable doubt] when "the evidence of defendant's intent to kill . . . was overwhelming, and the jury could have had no reasonable doubt on that matter."' " (*People v. Marshall*, *supra*, 15 Cal.4th 1, 42.)

(*People v. Carter*, *supra*, 36 Cal.4th at p. 1187; see also *People v. Haley*, *supra*, 34 Cal.4th at p. 310.)

Even if the jury based all of appellants' murder convictions on vicarious liability, it could not have found them guilty of conspiring to commit murder without finding they had the intent to kill. (See 36 RT 6499; 8 CT 1914; *People v. Jurado*, *supra*, 38 Cal.4th at p. 123 ["For a conspiracy to commit murder, intent to commit the target offense means an intent to kill."].)

Similarly, the jury could not find appellants guilty of four counts of first degree murder without finding they had the intent to kill. (9 CT 2288–2291, 2296–2299.) The trial court instructed the jury that in order to return first-degree verdicts, it had to find that the murders were "perpetrated by any kind of willful, deliberate and premeditated killing with express malice aforethought" (36 RT 6493, 9 CT 1898.) It also instructed the jury that it must return a second-degree verdict if the evidence of malice was "insufficient to establish deliberation and premeditation." (36 RT 6494; 9 CT 1901.) Therefore, the jury's determination that appellants were guilty of first degree murder must have been based on a finding of express malice intent to kill.

The jury also found that appellants were part of the conspiracy when *all five* of the overt acts were committed. (9 CT 2293–2294, 2300–2301.) The jury also specifically found for each murder charge and the conspiracy charge that appellants personally used a dangerous weapon. (9 CT 2288–2291, 2296–2299.) No reasonable jury could find that appellants participated in all the stages of the conspiracy to commit murder, and used a deadly weapon during the murders, but did not intend to kill the victims.

The error was also harmless because the evidence that appellants harbored the intent to kill was overwhelming. As discussed above, appellants had a motive to kill Raper and Smith. (24 RT 4209, 4401; 29 RT 5023–5031, 5064, 5067; 31 RT 5548.) McLaughlin testified that Cruz told her the night before the murders there was going to be a fight. (31 RT 5547–5548.) Evans testified that Cruz devised the conspiracy, and Beck participated from the beginning. Evidence established that Cruz had Willey brought to the Camp. Evans also testified that the plan was to use bats and knives because firearms would attract the attention of neighbors. She also testified that the plan was to drop off her and LaMarsh at the front door of the Elm Street house to make preparations before the others arrived and began the attack; and the other defendants confirmed that Evans and LaMarsh were dropped off first. (24 RT 4200, 4205–4216, 4403.) That evidence was far more credible than Cruz's claim that he suddenly decided to go to the Elm Street house to retrieve some clothes for Evans (see 34 RT 5976–5978, 6045 [Willey testified they went to move furniture]); but he brought numerous "defensive" weapons even though he had gone there a few days earlier unarmed (29 RT 29 RT 5084, 5609–5610; 30 RT 5296; 32 RT 5639–5641, 5644; 34 RT 5991, 6004); but he left his pregnant girlfriend and two children at the Camp even though he thought a motorcycle gang was going to attack the Camp that night and kill everyone there. Evidence that the defendants wore masks also proved that there was a conspiracy to commit murder. (15 RT 2690, 2757; 16 RT 2779–2780, 2788; 17 RT 2934, 2942; 20 RT 3415; 21 RT 3660–3663; 22 RT 3881–3883; 24 RT 4232–4233, 4252, 4400; 29 RT 5076, 5253; 33 RT 5767.)

Two eyewitnesses also testified that Cruz purposefully walked up to Ritchey, picked him up off the ground, and slit his throat. (18 RT 3075, 3077; 20 RT 3419, 3436–3437; see 34 RT 5997.) There is no possibility that Cruz

did that without intending to kill Ritchey. In fact, all of the victims received similar wounds, including Colwell, whose murder was attributed to Beck.

Finally, the prosecutor always maintained that Cruz devised the plan; the other defendants knowingly agreed and participated; and the object of the conspiracy was always murder. (See, e.g., 15 RT 2692; 36 RT 6527.) During closing argument, the prosecutor said, "Now, for that special circumstance you have to find that at least one of those was a first degree murder, that is, premeditated, with express malice. I would submit to you that all four of them are first degree murders in this particular case." (36 RT 6532.) In short, the jury's various findings, the overwhelming evidence, and the prosecutor's argument all demonstrate beyond a reasonable doubt that the jury found that appellants harbored the intent to kill. "Under these circumstances, [this Court should] conclude that no reasonable jury, properly instructed, would have failed to find that defendant acted with the requisite intent to kill." (*People v. Carter*, *supra*, 36 Cal.4th at p. 1187.) Accordingly, any instructional error regarding the special circumstance of multiple murders was harmless beyond a reasonable doubt because the jury necessarily found that for each murder, appellants were the actual killers and/or harbored the intent to kill. (See *ibid.*; *Chapman*, *supra*, 386 U.S. at p. 24; *Neder v. United States*, *supra*, 527 U.S. at pp. 7–10.)

VIII.

THE TRIAL COURT PROPERLY DECLINED TO INSTRUCT THE JURY ON IMPERFECT SELF-DEFENSE BECAUSE THERE WAS NO EVIDENCE THAT APPELLANTS BELIEVED THERE WAS AN IMMINENT THREAT

Appellants claim the trial court erred by denying their request for an instruction on unreasonable (imperfect) self-defense. (COB 268; BOB 379.) A trial court must instruct the jury on the elements of unreasonable self-defense when there is evidence (1) the defendant had a real, but unreasonable, fear of

death or great bodily injury; and (2) the defendant believed that the threat was imminent. However, a trial court need not instruct a jury on unreasonable self-defense when it is not supported by substantial evidence. Here, appellants' primary defense was that they went to the Elm Street house without any criminal intent. When violence broke out, Cruz did not participate at all, and Beck only pulled Colwell off of Vieira and punched him a few times. Though appellants testified that no one ever attacked or threatened them, they claim the trial court should have instructed the jury that they acted in unreasonable self-defense. Alternatively, appellants claim that the instruction was required because there was evidence that the conspiracy was an act of self-defense because they had to kill Raper before he sent a motorcycle gang to the Camp to kill them.

As a preliminary matter, Beck never joined Cruz's request for an instruction on unreasonable self-defense, so he forfeited his claim of error on appeal.

As for the merits of appellants' claim, it fails because there was no evidence that appellants organized the conspiracy as a preemptive strike. And even if there were, preemption is inconsistent with self-defense. Nor was there any evidence that appellants (or anyone else) thought that Raper or the motorcycle gang were actually at the Camp and about to attack–which is the type of imminence required to prove unreasonable self-defense. Indeed, if appellants had thought there was about to be an attack on the Camp, they would not have thought they could thwart it by going to the Elm Street house several blocks away. Nor would they have left Cruz's pregnant girlfriend and two small children at the Camp unprotected. In short, unreasonable self-defense was not an excuse for appellants to ambush and brutally kill four people who were just sitting around their house talking.

Similarly, there was no evidence that appellants acted in self-defense once they got to the Elm Street house. Appellants' defense theory was that they went

to the Elm Street house to protect Evans while she collected some clothes. Appellants testified that a fight broke out spontaneously, but neither appellant testified that he was threatened or attacked by any of the victims. Thus, there was no evidence to support an instruction on unreasonable self-defense.

In addition, any error was harmless because there is no possibility the jury would have found appellants acted in unreasonable self-defense. Appellants never claimed in testimony or in argument that they conspired or acted in self-defense. Nor was there any evidence that appellants felt so imperilled that they needed to act immediately to protect themselves–either while still at the Camp or when they got to the Elm Street house. So even if the jury had received the instruction on self-defense, it would have easily rejected that theory. Furthermore, the jury expressly found that appellants participated in all stages of the conspiracy, and personally used a deadly weapon during the murders. Thus, there is no possibility that the jury would have invented its own fact pattern and found that appellants acted in self-defense even though they never made such a claim. Accordingly, even if the trial court should have given the unreasonable self-defense instruction, there is not a reasonable probability that the error affected the verdicts.

A. Procedural History

Cruz testified that on the night of the murders, Evans told him that she needed some clothes from the Elm Street house, but earlier that day Raper had threatened to kill her. "Michelle told me that, that Raper was going to call his biker friends to come and kill everybody in the camp that night or in–sometime in the wee hours of the morning or something like that." (29 RT 5063–5064; see 29 RT 5083.) It "concerned" him "[b]ut it wasn't something new . . . ." (29 RT 5067.)

Cruz testified that he drove them to the Elm Street house. After he parked his car up the road, Beck, Vieira, and Willey ran to the house; but Cruz walked.

(29 RT 5090–5091.) Cruz had his cane to help him walk; but he did not have any weapons when he went inside the house; and he did not strike or stab anyone. (29 RT 5097.) Cruz testified that Ritchey, Paris, Colwell, and Raper did not make any advances towards him or attack him in any way; nor did Cruz act in self-defense. (29 RT 5124–5125.) Cruz testified that he was not physically fit enough to fight and if he had tried to subdue someone, he would have been overpowered. (29 RT 5185.)

Beck testified that he joined a conversation between Cruz and Evans on the night of the murders. "Miss Evans was real concerned. She stated that she went over to her sister's house earlier to get some things and Raper wouldn't let h[er] have them–that's Franklin Raper–and he threatened her life, plus our lives . . . . [¶] She said that he was going to kill us and kill her, also . . . . [¶] [Raper said s]omething about him and his friends were going to come over." Cruz did not take part in the conversation. "He just sat there and listened." (30 RT 5289–5291; see 30 RT 5342.) Beck testified that he was concerned for his life when they drove to the Elm Street house and went inside. But he did not bring a weapon. (30 RT 5346.) Beck testified he did not receive any injuries at the house; no one came at him with a weapon; no one tried to hit him; none of the other defendants had injuries afterward; and none of them told him that they had been attacked. (30 RT 5368.)

After submission of all evidence in the guilt phase, the parties discussed jury instructions. Cruz requested an instruction pursuant to CALJIC No. 8.40 [Voluntary Manslaughter–Defined] and Beck and LaMarsh joined the request. (35 RT 6189, 6259.) The prosecutor argued it was not consistent with any of the defendants' defenses. (*Ibid.*) The trial court stated that it was inclined to give the instruction on sudden quarrel and heat of passion, but it would delete the portion addressing unreasonable self-defense. (35 RT 6259–6264.)

Cruz's attorney stated, "[I]s it not an argument that Mr. Beck, Mr. Vieira, and Mr. Cruz entered into a conspiracy to commit manslaughter because they felt they had to do a preempt[ive] strike for self-defense reasons, otherwise they were going to be attacked by this motorcycle gang? [¶] . . . . [T]hat's my position on conspiracy on manslaughter." (35 RT 6264.) A little later, Cruz's counsel argued, "The evidence is that Miss Evans stated to Mr. Cruz and I think Mr. Beck as well that Raper is getting his gang together, they're going to come over tonight and kill you." (35 RT 6266.) The prosecutor argued that Cruz forfeited his self-defense claim when he went "looking for" the confrontation. (*Ibid.*) The trial court stated it would instruct with CALJIC No. 8.40 regarding only sudden quarrel and heat of passion. (*Ibid.*)

When the trial court asked if any of the defendants wanted to argue that there should be an instruction on unreasonable self-defense, only Cruz and LaMarsh spoke up:

> [THE COURT: . . . .] Does anybody wish to argue that the 8.40 part including the unreasonable belief in need of self-defense ought to be also given?
>
> MR. AMSTER: Absolutely, yes, Your Honor[.]
>
> MR. MAGANA: I believe it should be given with regard to Mr. LaMarsh. He's indicated that Mr. Raper had a knife. Two other individuals had indicated that he also had a knife. I think it's a reasonable, maybe unreasonable interpretation that he was coming to attack him with a knife, so I think that's appropriate in Mr. LaMarsh's case.
>
> THE COURT: Any other comment, gentlemen, on that?
>
> MR. AMSTER: I think I've stated my position.
>
> THE COURT: Mr. Brazelton?
>
> MR. BRAZELTON: I think the instruction's totally not right.

> THE COURT: All right. I'm going to give 8.40 so far as upon a sudden quarrel and heat of passion. I'm not going to give the honest but unreasonable belief to defend oneself against imminent peril. The Court doesn't see that there was any imminent peril at all.

(35 RT 6266–6267.)

The trial court also stated "that there's no evidence here to suggest that there was any type of imminent danger." (35 RT 6269.) The court said it was making that ruling with the awareness that Cruz testified that Evans told them that Raper was getting friends together to attack them. (*Ibid.*) It stated it might reconsider if there was evidence the attack was that particular night. (35 RT 6270.)

After citing some of Cruz's testimony about the purported threat from Raper and the motorcycle gang, Cruz's attorney summarized his argument:

> What I feel is that that testimony read into the record right now basically shows that Mr. Cruz had a mental state that he was worried about this motorcycle gang coming over that night and doing them first or killing them in the wee hours of the morning, that he believes that killing should only occur in self-defense. He was concerned about the safety of his children. He was concerned about the safety of himself. And, therefore, it's arguable that if he entered into a conspiracy, he entered into a conspiracy on a peremptory-strike type of situation, because he was concerned about what Mr. Raper would do to his family and to his children and he wanted to kill first before they killed him.

(35 RT 6278.)

The trial court ruled:

> [T]he evidence presented by the Prosecution could be susceptible that the conspiracy and killings were done in the heat of passion meriting the giving of voluntary manslaughter instructions. The Prosecution's evidence is not susceptible to finding that the conspiracy and killings were done as the result of any of the defendants having an unreasonable belief in the need to act in self-defense. The defendants' absolute denial of any conspiracy whatsoever, of any killings whatsoever, does not ipso facto prohibit the jury from finding that all the District Attorney

> proved was manslaughter. And if that's all they believe the prosecution proved, that's all they should find the defendants guilty of.
>
> However, the defendants' denial entering into any conspiracy and denial of committing any murders deprives them of–excuse me, of any killings, deprives them of asserting any type of self-defense claim whatsoever, [w]hether it be actual self-defense or of the unreasonable belief of the need to act in self-defense. If you don't kill anybody, you can't say that you did it in self-defense or the unreasonable belief that you needed to act in self-defense.

(35 RT 6280–6281.)

A little while later, Cruz brought up the issue again. He argued that in determining whether there is substantial evidence of unreasonable self-defense, "the jury can accept part of the defendant's testimony and reject part of it." (35 RT 6308.) The trial court ruled:

> Your argument that he can both deny the conspiracy and then–and then assert that he entered into the conspiracy as a result of an unjustified belief in the need of self-defense, that is correct in theory. I'm going to make a finding that there is no–in spite of what Mr. Cruz has said, there is no evidence–there is no substantial evidence which merits consideration by the jury that there was any belief or need for self-defense by Mr. Cruz, or unreasonable belief in the need.

(35 RT 6309.)

Later, Cruz again claimed that there was substantial evidence of unreasonable self-defense, and that he had the right to raise inconsistent defenses. (36 RT 6437–6440.) The trial court reiterated its earlier ruling:

> I acknowledged that you were entitled to present inconsistent defenses, that the jury could accept and reject parts of witnesses' testimony. What I further stated was that there still has to be some substantial evidence of the inconsistent defense, and I've found that there's no substantial evidence of this inconsistent, unreasonable belief in the need to act in self-defense . . . .

> I'm looking at what is necessary for a self-defense defense or even an unreasonable belief in the need to act in self-defense defense, and that primarily deals with when [there is] imminent danger . . . .
>
> I take the view that if–there just isn't substantial evidence that–from which even an unreasonable belief in the need of self-defense could arise here, and that's the basis of not so instructing.

(36 RT 6439–6440.)

The trial court instructed the jury on voluntary manslaughter, but only on the basis of heat of passion and sudden quarrel. (36 RT 6494–6497, 6504; 8 CT 1902, 1906, 1928.) The trial court also instructed on self-defense, but limited that instruction to the charge against LaMarsh regarding the murder of Raper. (36 RT 6509–6511; 8 CT 1940–1946.)

B. Legal Principles

"An honest but unreasonable belief that it is necessary to defend oneself from imminent peril to life or great bodily injury negates malice aforethought, the mental element necessary for murder, so that the chargeable offense is reduced to manslaughter." (*People v. Flannel* (1979) 25 Cal.3d 668, 674, other ground superceded by statute in *In re Christian S.* (1994) 7 Cal.4th 768, 777.) Voluntary manslaughter based on unreasonable self-defense is a lesser included offense of murder. (*People v. Barton* (1995) 12 Cal.4th 186, 200-201.) If the defendant actually, but unreasonably, believed there was an imminent danger of death or great bodily injury, the defendant is deemed to have acted without malice and is guilty only of voluntary manslaughter. (*People v. Manriquez* (2005) 37 Cal.4th 547, 581.)

> "[V]oluntary manslaughter, *whether it arises from unreasonable self-defense or from a killing during a sudden quarrel or heat of passion*, is not a defense but a crime; more precisely, it is a lesser offense included in the crime of murder. Accordingly, when a defendant is charged with murder the trial court's duty to instruct

> sua sponte, or on its own initiative, on unreasonable self-defense is the same as its duty to instruct on any other lesser included offense: this duty arises whenever the evidence is such that a jury could reasonably conclude that the defendant killed the victim in the unreasonable but good faith belief in having to act in self-defense."

(*People v. Breverman* (1998) 19 Cal.4th 142, 159 (*Breverman*), quoting *People v. Barton*, *supra*, 12 Cal.4th at pp. 200-201; italics added by *Breverman*.)

Unreasonable self-defense requires that (1) the defendant actually believed there was a danger of harm, and (2) the defendant feared the harm was imminent. (*People v. Manriquez*, *supra*, 37 Cal.4th at p. 581.) "'[T]he doctrine is narrow. It requires without exception that the defendant must have had an actual belief in the need for self-defense.'" (*Ibid.*) Further, "'[f]ear of future harm-no matter how great the fear and no matter how great the likelihood of the harm-will not suffice . . . . "'[T]he peril must appear to the defendant as immediate and present and not prospective or even in the near future. *An imminent peril is one that, from appearances, must be instantly dealt with.*'"'" (*Ibid.*, italics in original.) Further, the defendant's unreasonable fear cannot be trivial; it must be fear of death or great bodily harm. (*People v. Michaels* (2002) 28 Cal.4th 486, 529; *People v. Humphrey* (1996) 13 Cal.4th 1073, 1082.) And even though the fear is unreasonable, it must still be "honest" and "actual." (*People v. Flannel*, *supra*, 25 Cal.3d at p. 674; *In re Christian S.*, *supra*, 7 Cal.4th at p. 783; *People v. Manriquez*, *supra*, 37 Cal.4th at p. 581.)

> An instruction on a lesser included offense must be given only when the evidence warrants such an instruction. [Citation.] To warrant such an instruction, there must be substantial evidence of the lesser included offense, that is, "evidence from which a rational trier of fact could find beyond a reasonable doubt" that the defendant committed the lesser offense. [Citation.] Speculation is insufficient to require the giving of an instruction on a lesser included offense. [Citations.] In addition, a lesser included instruction need not be given when there is no evidence that the offense is less than that charged.

(*People v. Mendoza*, *supra*, 24 Cal.4th at p. 174.)

Even if a defendant does not rely on the theory of unreasonable self-defense, a trial court must instruct the jury on that theory whenever the jury could reasonably believe the defendant had an unreasonable–but good faith belief–that he needed to kill the victim in self-defense. (*People v. Barton*, *supra*, 12 Cal.4th at p. 201; *People v. Elize* (1999) 71 Cal.App.4th 605, 614–616.) However, a trial court is not required to instruct the jury whenever *any* evidence is admitted, no matter how weak. (*People v. Flannel*, *supra*, 25 Cal.3d at p. 685, fn. 12.) The evidence must be substantial enough to merit consideration by the trier of fact. (*Ibid.*; *People v. Barton*, *supra*, 12 Cal.4th at p. 201.) Trial courts have a sua sponte duty to instruct on voluntary manslaughter "whenever the evidence is such that a jury could reasonably conclude that the defendant killed the victim in the unreasonable but good faith belief in having to act in self-defense." (*People v. Barton*, *supra*, 12 Cal.4th at p. 201; *In re Christian S.*, *supra*, 7 Cal.4th at pp. 773, 783; *People v. Roldan*, *supra*, 35 Cal.4th at p. 715 [trial court has the authority to refuse requested instructions on a defense theory for which there is no supporting evidence]; see *People v. Haley*, *supra*, 34 Cal.4th at p. 312 [trial court need not instruct as to all lesser included offenses, just those that find substantial support in the evidence]; *People v. Wickersham* (1982) 32 Cal.3d 307, 329 [trial court may not deny request for instruction on unreasonable self-defense unless there was insufficient evidence for the jury to make that finding], overruled on another ground in *People v. Barton*, *supra*, 12 Cal.4th at p. 200.)

When a trial court erroneously denies a defendant's request for an instruction on unreasonable self-defense, it is state law error and can be found harmless if the jury made other findings which were incompatible with self-defense, or if it is not reasonably probable that the defendant would have

received a better result if the trial court had given the instruction. (*Breverman, supra*, 19 Cal.4th at p. 178.)

C. Beck Forfeited This Claim By Failing To Join At The Trial Court

At trial, Beck joined Cruz's request for CALJIC No. 8.40. (35 RT 6189, 6259.) However, when the trial court decided to delete the portion of that instruction concerning unreasonable self-defense, Beck made no objection.[48] The trial court asked, "Does anybody wish to argue that the 8.40 part including the unreasonable belief in need of self-defense ought to be also given?" But only Cruz and LaMarsh made argument.
(35 RT 6266–6267.) Cruz repeatedly renewed his argument that he deserved an instruction on unreasonable self-defense. However, Beck never joined that specific request, nor did he make any argument.

While appellants' primary defense theory was that there was no conspiracy, Cruz argued that the jury should be instructed on unreasonable self-defense because an alternative theory was that the defendants conspired to kill Raper before Raper came to the Camp with a motorcycle gang and killed all of them. The trial court and Cruz always referred to the request as *Cruz's* motion. And in Beck's Opening Brief, he claims only that his "defense theory was that there was no conspiracy to kill the Elm Street residents; rather, he accompanied the other defendants to the house in response to Evans' request for protection." (BOB 241–242; but see BOB 379 [Beck joined Cruz's argument].) That shows that Beck never intended to advance the theory that he was entitled to an

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48. Beck submitted supplemental instructions concerning perfect self-defense. (8 CT 2077–2083 [Defendant's Special Instructions BB, CC, EE, FF, GG, HH, II].) However, Beck did not make any argument about why those instructions were necessary, and did not object when the trial court rejected those instructions. (36 RT 6422.)

instruction on unreasonable self-defense because there was a self-defense conspiracy.

Though Beck now claims he deserved that instruction because there was evidence that violence broke out spontaneously, he never made that argument at the trial court. Beck cannot show that he preserved his claim when he never objected to the trial court's modification; he never joined Cruz's repeated requests to include the instruction on unreasonable self-defense; and he never argued that a sudden quarrel justified *self-defense*. Therefore, because Beck never joined Cruz's request for an instruction on unreasonable self-defense, he forfeited this claim on appeal. (See *People v. Andersen*, *supra*, 26 Cal.App.4th at p. 1249; see § 1259.)

In Cruz's Opening Brief, Cruz claims that he deserved an instruction on unreasonable self-defense because there was evidence of a self-defense conspiracy and because there was evidence that he acted in self-defense when violence broke out at the Elm Street house. In Beck's brief, he makes only the latter assertion. Nevertheless, appellants joined each other's arguments. (BOB 379; Cruz Joinder.) Therefore, even though Beck did not preserve either claim on appeal, Respondent will address its argument to both appellants in case this Court disagrees with Respondent's forfeiture argument.

D. There Was No Evidence That, While Still At The Camp, Appellants Believed That Raper Posed An Actual And Imminent Threat Of Bodily Harm Or Death

A trial court should instruct a jury on unreasonable self-defense when there is substantial evidence that supports that theory–even if it is inconsistent with both the prosecutor and the defendant's theories of the case. (*People v. Flannel*, *supra*, 25 Cal.3d at p. 685, fn. 12; see 35 RT 6309; 36 RT 6439.) Notwithstanding appellants' argument, there was no evidence that they formed the conspiracy to kill Raper because they believed they were in real danger of

harm; nor was there any evidence they formed the conspiracy while believing an attack was imminent. (See *People v. Manriquez*, *supra*, 37 Cal.4th at p. 581 [unreasonable self-defense requires that (1) the defendant actually believed there was a danger of harm, and (2) the defendant feared the harm was imminent].)

1. There Was No Evidence That Appellants Conspired To Kill Raper In Self-Defense

Appellants claim that there was evidence that they believed the residents of the Camp were threatened by "imminent attack by Raper and his group of bikers, and that to defend against the attack, it was necessary to confront those threatening them in order to prevent the attack, leading to an agreement to go to 5223 Elm Street to do so." (COB 274; BOB 379.) Appellants are wrong. Appellants' testimony did constitute substantial evidence that they feared that Raper would send a motorcycle gang to kill everyone at the Camp. However, there was no evidence that this purported fear was what motivated appellants to attack the Elm Street house. In fact, both appellants expressly denied that was their motive. Rather, they claimed they went to the house to get clothes and the fight broke out spontaneously.

To the extent appellants contend that they could have been guilty of conspiracy to commit voluntary manslaughter, there is no such crime. All conspiracies to commit murder are conspiracies to commit premeditated first degree murder because one cannot plan to commit murder without premeditation and intent to kill. (*People v. Cortez*, *supra*, 18 Cal.4th at p. 1232.) The trial court mistakenly instructed the jury on conspiracy to commit voluntary manslaughter. (36 RT 6504.) But that was a windfall for appellants. Nevertheless, the instruction could not help them because in planning to commit murder they necessarily intended to kill the victims, and there was no evidence that appellants entered the conspiracy out of fear of imminent bodily

injury or death. (Nor was there any evidence that sudden quarrel or heat of passion from some earlier encounter continued to enrage appellants while they planned the murders blocks away from the victims.)

Contrary to appellants' argument, there was also no evidence whatsoever that the "agreement to go to 5223 Elm Street" had anything to do with stopping an imminent attack. (COB 274; BOB 379.) Cruz and Beck did testify that Evans told them that Raper had enlisted a motorcycle gang to attack the Camp. But appellants also testified there had been no discussion about going to the Elm Street house to hurt anyone; Evans simply said she needed some clothes and they all went with her to protect her. (29 RT 5068–5069; 30 RT 5296.) Since there was no evidence that the purpose of the conspiracy was to stop Raper from attacking the Camp, there was no reason to instruct the jury that the conspiracy might have been based on unreasonable self-defense.

Appellants suggest that even though they testified that everyone agreed to go to the Elm Street house to protect Evans while she retrieved some clothes, the jury could have inferred that the defendants' real agreement was to make a preemptive strike. Not only would such an inference contradict all of the defendants' testimony, but it was also inconsistent with the prosecutor's theory of the case. Virtually all of the direct evidence of the conspiracy came from Evans, and she never testified that she told Cruz that Raper had enlisted a motorcycle gang to attack the Camp. Nor did appellants' counsel bother to ask Evans about the supposed threat from a motorcycle gang when she was testifying. More importantly, Evans never suggested that the purpose of the attack was defensive. Thus, the trial court had no duty to instruct on the defense theory of conspiracy to commit voluntary manslaughter when no such crime exists; when all of the testimony and every party's theory of the case contradicted the theory that there was a self-defense conspiracy; and when that theory would have required the jury to make up its own defense.

In sum, there was evidence that appellants believed a motorcycle gang might have been enlisted to attack the Camp. But there was no evidence tying that belief to the conspiracy to attack the Elm Street house. Evans never testified the purpose of the conspiracy was self-defense, and all of the defendants testified that there was no conspiracy. Therefore, there was no evidence that the conspiracy was in self-defense.

2. There Was No Evidence That Appellants Conspired To Kill Raper Because They Believed They Were In Imminent Peril

The trial court also had no duty to instruct the jury on unreasonable self-defense if there was no substantial evidence that appellants believed the threat of death or great bodily injury was imminent. Cruz testified that the threat from the motorcycle gang concerned him but did not excite him. (29 RT 5067.) Cruz also testified he had heard the same threat twice before; that the threats had been going on for a long time; and that during the week preceding the murders, his group had been guarding the Camp around the clock. (30 RT 5067, 5239; see 28 RT 4978.) Similarly, Beck testified that he was concerned when Evans told them about Raper's threat, and Cruz did not say or do anything. (30 RT 5289–5291; see 30 RT 5342, 5346.) But neither appellant testified they were scared while still at the Camp.

McLaughlin testified that the night before the murders, Cruz told her he was planning to settle a score with Jimmy Smith; and Evans testified that Smith was one of Cruz's express targets. (24 RT 4401; 31 RT 5548.) That showed that the threat was not imminent since Cruz took at least a day to implement the preemptive strike. Thus, the evidence might have shown that appellants had a generalized fear of an attack, but they were cooly calculating in their response.

More importantly, there was no evidence that appellants believed the threat would be carried out imminently–which is a prerequisite for the instruction on unreasonable self-defense. (See *People v. Manriquez*, *supra*, 37 Cal.4th at p.

581.) If appellants had honestly believed an attack was imminent, they would have gathered everyone together and gone away. Or they would have called the police. Rather, the uncontradicted evidence was that they spent the evening at the Camp; and when they went to the Elm Street house, they left behind Starn and the two children.

Obviously, they would not have left behind Starn and the children if they believed an attack was imminent. It is true that Beck testified that he was not concerned about a motorcycle gang attacking the Camp while they were at the Elm Street house because Starn had guns. (30 RT 5425.) But it was not credible that Beck honestly believed that pregnant Starn could defend herself and two children from a marauding motorcycle gang. (See 30 RT 5291 [Beck testified that he went to Ceres to pick up Willey because they needed his help protecting the Camp].) Moreover, if the threat from Raper was such that Starn could repel it herself, then appellants had no basis to claim that they faced an imminent threat of death. After all, if pregnant Starn could protect herself and her two children all by herself, then Starn and six other well-armed adults could certainly do the same.

Furthermore, there was absolutely no evidence that Raper or the other victims were threatening anyone. There was no evidence that Raper and his friends were actually on their way to attack the Camp. There was no evidence that appellants received a phone call warning them that bikers were approaching the Camp. There was no evidence that appellants heard a gunshot and thought the Camp was under attack. There was nothing–just a vague oft-repeated empty threat. That is not enough. Absent evidence that appellants had to act immediately to thwart a threat of death or bodily harm, they were not entitled to an instruction on unreasonable self-defense. (See *People v. Manriquez*, *supra*, 37 Cal.4th at p. 581.) Nor is this even a close question. Appellants could not go over to the Elm Street house and ambush a bunch of hapless

misfits who were either sleeping or peacefully talking amongst themselves and then demand an instruction on self-defense. (See *In re Christian S.*, *supra*, 7 Cal.4th at p. 779 & fn. 1 [preemptive strike is not self-defense].)

The trial court opined, "I'm not going to give the honest but unreasonable belief to defend oneself against imminent peril. The Court doesn't see that there was any imminent peril at all." (35 RT 6267.) The trial court also stated "that there's no evidence here to suggest that there was any type of imminent danger." (35 RT 6269.) The trial court ruled, "I'm going to make a finding that there is no–in spite of what Mr. Cruz has said, there is no evidence–there is no substantial evidence which merits consideration by the jury that there was any belief or need for self-defense by Mr. Cruz, or unreasonable belief in the need." (35 RT 6309.)

"For killing to be in self-defense, the defendant must actually and reasonably believe in the need to defend. (*People v. Flannel*, *supra*, 25 Cal.3d at p. 674.) If the belief subjectively exists but is objectively unreasonable, there is 'imperfect self-defense,' i.e., 'the defendant is deemed to have acted without malice and cannot be convicted of murder,' but can be convicted of manslaughter." (*People v. Humphrey*, *supra*, 13 Cal.4th at p. 1082.) Here, appellants cite various evidence which might make a reasonable person fear Raper. But they do not cite any evidence that showed they were in fear of imminent attack by Raper and his friends when they conspired to kill Raper.

On the contrary, Cruz testified he was not in fear while at the Camp. (29 RT 5067.) Beck testified that he thought Raper and his buddies were going to come kill him and his friends; but he was not afraid of Raper. (30 RT 5342.) According to Beck, he did not feel fear until they were on their way to the Elm Street house. (30 RT 5289–5291, RT 5342.) While there was ample evidence that Raper had threatened Cruz, the evidence also showed that these threats had gone on for months. Moreover, there was no evidence that Raper ever actually

acted on *any* of these threats. It was appellants who went beyond mere words by towing away Raper's trailer, burning Raper's car, and roughing-up Colwell. Nevertheless, in appellants' attempt to portray themselves as the victims, they testified that they were "concerned" that Raper would send a motorcycle gang to kill everyone at the Camp. (29 RT 5067; 30 RT 5178.) However, that "concern" was not enough to justify a preemptive strike.

In *People v. Sinclair*, the court held that when there was no evidence that the defendant harbored the type of strong passion that would obscure his reasoning ability, the trial court need not instruct on voluntary manslaughter even when requested to do so:

> The subjective element requires that the actor be under the actual influence of a strong passion [such as fear] at the time of the homicide." (*People v. Wickersham* (1982) 32 Cal.3d 307, 326-327, disapproved on another point in *People v. Barton* (1995) 12 Cal.4th 186, 200-201.) In connection with the imperfect self-defense theory, the accused must possess "*actual* fear of an *imminent* harm." (*In re Christian S.*, *supra*, 7 Cal.4th at p. 783; original italics.) . . . . Both theories of partial exculpation, heat of passion and imperfect self defense, require that the defendant actually both possess and act upon the required state of mind. In the present case, defendant testified that he did not shoot the decedent. In fact, defendant even denied under oath he was armed. Accordingly, putting aside circumstantial evidence of his mental state as he shot the decedent, a subject which will be discussed shortly, based upon his own testimony, no voluntary manslaughter instructions had to be given on request.

(*People v. Sinclair* (1998) 64 Cal.App.4th 1012, 1016.)

Similarly, here, while there may have been evidence that appellants had a motive to kill Raper before Raper killed them, there was no evidence that they were actually in a state of fear that compelled them to act on that motive. On the contrary, like the defendant in *Sinclair*, appellants testified that they went to the Elm Street house without a weapon and without any intent to cause harm. (29 RT 5070, 5084, 5097, 5106; 30 RT 5296, 5300, 5346.) Moreover, Cruz

testified that when he received news that Raper was going to have him killed, it did not excite him because it was nothing new:

> Q. Now, on Sunday night, May the 20th, Michelle Evans told you that she had information that Mr. Raper was going to have you killed or her killed?
>
> A. Well, both.
>
> Q. Okay. And did that excite you?
>
> A. Well, it didn't make me happy, you know. It–it concerned me, you know. But it wasn't something new, you know . . . .

(29 RT 5067.)

Thus, Cruz expressly testified that he was not "under the actual influence of a strong passion." (*People v. Sinclair*, *supra*, 64 Cal.App.4th at p. 1016.) Later, Cruz testified that he had been told about the threat from Raper's friends a total of three times, and in response, he and the others had been standing guard day and night for over a week. (30 RT 5239.) That type of ongoing threat is not the type of threat of imminent harm contemplated by the unreasonable self-defense defense. Moreover, there was absolutely no other evidence that appellants conspired to attack the Elm Street house out of fear or in self-defense. As *Sinclair* makes clear, the mere fact that appellants had a reason to fear Raper is insufficient when all of the evidence shows that the reason did not instill the type of fear of an imminent threat that would justify an instruction on unreasonable self-defense. (See *People v. Sinclair*, *supra*, 64 Cal.App.4th 1012, 1016.)

This Court has explained that unreasonable self-defense is a "narrow" doctrine. (*In re Christian S.*, *supra*, 7 Cal.4th at p. 783.) "Fear of future harm–no matter how great the fear and no matter how great the likelihood of the harm–will not suffice. The defendant's fear must be of imminent danger to life or great bodily injury." (*Ibid.*) Here, there was no dispute that the victims

of the attack were blocks away from the Camp, sitting around the house talking; Alvarez was sleeping. No one was busting down doors at the Camp, firing guns, or making threats of any kind. It is inconceivable that while appellants sat around the Camp planning their assault, they had the type of fear of imminent harm that is required to demonstrate unreasonable self-defense.

Appellants have not cited any authority for the proposition that a defendant has a right to an unreasonable self-defense instruction when he launches a preemptive attack against people who are minding their own business and posing no threat whatsoever. According to appellants' theory, all a defendant needs to do is testify that he was afraid the victim was going to attack him, and the trial court must instruct the jury on unreasonable self-defense. Appellants are wrong. A defendant must demonstrate that he had an honest and actual fear that an attack was imminent. (*People v. Flannel*, *supra*, 25 Cal.3d at p. 674; *People v. Manriquez*, *supra*, 37 Cal.4th at p. 581.) No evidence of such fear was admitted at trial.

All in all, it is plain that appellants' testimony about the motorcycle gang was gratuitous. They tried to characterize Raper as violent and aggressive to show that he spontaneously started the confrontation. But Cruz and Beck tried to downplay their own emotions to avoid the conclusion that Raper antagonized them so much that they conspired to kill him out of revenge. (See 30 RT 5369 [Beck testified that he and Cruz discussed their defense cases].) For example, Cruz not only claimed he did not plot to kill Raper, he claimed he never talked to Raper about their problems; he did not participate when his group towed away Raper's trailer; and he was not present when they burned Raper's car. (29 RT 5026–5031.) And when he went to visit Raper a few days before the murders, he brought a twelve-pack of beer as a peace offering. (29 RT 5042.) Beck did not testify about any conflicts with Raper, though Kevin Brasuell and

Cruz testified that it was Beck who used his van to tow away Raper's trailer. (21 RT 3586–3587; 29 RT 5028.)

However, by tailoring all of their testimony towards proving they had no vendetta and there was no conspiracy to kill Raper, appellants failed to provide substantial evidence that there was a conspiracy to commit murder in self-defense. Appellants were entitled to claim there was no conspiracy; or that there was a conspiracy to act in self-defense; or both. But since they offered no evidence of a conspiracy, and Evans' testimony about the conspiracy did not involve a motorcycle gang or a preemptive attack, appellants were not entitled to an instruction on an unsupported and nonexistent defense theory of conspiracy to commit murder in unreasonable self-defense.

E. There Was No Evidence That, While At The Elm Street House, Appellants Faced An Imminent Threat Of Bodily Harm From Any Of The Victims

Appellants claimed that they went to the Elm Street house to protect Evans while she retrieved some clothes. (29 RT 5069; 30 RT 5294.) Then a fight spontaneously broke out and some members of the group overreacted and presumably committed the murders. (29 RT 5090–5091; 30 RT 5302–5308.) However, appellants claimed that no one ever attacked them at the Elm Street house. Cruz claimed he never hit anyone, and Beck claimed his only violent act was pulling Colwell off of Vieira and punching him three times. (29 RT 5089–5109; 30 RT 5306.) But if the jury had believed their accounts, they would certainly not have needed a self-defense instruction to avoid four first degree murder convictions and a conviction for conspiracy to commit murder.

Contrary to appellants' argument, there was, in fact, no evidence of any act of self-defense other than LaMarsh's testimony that Raper came at him with a knife. Cruz claimed that the reason the trial court should instruct on unreasonable self-defense was because the jury might conclude that Cruz

"entered into a conspiracy on a peremptory-strike type of situation, because he was concerned about what Mr. Raper would do to his family and to his children and he wanted to kill first before they killed him." (35 RT 6278.) In other words, Cruz argued that he was entitled to the instruction even if the jury believed that he conspired to kill Raper and anyone else at the house; crafted a plan to corral the victims and bludgeon them to death with bats and knives; stormed the house and executed the plan–and then one or two of the victims supposedly fought back. Cruz was wrong.

If appellants conspired to kill Raper and stormed the house with the other defendants, they were all aggressors, and were not entitled to argue any kind of self-defense. "It is well established that the ordinary self-defense doctrine–applicable when a defendant reasonably believes that his safety is endangered–may not be invoked by a defendant who, through his own wrongful conduct (e.g., the initiation of a physical assault or the commission of a felony), has created circumstances under which his adversary's attack or pursuit is legally justified. [Citations.] It follows, a fortiori, that the imperfect self-defense doctrine cannot be invoked in such circumstances." (See *In re Christian S.*, *supra*, 7 Cal.4th 768, 773, fn. 1; *People v. Seaton* (2001) 26 Cal.4th 598, 664; *People v. Randle* (2005) 35 Cal.4th 987, 1001.)

While the foregoing argument is not legally tenable, the jury could have theoretically believed appellants' testimony that there was no conspiracy and they went to the house to get clothes. (But see 38 RT 6886, 6890 [jury found appellants guilty of conspiracy]; 39 RT 6886, 6891; 9 CT 2293–2294, 2300–2301 [jury found all five overt acts true].) Thus, if there had been sufficient evidence of unreasonable self-defense at the Elm Street house, the trial court would have been obliged to instruct the jury on that theory. (*People v. Barton*, *supra*, 12 Cal.4th at p. 201; *People v. Elize*, *supra*, 71 Cal.App.4th at pp. 614–616.)

Appellants claim "there was evidence suggesting that Raper and his associates were the aggressors in this incident." (COB 275; BOB 239–241, 379; Cruz Joinder.) But they fall far short of making that case. Appellants observe that there was expert testimony that Raper had drugs in his body that could have made him aggressive. But Raper was a drug addict and alcoholic who always had something in his system. Tellingly, Cruz testified that Raper had threatened him many times, but Cruz never claimed that Raper had followed through on his threats against him. Rather, it was appellants' group who towed away Raper's trailer, burned his car, and roughed-up Colwell; it was also LaMarsh–a member of appellants' group–who beat up Raper just a few days before the murders. (24 RT 4192; 24 RT 4188–4199 [Evans testified that a few days before the murders the group went to the Elm Street house and LaMarsh beat up Raper].) Drugs in Raper's system did not prove he attacked anyone. On the contrary, evidence that Raper always had drugs in his system, but never initiated violence, tended to prove that he *did not* act violently prior to his murder.

Appellants argue, "In light of the evidence of animosity and mutual fear that existed between the two groups prior to the homicides, it is not unreasonable that the defendants would arm themselves before accompanying Evans to the house; nor is it unreasonable that once the fighting started, the victims' deaths were the result of an actual belief among the defendants that the acts which caused the victims' deaths were necessary to avert their own deaths or physical injury." (BOB 242; Cruz Joinder.) Appellants are correct that such a scenario would have been a perfectly reasonable basis for an instruction on unreasonable self-defense. What is unreasonable, however, is for appellants to expect an instruction on a theory which was not supported by any actual evidence and which completely contradicted their own testimony that no one ever attacked them. Appellants cite ample evidence of the animosity between them and

Raper. However, none of that evidence counts for anything because there was no evidence that any of the victims ever posed an imminent threat of peril prior to the murders.

Cruz testified that when he approached the Elm Street house, he heard someone yell something like, "'He's going crazy." (29 RT 5090.) However, Beck expressly testified that he did not hear anyone say, "'He's going crazy.'" (30 RT 5368.) Beck testified that he heard a girl scream and he thought it was Evans, and once inside the house, he feared for his life. (30 RT 5301.) But both appellants expressly testified that no one attacked them; they had no injuries; none of the other defendants told them they were attacked; and none of the other defendants had injuries. (29 RT 5124–5125; 30 RT 5368.)

Appellants argue that they testified that when they entered the Elm Street house, they were in fear for their lives. (COB 275; BOB 397.) But if both appellants testified that no one attacked them, then a hollow claim of fear did not support any kind of self-defense instruction.

Appellants note that LaMarsh felt threatened by Ritchey and Colwell, and then pulled a gun on them. (COB 276; BOB 379.) But there was no evidence that appellants were present when that happened, nor was there any evidence that LaMarsh communicated that information to appellants. So appellants could not have been motivated to act in self-defense by the alleged threat to LaMarsh.

Appellants cite LaMarsh's testimony that Raper came at him with a knife as evidence of provocation or self-defense. (COB 276.) But that also proved nothing regarding *appellants'* honest belief in a need for self-defense. No one suggested that appellants were present when Raper supposedly came at LaMarsh. (See 32 RT 5656–5657.) Nor did anyone testify that LaMarsh told appellants that Raper tried to attack him. According to LaMarsh's account, Cruz did not come into the house until after LaMarsh had broken Raper's arm. (32 RT 5654.) There was no evidence that Raper threatened anyone after that.

Indeed, according to LaMarsh's account, Raper was in shock and backing up when Cruz approached and hit Raper on the head with his baton. (32 RT 5656.) LaMarsh specifically testified that Raper "backed up a little bit more" when Cruz approached him. (32 RT 5873.) LaMarsh also testified that Raper was so bewildered that he did not even protect himself when Cruz repeatedly hit him. (32 RT 5874.) According to Cruz's testimony, when he entered the house, Raper was sitting in a chair, not moving, and presumably already dead–just like in the police photo that was taken a little while later. (29 RT 5097–5100.) So when Cruz went into the living room, he either saw Raper standing, in shock, and with a broken arm; or he saw Raper sitting in his chair unconscious. According to Beck's testimony, Raper was already slumping down in his chair, i.e., unconscious, when Beck entered the Elm Street house. (30 RT 5304–5305.) Thus, there was no account in which Raper posed a threat to appellants.

According to appellants, they could have argued that Cruz attacked Raper because he thought Raper was trying to kill LaMarsh. (COB 276; BOB 379.) But, of course, there was no evidence of that. Moreover, Cruz did not make that argument because Cruz testified that Raper was already dead when he went inside the house. And if the jury believed LaMarsh's testimony, it would have believed that Raper was in shock and backing up when Cruz arrived. (32 RT 5873–5874.) There was simply no evidence that would have caused the jury to infer that Cruz pummeled Raper's head with his police baton because he honestly felt that Raper posed an imminent threat of great bodily harm. After all, Cruz had his baton and LaMarsh had a bat, and they were both much younger and bigger than Raper. There was no reason why the jury would determine, without any evidentiary support, that Raper–an unhealthy 95-pound drug addict who had just had his arm broken–threatened LaMarsh and Cruz.

Similarly, Beck testified that he pulled Colwell off of Vieira and punched Colwell three or four times. But even if that is considered a defense of others, it did not justify an instruction on unreasonable *self*-defense. There was no evidence that Colwell ever threatened Beck. Nor was there any evidence that Colwell's threat to Vieira was such that it justified even the unreasonable use of deadly force. (See *People v. Oropeza* (2007) 151 Cal.App.4th 73, 78, 82 [instruction on defense of others is required only when evidence shows the defendant actually believed the other person was in imminent danger of great bodily harm]; *People v. Hardin* (2000) 85 Cal.App.4th 625, 634 fn. 7 [once the victim had been disarmed, defendant could no longer believe the victim posed an imminent threat of harm].)

Just as Raper could not have been a threat to Cruz and LaMarsh when he had a broken arm and they were armed with a baton, gun, and bat, Colwell could not have been a threat to Beck or Vieira when they outnumbered Colwell and Vieira had a bat and knife. Furthermore, Beck specifically testified that as soon as he pulled off Colwell and punched him a few times, he ran outside. (30 RT 5306.) In fact, both appellants testified that as they left the house, they saw Vieira take out Cruz's baton and a knife, and prepare to stab Colwell. (29 RT 5099–5104; 30 RT 5305–5306.) Thus, there was not only no evidence that Beck acted in self-defense, there was no evidence that Beck believed Vieira remained in danger of imminent attack. Thus, Colwell, like the others, never posed any threat to appellants.

Similarly, appellants' purported fear of attack could not have been provoked by Ritchey because, by Willey's account, Ritchey was trying to get away when Willey tackled him. (34 RT 5993; see 29 RT 5092 [Cruz testified Willey and Ritchey were already fighting when he got to the house].) According to Evans, when Ritchey ran out of the house, Cruz yelled, "'Get 'im, get 'im.'" (24 RT 4239.) Appellants' fear could not have been provoked by Paris because by

appellants' account, Evans had her down on the ground and was beating her. (29 RT 5103; 30 RT 5307.)

According to appellants' testimony, each time they saw a victim, they were on the defensive and posing no threat to them. The only slight exception was Colwell, who was purportedly on top of Vieira. But appellants made it clear that Colwell did not attack or threaten them, and the most reasonable inference was that Colwell was so engaged with Vieira that he did not even know appellants were there until Beck threw him aside. Therefore, appellants' claim that they were afraid for their lives was a rather hollow excuse. As a general matter, assailants often feel fear even when they have overwhelming force and their victims are on the run because physical confrontations always entail the risk of injury and criminal prosecution; but that fear does not turn the attack into self-defense.

Finally, appellants suggests that the jury could have found that they acted in unreasonable self-defense even though they never claimed that they acted in self-defense. That may be theoretically true. But appellants either personally used deadly weapons–as the jury found for every charge; or they did not have any weapon and did not touch anyone–as appellants testified. Since neither scenario was amenable to any kind of self-defense theory, an unreasonable self-defense instruction was not required. (*People v. Curtis*, *supra*, 30 Cal.App.4th at p. 1357.)

Thus, contrary to appellants' argument, none of the evidence would have supported the jury in finding that they had an "unreasonable belief in a need to defend against imminent peril to himself and his friends . . . ." (COB 276; BOB 238–242, 379; Cruz Joinder.) In short, the jury clearly found that appellants conspired to attack everyone at the Elm Street house, and appellants never claimed that the plot was intended as a preemptive attack. Nor was there any evidence whatsoever that anyone ever attacked appellants. Nor did appellants

ever contend that they acted in self-defense. Accordingly, the trial court properly denied appellants' request to instruct the jury on unreasonable self-defense.

F. Any Error Was Harmless Because There Is No Possibility That Appellants Would Have Received A More Favorable Verdict If The Jury Had Been Instructed On Unreasonable Self-Defense

According to appellants, there was a chance the jury would have found that they acted in unreasonable self-defense even though it was inconsistent with their own defense theory and no one testified that the murders were a response to Raper's alleged plot to attack the Camp. Appellants are mistaken. For the jury to find that the conspiracy was an act of unreasonable self-defense, it would have had to invent a defense theory by patching together parts of various witnesses' testimony. It would have had to ignore the fact that there was no evidence of an imminent threat. And it would have had to impose that theory on defendants who claimed there was no conspiracy and that they did not act in self-defense. Similarly, to find that appellants acted in unreasonable self-defense at the murder scene, the jury would have had to find that appellants were under an imminent threat of harm even though there was no evidence that even suggested that, and appellants expressly testified that no one attacked them.

Moreover, even if the trial court had agreed to instruct the jury on unreasonable self-defense, there is no chance appellants' counsel would have argued that the jury should accept that theory because it contradicted appellants' main defense theory that they did not plan the murders and did not harm anyone. Because there is no possibility that the jury would have invented its own defense theory, any error in failing to instruct the jury on unreasonable self-defense was harmless. (See *Breverman*, *supra*, 19 Cal.4th at p. 165.)

Appellants rely on *People v. Ramkeesoon* (1985) 39 Cal.3d 346, 351–352 and *People v. Sedeno* (1974) 10 Cal.3d 703, 721, for the proposition that the failure to instruct on a lesser included offense is reversible "unless it can be determined that the factual question posed by the omitted instruction was necessarily resolved adversely to the defendant under other instructions that were given." (COB 279; BOB 379.) However, those cases were overruled by this Court's opinion in *Breverman, supra*, 19 Cal.4th at p. 165. The *Breverman* court held that the *Watson* standard generally applies in determining whether instructional and other error under California law are prejudicial. (19 Cal.4th at p. 165.)

In *Breverman*, the defendant contended the trial court prejudicially erred by not instructing sua sponte on the lesser included offense of voluntary manslaughter. (19 Cal.4th at p. 153.) Although this Court agreed that the trial court erred by not instructing on that lesser included offense of murder, it overruled the longstanding standard of prejudice set forth in *People v. Sedeno*, *supra*, 10 Cal.3d 703, and concluded the *Watson* standard should apply instead. (*Breverman, supra*, at pp. 148-149, 164-165.) The court stated:

> [T]he failure to instruct sua sponte on a lesser included offense in a noncapital case is, at most, an error of California law alone, and is thus subject only to state standards of reversibility. We further determine, in line with recent authority, that such misdirection of the jury is not subject to reversal unless an examination of the entire record establishes a reasonable probability that the error affected the outcome. (Cal. Const., art. VI, § 13; *Watson, supra*, 46 Cal.2d 818, 836.)

(*Breverman, supra*, at p. 165.) Nevertheless, the holding left open the possibility that a capital defendant is entitled to review under the more stringent federal standard of harmlessness beyond a reasonable doubt. However, even under that standard, any error was clearly harmless beyond a reasonable doubt. (See *Chapman, supra*, 386 U.S. at p. 24.)

Since there was no evidence that the conspiracy was a response to an imminent threat, or that the conspirators actually feared imminent harm prior to carrying out their plans, there was no possibility that the instruction on unreasonable self-defense would have changed the jury's verdict on the conspiracy charge. Similarly, there is no possibility that the instruction would have convinced the jury not to find that appellants planned and premeditated the four murders.

The evidence showed that while appellants planned the murders, the victims sat in their home minding their own business. As a matter of law, the victims posed no imminent threat to appellants. To the extent appellants claimed the threat came from the fear of being attacked by a motorcycle gang, fear of future harm was insufficient justification. Appellants were aggressors as a matter of law, and they were precluded from claiming self-defense. (See *In re Christian S.*, *supra*, 7 Cal.4th 768, 773, fn. 1; *People v. Seaton*, *supra*, 26 Cal.4th at p. 664; *People v. Randle*, *supra*, 35 Cal.4th at p. 1001.) Similarly, there was no evidence that anyone threatened appellants at the murder scene. Therefore, the jury could not have found that unreasonable self-defense applied, and any error had to be harmless beyond a reasonable doubt. (See *Chapman*, *supra*, 386 U.S. at p. 24.)

In *People v. Koontz*, this Court held that any error in failing to instruct the jury in a capital murder prosecution on unreasonable self-defense was necessarily harmless because the jury rejected that theory when it found the robbery special-circumstance allegation true. (*People v. Koontz* (2002) 27 Cal.4th 1041, 1086.) "This finding signified the jury's unanimous conclusion that the killing occurred during the commission of a robbery and that defendant committed the murder in order to carry out or advance the commission of the crime of robbery." (*Id.* at pp. 1086–1087.) Similarly, here, the jury found that appellants conspired to commit murder, and participated in five overt acts in

furtherance of the conspiracy. They also committed four premeditated and deliberate first degree murders. Thus, the jury necessarily found that appellants made a calculated decision to commit murder–as opposed to an emotional response to an imminent threat. (See Respondent's Argument VII-A-2.)

Those findings show that any error was necessarily harmless because any jury that found that appellants planned, premeditated, and deliberated the murders could not also find that they reacted in the moment to a perceived threat of imminent harm. (See *People v. Koontz*, *supra*, 27 Cal.4th at pp. 1086–1087.) Accordingly, even if the trial court should have instructed the jury on unreasonable self-defense, the error was harmless under any standard.

IX.

THE TRIAL COURT PROPERLY INSTRUCTED THE JURY THAT IT COULD INFER CONSCIOUSNESS OF GUILT IF IT FOUND THAT THE DEFENDANTS DESTROYED EVIDENCE, FLED THE CRIME SCENE, OR MADE FALSE STATEMENTS TO POLICE

Appellants claim the trial court improperly gave the jury pinpoint instructions based on CALJIC Nos. 2.03 [Consciousness Of Guilt–Falsehood], 2.06 [Efforts To Suppress Evidence], and 2.52 [Flight After Crime]. (COB 288; BOB 379.) They are mistaken. All of the instructions were germane to evidence admitted at trial; none of them were pinpoint instructions; and each instruction has been repeatedly upheld by this Court. Moreover, appellants forfeited their claim regarding CALJIC No. 2.06 by failing to object or request augmentation. And any error regarding the three instructions was harmless.

A. Procedural History

While discussing instructions, the trial court noted that CALJIC No. 2.03 had been submitted by the People, but Cruz had also requested a modified version. Beck joined the request. (35 RT 6156.) The trial court denied the

request to add supplemental instructions purportedly based on *People v. Kimble* (1988) 44 Cal.3d 480, 498 and the Sixth, Eighth, and Fourteenth Amendments.[49] (35 RT 6156–6157; 8 CT 2120.) The trial court stated it was instructing with CALJIC No. 2.03 "[i]n its entirety." (35 RT 6157.)

Cruz joined Beck's request to add three supplemental instructions (HHH, III, ZZ), but the trial court also denied that request.[50] (36 RT 6420–6421, 6431–6434; 8 CT 2074–2075, 2098; see also 36 RT 6412.) The trial court

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49. Cruz's proposed instruction added: "Before considering the defendant's statements, you must determine the existence of the following preliminary facts: [¶] 1. Whether the defendant made the statements; and [¶] 2. Whether the defendant deliberately lied to hide his complicity in the crime. [¶] Unless you find both these preliminary facts to exist, you must disregard the statements. [¶] The defendant's consciousness of guilt, if any, is relevant upon the questions . . . whether the defendant thought he had committed a crime. Consciousness of guilt may not be considered [in determining the degree of defendant's guilt] [or] [in determining which of the charged offenses the defendant committed.] (8 CT 2120.)

50. Beck's proposed instruction HHH provided: "False statements before trial (New). [¶] Evidence has been introduced of statements made by the defendant before this trial from which an inference of his consciousness of guilt may be drawn. However, it is entirely up to you to find whether the evidence presented suggests that the defendant's statement was false and even if false, whether the defendant deliberately lied to hide his complicity in the crim[e] charged against him." (8 CT 2074.)

Beck's proposed instruction III provided: "Must be wilfully false. [¶] If you find that before this trial a defendant made wilfully false or deliberately misleading statements concerning the charge upon which he is now being tried, you may consider such statements as a circumstance tending to prove a consciousness of guilt but it is not sufficient of itself to prove guilt. The weight to be given to such a circumstance and its significance, if any, are matters for your determination." (8 CT 2075.)

Beck's proposed instruction ZZ provided: "False statements. [¶] Evidence that the defendant attempted to hide or cover up the killing by false or evasive statements made after the killing cannot be considered by you in determining whether the killing was deliberate and premeditated." (8 CT 2098.)

stated the modifications were not necessary because the topic was "adequately covered in CALJIC No. 2.03." (36 RT 6421.) The trial court invited comments, but neither Cruz nor Beck offered any argument. (*Ibid.*)

The trial court instructed the jury pursuant to CALJIC No. 2.03:

> If you find that before this trial a defendant made a willfully false and deliberately misleading statement concerning the crimes for which he is now being tried, you may consider such statement as a circumstance tending to prove a consciousness of guilt on the part of such defendant. However, such conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are matters for your determination.

(36 RT 6474; 8 CT 1853.)

While discussing instructions, the trial court stated that CALJIC No. 2.06 had been requested by the People and it planned on giving it. (36 RT 6157–6158.) Cruz asked if the trial court planned on giving the "bracketed portions," and the trial court replied, "The bracketed parts would be 'by destroying evidence or concealing evidence,' those two bracketed parts, not the 'intimidation of a witness' part." (35 RT 6158.) Appellants did not object or say anything else about that instruction. (*Ibid.*)

The trial court instructed the jury pursuant to CALJIC No. 2.06:

> If you find that a defendant attempted to suppress evidence against himself in any manner, such as by attempting to induce a person to alibi for him or by destroying or concealing evidence, such attempt may be considered by you as a circumstance tending to show a consciousness of guilt. However, such conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are matters for your consideration.

(36 RT 6474–6475; 8 CT 1854.)

While discussing instructions, the trial court noted that Cruz and LaMarsh had requested CALJIC No. 2.52, however Cruz's request included a supplement to that instruction–similar to what he proposed adding to the

instruction pursuant to CALJIC No. 2.03.[51] (35 RT 6177; 8 CT 2141.) Beck and Willey joined the request, but the trial court ruled, "I'm going to give CALJIC 2.52, not the modification requested by Mr. Amster." (35 RT 6177; 9 CT 2141.)

The trial court instructed the jury pursuant to CALJIC No. 2.52:

> The flight of a person immediately after the commission of a crime or after he is accused of a crime is not sufficient in itself to establish his guilt. It is a fact which, if proved, may be considered by you in the light of all other proved facts in deciding the question of his guilt or innocence. The weight to which such circumstance is entitled is a matter for the jury to determine.

(36 RT 6482; 8 CT 1870.)

B. Appellants Forfeited Their Claim Regarding CALJIC No. 2.06

"[T]he failure to object to an instruction in the trial court waives any claim of error unless the claimed error affected the substantial rights of the defendant, i.e., resulted in a miscarriage of justice, making it reasonably probable the defendant would have obtained a more favorable result in the absence of error. [Citations.]." (*People v. Andersen*, *supra*, 26 Cal.App.4th at p. 1249.) Appellants concede they did not object to CALJIC No. 2.06 [suppression of

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51. Cruz's proposed instruction added: "Before considering the evidence of flight you must determine that the following preliminary facts have been proven: [¶] 1. A person fled from the scene of the crime; [¶] 2. The person who fled was the defendant; [¶] 3. The defendant fled with the intent to avoid observation or arrest. [¶] You must disregard the evidence of flight unless you find that all of the above preliminary facts have been proven. [¶] The defendant's consciousness of guilt, if any, is relevant upon the question or [sic] whether the defendant was afraid of being apprehended and whether the defendant thought [he][she] had committed a crime. Consciousness of guilt may not be considered [in determining the degree of defendant's guilt] [or] [in determining which of the charges offenses the defendant committed]." (9 CT 2141.)

evidence], but assert they did not waive the claim because it affected their substantial rights. (COB 291, citing § 1259; BOB 379.)

In fact, none of the instructions affected their substantial rights. Instructions on how to evaluate evidence of flight, extrajudicial statements, and destruction of evidence are not on a par with instructions that describe the elements of a crime, explain the presumption of innocence, or require the jury to find guilt beyond a reasonable doubt. (See, e.g., *People v. Hillhouse* (2002) 27 Cal.4th 469, 503 ["Instructions regarding the elements of the crime affect the substantial rights of the defendant, thus requiring no objection for appellate review"].) It is doubtful that any of the challenged instructions are compelled by the state or federal constitutions. As appellants otherwise concede, they were "unnecessary." (COB 291; BOB 379.)

Notwithstanding appellants' claim that the instructions caused the jurors "to draw irrational inferences against" them (COB 292; BOB 379), they simply advised the jurors they could infer from their behavior that the defendants believed they had committed crimes. Moreover, the instructions advised the jury that it could not convict appellants solely because it found that they lied to police, destroyed evidence, or fled.

To the extent appellants argue that the modifications rejected by the trial court were necessary for a fair trial, they have preserved their right to contest the instructions pursuant to CALJIC Nos. 2.03 and 2.52. However, appellants did not object to the instruction pursuant to CALJIC No. 2.06, and that instruction did not affect their substantial rights. Therefore, appellants forfeited that claim. (*People v. Bolin* (1998) 18 Cal.4th 297, 326 [defense counsel agreed to giving of instruction and raised no objection]; *People v. Vera* (1997) 15 Cal.4th 269, 275-276 [as a general rule, appellate courts will not consider claims of error that could have been raised in the trial court].)

C. CALJIC No. 2.03 Was A Proper Statement Of The Law And It Applied To Appellants Because They Made False Extrajudicial Statements

Appellants acknowledge that there was evidence the defendants discussed alibis and appellants lied to police about spending the night of the murders in Oakdale. (COB 292; BOB 379; see 24 RT 4254, 4412; 29 RT 5128 [Cruz testified he told Detective Deckard that he had been at home with his wife and kids until 9:00 p.m., and then they spent the rest of the night at his parents' home in Oakdale.]; 29 RT 5129 [Cruz testified he told Detective Deckard that he had not been to the Elm Street house that night; he also testified that he told Deckard that Beck and Vieira came over later that night]; 30 RT 5322 [Beck testified he lied to police because he did not want to get his friends in trouble]; 34 RT 6027 [Willey testified that he told Detective Deckard that he was home with his girlfriend the night of the murders].)

Appellants concede that this Court has repeatedly rejected challenges to CALJIC No. 2.03. (COB 294, citing *People v. Nakahara* (2003) 30 Cal.4th 705, 713; COB 295, citing *People v. Bacigalupo* (1991) 1 Cal.4th 103, 123; COB 296, citing *People v. Kelly* (1992) 1 Cal.4th 495, 531–532 [CALJIC No. 2.03 does not pinpoint evidence the jury may consider]; COB 302, citing *People v. Hughes* (2002) 27 Cal.4th 287, 348 and *People v. Nicolaus* (1991) 54 Cal.3d 551, 579 and *People v. Boyette* (2002) 29 Cal.4th 381, 438–439 and *People v. San Nicolas* (2004) 34 Cal.4th 614, 666–667 and *People v. Crandell* (1988) 46 Cal.3d 833, 871, overruled on another ground in *People v. Crayton* (2002) 28 Cal.4th 346, 364–365; COB 304, citing *People v. Rodriguez* (1994) 8 Cal.4th 1060, 1139–1140 and *People v. Griffin* (1988) 46 Cal.3d 1011, 1027; BOB 379.) This Court has repeatedly rejected appellants' claim that the instruction pinpoints evidence, is argumentative, and permits jurors to use permissive inferences to reach irrational conclusions. Since appellants claim their supplemental instructions were necessary to cure "the errors inherent in the

instructions given" (COB 291; BOB 379), but this Court has found the instruction correct, the modifications could not have been necessary. This Court should find yet again that CALJIC No. 2.03 is a proper statement of law. (See *People v. Mungia* (2008) ___ Cal.4th ___ [2008 WL 3483869, p. 25].)

D. CALJIC No. 2.06 Was A Proper Statement Of The Law And It Applied To Appellants Because They Destroyed Evidence Of The Crimes And Asked Others To Provide Them With A False Alibi

Even if appellants did not forfeit their challenge to CALJIC No. 2.06, it fails on the merits. Appellants acknowledge that there was evidence they gave Willey murder weapons and masks to hide or destroy; Cruz directed Vieira to clean blood off his shoes as well as the car; and the defendants discussed false alibis. (COB 292; BOB 379; see 24 RT 4253, 4468 [Evans testified the defendants gave their weapons and masks to Willey to dispose of]; 24 RT 4254 [Evans testified that Cruz told Vieira to clean the blood off Cruz's shoes and the car]; 24 RT 4256 [Evans testified that LaMarsh wanted to throw his bat out the car window]; 24 RT 4412 [Evans testified that Beck was going to use a motel room as an alibi; Cruz was going to say he was sick at his mother's house in Oakdale]; 29 RT 5119 [Cruz testified that LaMarsh wanted to throw his bat out the window]; 29 RT 512 [Cruz testified he told Detective Deckard that he had been home until 9:00 p.m. and then went to his parents' house in Oakdale; then Beck and Vieira came over]; 30 RT 5312 [Beck testified that LaMarsh tried to dispose of his bat]; 30 RT 5321 [Beck testified he lied to police because he did not want to get his friends in trouble]; 32 RT 5723 [LaMarsh testified that Cruz told Beck they would need alibis]; 32 RT 5669, 5719 [LaMarsh testified that he gave his gun to Willey for disposal]; 32 RT 5723 [LaMarsh testified that Cruz told Beck they would need alibis]; 34 RT 6005 [Willey testified that Cruz discussed alibis]; 34 RT 6006 [Willey testified that LaMarsh tried to dispose of his bat]; 34 RT 6008–6009 [Willey testified that Cruz told

Vieira to clean the blood from Cruz's shoes and from the car]; 34 RT 6010 [Willey testified that Cruz asked him to store some weapons, and he put them under his house]; 34 RT 6015–6016 [Willey testified that he burned his clothes and disposed of two knives and a bat]; 34 RT 6136 [Willey testified he washed and burned his shoes].)

Appellants concede that this Court has previously found that CALJIC No. 2.06 is a proper statement of law. (COB 302, citing *People v. Nicolaus*, *supra*, 54 CAL.3d at p. 579; *People v. Crandell*, *supra*, 46 Cal.3d at p. 871; COB 304, citing *People v. Rodriguez*, *supra*, 8 Cal.4th at pp. 1139–1140; BOB 379; see also *People v. Thornton*, *supra*, 41 Cal.4th at pp. 438-439 [CALJIC No. 2.06 is proper when a defendant "admits some or all of the charged conduct, merely disputing its criminal implications"]; *People v. Farnam* (2002) 28 Cal.4th 107, 164–165 [rejecting claims that CALJIC No. 2.06 included a permissive presumption, was an improper pinpoint instruction, and impermissibly restricted the jury's review of relevant evidence].)

This Court has repeatedly rejected appellants' claim that the instruction pinpoints evidence, is argumentative, and permits jurors to use permissive inferences to reach irrational conclusions. Because appellants offer nothing new, this Court should find yet again that CALJIC No. 2.06 is a proper statement of law. (See *People v. Farnam*, *supra*, 28 Cal.4th at pp. 164–165.)

E. CALJIC No. 2.52 Was A Proper Statement Of The Law And It Applied To Appellants Because They Fled The Crime Scene And Spent A Night In A Motel To Avoid Detection

Appellants acknowledge that there was evidence they fled the murder scene and went to Willey's home in Ceres; Cruz called Starn and advised her to get a motel room for them; and then they stayed there to avoid the police. (COB 291–292; BOB 379; see 19 RT 3325–3328 [William Duval testified he saw four assailants trot single-file away from the Elm Street house after the

murders]; 24 RT 4242–4243 [Evans testified that all five men ran back to the car]; 29 RT 5107–5109 [Cruz testified that while he was walking back to the car, Vieira and Evans ran past him; LaMarsh and Willey were already at the car when he got there]; 29 RT 5116–5118 [Cruz testified that he drove the defendants to Willey's house]; 29 RT 5124 [Cruz testified he called Starn and told her to rent a motel room]; 30 RT 5309 [Beck testified that Vieira and Evans ran back to the car]; 30 RT 5311 [Beck testified Cruz drove them to Willey's house after the murders]; 30 RT 5315–5316 [Beck testified he stayed at a motel in Oakdale with Vieira, Starn, Cruz, and their two children]; 32 RT 5663 [LaMarsh testified that Cruz drove them to Willey's house]; 32 RT 5671 [LaMarsh testified he went to Oregon]; 34 RT 6001 [Willey testified he ran to the car]; 34 RT 6002 [Willey testified that Cruz drove them to Willey's house]; 34 RT 6008 [Willey testified that he gave Cruz a phone and he called Starn and told her "to get some money, get the kids, and take the van to Oakdale and get a motel room and he'll meet her there."].)

Appellants concede that this Court has repeatedly rejected challenges to CALJIC No. 2.52. (COB 302, citing *People v. Nicolaus*, *supra*, 54 CAL.3d at p. 579 and *People v. Boyette*, *supra*, 29 Cal.4th at pp. 438–439; BOB 379; see also *People v. Williams* (1997) 55 Cal.App.4th 648, 651 ["when there is evidence of a defendant's flight, such evidence may be considered in deciding guilt or innocence and [a flight instruction] must be given sua sponte, pursuant to Penal Code section 1127c."]; *People v. Mendoza*, *supra*, 24 Cal.4th at pp. 179, 180-181 [rejecting claims that instruction creates an unconstitutional permissive inference, was argumentative, and lessened the burden of proof]; *People v. Loker* (2008) ___ Cal.4th ___ [80 Cal.Rptr.3d 630, 7] ["We have repeatedly rejected the claim that the flight instruction 'permit[s] the jury to draw impermissible inferences about the defendant's mental state, or [is]

otherwise inappropriate where mental state, not identity, is the principal disputed issue.'"].)

This Court has repeatedly rejected appellants' claim that the instruction pinpoints evidence, is argumentative, and permits jurors to use permissive inferences to reach irrational conclusions. Since appellants claim their supplemental instructions were necessary to cure "the errors inherent in the instructions given" (COB 291; BOB 379), but this Court has found the instruction correct, the modifications could not have been necessary. This Court should find yet again that CALJIC No. 2.52 is a proper statement of law. (*People v. Loker*, *supra*, 80 Cal.Rptr.3d at p. 7.)

F. The Instructions Did Not Merely Duplicate Other Instructions On The Use Of Circumstantial Evidence

Appellants claim the challenged instructions merely reiterated instructions from CALJIC Nos. 2.00, 2.01, and 2.02. "These instructions amply informed the jury that it could draw inferences from the circumstantial evidence . . . . There was no need to repeat this general principle in the guise of permissive inferences of consciousness of guilt . . . ." (COB 292; BOB 379.) Appellants are mistaken. The instructions on circumstantial evidence focused on the facts of the crimes and the mental state of the defendants while committing the crimes. (36 RT 6472–6473, 6508–6509; 8 CT 1849–1850, 1939.) The challenged instructions, on the other hand, concerned the defendants' state of mind *after* committing the crimes and whether that reflected the defendants' own belief that they had done something wrong. Not only did the challenged instructions concern a different matter, they were more specific than the general instructions on circumstantial evidence. Also, CALJIC Nos. 2.00, 2.01, and 2.02 specifically told the jury that it could convict the defendants based solely on circumstantial evidence. The challenged instructions told the jury that evidence of consciousness of guilt was insufficient to prove guilt. Accordingly,

the challenged instructions were not duplicative of the general instructions on circumstantial evidence.

The trial court also instructed the jury, "If any rule, direction, or idea is repeated or stated in different ways in these instructions, no emphasis is intended and you must not draw any inference because of its repetition." (36 RT 6469.) So even if the challenged instructions were cumulative, the jury was told not to infer that any significance was intended. (*People v. Pinholster*, *supra*, 1 Cal.4th at p. 919 [appellate courts presume the jury followed the instructions it was given].) In any event, appellants cannot show that by repeating correct instructions, the challenged instructions were reasonably likely to have caused the jury to misapply the law. (See *Estelle v. McGuire*, *supra*, 502 U.S. at p. 72.)

G. Any Error Was Harmless Because The Evidence Against Appellants Was Overwhelming

As appellants concede, the jury could have made inferences about their consciousness of guilt even if the challenged instructions had not been given. Thus, absent the instructions, the jury would have made normal inferences from evidence that appellants fled the crime scene; did not call police; hid out in a motel room; disposed of their weapons; cleaned blood from their bodies, clothes, and the car; discussed alibis; and lied to police about their whereabouts at the time of the murders. In addition, as discussed in previous arguments, the evidence against appellants was overwhelming.

Further, any prejudicial effect from the challenged instructions had to be minor. They told the jury that it had to determine the truth of the underlying fact before it could determine what weight to give those facts. Moreover, pursuant to CALJIC Nos. 17.30 and 17.31, the trial court instructed the jury:

> I have not intended by anything I have said or done, or by any questions that I may have asked, or by any ruling I may have

made, to intimate or suggest what you should find to be the facts, or that I believe or disbelieve any witness.

If anything I have said or done has seemed to so indicate, you will disregard it and form your own conclusion.

The purpose of the Court's instructions is to provide you with the applicable law so that you may arrive at a just and lawful verdict. Whether some instructions will apply will depend upon what you find to be the facts. *Disregard any instruction which applies to facts determined by you not to exist.* Do not conclude that because an instruction has been given that I am expressing an opinion as to the facts.

(37 RT 6759, italics added; 8 CT 1962.) It is presumed that the jury followed the trial court's instructions and, thus, that it did not use the challenged instructions unless it first found the predicate facts were true. (See *People v. Mooc* (2001) 26 Cal.4th 1216, 1234 [it is presumed that the jury understood and followed the trial court's instructions].)

In sum, even if the instructions somehow misled the jury, it still would have reached the same verdicts even if the trial court had instructed the jury with any legally correct modifications requested by appellants. Any error was also harmless because there is not a reasonable probability that if the trial court had omitted the challenged instructions, appellants would have received a better result. (See *Breverman, supra*, at pp. 148-149, 164-165.) Moreover, even if the federal standard applied, any error was harmless beyond a reasonable doubt. (See *Chapman, supra*, 386 U.S. at p. 24.)

X.

THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON THE NEED TO FIND ALL ELEMENTS BEYOND A REASONABLE DOUBT

Appellants claim that the standard CALJIC instructions on circumstantial evidence (Nos. 2.01, 2.02, 2.90, 8.83, and 8.83.1), as well as other standard

CALJIC instructions (Nos. 1.00, 1.02, 2.21.2, 2.22, 2.27, 2.50, 2.51, 2.52, 8.20, 8.83, and 8.83.1), resulted in a reasonable likelihood that the jury convicted them on less than the constitutionally required standard of proof beyond a reasonable doubt. (COB 310; BOB 379.) Appellants argue that their claims are preserved because the instructions affected their fundament rights, but concedes that they did not object to these instructions. (COB 319, fn. 116; BOB 379.) Appellants also acknowledge that "this Court has repeatedly rejected constitutional challenges to many of the instructions . . . .," but ask this court to reconsider its prior rulings. (COB 324; BOB 379.)

First, appellants have forfeited many of these claims because they failed to object. Though some of instructions do address fundamental rights, such as the standard of proof, many others do not and, therefore, are not preserved on appeal. Second, while appellants cite various cases for general principles, they fail to cite authority that holds that any of the challenged instructions were improper. Therefore, this Court should reaffirm its earlier opinions which held these instructions to be proper statements of the law. Further, when considered together, the instructions were not reasonably likely to cause the jury to misapply the law. Finally, any error was harmless beyond a reasonable doubt because the evidence against appellants was overwhelming, and their defense theories were not credible.

A. Appellants Forfeited Some Of Their Claims Of Error By Failing To Object

Appellants did not object to any of the instructions challenged in this argument. As discussed in the previous argument, by failing to object, appellants forfeited claims regarding any instructions that did not affect their substantial rights. (See *People v. Andersen*, *supra*, 26 Cal.App.4th at p. 1249; § 1259.) Instructions on using circumstantial evidence and evaluating witnesses did not affect appellants' fundamental rights and appellants have forfeited

challenges to those instructions. (*Ibid.*) However, to the extent this Court accepts appellants' characterization of other instructions as affecting the prosecutor's burden of proof, the claims are not forfeited. (*People v. Salcido* (2008) 44 Cal.4th 93, 155 ["Because defendant contends the instruction reduced the prosecutors burden of proof, thus affecting one of his fundamental constitutional rights, we entertain the claim on its merits."].) Of course, CALJIC No. 2.90, which expressly addresses the beyond-a-reasonable-doubt standard, is preserved. (§ 1259; see, e.g., *People v. Elguera* (1992) 8 Cal.App.4th 1214, 1219 [prosecutor's burden of proof is a fundamental principle of law].)

B. The Instructions On Circumstantial Evidence And Reasonable Doubt Were Proper (CALJIC Nos. 2.01, 2.02, 2.90, 8.83, 8.83.1)

Appellants claim that the requirement of proof beyond a reasonable doubt was undermined by instructions pursuant to CALJIC Nos. 2.01 [Sufficiency Of Circumstantial Evidence Generally], 2.02 [Sufficiency Of Circumstantial Evidence To Prove Specific Intent], 2.90 [Presumption of Innocence–Reasonable Doubt–Burden of Proof], 8.83 [Special Circumstances–Sufficiency of Circumstantial Evidence–Generally], 8.83.1 [Special Circumstances–Sufficiency of Circumstantial Evidence to Prove Required Mental State]. (COB 311; BOB 379.)

In *People v. Maury* (2003) 30 Cal.4th 342 (*Maury*), the defendant challenged these same instructions (plus two instructions from Cruz's Argument X-B, i.e., CALJIC Nos. 2.21.2 and 2.22). (*Id.* at p. 428.) This Court explained:

> Without objection, the trial court gave the standard instructions on (1) circumstantial evidence (CALJIC Nos. 2.01 [sufficiency of circumstantial evidence generally], 2.02 [sufficiency of circumstantial evidence to prove specific intent], 8.83 [sufficiency of circumstantial evidence to prove the special circumstance], and 8.83.1 [sufficiency of circumstantial evidence

to prove mental state]); (2) the credibility and weight of the evidence (CALJIC Nos. 2.21.2 [witness willfully false] and 2.22 [weighing conflicting testimony]); and (3) the definition of reasonable doubt (CALJIC No. 2.90). Defendant claims that those instructions given, singly and collectively, impermissibly diluted the reasonable doubt standard.

Regarding the instructions on circumstantial evidence, we have repeatedly rejected defendant's argument. Those instructions, which refer to an interpretation of the evidence that "appears to you to be reasonable" and are read in conjunction with other instructions, do not dilute the prosecution's burden of proof beyond a reasonable doubt. (*People v. Hughes*, *supra*, 27 Cal.4th at pp. 346-347; *People v. Osband*, *supra*, 13 Cal.4th at pp. 678-679; *People v. Ray*, *supra*, 13 Cal.4th at pp. 347-348.)

Regarding CALJIC No. 2.21.2, defendant argues that it lowers the standard of proof for conviction by permitting the jury to assess the testimony of prosecution witnesses under a "probability of truth" standard. We have rejected a similar claim that the instruction, as applied to the defendant's testimony, increases the burden of proof from raising a reasonable doubt to meeting a "probability of truth." (*People v. Beardslee*, *supra*, 53 Cal.3d at p. 94.) "The qualification attacked by defendant as shifting the burden of proof ('unless from all the evidence you shall believe the probability of truth favors his testimony in other particulars') is merely a statement of the obvious–that the jury should refrain from rejecting the whole of a witness's testimony if it believes that the probability of truth favors any part of it. [¶] 'Thus CALJIC No. 2.21 does nothing more than explain to a jury one of the tests they may use in resolving a credibility dispute.'" (*Beardslee*, *supra*, at p. 95.) Although defendant here attacks the instruction as applied to prosecution witnesses, the same rationale applies. (*People v. Brown* (1996) 42 Cal.App.4th 1493, 1502-1503; *People v. Wade* (1995) 39 Cal.App.4th 1487, 1493-1494; *People v. Foster* (1995) 34 Cal.App.4th 766, 772-776.) When CALJIC No. 2.21.2 is considered in context with CALJIC Nos. 1.01 (consider instructions as a whole) and 2.90 (burden of proof), "the jury was adequately told to apply CALJIC No. 2.21.2 'only as part of the process of determining whether the prosecution had met its fundamental burden of

> proving [defendant's] guilt beyond a reasonable doubt.' [Citation.]" (*Foster*, *supra*, at p. 775.)
>
> Regarding CALJIC No. 2.22, defendant argues that it impermissibly dilutes the reasonable doubt standard because it allows the jury to resolve conflicting testimony by weighing "the convincing force of the evidence." Again, when this instruction is considered with CALJIC Nos. 1.01 and 2.90, "'[I]t is apparent that the jury was instructed to weigh the relative convincing force of the evidence (CALJIC No. 2.22) only as part of the process of determining whether the prosecution had met its fundamental burden of proving [defendant's] guilt beyond a reasonable doubt . . . .'" (*People v. Clay* (1984) 153 Cal.App.3d 433, 461-462; *People v. Salas* (1975) 51 Cal.App.3d 151, 157.)
>
> Finally, with respect to former CALJIC No. 2.90, we have repeatedly held that the phrases "depending on moral evidence" and "to a moral certainty" correctly define reasonable doubt. (*People v. Turner* (1994) 8 Cal.4th 137, 203; *People v. Jennings* (1991) 53 Cal.3d 334, 385-386.) Because the instruction, individually, correctly defines reasonable doubt, we reject defendant's claim that this instruction, when considered together with the other complained-of instructions, was improper. (*People v. Osband*, *supra*, 13 Cal.4th at pp. 678-679.)

(*Maury*, *supra*, 30 Cal.4th at pp. 428–429, footnotes omitted.)

Since *Maury* rejects each of appellants' claims, this Court should do the same. Appellants claim the use of the terms "moral evidence" and "moral certainty" in CALJIC No. 2.90 was reasonably likely to have lowered the beyond-a-reasonable doubt standard. (COB 311; BOB 379.) *Maury* rejects that claim. (*Maury*, *supra*, 30 Cal.4th at p. 429 ["we have repeatedly held that the phrases "depending on moral evidence" and "to a moral certainty" correctly define reasonable doubt."]; see also *Victor v. Nebraska* (1994) 511 U.S. 1 [finding CALJIC 2.90 and the term "moral certainty" constitutional].)

Appellants claim the relationship between CALJIC Nos. 2.01, 2.02, 8.83, and 8.83.1 "informed the jury that if appellant *reasonably appeared* to be guilty, they were to find him guilty–even if they entertained a reasonable doubt

as to his guilt." (COB 314, italics in original; BOB 379.) *Maury* rejected that claim. (*Maury, supra*, 30 Cal.4th at p. 428 ["Those instructions, which refer to an interpretation of the evidence that 'appears to you to be reasonable' and are read in conjunction with other instructions, do not dilute the prosecution's burden of proof beyond a reasonable doubt."].) Accordingly, this Court should follow its own precedent and similarly reject appellants' same claims.

C. The Other Challenged Instructions Were Proper And Did Not Lower The Reasonable Doubt Standard (CALJIC Nos. 1.00, 1.02, 2.01, 2.21.2, 2.22, 2.27, 2.50, 2.51, 2.52, 8.20, 8.83, And 8.83.1)

Appellants claim that CALJIC Nos. 1.00 [Respective Duties of Judge and Jury], 2.01 [Sufficiency of Circumstantial Evidence–Generally], 2.51 [Motive], and 2.52 [Flight After Crime] "violated appellant's constitutional rights by misinforming the jurors that their duty was to decide whether appellant was guilty or innocent, rather than whether he was guilty or not guilty beyond a reasonable doubt." (COB 319; BOB 379.) Appellants further claim that CALJIC No. 2.51 placed the burden on them to prove that they had an alternative motive which established their innocence. (COB 320; BOB 379.) However, this Court has previously rejected each of appellants' claims. (*People v. Brasure, supra*, 42 Cal.4th at p. 1059 [in light of the entire instruction, CALJIC No. 1.00 does not suggest that the defendant bears the burden of proving his innocence]; *ibid.* [same regarding CALJIC No. 2.01]; *Maury, supra*, 30 Cal.4th at p. 428 [CALJIC No. 2.01]; *People v. Parson* (2008) 44 Cal.4th 332, 358 [rejecting challenge to CALJIC Nos. 1.00, 2.01,and 2.51; *People v. Rundle, supra*, 43 Cal.4th at p. 155 [rejecting challenges to CALJIC Nos. 2.01 and 2.51]; *People v. Loker, supra*, 80 Cal.Rptr.3d at p. 7 ["Defendant argues that [CALJIC No. 2.51] improperly allowed the jury to find guilt based on motive alone, reduced the prosecutor's burden of proof, and required defendant to show an absence of motive to establish his innocence, violating his

rights to a fair jury trial, due process, and a reliable verdict in a capital case. We have rejected these challenges to the instruction"], citing *People v. Kelly*, *supra*, 42 Cal.4th at p. 792 and *People v. Cleveland* (2004) 32 Cal.4th 704, 750; COB 302 [Cruz conceded in his previous argument that this Court had rejected challenges to CALJIC No. 2.52], citing *People v. Nicolaus*, *supra*, 54 Cal.3d at p. 579 and *People v. Boyette*, *supra*, 29 Cal.4th at pp. 438–439; BOB 379; see also *People v. Williams*, *supra*, 55 Cal.App.4th at p. 651 [CALJIC No. 2.52]; *People v. Mendoza*, *supra*, 24 Cal.4th at pp. 179, 180-181 [CALJIC No. 2.52]; *People v. Loker*, *supra*, 80 Cal.Rptr.3d at pp. 6–7 [CALJIC No. 2.52].)

Appellants claim that CALJIC Nos. 2.21.2 [Witness Willfully False] and 2.22 [Weighing Conflicting Testimony] lessened the prosecution's burden of proof. (COB 321–322; BOB 379.) As discussed above, *Maury* rejected those claims. (*Maury*, *supra*, 30 Cal.4th at p. 429 [CALJIC No. 2.21.2 instructs jury to determine whether the prosecution has met its fundamental burden of proving guilt beyond a reasonable doubt; CALJIC No. 2.22 instructs the jury to weigh the relative force of the evidence only as part of the process of determining whether the prosecution has met its burden]; see also *People v. Brasure*, *supra*, 42 Cal.4th at p. 1059 [in light of the entire instruction, CALJIC No. 2.22 does not suggest that the defendant bears the burden of proving his innocence]; *People v. Parson*, *supra*, 44 Cal.4th at p. 358 [rejecting challenge to CALJIC Nos. 2.21.2 and 2.22]; *People v. Rundle*, *supra*, 43 Cal.4th at p. 155 [CALJIC No. 2.21.2].)

Appellants claim that CALJIC No. 2.27 [Sufficiency of Testimony of One Witness] erroneously suggested that the defendants had the burden of proving facts. (COB 323; BOB 379.) However, in *People v. Brasure*, *supra*, 42 Cal.4th 1037, this Court held that the instruction does not suggest that the defendant bears the burden of proving his innocence. (*Id.* at p. 1059; see also *People v.*

Parson, supra, 44 Cal.4th at p. 358 [rejecting challenge to CALJIC No. 2.27]; *People v. Rundle, supra*, 43 Cal.4th at p. 155 [same].)

Finally, appellants claim that CALJIC No. 8.20 [Deliberate and Premeditated Murder] misled the jury by requiring the defendants to prove there was no possibility of premeditation. (COB 323; BOB 379.) However, *People v. Brasure, supra*, 42 Cal.4th 1037 held that the instruction did not "'preclude'" the jury from considering that there was no deliberation and it did not suggest that the defendant bore the burden of proving his innocence. (*Id.* at p. 1059; see *People v. Whisenhunt* (2008) 44 Cal.4th 174, 218–220 [CALJIC No. 8.20 is the standard instruction for first degree premeditated murder and is a proper and sufficient statement of the law], citing *People v. Moon, supra*, 37 Cal.4th at pp. 31-32.)

Accordingly, this Court should follow its own precedents and reject appellants' claims.

D. Any Error Was Harmless

As discussed above, the evidence against appellants was overwhelming and their defense theories were not credible. Therefore, any errors in the challenged instructions were harmless because there is not a reasonable probability that if the trial court had made changes implied–but not articulated–by appellants, they would have received a better result. (See *Breverman, supra*, at pp. 148-149, 164-165.) Moreover, even if the federal standard applied, any error was harmless beyond a reasonable doubt. (See *Chapman, supra*, 386 U.S. at p. 24.)

XI.

THE TRIAL COURT DID NOT EXCLUDE APPELLANTS FROM ANY CRITICAL STAGES OF THE TRIAL

Appellants claim that the trial court violated their federal and state constitutional rights by excluding them from critical stages of the trial,

including sidebar conferences, discussions about jury questions and supplemental instructions, an inquiry into possible jury misconduct, and motions for mistrial. (COB 328–329; BOB 379.) However, appellants either impliedly or expressly agreed not to attend various proceedings either for the convenience of the court and the parties, or because they understood that their presence would serve no useful purpose. While that acquiescence did not effect a waiver in every instance (see *People v. Davis* (2005) 36 Cal.4th 510, 531–532; § 977), it certainly showed that appellants had no desire to participate in legal and technical matters, and would have been disinclined to participate in those proceedings. Moreover, the record shows that appellants said nothing during the many hearings they did attend, and when the trial court did ask whether they wanted to be present during discussions of jury instructions, appellants personally waived their presence. (34 RT 6147.) Similarly, all of the defense attorneys agreed that they could address jury questions and the juror misconduct allegation outside the presence of the defendants. (37 RT 6766, 6779.)

This Court has held innumerable times that capital defendants have no right to be present during routine sidebar discussions about evidentiary rulings, questions of law, and procedural matters, and appellants concedes as much. (COB 329; BOB 379.) Since the sidebar discussions in this matter were not critical stages of the trial, and it is customary to hold such technical legal discussions at the bench and outside the presence of the jury and defendants, appellants' rights were not violated.

Similarly, appellants had no right to be present at discussions about jury questions and supplemental jury instructions because they had nothing to do with effective cross-examination under the Sixth Amendment; their participation was not necessary to ensure a fair outcome under the Fourteenth Amendment's due process clause; and their participation was not substantially

related to their opportunity to defend under the California Constitution or section 977.

Appellants had no right to be present when the trial court asked a juror about a newspaper article he had read about a different criminal trial because it was a nonissue–there was no misconduct. Moreover, all of the attorneys waived the defendants' presence; it was not critical to the outcome of the trial; none of the attorneys wanted to participate in that voir dire; and none of the attorneys argued afterward that there was any misconduct.

During a discussion of jury questions, Willey, Cruz, and Beck's attorneys moved for mistrial because four autopsy reports were sent into the jury deliberation room even though they were never admitted into evidence. After the trial court determined that a few jurors had seen limited parts of the report, the attorneys made legal arguments. Counsel for LaMarsh conceded there was insufficient evidence that the error prejudiced the jurors and the trial court denied the motion for a mistrial. The motions were perfunctory and there is no possibility that appellants could have added anything to the process; nor would their presence have made the procedure more fair.

Finally, any error was harmless because appellants have failed to show that their participation in any of the hearings would have changed the result of the trial court's rulings or the jury's verdicts. Indeed, based on appellants' lack of participation in numerous hearings, it is extremely doubtful they would have said anything at the sidebar conferences or the discussions on jury questions and responses. Moreover, appellants orally waived their right to be present during discussions of jury instructions and their counsel waived appellants' right to be present during discussions of jury questions and the purported juror misconduct.[52/] That showed that appellants not only did not want to be present

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52. The waivers did not need to comply with the requirement that a defendant charged with a felony must waive his presence in writing (§ 977)

at those proceedings, but that they were not particularly keen on participating in post-trial legal proceedings. Moreover, their attorneys did not think their presence would be helpful. In short, appellants fail to carry their burden of showing that their presence at any of the proceedings would have made any difference and, therefore, any error was harmless.

A. Procedural History

During an early sidebar conference, the trial court noted, "The attorneys are present on each of those occasions we've had a sidebar conference, but they are not personally attended by the defendants." (21 RT 3585.)

Later, the trial court repeated:

> The record reflects that the defendants are not present whenever I made the comment we're out of the presence of the jury, the attorneys are present. [¶] . . . .
>
> All of these are sidebar conferences taking place in a hallway just outside the courtroom, it being more convenient for the Court to have these sidebar conferences here than having the jury leave the courtroom each and every time there's a sidebar conference. And the manner in which the courtroom is set up, a sidebar conference in the courtroom would take place absolutely immediately adjacent to the jurors.
>
> Obviously, the purpose of sidebar conferences is to deal with matters the jury should not hear. And the Court has been earlier provided with points and authorities that the defendants are not entitled to be–there's no error if sidebar conferences dealing with legal matters only take place outside the presence of the defendants.

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because those proceedings did not have a substantial relationship to appellants' opportunity to defend the charges against them. (See *People v. Cole* (2004) 33 Cal.4th 1158, 1231.) Though appellants claim their "constitutional and statutory rights" were violated (e.g., COB 328, 346; BOB 379), they do not actually discuss any statutes in their argument, including their argument on waiver (COB 346–357; BOB 379).

(22 RT 3799–3800.) Cruz's attorney said, "Thank you, Your Honor." (22 RT 3800.)

Towards the end of the guilt phase, the trial court advised counsel that the defendants could decide whether they wished to be present when they discussed jury instructions. "I think your clients are entitled, at least I'll find that your clients are entitled, to be present if they wish. If they wish to waive their presence while we discuss instructions, then they will not have to be here. And all the–the discussions or instructions will be on the record." (33 RT 5949.) Later, all of the defendants personally stated that they did not wish to be present during discussions of jury instructions. (34 RT 6147.)

Immediately before the jury began deliberations, the trial court asked the parties to stipulate that the jury could convene, recess for lunch, and reconvene without the presence of counsel or the defendants. All of the attorneys agreed. (37 RT 6761.)

After the jury retired for deliberations, the trial court asked the parties: "[S]o far as possible [regarding] jury questions, can I have a stipulation that we can deal with those on the record with the reporter present and you're present without your clients being present so they don't have [to] sit around their holding cell all day?" All of the attorneys agreed. (37 RT 6766.)

The next day the trial court discussed three jury questions with counsel. The trial court noted, "The defendants are not present, having waived their personal appearance when the jury has questions." (37 RT 6771.) The first question was a request for a readback of all of Evans' testimony. Beck's attorney asked if the court expected counsel to be present during the readback. The trial court replied that counsel were welcome to be present, but it assumed they would not want to sit through a readback of two days of testimony. (37 RT 6772.) All of the attorneys stated they did not wish to be present. (37 RT 6773.)

The second jury question concerned a request for a list of exhibits. It was determined that the jury had autopsy reports that were never admitted into evidence. The trial court instructed the bailiff to retrieve the autopsy reports. (37 RT 6773–6777.) Later, the trial court determined that a few jurors had read small parts of the report, while one had read most of it. (37 RT 6782–6784.) Counsel for Willey moved for mistrial, and counsel for the other defendants joined the motion–though counsel for LaMarsh suggested waiting until the jurors could be questioned further. (37 RT 6787–6790.) The trial court ascertained that the jurors did not discuss the autopsy reports and it directed the jurors not to discuss them. (37 RT 6796–6797.) Later, counsel for LaMarsh stated he did not believe there was a sufficient showing for a mistrial. (37 RT 6804.) The trial court again admonished the jurors not to discuss the autopsy reports, questioned them some more about what they read, and found there was no prejudice to the defendants. (37 RT 6806–6813.)

The third question was whether Juror No. 1 could share the contents of a newspaper article with the other jurors.[53] Cruz's counsel requested that the juror be excused; but LaMarsh and Willey disagreed. The trial court stated it would not let Juror No. 1 discuss the article with the other jurors and, assuming he had not already done so, it would allow counsel to voir dire him outside the presence of the other jurors. However, Cruz's counsel stated he did not want to ask the juror any questions. (37 RT 6776–6778.)

The trial court asked counsel, "Do any of you want your client[]s here while [Juror No. 1], if he is questioned about this newspaper article, is so questioned?" All of the attorneys declined. (37 RT 6779.) When the trial court called in the jury to discuss the questions, it stated, "Ladies and gentlemen, you

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53. The trial court stated that the article concerned "the King case." (37 RT 6777.) Presumably, it was referring to the inflammatory trial of officers who had beaten and arrested Rodney King. The four officers had been acquitted three weeks earlier. (See 37 RT 6784.)

notice that the defendants are not personally present. This is a part of the trial where their presence is not required and they have waived their presence during any questions asked by the jury, unless they specifically wish to be here." (37 RT 6780.)

When it reconvened, the trial court noted that Beck's attorney would be in San Diego the next day and asked for a stipulation that it could have testimony read to the jury without his presence. (37 RT 6800.) Beck's attorney agreed. Then the trial court asked the other attorneys, "[I]f all the jury wants is readback, are you satisfied that I can allow that to occur without you being here? Mr. Amster?" Cruz's attorney replied, "Yes, I am, Your Honor. I'd like the ability to inquire in to the Court and at least know what's going on; but other than that, I have no problem." (*Ibid.*)

After the trial court announced the jury's verdicts for appellants, it directed the jury to resume deliberations on the charges against LaMarsh and Willey. Later that afternoon, the trial court noted that it had received a second letter from the jury indicating it would not be able to reach unanimous verdicts. After querying the jury and counsel for LaMarsh and Willey, the trial court declared a mistrial as to those defendants. Neither appellants nor their counsel were present during that proceeding. (38 RT 6901–6906.)

B. Legal Principles

> Broadly stated, a criminal defendant has a right to be personally present at certain pretrial proceedings and at trial under various provisions of law, including the confrontation clause of the Sixth Amendment to the United States Constitution, the due process clause of the Fourteenth Amendment to the United States Constitution, section 15 of article I of the California Constitution, and sections 977 and 1043.

(*People v. Cole, supra*, 33 Cal.4th at p. 1230.)

> Under the Sixth Amendment's confrontation clause, a criminal defendant does not have a right to be personally present at a particular proceeding unless his appearance is necessary to

> prevent "interference with [his] opportunity for effective cross-examination." (*Kentucky v. Stincer* (1987) 482 U.S. 730, 744-745, fn. 17.)
>
> Similarly, under the Fourteenth Amendment's due process clause, a criminal defendant does not have a right to be personally present at a particular proceeding unless he finds himself at a "stage . . . that is critical to [the] outcome" and "his presence would contribute to the fairness of the procedure." (*Kentucky v. Stincer*, *supra*, 482 U.S. at p. 745.)
>
> Under section 15 of article I of the California Constitution, a criminal defendant does not have a right to be personally present "either in chambers or at bench discussions that occur outside of the jury's presence on questions of law or other matters as to which [his] presence does not bear a """"reasonably substantial relation to the fullness of his opportunity to defend against the charge."""" (*People v. Bradford* [(1997)] 15 Cal.4th [1229,]1357; accord, e.g., *People v. Jackson* (1980) 28 Cal.3d 264, 308-309 (plur. opn. of Richardson, J.).)

(*People v. Waidla*, *supra*, 22 Cal.4th at p. 741; see also *People v. Cole, supra,* 33 Cal.4th at p. 1231.)

Section 977, subdivision (b), provides that a defendant charged with a felony must be present at all court proceedings unless he signs a written waiver in open court. However, under sections 977 and 1043, there is no right to be present, even in the absence of a written waiver, where the defendant has no such right under the California Constitution. (*People v. Cole, supra,* 33 Cal.4th at p. 1231.)

Appellate courts review the defendant's absence from trial procedures de novo. (*People v. Waidla*, *supra*, 22 Cal.4th at p. 742.) However, the burden is on the defendant to demonstrate that his absence prejudiced his case or denied him a fair trial. (*People v. Bradford*, *supra*, 15 Cal.4th at p. 1357.)

C. Appellants Had No Right To Be Present At The Sidebar Conferences

Contrary to appellants' assertions, they had no constitutional or statutory right to be personally present at any of the sidebar conferences. They all involved discussions between the court and counsel conducted outside the presence of the jury, in which procedural or legal matters were discussed. (See *People v. Cole, supra,* 33 Cal.4th at pp. 1231-1232.) On every occasion, defense counsel were present who were fully able to represent appellants' interests. And in every instance, the matters addressed were legal and technical, and did not bear a reasonably substantial relation to appellants' opportunity to defend themselves or contribute to the fairness of the procedure. (See *ibid.*; *People v. Waidla, supra,* 22 Cal.4th at p. 741.)

Appellants argue, "A number of those conferences involved substantial argument by counsel, including requests for mistrial and severance." (COB 332; BOB 379.) However, that argument essentially concedes that these were technical discussions about evidentiary rules and legal concepts that appellants would not have been able to understand or contribute to. No lay person would know the legal bases for a motion for mistrial or severance, and appellants' argument fails to show any real contribution that they could have made. Moreover, these discussions about points of law did not directly implicate appellants' rights to defend themselves. (See *People v. Cole, supra,* 33 Cal.4th at pp. 1231-1232.)

Appellants make a lengthy argument about sidebar conferences that took place while Cruz and LaMarsh were testifying. (COB 332–335; BOB 379.) However, appellants' main point seems to be that the sidebar conferences were extensive and covered many legal arguments. However, that only shows that legal arguments with a judge, prosecutor, and four defense attorneys were–unsurprisingly–long and complicated. But appellants offer no authority

for the proposition that defendants somehow gain the right to be present when sidebar conferences will take more time than usual.

This court has repeatedly held that neither section 977 "nor the constitutional right to be present at trial extends to chambers or bench discussions outside the presence of the jury when those matters do not bear a reasonably substantial relation to the opportunity to defend." (*People v. Holt* (1997) 15 Cal.4th 619, 706.) Appellants have not shown that their counsel were incompetent to represent their interests at the sidebar conferences. Appellants make the conclusory assertion that if they had been present during these discussions, "it is reasonably probable that [they] could have assisted [their] attorney[s] in responding to the factual arguments and allegations . . . ." (COB 348; BOB 379.) But the mere fact that some of these sidebars included factual details did not make appellants' presence necessary. Appellants do not cite any instances in the record when their counsel stated they did not know a fact and needed to ask appellants. On the contrary, when given the choice, counsel opted to proceed without appellants' presence. Moreover, appellants offer no authority to support their contention that they gained the right to be present because they had personal knowledge related to some of the legal issues.

In *People v. Waidla*, *supra*, 22 Cal.4th 690, this Court held that the defendant's exclusion from 16 sidebar conferences that related to procedural, evidentiary, and housekeeping matters, and from one conference in chambers which related to instructions, did not violate the defendant's right to be personally present at trial. (*Id.* at pp. 741–742.)

This court explained:

> Having examined each of the 17 "proceedings" in question, whose general nature we have identified above, we cannot conclude with respect to any one of them that Waidla's personal presence either was necessary for an "opportunity for effective cross-examination," for purposes of the Sixth Amendment's

> confrontation clause (*Kentucky v. Stincer*, *supra*, 482 U.S. at pp. 744-745, fn. 17); or would have "contribute[d]" to the trial's "fairness" in any marginal way, for purposes of the Fourteenth Amendment's due process clause (*Kentucky v. Stincer*, *supra*, 482 U.S. 730, 745); or bore a """"reasonably *substantial* relation to the fullness of his opportunity to defend,""""" for purposes of section 15 of article I of the California Constitution and also sections 977 and 1043 of the Penal Code (*People v. Bradford*, *supra*, 15 Cal.4th at p. 1357, italics added). The only possible basis for a conclusion favorable to Waidla in this regard would be speculation. Such a basis, however, is inadequate. (See *People v. Horton* (1995) 11 Cal.4th 1068, 1121.)

(*People v. Waidla*, *supra*, 22 Cal.4th at p. 742.)

In *People v. Bradford*, *supra*, 15 Cal.4th 1229, this Court noted that it had repeatedly held that a defendant had no right to be personally present at bench discussions that occurred outside of the jury's presence on questions of law or other matters when the defendant's presence would not substantially add to his opportunity to defend against the charges. (*Id.* at p. 1357.) Here, appellants have not shown how the sidebar conferences in their trial were any different than the ones this Court has repeatedly found did not require the defendants' presence. Accordingly, this Court should reject appellants' claim. (See *People v. Waidla*, *supra*, 22 Cal.4th at p. 741.)

D. Appellants Had No Right To Be Present At Discussions Concerning Responses To Jury Questions And Supplemental Jury Instructions

Appellants personally stated that they did not wish to be present during discussions of jury instructions. (34 RT 6147.) Later, in appellants' presence, counsel stipulated that appellants did not need to be present during discussions of jury questions. (37 RT 6766.) Nevertheless, appellants claim their rights were violated because they were not present when the trial court discussed responses to jury questions and supplemental instructions. Appellants are mistaken.

The formulation of responses to jury inquiries is a question of law resolved outside the jury's presence. Appellants have not demonstrated that they could have reasonably be expected to have provided meaningful input; as a result, their absence did not violate their right to be present. (See *People v. Lucero*, *supra*, 23 Cal.4th at p. 717; *People v. Waidla*, *supra*, 22 Cal.4th at p. 742; *People v. Horton* (1995) 11 Cal.4th 1068, 1122.)

Similarly, appellants' personal presence was not necessary to formulate responses to jury questions in order to effectuate the Sixth Amendment's "opportunity for [a] full and effective cross-examination." (*Kentucky v. Stincer* (1987) 482 U.S. 730, 744; see also *People v. Cole, supra,* 33 Cal.4th at p. 1231.) Nor would their personal presence have contributed to the fairness of the procedure for purposes of the Fourteenth Amendment's due process clause. (*People v. Cole*, *supra*, at p. 1231, citing *Kentucky*, *supra*, at pp. 744-745.) Nor did their personal presence bear a reasonably substantial relation to the fullness of their opportunity to defend against the charge, for purposes of article I, section 15 of the California Constitution. (*People v. Cole*, *supra*, at pp. 1231-1232.) The discussion of responses involved the type of legal questions that appellate courts have routinely held do not require a defendant's personal presence. (*People v. Morris* (1991) 53 Cal.3d 152, 210, overruled on other grounds in *People v. Stansbury* (1995) 9 Cal.4th 824, 830, fn. 1; *United States v. Rubin* (2d Cir.1994) 37 F.3d 49, 54; *United States v. Sherman* (9th Cir.1987) 821 F.2d 1337, 1339, and cases cited therein [no constitutional or statutory right to attend jury instruction conference]; *United States v. Graves* (5th Cir.1982) 669 F.2d 964, 972-973, and cases cited therein ["A defendant does not have a federal constitutional or statutory right to attend a conference between the trial court and counsel concerned with the purely legal matter of determining what jury instructions the trial court will issue"].)

Moreover, it is extremely unlikely that appellants, who had no legal training, could or would have contributed in any way to the discussions regarding appropriate instructions on issues of law. (See 41 RT 7337–7344, 7348 [Cruz testified at the penalty phase that he did not attend school regularly after eighth grade and dropped out in the tenth grade].) Appellants claim that if they had been present, they could have observed the jurors and "consult[ed] with counsel about any concerns such observations might raise about the attitude or understanding of the instructions by the jurors." (COB 352; BOB 379.) However, the issue is the supplemental instructions–not how the jurors responded. Once the trial court gave the supplemental instructions, the deed was done. Appellants cannot seriously suggest that counsel would approach the trial court about facial expressions appellants noticed in response to the supplemental instructions. Nothing in the record suggests that appellants' presence during the discussions of supplemental jury instructions would have made any difference. As for Cruz, it is particularly doubtful that he could have communicated much information since his attorney stated prior to trial that he preferred not to discuss anything with Cruz during court proceedings. "I know for one that I do not want my client to orally talk to me during a proceeding. I want him to write on notes and hand them to me." (7 RT 1312.)

Nevertheless, appellants contend that if they had been present when the trial court responded to the jury's questions, they "could have urged counsel to object to the trial court's instruction that the jurors could cut off the reading of the testimony without having heard the entirety of the testimony." (COB 350; BOB 379.) Appellants also claim they might have urged counsel to compel the jury to listen to contrary testimony to balance out the testimony it had asked to hear again. (COB 351; BOB 379.) Appellants, of course, offers no authority for the proposition that they could make the jury listen to more of a witness's testimony than it wanted to hear, nor that appellants could require the jury to

listen to a readback of other testimony that appellants wanted the jury to hear again.[54] In fact, it is precisely that type of misguided advice that underlies why it is not considered essential that defendants be present during legal discussions outside the presence of the jury. Appellants have proven the People's case. Their presence was not required to defend the charges against them and they have not demonstrated prejudice. (See *People v. Waidla*, *supra*, 22 Cal.4th at p. 741.)

E. Appellants Had No Right To Be Present During The Voir Dire Of A Juror Who Read A Newspaper Article About An Unrelated Criminal Matter, Nor During A Motion For Mistrial Regarding The Jury's Receipt Of Autopsy Reports

Appellants complain that they were not present when the trial court questioned Juror No. 1 about an article he had read in the newspaper about the Rodney King case. Appellants gloss over the fact that their attorneys specifically waived their presence (37 RT 6779) and there was absolutely no substance to the allegation of juror misconduct.

Appellants contend that if they had been present, they "could have, for instance, urged counsel to press for information from [Juror No. 1] about how he came to read the article, and why he did not stop reading it after recognizing the subject matter." (COB 349; BOB 379.) Appellants also claim they could have given counsel insights concerning the juror's "'facial expressions,

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54. Appellants cite *Riley v. Deeds* (9th Cir. 1995) 56 F.3d 1117, 1121, for the proposition that it is inherent in a trial court's decision to order a rereading of testimony to decide "'*whether in fairness other testimony should also be read.*'" (COB 351, italics added by Cruz; BOB 379.) However, that case expressly does not address that proposition. Rather, *Riley v. Deeds* says, "*This case does not present a situation in which a judge* entertains a jury's request to rehear particular trial testimony, makes a decision whether and what part of the testimony should be read back, decides *whether in fairness other testimony should also be read* . . . . We express no opinion about the constitutional ramifications of such a scenario." (*Ibid.*, italics added.)

demeanor and other subliminal responses . . . .'" (*Ibid.*, citing *People v. Sloan* (N.Y. 1992) 592 N.E.2d 784, 787.) But, of course, an appellant can always dream up things he might have said to counsel. By that logic, trial counsel should *never* be allowed to make a decision without the presence of a defendant because there is always the possibility that the defendant will have a brilliant insight. But that is not the law.

Moreover, as the trial court said to the juror, "[Y]ou haven't done anything wrong, so don't think that you're out here so we can get angry with you. The admonition was not to read anything about our case, not about any case in the whole world." (37 RT 6785.) Thus, even years later in the relative calm of appellate review, appellants still miss the point. If the trial court never instructed the jury to avoid newspaper articles about other crimes, then there was no reason for appellants to ask their attorneys to press the juror on why he did not "stop reading [the article] after recognizing the subject matter." Thus, if that is all appellants had to add to the discussion, it was not going to help them.

Further, after the juror said he did not learn anything from the article he did not already know, all of the defense attorneys declined the trial court's invitation for voir dire. (37 RT 6785–6786.) The trial court instructed the juror not to discuss the article with the other jurors and returned him to deliberations. None of the attorneys argued that the juror had committed misconduct or should be excused. (37 RT 6786–6787.) Clearly, if the juror did nothing wrong, and counsel felt no need to argue or move for excusal for cause, then there is no chance that appellants would have offered anything substantive. Therefore, appellants' presence was not necessary to ensure their right of cross-examination or to defend against the charges. (See *People v. Waidla*, *supra*, 22 Cal.4th at p. 741.)

In *United States v. Gagnon*, the attorney for one of four defendants was present when the trial court discussed an instance of possible misconduct with one juror. (*United States v. Gagnon* (1985) 470 U.S. 522, 523–524.) The Supreme Court observed:

> We think it clear that respondents' rights under the Fifth Amendment Due Process Clause were not violated by the in camera discussion with the juror. "[T]he mere occurrence of an ex parte conversation between a trial judge and a juror does not constitute a deprivation of any constitutional right. The defense has no constitutional right to be present at every interaction between a judge and a juror, nor is there a constitutional right to have a court reporter transcribe every such communication."

(*United States v. Gagnon*, *supra*, 470 U.S. at p. 526, quoting *Rushen v. Spain* (1983) 464 U.S. 114, 125-126, Stevens, J., concurring in judgment); accord *People v. Bradford*, *supra*, 15 Cal.4th at p. 1357.) If there was no due process violation of the three defendants who were neither present personally, nor through counsel, then appellants' rights could not have been violated when the trial court conducted voir dire of a juror in the presence of their counsel.

Similarly, appellants make the unsupported claim that they could have made an important contribution to the motion for mistrial after it was determined that some jurors had read parts of the four autopsy reports that were never admitted into evidence and were mistakenly sent into the deliberation room. Appellants claim if they had been present during the voir dire, they would have "come to [their] own independent judgment regarding advisability of pursuing further inquiry on the subject . . . ." (COB 350; BOB 379.) It is not clear what that means other than that if appellants had been present, they might have thought of something to tell their attorneys. But that is mere speculation; it does not show they would have made a meaningful contribution to their defense; and it does not demonstrate prejudice. (See *People v. Waidla*, *supra*, 22 Cal.4th at p. 741.)

F. Any Error Was Harmless Because Appellants Cannot Show Their Presence At Any Of The Proceedings Would Have Made Any Difference To The Trial Court's Rulings Or The Jury's Verdicts

Appellants claim, without citation to authority, that "[t]he exclusion of appellant[s] from these discussions affected the structure of the trial and the error mandates a finding of prejudice per se." (COB 354; BOB 379.) They are mistaken. If they were excluded from a critical stage of the trial, that would be federal (and state) constitutional error and reviewable under *Chapman*. (*People v. Bradford*, *supra*, 15 Cal.4th at pp. 1356–1357; *Rushen v. Spain*, *supra*, 464 U.S. at p. 118, fn. 2.) If they were excluded from noncritical phases of the trial, then appellants bear the burden of proving prejudice by explaining how their absence resulted in an unfair trial or how their presence at the hearings would have altered the outcome of the trial. (*People v. Bradford*, *supra*, 15 Cal.4th at pp. 1357–1358.)

As shown above, appellants were not excluded from any critical stages of their trial. Certainly, appellants had no statutory or constitutional rights to be at the sidebar conferences; they were all "bench discussions outside the jury's presence on questions of law or other matters as to which his presence bears no reasonable, substantial relation to his opportunity to defend the charges against him." (*People v. Harris* (2008) 43 Cal.4th 1269, 1306.) Similarly, appellants had no right to be present during discussions of jury questions, responses to those questions, the voir dire of the juror who read the newspaper article about the Rodney King case, and the motion for mistrial regarding the mistaken delivery of the autopsy reports to the jury. They were all the functional equivalent of "bench discussions outside the jury's presence on questions of law . . . ." (*Ibid.*)

Moreover, in appellants' presence, counsel agreed that appellants did not need to be present when the attorneys discussed jury questions. (37 RT 6766.)

Though appellants did not foresee that those questions would lead to discussions about the autopsy report and the article about the King case, it is highly unlikely that appellants would have wanted to participate in those discussions, since they had already absented themselves from discussions about jury instructions and jury questions. And when these issues arose, none of the four defense attorneys ever suggest that they needed their clients to be present. (See 37 RT 6779 [attorneys agreed that defendants did not need to be present for discussions about possible juror misconduct].) While "[i]t may be that if personal presence truly bears a substantial relation to a defendant's opportunity to defend against the charges, counsel's waiver would not forfeit the claim," the very fact that counsel did not think appellants' presence was necessary "strongly indicates that [their] presence did not, in fact, bear [] a substantial relation" to the fullness of their opportunity to defend. (*People v. Cleveland*, *supra*, 32 Cal.4th at p. 741.)

In any case, appellants have failed to show that their presence at any of the challenged proceedings would have made any difference to the trial court's ruling, nor to the jury's ultimate verdicts. Therefore, they have failed to carry their burden of proving prejudice. (*People v. Bradford*, *supra*, 15 Cal.4th at pp. 1357–1358; *People v. Holt*, *supra*, 15 Cal.4th at pp. 706–707 [reversal not necessary because the defendant's "presence at these proceedings was not necessary to protect his interests, assure him a fair and impartial trial, or assist counsel in defending the case . . . ."]; see also *People v. Holloway* (1990) 50 Cal.3d 1098, 1116, overruled on another ground in *People v. Stansbury*, *supra*, 9 Cal.4th at p. 830, fn. 1; *People v. Garrison* (1989) 47 Cal.3d 746, 783; *People v. Benavides*, *supra*, 35 Cal.4th at p. 89 [failure to show that defendant's presence would have served any purpose].)

Finally, since appellants fail to demonstrate that they made any meaningful contribution during the numerous hearings they did attend, there is virtually no

possibility that appellants would have added anything to the legal discussions they did not want–or ask–to attend. (See *United States v. Gagnon, supra,* 470 U.S. at pp. 526-527 [the central inquiry in determining whether due process principles entitled a defendant to appear at a hearing is whether the defendant's presence reasonably could have assisted his defense of the charges against him].) Therefore, even if appellants should have been present, they cannot show they would have added anything that could have helped them overcome evidence that was overwhelming. Thus, any error was harmless beyond a reasonable doubt. (See *Chapman, supra,* 386 U.S. at p. 24; *People v. Bradford, supra,* 15 Cal.4th at pp. 1356–1357.)

XII.

CRUZ'S CONSPIRACY CONVICTION SHOULD BE CONVERTED TO A TERM OF 25 YEARS TO LIFE

Cruz was convicted in Count 5 of conspiracy to commit murder. (9 CT 2284–2285; 38 RT 6885–6887.) The jury rendered a verdict of death. (9 CT 2402, 2413, 2419–2420; 41 RT 7572.) The trial court sentenced Cruz to death. (10 CT 2650, 2652, 2660–2665; 45 RT 8426.)

Cruz argues, "A sentence of death for conspiracy to commit murder is unauthorized by law . . . ." (COB 358.) Respondent agrees. Cruz's death sentence for conspiracy should be modified to a term of 25 years to life.[55]

In *Vieira*, this court held:

> Defendant contends the trial court erred in imposing a separate death sentence upon him for conspiracy to commit murder. As the Attorney General concedes, defendant is correct, and we have held that conspiracy to commit murder is not a death-eligible crime. (*People v. Lawley* (2002) 27 Cal.4th 102, 171-172.) As in *Lawley*, "[u]nder our statutory power to modify an unauthorized sentence (see § 1260), we shall direct the trial court

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55. In Argument XXVI, Respondent makes the same concession as to Beck.

> to issue an amended abstract of judgment reflecting the appropriate sentence for conspiracy to commit murder, which the Attorney General in this case agrees is imprisonment for 25 years to life . . . ." (*Id.* at pp. 171-172, fn. omitted.)

(*Vieira, supra*, 35 Cal.4th at p. 294.) Likewise, here, this Court should "reverse the death sentence as to the conspiracy to commit murder count and remand to the trial court to issue an amended abstract of judgment reflecting a sentence of imprisonment for 25 years to life for that count." (*Id.* at p. 306; see § 182, subd. (a)(6) [punishment for conspiracy to commit murder is the same as the punishment for first degree murder]; § 190, subd. (a) [punishment for first degree murder is death, life without parole, or 25 years to life]; *People v. Lawley* (2002) 27 Cal.4th 102, 172 [correct sentence for conspiracy to commit murder is 25 years to life]; but see *id.* at p. 173, conc. opn. Baxter, J. ["the punishment intended by the Legislature for conspiracy to commit murder seems to present a close and difficult question" because a literal reading of the statutes suggests that death is a proper punishment for conspiracy to commit murder].)

Cruz further claims that "any sentence on Count V must be stayed pursuant to Penal Code section 654. Since there is no evidence of any objective to the conspiracy other than the murders for which appellant was sentenced to death, a separate sentence for the conspiracy violates section 654. (*In re Cruz* (1966) 64 Cal.2d 178, 180–181.)" (COB 358–359.) Cruz is mistaken. The objective of the conspiracy was much wider than the four victims who were ultimately killed.

Penal Code section 654, subdivision (a), states in relevant part: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision."

> Because of the prohibition against multiple punishment in section 654 , a defendant may not be sentenced "for conspiracy

> to commit several crimes and for each of those crimes where the conspiracy had no objective apart from those crimes. If, however, a conspiracy had an objective apart from an offense for which the defendant is punished, he may properly be sentenced for the conspiracy as well as for that offense." [Citations.] Thus, punishment for both conspiracy and the underlying substantive offense has been held impermissible when the conspiracy contemplated only the act performed in the substantive offense [citations], or when the substantive offenses are the means by which the conspiracy is carried out [citation]. Punishment for both conspiracy and substantive offenses has been upheld when the conspiracy has broader or different objectives from the specific substantive offenses.

(*People v. Ramirez* (1987) 189 Cal.App.3d 603, 615-616, fn. omitted, disapproved on other grounds in *People v. Russo* (2001) 25 Cal.4th 610, 1137, accord, *In re Cruz* (1966) 64 Cal.2d 178, 180-181.) Thus, for example, a defendant may not be punished for both murder and conspiracy to commit that particular murder. (*People v. Hernandez* (2003) 30 Cal.4th 835, 866.) However, he may be punished for both offenses where the evidence shows a conspiracy to kill not only the particular person who was the victim of the substantive offense, but other persons as well. (*People v. Vargas* (2001) 91 Cal.App.4th 506, 570-571.)

"Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor." (*Neal v. State* (1960) 55 Cal.2d 11, 19; *People v. Cleveland* (2001) 87 Cal.App.4th 263, 267.)

The trial court's finding on this question must be upheld if supported by the evidence in the record. (*People v. Nelson* (1989) 211 Cal.App.3d 634, 638; *People v. Ferraez* (2003) 112 Cal.App.4th 925, 935; see *People v. Blake* (1998) 68 Cal.App.4th 509, 512 [the trial court's imposition of multiple punishments will be upheld if there is substantial evidence–even if its finding of separate intent and objective for each offense is only implied].) Further, the trial court's

determination that defendant had separate intents for multiple offenses and could, thus, receive multiple punishments, is reviewed for sufficient evidence in the light most favorable to the judgment, and the reviewing court presumes in support of the trial court's conclusion the existence of every fact the trier of fact could have reasonably deduced from the evidence. (*People v. Cleveland*, *supra*, 87 Cal.App.4th at p. 271.)

In *People v. Vargas*, the defendant was sentenced consecutively both for the offense of murder and the conspiracy to commit murder. (91 Cal.App.4th, *supra*, at p. 570.) These consecutive sentences did not violate section 654 because there was strong evidence that the defendant's gang "conspired to kill not only [the victim], but other persons as well, in addition to the gang's overriding conspiracy." (*Id.* at p. 571) Similarly, here, Cruz conspired to kill people beside the actual victims.

For example, Evans testified that Cruz wanted to kill Raper, Raper's associates, and any witnesses who happened to be at the murder scene. (24 RT 4209, 4211, 4297.) She specifically testified that Cruz said he hoped Jimmy Smith and Debbie Smelser would be at the Elm Street house so the group could kill them. (24 RT 4401.) Similarly, McLaughlin testified that the night before the murders, she spoke to Cruz on the phone, and he said he had a score to settle with Smith and they were going to get in a fight the next day. (31 RT 5547–5548.) Evans testified that Cruz had specifically mentioned Smith as a target of the conspiracy. (24 RT 4401.) Cruz also threatened to kill his fellow conspirators if they did not follow the plan. (24 RT 4404.) Cruz's intent to kill more than the actual victims was also corroborated by Evans testimony that after the murders, Cruz was disappointed that Smelser had not been at the house. (24 RT 4405–4406.) Evans also testified that when Willey said that witness Creekmore had seen him kill Ritchey, Cruz became "pissed." "[H]e was mad that [Creekmore] wasn't killed because [he] was a witness. They were

supposed to do them all and leave no witnesses." (24 RT 4250.) LaMarsh and Willey both testified that once inside the car, Cruz asked Evans how many people had been at the house; Evans told Cruz there had been five people; Beck told Cruz they only "got" four of them; and then Cruz became upset that they let one person (Alvarez) get away. (32 RT 5663; 34 RT 6005.) In addition, Evans testified that Beck said it was "a waste" they only killed four people. (24 RT 4249.)

As Cruz acknowledges, if the "conspiracy had an objective apart from an offense for which the defendant is punished, he may properly be sentenced for the conspiracy as well as for that offense." (*In re Cruz*, *supra*, 64 Cal.2d at p. 181, citing *People v. Scott* (1964) 224 Cal.App.2d 146, 151-152.) Cruz's conspiracy clearly met that test. Cruz targeted any number of people who might have been at or near the house; and he specifically intended to kill Smith, Smelser, Alvarez (as the personification of any associate of Raper's who happened to be at the house), and Creekmore (as the personification of any witness who happened to see the crimes). Taken together, and viewed in the light most favorable to the judgment, there was substantial evidence supporting the trial court's decision to impose a separate and consecutive sentence for the conspiracy conviction. (See *People v. Nelson*, *supra*, 211 Cal.App.3d at p. 638; *People v. Ferraez*, *supra*, 112 Cal.App.4th at p. 935; see *People v. Blake*, *supra*, 68 Cal.App.4th at p. 512; *People v. Cleveland*, *supra*, 87 Cal.App.4th at p. 271; *People v. Hutchins* (2001) 90 Cal.App.4th 1308, 1312 [trial court has broad latitude in determining whether section 654 applies in a given case]; *People v. Herrera* (1999) 70 Cal.App.4th 1456, 1466; see *In re Cruz*, *supra*, 64 Cal.2d at p. 181; see *Neal v. State*, *supra*, 55 Cal.2d at p. 19 [defendant liable for the crime of conspiracy to commit murder in addition to the individual murders because he had a separate and additional intent and objective]; *People v. Flores* (2005) 129 Cal.App.4th 174, 184-185.)

Finally, it is worth noting that this same situation was present in coconspirator Vieira's case. There, as in the present matter, Vieira was convicted of four counts of first degree murder and one count of conspiracy to commit murder. (*Vieira, supra*, 35 Cal.4th at p. 273.) As in the present matter, the trial court set all five of the terms to run consecutively. (*Ibid.*) Though this Court reduced the sentence for conspiracy to 25 years to life, it did not order that sentence stayed pursuant to section 654. (*Id.* at pp. 273, 306)

For all of the above reasons, this Court should order the term for Cruz's conspiracy conviction modified to 25 years to life. But it should defer to the trial court's ruling and order that term to run consecutively.

XIII.

THE TRIAL COURT PROPERLY ADMITTED EVIDENCE OF PRIOR CRIMINAL ACTIVITY DURING CRUZ'S PENALTY PHASE; IT PROPERLY INSTRUCTED THE PENALTY JURY ON HOW TO USE THAT EVIDENCE (PURSUANT TO CALJIC NO. 8.87); CRUZ FORFEITED HIS CLAIMS OF ERROR BY FAILING TO OBJECT TO THE EVIDENCE AND BY FAILING TO ASK THE TRIAL COURT TO AUGMENT THE INSTRUCTION; AND ANY ERROR WAS HARMLESS

Stam testified at the penalty trial about Cruz's prior criminal activities. Cruz claims that some of this evidence was inadmissible because the acts did not violate any criminal statutes or did not involve threats or violence. Cruz claims that evidence of his firearms collection, which was admitted during the guilt phase, was improperly used by the penalty jury as evidence of criminal activity. Finally, Cruz claims the trial court's instruction pursuant to CALJIC No. 8.87[56]

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56. Cruz mistakenly refers to CALJIC No. 8.77 in the heading for this argument. (COB 360.) He meant to reference CALJIC No. 8.*87*.

Beck raises a similar claim regarding the use of CALJIC No. 8.87 during his penalty trial. Respondent asks this Court to refer to its Argument XXXI for

was inadequate and caused the jury to improperly use the challenged evidence as factors in aggravation in violation of his statutory and federal constitutional rights to a fair trial, a reliable penalty determination, and due process. (COB 360.) Cruz is wrong.

All of the challenged activities from Starn's penalty phase testimony were criminal acts which violated criminal statutes. Furthermore, Cruz forfeited his claim by failing to object to the admission of that evidence. As for the firearms evidence, that was not evidence of criminal activity and it was properly admitted during the guilt phase. Moreover, Cruz forfeited his claim that the firearms evidence was improperly used by the penalty jury by failing to request a supplemental instruction to limit the use of that evidence. Similarly, the instruction pursuant to CALJIC No. 8.87 was legally correct and Cruz forfeited his claim that it should have included a list of the criminal activities it pertained to. Cruz did not object to the instruction when the trial court read it aloud during the hearing on jury instructions, and Cruz failed to ask the trial court to augment the instruction. Further, any error was harmless because the relative mildness of the challenged evidence paled in comparison to the viciousness of the other evidence of criminal conduct–as well as the cold-blooded viciousness of the crimes charged.

A. Procedural History

Cruz requested that the trial court instruct the jury with CALJIC No. 8.87. (9 CT 2394; see COB 365 [Cruz acknowledges that he requested CALJIC No. 8.87].)

The trial court modified the instruction so that rather than describing the specific criminal activities it addressed, the instruction indicated that it concerned any evidence of criminal activity that had been admitted. (9 CT

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additional argument.

2394.) At the hearing on penalty trial instructions, the trial court read the instruction and asked the prosecutor if he objected. The prosecutor said, "No, other than we have to specify the–." (39 RT 7145.) The prosecutor probably was trying to say that the instruction should specify the criminal activities, but the trial court cut off the prosecutor. After the trial court finished reading the instruction, the prosecutor simply said, "All right." (*Ibid.*) Cruz did not object. (39 RT 7145.)

Pursuant to CALJIC No. 8.85 (and section 190.3, subdivision (b)), the trial court instructed the jury:

> 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. You shall consider, take into account, and be guided by the following factors, if applicable: . . . .
>
> (B) The presence or absence of criminal activity by the defendant, other than the crimes for which the defendant has been tried in the present proceedings, which involve the use or attempted use of force or violence or the expressed or implied threat to use force or violence.

(41 RT 7501.)

The trial court instructed the jury pursuant to CALJIC No. 8.87 (and section 190.3, subdivision (b)):

> Evidence has been introduced for the purpose of showing that the defendant has committed criminal activity which involved the expressed or implied use of force or violence or the threat of force or violence. Before a juror may consider any of such criminal activity as an aggravating circumstance in this case, a juror must first be satisfied beyond a reasonable doubt that the defendant did, in fact, commit such criminal activity. A juror may not consider any evidence of any other criminal activity as an aggravating circumstance.
>
> It is not necessary for all jurors to agree. If any juror is convinced beyond a reasonable doubt that such criminal activity occurred, that juror may consider that activity as a fact in

aggravation. If a juror is not so convinced, that juror must not consider that evidence for any purpose.

(41 RT 7507–7508.[57])

B. Legal Principles

Section 190.3, subdivision (b), provides

> If the defendant has been found guilty of murder in the first degree, and a special circumstance has been charged and found to be true . . . the trier of fact shall determine whether the penalty shall be death or confinement in state prison for a term of life without the possibility of parole [¶] . . . .
>
> In determining the penalty, the trier of fact shall take into account any of the following factors if relevant: [¶] . . . .

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57. CALJIC No. 8.87 provides, "Evidence has been introduced for the purpose of showing that the defendant [_____] has committed the following criminal [act[s]] [activity]: [_____] which involved [the express or implied use of force or violence] [or] [the threat of force or violence]. Before a juror may consider any criminal [act[s]] [activity] as an aggravating circumstance in this case, a juror must first be satisfied beyond a reasonable doubt that the defendant [_____] did in fact commit the criminal [act[s]] [activity]. A juror may not consider any evidence of any other criminal [act[s]] [activity] as an aggravating circumstance. [¶] It is not necessary for all jurors to agree. If any juror is convinced beyond a reasonable doubt that the criminal activity occurred, that juror may consider that activity as a fact in aggravation. If a juror is not so convinced, that juror must not consider that evidence for any purpose."

The Use Note for CALJIC No. 8.87 provides: "This instruction must be given sua sponte in all cases where the People claim any criminal activity and especially where CALJIC 8.85, subparagraph (c), is given. [¶] Although the court has no sua sponte duty to give an instruction defining the elements of "other" crimes, it should do so when requested by the defendant or the people or if it determines on its own motion that it is appropriate or vital to a proper consideration of the evidence (i.e., there is no prohibition to doing so). (*People v. Davenport*, 41 Cal.3d 247, 281–282 (1985).)"

> (b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence.

Section 190.3 "expressly excludes evidence of criminal activity, except for felony convictions, which activity 'did not involve the use or attempted use of force or violence or which did not involve the express or implied threat to use force or violence.'" (*People v. Boyd* (1985) 38 Cal.3d 762, 776.) However, nonviolent and nonthreatening conduct is admissible under section 190.3, subdivision (b), if that conduct resulted in a felony conviction. (*Ibid.*; *People v. Monterroso* (2004) 34 Cal.4th 743, 774; *People v. Cain* (1995) 10 Cal.4th 1, 75.)

The "criminal activity" contemplated by section 190.3, subdivision (b), is conduct that constitutes an "'actual crime,'" i.e., an offense proscribed by statute. (*People v. Lancaster* (2007) 41 Cal.4th 50, 93; *People v. Kipp* (2001) 26 Cal.4th 1100, 1133.)

Allowing a jury to consider unadjudicated criminal activity as an aggravating factor in its death penalty determination is not unconstitutional and it does not render a death sentence unreliable. (*People v. Morrison* (2004) 34 Cal.4th 698, 729; *People v. Brasure*, *supra*, 42 Cal.4th at p. 1068.)

A trial court has no sua sponte duty to instruct the penalty phase jury on how to use evidence of prior criminal activity. (*People v. Hughes*, *supra*, 27 Cal.4th at p. 383; *People v. Lewis* (2001) 25 Cal.4th 610, 666.) If a trial court instructs on prior criminal activity, it has no sua sponte obligation to specify precisely which criminal activities are addressed by the instruction. (*People v. Lewis*, *supra*, 25 Cal.4th at p. 666, citing *People v. Medina* (1995) 11 Cal.4th 694, 770–771.) But if the trial court elects to specify the prior criminal acts, it is the defendant's responsibility to point out any omissions from that list. (*People v. Lewis*, *supra*, 25 Cal.4th at p. 666.)

Evidence of nonviolent criminal activity that did not result in a felony conviction is inadmissible as an aggravating factor during a capital penalty murder trial. (*People v. Visciotti* (1992) 2 Cal.4th 1, 72.) However, when a capital defendant fails to make a timely objection, he forfeits his right to complain that the conduct did not involve the use of force or violence. (*People v. Pinholster, supra*, 1 Cal.4th at p. 960.)

The improper admission of evidence of criminal activity that did not involve the use or threat of force or violence is reviewed under the state standard of harmless to determine whether it is reasonably probable that absent the error, the defendant would have obtained a better result. (*People v. Pinholster, supra*, 1 Cal.4th at p. 963; *People v. Lewis, supra* 25 Cal.4th at p. 666.)

C. The Trial Court Properly Instructed The Jury That It Had To Find Beyond A Reasonable Doubt That The Acts Were "Criminal" Before It Could Consider Those Unadjudicated Acts As Factors In Aggravation

1. Cruz Forfeited This Claim By Failing To Object Or Request An Augmentation

Cruz requested CALJIC No. 8.87. (9 CT 2394.) At the hearing on penalty trial instructions, the trial court read the instruction it planned to give. (39 RT 7145.) The instruction tracked CALJIC 8.87, except that it did not describe any specific criminal activity and left it to the jury to determine the applicable acts. (Compare 9 CT 2394 with 41 RT 7507–7508.) Because Cruz did not object when the trial court read the exact instruction it planned to give, he forfeited his claim of error. (*People v. Pinholster, supra*, 1 Cal.4th at p. 960 [when a capital defendant fails to make a timely objection, he forfeits his right to complain that the conduct did not involve the use of force or violence].)

Cruz claims he did not forfeit his claim because the instructional error affected his substantive rights. (COB 367, fn. 137; § 1259.) However, this Court has specifically rejected that claim. In *People v. Medina, supra*, 11

Cal.4th 694, as in the present matter, the trial court instructed the penalty jury that it could consider "'all' of the evidence received at any part of the trial" (CALJIC No. 8.85) and "other crimes involving force or violence or the threat of violence could be considered" (CALJIC No. 8.87). (*People v. Medina*, *supra*, 11 Cal.4th at p. 771.) However, the trial court did not "list the 'other crimes' the jury properly could consider, or . . . specify the irrelevant evidence which the jury should ignore." (*Ibid.*) The *Medina* court held that the trial court had no duty to provide the list of other crimes because the defendant did not request it. (*Ibid.*) Further, it held that the defendant forfeited his claim. (*Ibid.*, citing *People v. Johnson* (1993) 6 Cal.4th 1, 23 ["defendant failed to request clarifying instructions, an omission which bars appellate review of the issue"].)

Furthermore, as a general principle, "'[A] party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language.'" (*People v. Lewis*, *supra*, 25 Cal.4th at p. 666.) Here, when the trial court read the instruction it proposed to give, Cruz did not "request clarifying or amplifying language," so he forfeited his claim. (*Ibid.*)

In *People v. Lewis*, *supra*, 25 Cal.4th 610, this Court observed:

> Respondent argues that because a trial court is under no obligation to specify for the jury the violent criminal activity that could be considered (*People v. Medina*, *supra*, 11 Cal.4th at pp. 770-771), it was incumbent on defense counsel to point out the omission of [one of the incidents of criminal activity] and request a more complete instruction on the subject. We agree. The instruction as given was not erroneous, only incomplete, and "a party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language." (*People v. Andrews* (1989) 49 Cal.3d 200, 218.)

(*People v. Lewis*, *supra*, 25 Cal.4th at p. 666.)

Cruz observes that the prosecutor tried to advise the trial court to list the criminal acts (COB 365, citing 39 RT 7145), but the *prosecutor's* truncated statement could not have preserved *Cruz's* claim. On the contrary, the prosecutor's statement made Cruz's failure to object even more inexcusable. It put Cruz on notice that the trial court had omitted the description of criminal activities.[58] Moreover, the prosecutor probably did not repeat his suggestion after the trial court read the modified instruction because he realized that the change was insignificant and Cruz accepted the instruction the way it was. Since Cruz did not ask for clarifying or amplifying language, he has forfeited his claim. (See *People v. Lewis*, *supra*, 25 Cal.4th at p. 666; *People v. Medina*, *supra*, 11 Cal.4th at pp. 770–771.)

Finally, the omission of the list of criminal activities could not have affected Cruz's substantive rights because the prosecutor told the jury exactly which criminal activities he wanted them to consider under section 190.3 "factor (b)." (41 RT 7516–7517; see *People v. Mitcham* (1992) 1 Cal.4th 1027, 1075 [the trial court's omission of a list of factor (b) criminal activities could not have affected the verdict because the prosecutor listed them in closing argument to the penalty jury].)

2. The Instruction Was Legally Correct

As noted above, this Court has repeatedly held that trial courts have no sua sponte duty to instruct capital penalty juries on the use of evidence of criminal

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58. The fact that the change was brought to the trial court's attention also strengthens the inference that defense counsel consciously decided to accept the modification. As discussed below, unlike the standard CALJIC instruction, the modified instruction did not focus the jury's attention on a compilation of all the criminal activities which could be used as aggravating factors. Therefore, the modification certainly could be viewed as advantageous to Cruz.

activities. (*People v. Hughes*, *supra*, 27 Cal.4th at p. 383; *People v. Lewis*, *supra*, 25 Cal.4th at p. 666.) Moreover, this Court has upheld instructions pursuant to CALJIC No. 8.87, and has held that trial courts have no duty to instruct juries on the specific criminal activities that it could consider. (*People v. Lewis*, *supra*, 25 Cal.4th at p. 666; *People v. Sapp* (2003) 31 Cal.4th 240, 314; *People v. Harris*, *supra*, 43 Cal.4th at p. 1312.) Most importantly, in *People v. Mitcham*, *supra*, 1 Cal.4th 1027, this Court specifically found that an instruction pursuant to CALJIC No. 8.87 that did not include a list of criminal activities adequately instructed the jury on how to use evidence under section 190.3, factor (b). (*Id.* at p. 1075.) Since Cruz offers no contrary authority on point, this Court should reject his claim that the instruction given here was erroneous.

Furthermore, contrary to Cruz's argument, the instruction did not leave the jury with "no legal basis to guide their determination of what evidence demonstrated legitimate 'criminal activity' under factor (b)." (COB 371.) The instruction was requested by Cruz and helped Cruz by limiting the jury's consideration of unadjudicated criminal activities to conduct that involved threats and violence and that was proven beyond a reasonable doubt. Cruz does not explain how adding a list of criminal activities would provide the jury with a "legal basis" for determining if the conduct was actually criminal conduct. Moreover, the instruction pursuant to CALJIC No. 8.85 [Penalty Trial—Factors for Consideration] provided much more guidance in that regard than a mere list of criminal activities. (See 41 RT 7501–7507; 9 CT 2386–2392.)

Cruz cites *People v. Robertson* (1982) 33 Cal.3d 21 (*Robertson*) three times for the proposition that "to avoid potential confusion over which 'other crimes'–if any–the prosecution is relying on as aggravating circumstances in a given case, the prosecution should request an instruction enumerating the particular other crimes which the jury may consider as aggravating

circumstances in determining penalty." (*Id.* at p. 55, fn. 19; COB 370–372.) However, as discussed above, trial courts are not required to sua sponte give *any* instruction on the use of evidence of criminal activities. And when they do give such instructions, they have no sua sponte duty to list the criminal activities. (*People v. Lewis*, *supra*, 25 Cal.4th at p. 666.) Therefore, to the extent the trial court gave an abridged instruction, it was Cruz's responsibility to ask for augmentation. Furthermore, in *People v. Mitcham*, *supra*, 1 Cal.4th 1027, this Court called the statement in *Robertson* that the prosecutor should request an instruction specifically listing the other crimes "a suggestion." (*Id.* at p. 1075.) Therefore, *Robertson* does not help Cruz and does not prove the instruction was erroneous.

Finally, to the extent *Robertson* correctly cautioned that a list of other criminal activity was necessary to avoid confusion over which acts the prosecutor was relying upon,(33 Cal.3d. at p. 55, fn. 19), there was no danger of that occurring here because the prosecutor told the jury which criminal activities he wanted them to consider as factors in aggravation. (See *People v. Mitcham*, *supra*, 1 Cal.4th at p. 1075 [the trial court's omission of a list of factor (b) criminal activities could not have affected the verdict because the prosecutor listed them in closing argument to the penalty jury].) The prosecutor told the jury that the factor (b) activities were placing a rifle in McLaughlin, Starn, and Vieira's mouths and threatening to kill them; the beatings of Vieira and Perkins; the ongoing child abuse of Cruz's daughter, Alexandra; and the time Cruz kicked Starn between the legs when she was three months pregnant and made her bleed. (41 RT 7516–7517.) Because the prosecutor's argument served the same function as a list of criminal activities, Cruz cannot show that he was prejudiced by the instruction. (See *People v. Mitcham*, *supra*, 1 Cal.4th at p. 1075.)

D. During The Penalty Phase, The Trial Court Properly Admitted Evidence Regarding Cruz's Mistreatment Of His Daughter

The "criminal activity" contemplated by section 190.3, subdivision (b), is conduct that is an offense proscribed by statute. (*People v. Lancaster*, *supra*, 41 Cal.4th at p. 93; *People v. Kipp*, *supra*, 26 Cal.4th at p. 1133.) Cruz complains that the prosecutor elicited testimony from Starn regarding Cruz's violent and mentally abusive treatment of his infant daughter, Alexandra. Cruz claims none of the activities involved the use or threat of force or violence, nor did they violate any criminal statutes. (COB 366–367.) Cruz is wrong. His treatment of Alexandra was criminal. Moreover, he forfeited his claim of error by failing to object.

1. Cruz Forfeited This Claim By Failing To Object To The Evidence

Cruz apparently concedes that he forfeited his claim regarding the admission of evidence that he abused Alexandra. So instead, he challenges the instruction which allowed the jury to use that evidence as a factor in aggravation. (COB 367, fn. 137.) However, as discussed above, he also forfeited that claim by failing to object to the instruction and failing to request an amplifying instruction. (*People v. Lewis*, *supra*, 25 Cal.4th at p. 666; *People v. Geier* (2007) 41 Cal.4th 555, 611.)

2. The Evidence Was Admissible As Criminal Activity

"Notice that a particular crime will be presented in aggravation should alert defense counsel that all crimes committed as part of the same course of conduct will be offered, and thus substantially complies with section 190.3." (*People v. Zambrano* (2007) 41 Cal.4th 1082, 1163, fn. 33.) Section 273a prohibits any person who cares for a child from causing or permitting that child to suffer unjustifiable physical pain or mental suffering. Although a single act of abuse

is enough to sustain a conviction, a violation of Penal Code section 273a may also be established by a showing of "'a continuous course of conduct of a series of acts over a period of time.'" (*People v. Napoles* (2002) 104 Cal.App.4th 108, 115.) Here, all of the abuse described by Starn's testimony could be considered together as a continuous course of child abuse in violation of section 273a.

Starn testified that Cruz often hit their infant daughter, Alexandra, with a fly swatter, ruler, or his hands, and she would get bruises all over her body. (39 RT 6992–6993.) When Cruz hit Alexandra's ears with his hands, it would leave bruises on the inside of her ears. (39 RT 6993.) When Alexandra was less than a year old, Cruz often put her in "the rack," and would attach jars of water to her legs. He also often submerged her in cold water or sprayed her with a water bottle. (39 RT 6994–6995.) Cruz also would put Alexandra in a dark room by herself, and allow Starn to tend to her only every six hours. (39 RT 7016.) All of this evidence constituted a continuous course of conduct (*People v. Napoles*, *supra*, 104 Cal.App.4th at p. 115) and violated section 273a's prohibition of unjustifiable physical pain and mental suffering. Since that crime involved threats of violence and violence, it was properly admitted under section 190.3. (See *People v. Boyd*, *supra*, 38 Cal.3d at p. 776.)

E. During The Guilt Phase, The Trial Court Properly Admitted Evidence That Cruz Possessed Numerous Firearms

As discussed in Argument II, during the guilt phase, the trial court properly admitted evidence that Cruz possessed numerous firearms and Cruz did not object to most of that evidence. Nevertheless, Cruz claims that admission of the evidence not only prejudice the guilt phase, but "[t]hat inflammatory and prejudicial effect was likely to have been improperly compounded at the penalty phase by the trial court's erroneous modification of CALJIC No. 8.77." (COB 367.) Cruz is wrong. There was no evidence that the firearms were illegally

possessed. Therefore, pursuant to the instruction given by the trial court, the jury could not find that possession of those weapons constituted criminal activity and, therefore, could not use that evidence as an aggravating factor. Moreover, the prosecutor specifically argued which criminal activities fell under factor (b), and he did not mention the firearms evidence. (41 RT 7516–7517.) In addition, Cruz forfeited this claim by failing to request any modification or augmentation of the penalty trial instructions.

1. Cruz Forfeited His Claim Of Error By Failing To Request An Instruction Limiting The Use Of This Evidence

As discussed above, it was Cruz's responsibility to request additional instructions if the one offered by the trial court was inadequate. Because Cruz failed to do so, he forfeited his claim that the instruction pursuant to CALJIC No. 8.87 did not adequately instruct the jury on the use of the firearms evidence. (*People v. Lewis*, *supra*, 25 Cal.4th at p. 666.)

2. The Trial Court Properly Instructed The Jury On The Use Of Criminal Activities And It Is Not Reasonably Likely That The Instruction Caused The Jury To Misapply The Law

Cruz complains that evidence of his large firearms arsenal was admitted over objection during the guilt phase even though there was no evidence that the weapons were possessed illegally. He also contends that the trial court erred by not instructing the jury that this evidence could not be considered during the penalty phase as evidence of criminal activity. (COB 364.) However, this Court has repeatedly held that trial courts have no sua sponte duty to instruct juries on factor (b) evidence. (*People v. Hughes*, *supra*, 27 Cal.4th at p. 383; *People v. Lewis*, *supra*, 25 Cal.4th at p. 666.) Thus, it was Cruz's responsibility to ask for an instruction that advised the jury how to use that evidence and, absent Cruz's request, the trial court could not have erred. Moreover, even if

the trial court had a duty to instruct on the use of the firearms evidence, the instruction it gave pursuant to CALJIC No. 8.87 was adequate.

In deciding whether an instructional error has occurred, appellate courts determine whether it is reasonably likely that the trial court's instructions caused the jury to misapply the law. (*Estelle v. McGuire*, *supra*, 502 U.S. at p. 72; *People v. Clair* (1992) 2 Cal.4th 629, 688; *People v. Cain*, *supra*, 10 Cal.4th at p. 36; *People v. Kelly*, *supra*, 1 Cal.4th at pp. 525-527; *Boyde v. California* (1990) 494 U.S. 370, 380.) Here, the trial court properly instructed the jury it could use prior conduct as an aggravating factor only if it found beyond a reasonable doubt that the criminal activity actually occurred and it involved violence or threats of violence. (41 RT 7507–7508.)

As Cruz correctly argues, the prosecutor never claimed that the weapons were possessed illegally. (COB 363–364.) (Nor did the prosecutor ever argue that the firearms evidence should be admitted during the guilt phase as prior bad acts evidence.) Indeed, Deputy Freitas testified that, to his knowledge, none of the weapons were illegal. (15 RT 2767.) Since there was no evidence that the firearms were owned illegally, the jury could not have thought that mere possession of those weapons constituted criminal activity. Nor could mere possession of weapons amount to threats or violence. Since the instruction made it clear that the firearms evidence could not be used as an aggravating factor unless it was criminal activity involving threats or violence–and neither of those elements were presented in the evidence–Cruz cannot show the instruction caused the jury to misapply the law. (See *Estelle v. McGuire*, *supra*, 502 U.S. at p. 72; see also *People v. Pinholster*, *supra*, 1 Cal.4th at p. 919 [appellate courts presume the jury followed the instructions it was given].)

Moreover, Cruz's claim that the jury used the firearms evidence as an aggravating factor is purely speculative. The instruction clearly prohibited its use and the prosecutor implicitly told the jury not to use that evidence by

leaving it out of his list of factor (b) criminal activities. (41 RT 7516–7517.) Therefore, Cruz has no basis to prove the jury improperly used that evidence and this Court should reject Cruz's claim.

F. Cruz Forfeited His Claim That The Trial Court Improperly Admitted Evidence That He Was Granted Juvenile Probation By Eliciting That Evidence Himself; He Also Forfeited His Claim Of Instructional Error By Failing To Request A Limiting Instruction

Cruz claims the trial court erred by admitting evidence that he spray painted a car when he was a juvenile. Cruz is correct that the evidence could not be admitted pursuant to section 190.3, subdivision (b), because it was a property crime that did not involve violence or a threat of violence, and did not result in a felony conviction. (COB 369, citing *People v. Boyd*, *supra*, 38 Cal.3d at p. 776.) However, Cruz has no basis to complain about evidence that his own attorney elicited. Moreover, he forfeited his claim of instructional error by failing to request any modification to the instruction the trial court proposed.

1. Cruz Cannot Complain About The Admission Of Evidence Which He Elicited

Cruz complains that "[t]he only evidence concerning appellant's juvenile misconduct was that it involved only injury to property" and that property crimes are "not admissible as aggravation under factor (b). (*People v. Boyd*, *supra*, 38 Cal.3d at p. 776.)" (COB 369.) But it was Cruz's own attorney who asked a former family attorney if he ever represented Cruz in a juvenile proceeding, and if Cruz was charged with spray painting a car. (40 RT 7187.) Further questioning established that Cruz admitted to spray painting a Cadillac in 1972, and he was granted six months of probation. (40 RT 7187–7189.)

Cruz cannot complain about the introduction of his own evidence, nor evidence which was admitted without objection. (*People v. Williams* (1988) 44 Cal.3d 883, 913; *People v. Geier*, *supra*, 41 Cal.4th at p. 611.) The evidence

was apparently elicited to show that Cruz was troubled by doubts about his parentage and acted out in his youth. However, Cruz cannot attack evidence that he consciously decided to elicit just because he did not receive the result he hoped for. (See *People v. Visciotti* (1992) 2 Cal.4th 1, 72 ["Having introduced the evidence himself, defendant may not now complain that the jury might have concluded that the factor to which it was relevant was aggravating rather than mitigating"].)

In *People v. Williams*, *supra*, 44 Cal.3d 883, the capital defendant claimed that his attorney introduced evidence of prior criminal conduct only because he believed that this was preferable to having it come in on rebuttal or through cross-examination of the defendant. (*Id.* at p. 913.) However, this Court found that it was likely the attorney made a tactical decision to enter that evidence as part of a diminished capacity defense, and it held that the defendant was estopped from urging error. (*Ibid.*) Similarly, here, since it was Cruz who introduced the evidence, and he did so for a tactical reason, he is estopped from urging error now that the jury rejected his defense theory. (See *ibid.*)

2. Cruz Forfeited His Claim Of Instructional Error By Failing To Request An Augmentation To The Instructions

Cruz complains that the trial court did not instruct the jury to exclude the evidence of his juvenile probation from its deliberations regarding factor (b). (COB 364.) As discussed above, however, trial courts have no sua sponte duty to instruct juries on factor (b) evidence, and Cruz forfeited his claim of instructional error by failing to request supplemental instructions. (*People v. Hughes*, *supra*, 27 Cal.4th at p. 383; *People v. Lewis*, *supra*, 25 Cal.4th at p. 666.)

G. Any Error Was Harmless

Even if Cruz were correct that the challenged evidence was erroneously admitted and the instruction pursuant to CALJIC No. 8.87 was improper or incomplete, the errors were harmless. Contrary to Cruz's argument that a variety of his federal constitutional rights were implicated by the purported errors, this Court has repeatedly found that errors concerning "factor (b)" evidence is reviewed under the state standard of harmlessness. (*People v. Pinholster*, *supra*, 1 Cal.4th at p. 963; *People v. Lewis*, *supra* 25 Cal.4th at p. 666; see also *People v. Michaels*, *supra*, 28 Cal.4th at p. 538 [erroneous admission of evidence in capital penalty trial reviewed for reasonable probability that it affected the verdict].) Moreover, even if Cruz's constitutional right were violated, the error was harmless beyond a reasonable doubt. (See *Chapman*, *supra*, 386 U.S. at p. 24.)

Here, the evidence that Cruz treated his daughter harshly, owned many firearms, and spray painted a car when he was a youth was mild in comparison to evidence of how he treated Starn, Vieira and Perkins. For example, Starn testified that Cruz frequently punched Vieira and Perkins in the stomach while ordering them to stand still. (39 RT 6983–6987.) Cruz used a stun gun on Vieira several times and on Starn twice. (39 RT 6985.) Cruz put a rifle barrel in the mouth of Starn, Vieira, and McLaughlin, and threatened to kill them. (39 RT 6987–6988; see also 39 RT 6992 [put a rifle to Starn's head].) Cruz hit Starn about a hundred times over the years and often threatened to kill her. When Starn was three months pregnant with their third child, Cruz pushed her to the ground and kicked her as hard as he could in the stomach and between the legs, causing her to bleed. (39 RT 6989-6991.) All of this criminal activity was properly admitted because it involved violence or threats of violence. (§ 190.3, subd. (b).)

By comparison, the evidence of legal gun possession and spray painting a car thirty years earlier was insignificant. Even the evidence of Cruz's abuse of Alexandra was unlikely to have made any difference in light of the other evidence of criminal activity as well as the evidence that Cruz planned, led, and participated in the brutal murders of four people. (See § 190.3, subd. (a) [circumstances of crimes charged is a valid factor in aggravation].)

Moreover, it is unlikely that the jury considered the spray painting evidence or the firearms evidence admitted during the guilt phase. First, Cruz fails to cite anything in the record to support his argument that the jury used that evidence as a factor in aggravation. Second, the plain meaning of CALJIC No. 8.87 excluded that evidence because it was neither criminal nor violent. Third, the prosecutor made it clear that he was not relying on that evidence when he did not mention it while listing the criminal acts under factor (b). (41 RT 7516–7517.)

As for the purported instructional error, the trial court had no sua sponte duty to instruct on the use of prior criminal activity, so Cruz benefitted from having almost the entire standard instruction. (See *People v. Hughes*, *supra*, 27 Cal.4th at p. 383; *People v. Lewis*, *supra*, 25 Cal.4th at p. 666.) To the extent he claims it caused the jury to misuse the evidence of prior criminal activity, the argument makes little sense. The instruction told the jury it could not use any evidence of prior criminal activity until it first determined beyond a reasonable doubt that the activity had occurred. It also instructed the jury that it could only consider conduct that involved violence or the threat of violence. These instructions helped Cruz. On the other hand, if the instruction had listed the criminal acts the jury could use as factors in aggravation, it would have only helped the jury to focus its attention on every possible criminal act. Accordingly, any prejudicial effect from the omission of the list of criminal activities was minimal.

Cruz complains that there is no assurance that the jury confined its consideration to the criminal acts contemplated by the prosecutor. (COB 362.) However, there is no chance the jury did not know what evidence of criminal activity the prosecutor was relying upon because he told them during closing argument. (41 RT 7516–7517; see COB 366 [Cruz lists the incidents which the prosecutor argued to the jury were factor (b) activities].)

In *People v. Mitcham*, *supra*, 1 Cal.4th 1027, the defendant complained that the trial court failed to "to give an instruction sua sponte listing the specific other crimes relating to factor (b) of section 190.3, which the jury could consider in aggravation." (*Id.* at p. 1075.) Without deciding whether there was error, this Court found that the omission could not have been prejudicial:

> The trial court did not give such instruction at defendant's trial. The prosecutor, however, during closing argument explicitly identified the evidence to be considered as other crimes under factor (b), and the jury instructions . . . explicitly required that such evidence be considered only if it involved violence or the threat of violence. Therefore, the trial court's failure to list the other crimes relating to factor (b) could not have affected the verdict.

(*People v. Mitcham*, *supra*, 1 Cal.4th at p. 1075.) Similarly, here, the prosecutor listed and described the various prior criminal acts it wanted the jury to consider "under factor (B)." (41 RT 7516–7517; see COB 366.) Moreover, the instruction "explicitly required that such evidence be considered only if it involved violence or the threat of violence." (*Mitcham*, *supra*, 1 Cal.4th at p. 1075; 41 RT 7507–7508.) "Therefore, the trial court's failure to list the other crimes relating to factor (b) could not have affected the verdict." (*Mitcham*, *supra*, 1 Cal.4th at p. 1075.)

In sum, even if the challenged evidence was improperly admitted, and even if the instruction somehow misled the jury, the errors were harmless beyond a reasonable doubt because the jury would have returned the same verdict even if only the uncontested evidence was admitted and the jury had been instructed

with a version of CALJIC No. 8.87 which included a list of criminal activities. (See *Chapman, supra*, 386 U.S. at p. 24.)

XIV.

CALIFORNIA'S DEATH PENALTY DOES NOT VIOLATE THE FEDERAL CONSTITUTION

Appellants contend that "[m]any features of California's capital sentencing scheme violate the United States Constitution. This Court, however, has consistently rejected cogently phrased arguments pointing out these deficiencies." (COB 377; BOB 326, 379.) Appellants also contend that while this Court has considered each claim in isolation, the capital sentencing scheme as a whole provides too few procedural safeguards and is therefore unreliable and unconstitutional. (BOB 326–326; Cruz Joinder.) Nevertheless, pursuant to this Court's advice in *People v. Schmeck* (2005) 37 Cal.4th 240, 303–304, appellants submit their claims in case this Court decides to reconsider any of its earlier rulings, and for purposes of federal review. (COB 377; BOB 326, 379; Cruz Joinder.)

A. Penal Code Section 190.3 Properly Requires Juries To Consider The Circumstances Of The Crime When Considering Whether To Impose The Death Penalty; It Does Not Violate The Sixth, Eighth, Or Fourteenth Amendments

This Court has repeatedly rejected appellants' contention (COB 377–378; BOB 329, 379; Cruz Joinder) that factor (a) of section 190.3 [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. Medina, supra*, 11 Cal.4th at p. 780; *People v. Sanders, supra*, 11 Cal.4th at p. 563; *People v. Turner, supra*, 8 Cal.4th at p. 208, overruled on another ground by *People v. Griffin, supra,* 33 Cal.4th at p. 555, fn. 5; *Vieira, supra*, 35 Cal.4th at p. 299; *People v. Harris, supra*, 43 Cal.4th at p. 1322.)

B. The Death Penalty Statute And Corresponding Jury Instructions Did Not Deprive Appellants Of Their Rights To A Jury Determination Of Each Element Of The Death Verdicts And Did Not Violate Their Rights Under The Sixth, Eighth, And Fourteenth Amendments

This Court has repeatedly rejected the nine arguments appellants make in support of their contention that California's death penalty law violates the Sixth, Eighth, and Fourteenth Amendments because it deprives defendants of the right to a jury trial on each element necessary to impose the death penalty; because it does not rationally limit the penalty to the crimes most deserving of death; and it lack sufficient safeguards to avoid the arbitrary imposition of the death penalty. (COB 379–397; BOB 332–333, 379; Cruz Joinder.)

1. Aggravating Factors Need Not Be Found True Beyond A Reasonable Doubt

Contrary to appellants' view (COB 379–384; BOB 334, 350–355, 379; Cruz Joinder), even after *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*), *Ring v. Arizona* (2002) 536 U.S. 584 (*Ring*), *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*), and *Cunningham v. California* (2007) 549 U.S. 270 (*Cunningham*), there is no constitutional requirement that aggravating factors (other than prior criminality per § 190.3, subd. (b)) be proven beyond a reasonable doubt; there is no requirement that the jury unanimously find that death is the appropriate penalty beyond a reasonable doubt; nor does the California death penalty violate the requirement that the jury find a fact in aggravation that makes the defendant eligible for the death penalty. (*People v. Cornwell, supra,* 37 Cal.4th at pp. 103-104; *People v. Ward* (2005) 36 Cal.4th 186, 221-222; *People v. Bolden, supra*, 29 Cal.4th at p. 566; *People v. Ochoa* (2001) 26 Cal.4th 398, 453-454; *People v. Barnett* (1998) 17 Cal.4th 1044, 1178; *People v. Loker, supra*, 80 Cal.Rptr.3d at pp. 44.)

2. The Trial Court Properly Abstained From Instructing The Jury On The Burden Of Proof Regarding How To Weigh Aggravating And Mitigating Factors

Contrary to appellants' view (COB 384–385; BOB 347, 350–351, 379; Cruz Joinder), 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. Holt, supra,* 15 Cal.4th at pp. 682-684; *People v. Carpenter, supra,* 15 Cal.4th at pp. 417-418; *People v. Harris*, *supra*, 43 Cal.4th at p. 1322; *Vieira*, *supra*, 35 Cal.4th at p. 303.)

3. Appellants Had No Right To A Unanimous Jury Finding On The Fact Of Prior Unadjudicated Activity, Nor On The Aggravating Circumstances That Justified The Death Penalty

Contrary to appellants' view (COB 387–388; BOB 362–363, 379; Cruz Joinder), California's death penalty law is not unconstitutional because it permits the jury to consider unadjudicated offenses as aggravating evidence (*People v. Ward, supra,* 36 Cal.4th at pp. 221-222; *People v. Bolin*, *supra*, 18 Cal.4th at p. 335; *People v. Samayoa, supra,* 15 Cal.4th at p. 863; *People v. Harris*, *supra*, 43 Cal.4th at p. 1323; *People v. Loker*, *supra*, 80 Cal.Rptr.3d at p. 44), and does not require that this particular aggravating factor be found true by a unanimous jury (*People v. Blair* (2005) 36 Cal.4th 686, 753; *People v. Ward, supra,* 36 Cal.4th at pp. 221-222; *People v. Carpenter*, *supra*, 21 Cal.4th at p. 1061; *People v. Hart* (1999) 20 Cal.4th 546, 649; *People v. Johnson* (1992) 3 Cal.4th 1183, 1245; *People v. Harris*, *supra*, 43 Cal.4th at p. 1323). This is so even after *Apprendi, Ring, Blakely*, and *Cunningham*. (*People v. Loker*, *supra*, 80 Cal.Rptr.3d at p. 44.)

4. The Trial Court Properly Instructed The Jury That It Could Impose The Death Penalty If The Aggravating Circumstances Substantially Outweighed The Mitigating Circumstances

Contrary to appellants' view (COB 388–389; BOB 347–348, 350–351, 379; Cruz Joinder), CALJIC No. 8.88 is not unconstitutionally vague in requiring that aggravating circumstances must be "so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." (CALJIC No. 8.88; *People v. Breaux* (1991) 1 Cal.4th 281, 315–316 & fn. 14; *People v. Harris*, *supra*, 43 Cal.4th at pp. 1321–1322; *People v. Loker*, *supra*, 80 Cal.Rptr.3d at p. 44.)

5. The Trial Court Properly Instructed The Jury To Determine Whether Death Was The Appropriate Punishment

Contrary to appellants' view (COB 389–390; BOB 351–355, 379; Cruz Joinder), there is no need to inform the jury that it must decide whether death is the appropriate punishment. That conclusion is inherent in the jury's determination that aggravating factors substantially outweigh mitigating factors. (CALJIC No. 8.88; see *People v. Arias*, *supra*, 13 Cal.4th at p. 171; *People v. Cook* (2007) 40 Cal.4th 1334, 1367; *People v. Loker*, *supra*, 80 Cal.Rptr.3d at p. 44.)

6. The Trial Court Properly Instructed The Jury That It Could Impose Death Only If Aggravating Factors Outweighed Mitigating Factors

Contrary to appellants' view (COB 390–392; BOB 351–355, 379; Cruz Joinder), it is not necessary to instruct the jury that it must return a verdict of life without parole if mitigating factors outweigh aggravating factors. That is implicit in the instruction that a death verdict can only be imposed if aggravating factors outweigh mitigating factors. (*People v. Duncan* (1991) 53

Cal.3d 955, 978; *People v. Coffman*, *supra*, 34 Cal.4th at p. 124; *People v. Cook*, *supra*, 40 Cal.4th at p. 1367; *Vieira*, *supra*, 35 Cal.4th at p. 303.)

7. Appellants Had No Right To Have The Jury Instructed That It Could Impose A Life Sentence Even If Mitigating Factors Outweighed Aggravating Factors

Contrary to appellants' view (COB 392–394; BOB 379), they had no right to have the jury instructed that it could impose a life sentence even if it found that aggravating factors substantially outweighed mitigating factors. "A jury is free to return a life verdict even if aggravation outweighs mitigation. But the jury is not free to return a life verdict regardless of the evidence. If aggravating circumstances are so substantial in comparison with mitigating circumstances as to warrant the death penalty, then death is the appropriate penalty." (*People v. Smith* (2005) 35 Cal.4th 334, 370; *People v. Geier*, *supra*, 41 Cal.4th at p. 619; *People v. Arias*, *supra*, 13 Cal.4th at pp. 170–171.)

8. The Trial Court Properly Refrained From Instructing The Jury On A Burden Of Proof And Unanimity Regarding Mitigating Circumstances

Contrary to appellants' view (COB 395–396; BOB 338–347, 379; Cruz Joinder), there is no burden of persuasion in the penalty phase of a criminal trial, and trial courts have no duty to instruct the jury that mitigating factors need not be proven by the defendant, nor unanimously agreed upon by the jury. "There is no reasonable likelihood the trial court's instruction requiring a unanimous verdict would confuse the jury regarding each juror's duty individually to evaluate and weigh the aggravating and mitigating evidence in arriving at a decision regarding the appropriate penalty." (*People v. Riggs* (2008) 44 Cal.4th 248, 328; *People v. Geier*, *supra*, 41 Cal.4th at p. 619; *People v. Blair*, *supra*, 36 Cal.4th at p. 753; *People v. Ward, supra,* 36 Cal.4th at pp. 221-222; *People v. Carpenter*, *supra*, 21 Cal.4th at p. 1061; *People v.*

Hart, *supra*, 20 Cal.4th at p. 649; *People v. Johnson*, *supra*, 3 Cal.4th at p. 1245).

9. The Trial Court Properly Refrained From Instructing The Penalty Jury That It Should Presume That Life Was The Proper Sentence

Contrary to appellants' view (COB 396–397; BOB 379), they were not entitled to an instruction on the presumption that life was the proper sentence. (*People v. Parson*, *supra*, 44 Cal.4th at p. 371; *People v. Abilez*, *supra*, 41 Cal.4th at p. 532; *People v. Arias*, *supra*, 13 CAL.4th 92, 190.)

C. The Lack Of Written Findings By The Jury Did Not Deprive Appellants Of Meaningful Appellate Review

Contrary to appellants' view (COB 363-367; BOB 355–359, 379; Cruz Joinder), California's death penalty law is not unconstitutional because it fails to require that the jury base a 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, overruled on another ground in *People v. Cromer* (2001) 24 Cal.4th 889, 901, fn. 3; *People v. Valencia* (2008) 43 Cal.4th 268, 311; *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; *People v. Harris*, *supra*, 43 Cal.4th at p. 1322; *Vieira*, *supra*, 35 Cal.4th at p. 303.)

D. The Trial Court Properly Instructed The Jury On Mitigating And Aggravating Factors

1. Restrictive Adjectives

Contrary to appellants' view (COB 397; BOB 363, 379; Cruz Joinder), the use of restrictive adjectives in the list of potential mitigating factors (e.g., "extreme" and "substantial" in section 190.3 and CALJIC No. 8.85), did not impermissibly act as a barrier to consideration of mitigation by the penalty jury. (*People v. Parson*, *supra*, 44 Cal.4th at p. 369; *People v. Jones, supra,* 15 Cal.4th at p. 190; *People v. Davenport, supra,* 11 Cal.4th at p. 1230; *People v. Turner*, *supra*, 8 Cal.4th at pp. 208-209; *People v. Wright, supra,* 52 Cal.3d at pp. 443-444; *People v. Morales* (1989) 48 Cal.3d 527, 567-568; *People v. Ghent*, *supra*, 43 Cal.3d at p. 776.)

2. Inapplicable Sentencing Factors

Contrary to appellants' view (COB 398; BOB 379), they had no right to have sentencing factors which may not have applied to them deleted from the jury instructions. "The trial court has no obligation to delete from CALJIC No. 8.85 inapplicable mitigating factors, nor must it identify which factors are aggravating and which are mitigating." (*People v. Cook* (2006) 39 Cal.4th 566, 618, citing *People v. Jones* (2003) 30 Cal.4th 1084, 1129 and *People v. Sapp*, *supra*, 31 Cal.4th at p. 315; see also *People v. Harris*, *supra*, 43 Cal.4th at pp. 1320–1321.)

3. There Was No Need To Instruct The Jury That Statutory Mitigating Factors Could Be Used Only As Potential Mitigators

Contrary to appellants' view (COB 398–399; BOB 364–368, 379; Cruz Joinder), trial courts have no constitutional duty to instruct the jury which of CALJIC No. 8.85's factors were aggravating and which were mitigating, nor

that section 190.3's statutory mitigating factors were relevant solely as potential mitigators. (*People v. Cook*, *supra*, 39 Cal.4th at p. 618; *People v. Medina*, *supra*, 11 Cal.4th at p. 781; *People v. Sanders*, *supra*, 11 Cal.4th at p. 564; *People v. Zapien* (1993) 4 Cal.4th 929, 990; *People v. Danielson, supra,* 3 Cal.4th at p. 718.)

E. Appellants Had No Right To Inter-case Proportionality Review To Determine Whether Their Planning And Participation In Four Murders Warranted Imposition Of The Death Penalty

Contrary to appellants' view (COB 399–400; BOB 359–361, 379; Cruz Joinder), 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* (1994) 9 Cal.4th 83, 156; *People v. Mincey* (1992) 2 Cal.4th 408, 476; *People v. Hayes* (1990) 52 Cal.3d 577, 645; *Vieira, supra,* 35 Cal.4th at p. 303; *People v. Harris, supra,* 43 Cal.4th at pp. 1322–1323; *People v. Loker, supra*, 80 Cal.Rptr.3d at p. 44.)

F. The California Death Penalty Law Does Not Violate The Equal Protection Clause

This Court has repeatedly rejected appellant's contention (COB 400; BOB 368–372, 379; Cruz Joinder) that California's death penalty law deprives capital defendants of equal protection because it does not guarantee the same safeguards on jury's enhancement determinations as afforded noncapital defendants. 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; *People v. Harris, supra,* 43 Cal.4th at p. 1322; *People v. Loker, supra,* 80 Cal.Rptr.3d at p. 44; see also

People v. Boyette, supra, 29 Cal.4th at p. 466, fn. 22; *People v. Keenan, supra,* 46 Cal.3d at p. 545; *People v. Allen* (1986) 42 Cal.3d 1222, 1286-1288.)

G. California's Use Of The Death Penalty Does Not Violate Any Controlling International Laws Or Agreements

Appellants' final contention is that "California's use of the death penalty as a regular form of punishment falls short of international norms," and also violates the Eighth and Fourteenth Amendments. (COB 400–401; BOB 373–379; Cruz Joinder.) As this Court stated in *People v. Hillhouse, supra,* 27 Cal.4th at p. 511, however, "had defendant shown prejudicial error under domestic law, we would have set aside the judgment on that basis, without recourse to international law. . . . [¶] . . . International law does not prohibit a sentence of death rendered in accordance with state and federal constitutional and statutory requirements." (See also *People v. Jenkins, supra,* 22 Cal.4th at p. 1055; *People v. Ghent, supra,* 43 Cal.3d at pp. 778-779 (maj. opn.); *id.* at pp. 780-781 (conc. opn. of Mosk, J.); *Vieira, supra,* 35 Cal.4th at p. 305; *People v. Harris, supra,* 43 Cal.4th at p. 1323; *People v. Loker, supra,* 80 Cal.Rptr.3d at p. 44.)

XV.

CRUZ SUFFERED NEITHER CUMULATIVE ERROR NOR PREJUDICE

Cruz argues that even if no single alleged error requires reversal of the jury's guilt and penalty phase verdicts, the cumulative effect of such errors compels reversal of the judgment and sentences of death. (COB 402.) Cruz's argument is unpersuasive.

For the reasons set forth in Respondent's Arguments I–XIV, XVI-A, XVII–XXVII, XXXII–XXXIV, there was only one error in the guilt phase and one error in the penalty phase. The trial court erroneously instructed the jury that conspiracy could be based on malice even though it actually required

express malice or intent to kill. However, that error was necessarily harmless since the jury made numerous other findings that demonstrated it had found Cruz harbored the intent to kill. The trial court also erred by allowing the jury to return a verdict of death on the conspiracy charge and by imposing that sentence. However, that was not the type of error that could infect other parts of the jury's penalty deliberations, nor could it cumulate with other errors. Moreover, this Court can easily correct that error. In sum, there was no cumulative error or prejudice because there were only two errors; one was harmless and the other one is easily corrected by this Court. Further, even if there were other minor errors, the verdicts would have been the same absent those errors because the evidence against Cruz was overwhelming.

Cruz argues that "[t]he jurors in this case did not view the evidence in this case as clear-cut. They took at least six days of deliberation to reach their verdicts as to appellant and Beck . . . ." (COB 403.) Respondent disagrees that six days of deliberation somehow demonstrates this was a close case. Six days was not a long time for the jury to consider evidence from a two month trial with four defendants; listen to various readbacks; review the instructions; consider twenty serious charges, as well as five special circumstance allegations, and five gun enhancements; and return verdicts against two of the defendants.

Moreover, it is possible that the jury focused on Cruz and Beck and reached verdicts on their charges before considering LaMarsh and Willey. But it is at least as likely that the jury began by discussing all of the defendants. If so, the most probable result was that the jury spent much of its time arguing about LaMarsh and Willey, and then decided to focus on the charges against Cruz and Beck because it became clear that it would be much easier to unanimously agree on those verdicts. Thus, the jury may well have spent much less than six days considering its verdicts against Cruz and Beck. In any case, the time the jury

took was commensurate with the length of the trial, the length of the jury instructions, the number of charges, and the seriousness of the charges. In addition, the jury's certainty about Cruz's guilt was confirmed when the same jury returned five death verdicts in three hours, presumably including a break for lunch. (41 RT 7569–7570.)

Similarly, Respondent disagrees with Cruz's claim that the prosecution's case against him was not strong. (COB 403.) As discussed above, there was ample evidence, including Cruz's own testimony, that Cruz had many problems with Raper, and that provided Cruz's motive. McLaughlin testified that the night before the murders, Cruz said he was planning to fight and settle a score the next day. (31 RT 5547–5548.) That testimony was part of LaMarsh's case, but it would have been admissible as a party admission even in a separate trial. (See Evid. Code, § 1220.) Evans testified that Cruz planned the conspiracy, instructed the others on their roles, handed out weapons, and drove them all to the murder scene. Contrary to Cruz's claim that this testimony was uncorroborated, there was no dispute that Cruz arranged for Willey to come to the Camp and Cruz told everyone they were going to the Elm Street house. Furthermore, conspiracies are usually proven by circumstantial evidence since conspirators typically do not discuss their conspiracy in front of other people. This case was, in fact, more illuminating than many because one of the conspirators agreed to testify as part of a plea bargain. Moreover, the jury justifiably found that Evans' testimony jibed with the other established facts and found her account generally reliable.

Cruz's defense theory was also so implausible that it practically proved the conspiracy. Cruz's testimony that they spontaneously went to the Elm Street house at midnight to retrieve some clothes was not credible. (See 34 RT 5976–5978, 6045 [Willey testified they went to move furniture].) It was not credible that they brought knives and bats and Cruz's baton as "defensive"

weapons. Those weapons were much more consistent with Evans' testimony that Cruz wanted to avoid drawing the attention of neighbors. It was not credible that Cruz saw every murder, and his bloody baton was found at the murder scene, but he did not participate in the slaughter. Furthermore, the evidence showed that two masks were found at the crime scene and two were destroyed. Cruz admitted that he had four masks that matched the ones seen and found at the murder scene, but could not explain why those masks could not be located in his house. Moyers and Creekmore were credible disinterested neighbors, and they identified Cruz as the person who cut Ritchey's throat. Cruz also showed consciousness of guilty by lying to police about his whereabout on the night of the murders and staying at a motel. Taken together, the evidence against Cruz was overwhelming.

According to Cruz, "The most serious errors in this case stemmed from the trial court's erroneous denial of appellant's numerous motions to sever and for mistrial." (COB 406.) However, if those errors truly entitled Cruz to a separate trial or a new trial, then there would be no need to cumulate them with other more minor errors. Either the defendants' trials should have been severed or not; either the trial court should have granted mistrials or not. In effect, Cruz admits that the other errors were far less significant. Therefore, if Cruz was not entitled to relief based on his severance and mistrial claims, it is unlikely he is entitled to reversal on his other subsidiary claims.

In sum, even if there were minor improprieties, the errors were harmless whether considered individually or collectively. (See, e.g., *People v. Box, supra,* 23 Cal.4th at p. 1214 ["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*, *supra*, 13 Cal.4th at p. 1245 [what few errors occurred at appellant's trial were harmless, singularly or cumulatively]; *People v. Lucas* (1995) 12 Cal.4th 415, 476 ["We have considered each claim on the merits, and neither singly nor cumulatively do they establish prejudice requiring the reversal of the convictions"]; see *Vieira*, *supra*, 35 Cal.4th at p. 305 [because there was only one error, and it was harmless, the claim of cumulative error was meritless]; *People v. Wallace* (2008) ___ Cal.4th ___ [2008 WL 3482895] [having found no prejudicial errors in either the guilt or penalty phase, court rejected defendant's claim that his death sentence should be reversed].) Accordingly, this Court should reject Cruz's claim of cumulative error.

XVI.

THE TRIAL COURT PROPERLY DENIED APPELLANTS' SEVERANCE MOTIONS; AND BECK RECEIVED A FAIR PENALTY TRIAL

Appellants assert that the trial court's failure to sever their trial "violated [their] state and federal constitutional rights to privacy, a fair trial, and to due process, and reliable guilt and penalty determinations." (BOB 85; Cruz Joinder.) They contend that this is so because their defense conflicted with that of the other defendants and, along with the prosecutor, they all ganged up on appellants. Further, appellants contend that the other defendants introduced evidence that would not have been admitted in a separate trial. (BOB 94–103; Cruz Joinder.) Finally, Beck claims that his penalty trial was tainted by evidence from Cruz's penalty trial. (BOB 103–113.) Respondent disagrees. The trial court properly used its broad discretion to deny appellants' severance motions, and the resulting trial did not violate any of appellants' rights. Moreover, the separate penalty phase trials complied with state law which provides that the same jury should hear both the guilt and penalty phases.

(§ 190.4, subd. (c).) As the trial court noted, to grant Beck's motion for separate trials on the basis that serial penalty trials would prejudice anyone who did not go first would be tantamount to finding that there could never be joint trials for capital codefendants. (5 RT 965.)

California has indicated a strong preference for joint trials, and there was no compelling reason to give appellants a separate trial. Contrary to appellants' claim, little evidence was admitted in the current trial that would not have been admissible in separate trials. Nor did the other defendants gang up on either Cruz or Beck. They all testified that there was no conspiracy, and Cruz's defense corroborated Beck's defense. While it is true that LaMarsh and Willey gave incriminating testimony, it is settled that the mere fact that defendants try to place the blame on one another does not justify severance. A separate trial is not required unless there is insufficient independent evidence of a defendant's guilt and there is a chance that the jury will convict solely on the basis of conflicting defenses. Here, there was an abundance of incriminating evidence against appellants. Moreover, the four defendants' defense theories were not mutually exclusive and the jury could have believed all of them. The prosecutor did not simply throw the defendants together and ask the jury to sort out who was guilty.

Additionally, California law provides that the same jury should hear both the guilt and penalty phases of a capital trial. Therefore, it is typical for capital codefendants to be tried by the same penalty jury. Since Cruz and Beck both wanted separate penalty trials in front of the same guilt-phase jury (4 RT 809 [Cruz argued, "Section 190.4 states that we're entitled to the same jury who finds the defendants guilty in the guilt phase to determine the punishment or determine the penalty in a penalty phase . . . ."]; 7 RT 1301 [Beck argued he had the "right to have one jury go all the way through the proceedings"]; 7 RT 1303 [Beck argued, "I want the same jury for both phases"]), it was

unavoidable that one defendant would be tried before the other. Moreover, Beck's claim that his penalty trial was tainted by Cruz's penalty trial is belied by the fact that, to minimize any prejudice, the prosecutor called only one witness in Cruz's penalty trial. On the other hand, the prosecutor called five witnesses in Beck's penalty trial–including the one witness who testified against Cruz. Beck could not have been prejudiced by Cruz's penalty trial because he received a separate penalty trial; the trial court instructed the jury to disregard evidence from Cruz's penalty trial; and even if the jury disregarded the trial court's instructions and considered evidence from Cruz's penalty trial, any of that evidence that was relevant was properly admitted in Beck's penalty trial anyway. Moreover, the goal of Beck's penalty defense was to show that he was a good man who was corrupted by Cruz. So, if any disparaging evidence about Cruz carried over from Cruz's penalty trial, it only helped Beck make his main point.

A. This Court Should Reject Appellants' Claim For The Same Reasons Given In Respondent's Argument I

Aside from appellants' dubious claim that Beck and Cruz's defenses were antagonistic, there is not much difference between the arguments in Beck's and Cruz's opening briefs. Both contend that the trial court erred by denying their motions to sever. Respondent asks that this Court refer to Argument I, which considered the argument in Cruz's brief, for a general response to the same argument in Beck's brief. In particular, Respondent's Argument I, subsections A (Procedural History) and B (Legal Principles) apply equally to both appellants' arguments. Respondent will focus on rebutting the specific contentions in Beck's brief.

B. Cruz's Defense Did Not Conflict With Beck's Defense

As a preliminary matter, appellants repeatedly and incorrectly assert that Beck's and Cruz's defenses were antagonistic. In Beck's Statement Of Facts

he claims, "All four defendants testified and put forth conflicting defenses. Cruz's defense blamed Beck, Evans, LaMarsh, Willey and Vieira for the homicides . . . . Cruz, during his direct testimony, told the jury that Beck went out to the street to assist Willey, who was fighting with Ritchey." (BOB 23–24, fn. 12.) In their argument, appellants assert, "Cruz implicated . . . Willey and Beck in the death of Ritchey." (BOB 90; Cruz Joinder.) "Contrary to Cruz's testimony, [Beck] denied any participation in the assault on Ritchey." (BOB 91; Cruz Joinder.) "Cruz's indirect attempt to pin Ritchey's murder on Beck added to the conflicting nature of the defenses." (BOB 94; Cruz Joinder.)

Appellants misread the record. Cruz and Beck's defense theories were harmonious and mutually exonerating. Cruz never testified that Beck participated in any murders. Cruz's only testimony about Beck committing an act of violence was that he saw Beck pull Colwell off of Vieira. Cruz testified that Vieira was on the floor, and Colwell was on top of him. Beck picked up Colwell and threw him aside. (29 RT 5099–5100.) However, since Cruz cast Colwell as the aggressor who was getting the better of Vieira, that testimony did not incriminate Beck. Moreover, Cruz merely testified that Beck pulled Colwell off of Vieira. It was Beck who added that he hit Colwell three times. (30 RT 5305.)

Similarly, Cruz never insinuated that Beck helped Willey kill Ritchey. Cruz testified only that he told Beck that someone was outside with Willey and that person might "jump" Willey. Then Beck ran outside. (29 RT 5101–5102.) That testimony did not indicate that Beck did anything to Ritchey. On the contrary, Cruz specifically testified that he did not know what Beck did once he left the house. (*Ibid.*) Moreover, Beck, testified to exactly the same thing. According to Beck, Cruz told him someone was outside with Willey and he ran outside. When he got outside, he found Willey standing over someone. (30 RT 5306–5308.) Furthermore, the prosecutor's theory was that *Cruz* helped Willey

kill Ritchey. Therefore, *Cruz's* testimony that Beck ran out of the house did not help the prosecutor's case one bit.

In a further attempt to imply a conflict, appellants repeatedly suggest that Cruz incriminated Beck by testifying he carried a weapon to the house. In his statement of facts, Beck claims that "Cruz testified that *everyone* went to the house armed for protection in case trouble broke out." (BOB 26, italics added.) In their argument, appellants assert that Cruz "admitted that *everyone* armed themselves with a weapon." (BOB 90, italics added; Cruz Joinder.) Only in a footnote do appellants acknowledge that Cruz actually testified that Beck was unarmed. (BOB 90, fn. 19; Cruz Joinder; see 29 RT 5070, 5089.) In fact, Cruz and Beck both testified that neither of them brought weapons. (29 RT 5070, 5089 [Cruz testified that Beck was not armed]; 30 RT 5300 [Beck testified that he and Cruz were not armed]; 30 RT 5297 [Beck testified that Cruz always kept his baton in his car]; 30 RT 5352 [Beck testified Vieira had Cruz's baton]; but see 24 RT 4219, 4247–4248 [Evans testified that Beck had an M-9 knife]; 32 RT 5641, 5703 [LaMarsh testified that Beck had a knife]; 32 RT 5657 [LaMarsh testified that Beck stabbed Colwell]; 32 RT 5997–5998, 6004 [Willey testified that Beck had a knife and slit Ritchey's throat].)

Tellingly, in the portion of his Statement Of Facts where he describes his own testimony, Beck begins by asserting that his "defense theory was *partially* consistent with that of Cruz." (BOB 34, italics added.) However, Beck's subsequent description of the main points of his testimony does not contain a single conflict with Cruz's testimony or defense. (*Ibid.*) Similarly, appellants concede that Cruz and his defenses were not antagonistic when they complain in another argument that Beck "was being prosecuted by three attorneys," i.e., the prosecutor and LaMarsh and Willey's attorneys. (BOB 201; Cruz Joinder.) Since appellants do not include Cruz's attorney in the list of other "prosecutors," they implicitly concede that their defenses were not antagonistic.

In short, appellants attempt to manufacture a conflict where none existed. Beck and Cruz's defense cases were complimentary and corroborative, and Cruz acknowledges this fact throughout his own brief. Not only did Cruz corroborate Beck's defense, he was the only one of the assailants who testified that Beck was not armed and did not hurt anyone. Cruz was also the only person who could corroborate Beck's testimony that there was not only no general conspiracy, but no "secret" conspiracy involving only Cruz, Beck, and Vieira. In fact, when Cruz sought permission from the trial court to rebut the other three defendants' closing argument, only Beck joined the motion. (36 RT 6456–6457.) Beck would not have endorsed Cruz's opportunity to rebut his and the other defendants' closing arguments if he thought Cruz's interests were antagonistic to his own. Accordingly, Beck's claim that he was prejudiced by a joint trial with Cruz is baseless.

C. Appellants Received A Fair Trial And A Reliable Determination Of Guilt

A trial court's ruling denying a motion for severance is evaluated based on the evidence available at the time of the original ruling. (*People v. Hardy*, *supra*, 2 Cal.4th at p. 167.) Nevertheless, even if the court's joinder ruling was proper when it was made, an appellate court should reverse the judgment if the defendant demonstrates that it "resulted in gross unfairness amounting to a denial of due process." (*People v. Lewis*, *supra*, 43 Cal.4th at p. 452, internal quotation marks omitted.) Here, appellants make no distinction between arguments made at the time of the severance rulings and evidence introduced afterward, during the guilt and penalty trials. Nor do appellants attempt to show that the trial court abused it's discretion. They argue only that the joint trial resulted in a violation of constitutional rights. Accordingly, Respondent will focus on how appellants' guilt and Beck's penalty trials were fair and satisfied the requirements of due process.

As discussed in Argument I, it certainly would have increased appellants' chances of avoiding conviction if they could have blamed all of the murders on fellow conspirators who would receive separate trials and could be counted on not to give contrary testimony pursuant to their Fifth Amendment privilege. However, contrary to appellants' argument, they did not have a due process right to avoid the incriminating testimony of coconspirators. Nor did they have a right to a separate trial because each defendant said that he was telling the truth and some of the defendants had to be lying. (BOB 91; Cruz Joinder.)

Appellants claim, "This case presents the classic context in which joinder of the co-defendants' cases violates the many constitutional principals set forth above." But as this Court recently held, "Contrary to what defendant suggests, this was a '"classic" case' for joinder. The prosecution claimed that [the codefendants] planned and committed the multiple murder together. Both stood accused in equal measure of the same offenses involving the same special-circumstance allegations. The evidence against each defendant was strong. It included their joint visit to the crime scene one week before the murders . . . . " (*People v. Carasi* (Aug. 25, 2008) ___ Cal.4th ___ [2008 WL 3891546, p. 19].) Most of the same factors apply here. All of the defendants were accused of planning and executing the same multiple murders; they were all charged with the same special circumstance; the evidence against all of the defendants was strong, including testimony by two eyewitnesses and a coconspirator; there was uncontradicted evidence that there was a joint visit to the crime scene a few days before the murders; and there was mutually exculpatory testimony that there was no conspiracy.

Nevertheless, to prevail on their claim that their right to a fair trial and due process were violated, appellants would have to show that the joint trial was inherently prejudicial. Generally, that can be shown in two ways: First, by demonstrating that the defendants' defenses were so irreconcilable that the jury

would be compelled to find someone guilty regardless of the evidence. Alternatively, they must show that evidence was admitted in the joint trial that would not have been admitted in separate trials, and that evidence was so prejudicial that the results could be said to be unfair. (*People v. Tafoya*, *supra*, 42 Cal.4th at p. 162; *Zafiro v. United States*, *supra*, 506 U.S. at p. 538.)

1. Conflicting Defenses Did Not Make The Trial Unfair

As discussed above, Cruz's defense did not conflict with Beck's, so joining their cases could not have violated due process. However, LaMarsh testified that Cruz beat Raper with his baton and Beck stabbed Colwell. (32 RT 5656–5657, 5752–5753.) Willey testified that Beck cut Ritchey's throat. (34 RT 5998–5999.) Though LaMarsh and Willey both testified that there was no conspiracy, they both also testified that Cruz, Beck, and Vieira had a very close relationship. They used that evidence to argue that if there was a conspiracy, it was between only Cruz, Beck, and Vieira.

Nevertheless, LaMarsh and Willey's primary defense was that there was no conspiracy. So their defenses were in agreement with Cruz and Beck's defenses on that point. If the jury had believed them, they would have all escaped conviction on the conspiracy count. LaMarsh and Willey's fall-back theory–that if there was a conspiracy, it involved only Cruz, Beck, and Vieira–came into play only if the jury rejected the primary claim of all four defendants that there was no conspiracy. The existence of that secondary theory did not make the defendants' defenses so incompatible that the jury was forced to choose between opposing defenses. Even if the jury believed that LaMarsh and Willey were not part of Cruz, Beck, and Vieira's conspiracy, that did not harm appellants. If the jury believed LaMarsh and Willey's testimony that they did not know about any conspiracy, that would not prove the others *were* in a conspiracy; it just proved that LaMarsh and Willey were not part of it and did not know about it.

Appellants cannot show that the defenses were so fundamentally in conflict that the jury would have inferred that the conflict alone demonstrated that all the parties were guilty, or that accepting one defendant's defense would preclude acquittal of the other.[59] (*People v. Coffman*, *supra*, 34 Cal.4th at p. 41; *People v. Lewis*, *supra*, 43 Cal.4th at p. 460.) The jury did not reach verdicts against LaMarsh and Willey, so there is no possibility that the jury found all of the defendants guilty based solely on the conflict in defenses.

Nor did LaMarsh and Willey's defenses preclude acquittal of appellants. LaMarsh and Willey both testified that there was no meeting in LaMarsh's trailer and there was no conspiracy. Their testimony corroborated Cruz and Beck's testimony and undermined the testimony of Evans–the only person who could and would give direct testimony on the conspiracy. Therefore, rather than precluding acquittal of appellants, LaMarsh and Willey's testimony had the potential to be exonerating on the most serious question of fact–the existence of the conspiracy.

Not only was the conspiracy a serious charge in itself. It is likely that some of appellants' murder convictions were based on vicarious liability as coconspirators. If the jury had believed LaMarsh and Willey's defense that there was no conspiracy, appellants might have also escaped conviction on the other murder charges which the prosecutor did not claim appellants personally committed. Since appellants' entire defense depended on proving there was no conspiracy, LaMarsh and Willey's testimony, if believed, could have been extremely helpful. Therefore, appellants cannot show that the other defendants'

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59. Before trial began, Beck renewed his motion for severance based on a confidential declaration. (5 RT 961.) Tellingly, counsel argued, "I'm not making the claim that the defendants have conflicting defenses in the guilt phase, but rather that in the penalty phase there's going to be extremely damaging evidence admitted." (5 RT 963.)

defense theories were so antagonistic that it guaranteed someone would be convicted regardless of the evidence.

Nor can appellants demonstrate that they received an unreliable determination of guilt just because there was some antagonism between their defenses and LaMarsh and Willey's defenses. (See *People v. Coffman*, *supra*, 34 Cal.4th at p. 41; *People v. Jenkins*, *supra*, 22 Cal.4th at p. 949.) A full airing of the evidence against the conspirators, as well as their respective defenses, did not make the jury's determination of guilt unreliable. The jury was capable of viewing all of the evidence and weighing the credibility of competing defenses. (*People v. Turner*, *supra*, 37 Cal.3d at p. 313 ["no denial of a fair trial results from the mere fact that . . . defendants who are jointly tried have antagonistic defenses and one defendant gives testimony that is damaging to the other and thus helpful to the prosecution."], overruled on another ground in *People v. Anderson*, *supra*, 43 Cal.3d at p. 1149; see also *People v. Morganti*, *supra*, 43 Cal.App.4th at p. 673; *People v. Box*, *supra*, 23 Cal.4th at pp. 1196–1197.)

2. Almost All Of The Evidence Would Have Been Admissible In Separate Trials

LaMarsh and Willey introduced some evidence showing the closeness and interdependence of Cruz, Beck, and Vieira. LaMarsh testified that once he saw Beck yell at Vieira, and after Cruz said "'Okay,'" Beck punched Vieira in the stomach and knocked the wind out of him. (32 RT 5600–5601.) LaMarsh testified that Cruz, Beck, and Vieira appeared to constitute a "survivalist group." (32 RT 5615.) LaMarsh testified that he joined the group by cutting his hand and marking a piece of paper with a blood fingerprint. (32 RT 5618–5619.) Willey testified that Cruz told Beck and Vieira what to do. Cruz treated Beck as his best friend, but he treated Vieira like a child. Beck also told Vieira what to do, and he slapped or punched Vieira when he disobeyed. (34 RT 5960–5961.) Willey testified that he saw LaMarsh join the group by

signing a paper and putting a blood fingerprint on it. Previously, Willey had done the same thing. (34 RT 5965.)

Appellants claim that the foregoing evidence would not have been admitted if they had received a separate trial. They are wrong. It is relevant and proper to introduce evidence of the close relationship between codefendants to prove that they entered a conspiracy. (See *People v. Tinnin*, *supra*, 136 Cal.App. at p. 319.) Therefore, the evidence would have been admissible even if both appellants received separate trials.

It is true that the trial court accepted appellants' argument that much of this type of evidence was more prejudicial than probative. But that was a windfall for appellants. The trial court should have allowed the prosecutor to admit far more evidence of the cult-like qualities of the group and, in particular, appellants' domination of the group. Evidence that the group worked together, lived together, ate together, socialized together, shared their money, and had a functional hierarchy was all relevant to prove that there was a conspiracy. (See Respondent's Argument II-D, *supra*; *People v. Manson*, *supra*, 61 Cal.App.3d at pp. 126–131.) If appellants had received a separate trial, a different judge may have been less amenable to excluding such evidence. Accordingly, appellants cannot show that they were prejudiced by the joint trial because even more of this type of evidence could have been admitted in a separate trial.

Nevertheless, appellants claim that "LaMarsh and Willey, in particular, needed to do everything in their power to depict Beck and Cruz as evil . . . ." (BOB 93.) However, there was no evidence admitted that showed appellants to be "evil." As discussed above, LaMarsh and Willey gave a few very brief accounts of some interactions between Cruz, Beck, and Vieira. There was also evidence that they had many weapons, but that came predominantly from testimony by Evans and a gun store clerk during the prosecutor's case-in-chief. All of this evidence demonstrated that Cruz, Beck, and Vieira formed a

tightknit group. It was not that surprising or prejudicial to introduce evidence that three men who lived and worked together would engage in roughhousing and develop a pecking order. However, that evidence was probative of whether their presence and conduct at the crime scene was likely to be by design.

Moreover, the evidence entered by LaMarsh and Willey at the guilt phase was very brief and mild compared to the evidence that was admitted in appellants' penalty trials concerning their treatment of Vieira and Perkins. Appellants call those "beatings similar to fraternity hazings . . . ." (BOB 112; Cruz Joinder.) While Respondent disagrees strenuously with that characterization, it belies their argument that the evidence admitted in the guilt phase was prejudicial. As discussed below, the evidence from appellants' penalty phase included graphic and quantitative descriptions of numerous beatings; shocks with exposed electrical cords and stun guns; and testimony by Perkins and his father that made it clear that Cruz and Beck inflicted severe–and probably permanent–damage on Perkins' body and mind. In fact, even Beck's own expert testified that it appeared that Perkins and Vieira were tortured and Beck was the one who administered the punishment. (44 RT 8087–8088.) But since appellants dismiss these acts as tantamount to "fraternity hazings," they have no basis to argue that the far milder and briefer evidence admitted at the guilt trial was prejudicial.

Appellants argue that LaMarsh was able to enter evidence that the trial court had barred the prosecution from using. However, they discuss only one insignificant piece of evidence, and that could not have been prejudicial. Appellants complain that LaMarsh questioned Beck about a Ka-Bar box, and admitted it into evidence, even though the trial court had ordered it suppressed. (BOB 95–96, citing 30 RT 5395–5398; Cruz Joinder.) However, Beck denied ever having seen that box. (30 RT 5395–5398.) Appellants argue that LaMarsh used that evidence to support his "assertion that Beck used the knife

in the killings." (BOB 96.) However, Evans testified that Beck used an M-9 knife. (24 RT 4220.) And LaMarsh agreed that Beck's knife resembled the M-9 knife in evidence. (32 RT 5704; see 22 RT 3814.) Similarly, the prosecution's theory was that Cruz and Vieira used Ka-Bar knives in the murders; Beck used an M-9. (15 RT 2693; 24 RT 4218–4220, 4249, 4255, 4421; see 29 RT 5070, 5120 [Cruz testified that Vieira had a Ka-Bar knife]; 29 RT 5124 [Cruz testified that Vieira pulled out a Ka-Bar knife and appeared ready to use it on Colwell]; 37 RT 6728 [prosecutor argued that Cruz had the Ka-Bar knife and Beck had the M-9 knife]; 37 RT 6729 [prosecutor argued that Vieira had another Ka-Bar knife].) Accordingly, the jury could not have used the Ka-Bar box to infer anything about Beck's guilt because it did not prove that Beck had or used an M-9 knife. Therefore, the evidence could not have been particularly prejudicial. (Evid. Code, § 352.)

Finally, appellants complain that LaMarsh had McLaughlin testify that the day after the murders, Beck told her that Vieira had cleaned the blood off of everyone's shoes; but Beck's shoes would not come clean, so he had to buy new shoes. On cross-examination, she "added that Beck told her they 'had to do them all.'" (BOB 99, citing RT 5549–5550, 5553.) However, these admissions could have been entered by the prosecutor even if appellants had received separate trials, and appellants make no argument to the contrary.[60/]

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60. This evidence was admissible against Beck as a party admission. (Evid. Code, § 1220.) And Cruz did not object at trial, so he forfeited any claim of error he might have raised. (See *People v. Hill*, *supra*, 3 Cal.4th at p. 994-995 [failure to make *Aranda-Bruton* objection below waived the claim on appeal], overruled in part on other grounds in *Price v. Superior Court*, *supra*, 25 Cal.4th at p. 1069, fn. 13.)

D. The Trial Court Properly Held Separate Penalty Trials Before The Same Jury, And Cruz's Penalty Trial Did Not Taint Beck's Penalty Trial

Beck filed supplemental points and authorities for a separate trial. The pleading argued that Beck's penalty phase jury would be tainted by Cruz's testimony in his penalty phase, which was scheduled to take place first. (6 CT 1557–1560; see 5 RT 893–894.) Two weeks later, but still before the commencement of trial, Beck renewed his motion for severance. He argued that he could not receive a fair penalty trial because the jury would be prejudiced by evidence in Cruz's penalty trial. The trial court stated that the prosecutor had already indicated he would not use any additional evidence concerning Beck in Cruz's penalty trial. It denied Beck's renewed motion for severance. (7 RT 1300–1304; 6 CT 1626.)

Beck claims that "[t]he state incorporated all of Starn's testimony against Cruz into Beck's penalty trial by tying Beck to Cruz, essentially arguing Beck's guilt by association." (BOB 109.) Furthermore, he asserts that by holding Cruz's penalty trial first, "the state was given the opportunity to taint Beck's jury with the highly prejudicial evidence against *Cruz*." (BOB 112.) However, Beck's argument does not make sense.

First, the trial court explicitly instructed the jury to disregard all evidence from Cruz's penalty trial and this Court presumes that the jury followed the trial court's instructions. (See 44 RT 8236 [the trial court instructed the jury, "You must determine what the facts are from the evidence received during the guilt phase of the trial and this penalty phase. Disregard any instruction . . . or any evidence that you heard during Mr. Cruz's penalty phase."]; *People v. Pinholster*, *supra*, 1 Cal.4th at p. 919 [appellate courts presume that jury followed trial court's instructions].)

Second, there is no reason why the jury would hold Beck responsible for Cruz's evil acts. Beck had a full opportunity to present himself as an individual

with a full panoply of mitigating circumstances. As the trial court noted, if serial penalty trials were necessarily prejudicial to whoever did not go first, capital defendants could never be tried together. (See 5 RT 965.)

Third, the prosecutor kept his word and did not introduce any evidence against Beck in Cruz's penalty trial. In fact, Beck's name was not even mentioned during the prosecution's case-in-chief–except to remind Starn of the night the defendants went to the Elm Street house and in a sidebar conference when the prosecutor advised the court that a document should be excluded because it had Beck's name on it. (39 RT 7012.)

Fourth, Cruz did not testify negatively about Beck in Cruz's penalty trial. He did not even mention Beck. (41 RT 7331–7377.) Therefore, Beck could not have been "tainted" by Cruz's testimony.

Fifth, the whole point of Beck's defense during the penalty phase was that he was a good man .... Until he met Cruz. Beck had numerous people testify that before he met Cruz, he was friendly and active in church, and he was a responsible and caring father. (43 RT 7799–7801, 7827–7829, 7857, 7874, 7885–7886, 7893, 7927–7931, 7943–7948; 44 RT 7990, 7993, 7996–7997, 8045–8048.)

However, Beck had numerous witnesses also testify that Cruz was a dangerous and charismatic man with strange religious ideas; he took advantage of Beck when he was at a low point in his life; and Beck was controlled and transformed by Cruz. (43 RT 7799–7818 [Beck's sister testified that he attended church and was a good father, but after he became close to Cruz, he stopped caring about his family]; 43 RT 7835 [Beck's brother testified that Cruz got other people to do his dirty work, and he convinced Beck to threaten to put a curse on his family]; 43 RT 7862–7863 [Beck's sister-in-law testified that meeting Cruz was like a religious experience for Beck and he gradually was transformed]; 43 RT 7901 [Beck's brother testified that Beck was different

after he met Cruz]; 43 RT 7950 [a family friend from Church testified that Beck had always been happy and involved in church, but when she met him more recently, he seemed overly serious]; 43 RT 7960–7966 [Beck's half-sister testified that Beck was a follower and tended to take after the people he spent time with; Cruz was into Voodoo and Beck spoke only when Cruz approved; the more time Beck spent with him, the weirder he became]; 44 RT 7999 [a friend of eighteen years testified that the last time he saw Beck, he did not seem to be the same person]; 44 RT 8031–8032 [a coworker testified that Beck was less sociable when Cruz was around and Cruz seemed to determine when Beck could leave work]; 44 RT 8075, 8092 [an expert on cult activity testified that Cruz was the leader of a cult and he controlled Beck]; 44 RT 8102 [a psychotherapist testified that Cruz took advantage of Beck after he suffered "shattered faith syndrome"]; 44 RT 8120 [a psychologist testified that Beck had the bad luck to meet a very influential person when he was feeling empty and desperate for guidance]; 44 RT 8150–8154 [another psychologist testified that Beck was an extremely vulnerable person, and Cruz exploited the emptiness Beck felt after his divorce]; 44 RT 8199–8209 [a professor of sociology testified that Cruz was the leader of a "high control group"; Beck's fundamentalist charismatic Christian background made him particularly vulnerable to control by Cruz; and Cruz had more thorough control over Beck than anyone else].) Considering all the evidence that *Beck* presented to show that Cruz was an evil man, he has very little basis to complain that he was tainted by disparaging evidence about Cruz from *Cruz's* penalty trial. Moreover, evidence in Cruz's penalty trial that Cruz was abusive and controlling–*if* it was considered by Beck's penalty jury–actually helped Beck make the central point of his own penalty trial: Beck was a good man who fell under the control of a bad man.

Beck further claims, "All of the evil acts performed by Cruz which were recounted ad nauseam by the state's witnesses would have been inadmissible as irrelevant and prejudicial." (BOB 112–113.) However, if there was any undue repetition of Cruz's "evil acts," it was by Beck's own witnesses. Starn was the *only* "state's witness" in Cruz's penalty trial. So any repetition by "state's witnesses" had to have occurred in Beck's own penalty trial. Moreover, it is difficult to imagine what evidence Beck is claiming was "recounted ad nauseam" when Starn did not even mention Beck's name at Cruz's penalty trial. Accordingly, Beck has no basis to complain that any of the prosecution's witnesses gave testimony that was cumulative of evidence in Cruz's penalty trial.

Beck claims that if he had "been tried separately, the state's aggravating evidence would have consisted solely of Beck's bad acts towards Vieira and Perkins; beatings similar to fraternity hazings . . . ." (BOB 112.) Beck is wrong for several reasons. First, the prosecutor expressly relied on the circumstances of the crime itself. (42 RT 7591.) So all evidence admitted during the guilt phase concerning the brutality of the murders was available as aggravating circumstances. (§ 190.3, subd. (a).)

Second, the five prosecution witnesses did focus on Beck's abuse of Vieira and Perkins. But they also testified about other abuse. Beck's former girlfriend, Rosemary McLaughlin, testified that one time she tried to leave Beck. He hunted her down, dragged her back to their home, and kept her in her room. (42 RT 7693–7694.) One time she saw Cruz and Beck put a loaded rifle in people's mouths. (42 RT 7695.) Cruz and Beck once locked her in the bathroom for three to four hours. (42 RT 7701.) Cruz and Beck put Alexandra in a chair for hours with full Gatorade bottles hanging from her legs. If Alexandra cried, they poured cold water on her till she stopped. (42 RT 7704–7706.) McLaughlin and Beck talked about getting married, but he told

her she had to marry Cruz. (42 RT 7713–7714.) One time Cruz said he would cut her head off and Beck seemed to agree. (42 RT 7722–7723.) Starn testified that Beck never abused Alexandra, but he did put her in the rack for Cruz. (43 RT 7766.) Beck also blew smoke in Alexandra's face when she was eleven months old. (43 RT 7792.) Cruz and Beck once handcuffed her and left her on the couch for an hour. (43 RT 7770.)

Third, Beck severely discounts the evidence from his penalty phase by comparing what he (and Cruz) did to Vieira and Perkins to fraternity hazings. Starn testified that she saw them use a stun gun on Vieira twice and had him use it on himself once. (42 RT 7696.) Cynthia Starn testified that once Cruz and Beck tricked her into turning on the electricity to an extension cord that was exposed and wrapped around Perkins' toes. (43 RT 7731.) She also testified that Beck hit Perkins in the stomach, head, groin, back, ribs, and arms more than ten times. (43 RT 7734.) Beck hit Vieira more than ten times. Both Perkins and Vieira screamed, but they did not fight back. (43 RT 7735.) Cruz's girlfriend, Jennifer Starn, testified that Cruz and Beck beat Vieira about thirty times. Typically, they would punch him in the stomach, leaving huge black bruises. (43 RT 7756–7757.) Starn also testified that they often beat Vieira, and they electrocuted Perkins and Vieira's toes with an exposed extension cord. (43 RT 7758.) Beck also used a stun gun on Vieira. (43 RT 7760.) Finally, Perkins' father testified that Cruz and Beck's abuse left Perkins with numerous physical and psychological scars. He had to be admitted to the hospital with shackle marks on his ankles; athletes foot so severe that two pairs of toes had grown together; so many bruises on his chest the doctors could not read the x-ray of his ribs; and with ulcers and chronic trouble breathing. Perkins was withdrawn, anxious, and moody, and he could no longer remember the day or month. He was, essentially, a shell of the man he had been before he met Beck and Cruz. (42 RT 7596–7621.) Thus, Beck's assertion that his and

Cruz's treatment of Vieira and Perkins was no worse than fraternity hazing is profoundly contradicted by the record.

Finally, Beck claims that his "counsel had agreed to follow the Cruz penalty phase on the promise that the Cruz trial would present no aggravating evidence against appellant. (RT 828.)" (BOB 5.) But the prosecutor made no such promise. He said only that he had no plans "at that point" of submitting any aggravating evidence other than the circumstances of the crimes charged. (4 RT 828–829.) However, the prosecutor expressly reserved his right to offer additional evidence. "If something happens between now and then, of course I'll come to the Court with it." (4 RT 829.) And, indeed, something did happen. Four months later, the prosecutor reached a plea agreement with Starn in which she agreed to testify at appellants' penalty trials. (10 CT 2638.) However, other than the circumstances of the crimes and Starn's unexpected testimony, the prosecutor did not offer any other evidence at Cruz's penalty trial. And, as discussed above, the prosecutor never elicited evidence about Beck at Cruz's penalty trial. Therefore, Cruz's penalty trial could not have been prejudicial to Beck's penalty trial.

E. Even If The Trial Court Abused Its Discretion, The Error Was Harmless

If the denial of the severance motions constituted a denial of appellants' due process and other federal constitutional rights, the error was still harmless. (See *Chapman*, *supra*, 386 U.S. at p. 24.) Even if this Court considers only the evidence introduced during the prosecutor's case-in-chief, and disregards the evidence and argument presented by LaMarsh and Willey, the evidence against appellants was overwhelming. Moreover, it was not credible that during the murders, Cruz did not touch anyone, and Beck's only contribution was pulling Colwell off of Vieira. It is certain beyond a reasonable doubt that appellants would not have received a more favorable result if they had a separate trial; nor

would they have received a more favorable result if the contested evidence from LaMarsh and Willey had been excluded. (See *ibid.*; *People v. Lewis*, *supra*, 43 Cal.4th at p. 456.) For a summary of the evidence against appellants, Respondent refers this Court to Argument I-G.

XVII.

THE TRIAL COURT PROPERLY REOPENED JURY SELECTION SO THE PROSECUTOR COULD MAKE A PEREMPTORY CHALLENGE

Code of Civil Procedure section 231, subdivision (d), provides, "When each side passes consecutively, the jury shall then be sworn, unless the court, for good cause, shall otherwise order." Here, all of the parties passed consecutively; but less than a minute later, prospective juror Lopez asked to speak to the trial court in private. Lopez told the trial court and parties that, for religious reasons, he was having doubts about whether he could impose the death penalty. However, he also agreed that he would follow the law as given to him; and he agreed to advise the court if he could no longer do so. The trial court found that Lopez was willing to follow the law, so it would not excuse him for cause. However, a few days later, it granted the prosecutor's motion to reopen voir dire. The prosecutor then exercised a peremptory challenge and Lopez was excused.

Appellants claim that the trial court erred because there was not good cause to reopen jury selection. They also claim that excusing Lopez was *Witherspoon-Witt* error and violated their due process right to an impartial jury. (BOB 120–132; Cruz Joinder.) Appellants are mistaken. Lopez indicated some doubts about following the law in his questionnaire. Then, during voir dire, he claimed that he had cleared up his doubts and was resolved to follow the law. Then, almost immediately after the parties passed on the jury, Lopez raised his hand because he was not sure he could follow the trial court's rules.

In chambers, Lopez told the trial court that, for religious reasons, he was not certain he would be able to impose the death penalty. Though the trial court partially rehabilitated Lopez, he still expressed lingering doubts about whether he would be able to impose the death penalty, and whether he could stand being the lone holdout juror. In fact, the trial court stated that one of the reasons it believed that Lopez was fit to continue as a juror was that it believed he would keep his word and advise the court if he could no longer follow the court's instructions.

It is well established that a trial court may reopen voir dire for good cause if the jury has not yet been sworn. Here, the trial court correctly found that Lopez's renewed statement of doubt about his ability to impose the death penalty was a new circumstance that the prosecutor was entitled to consider during voir dire. Contrary to appellants' argument, Lopez *did* change his position on the death penalty. During voir dire, Lopez reassured the trial court that he would follow instructions. But in chambers, he voiced serious concerns about whether his religious beliefs would interfere with his ability to impose the death penalty. Since this new information persuaded the prosecutor to change his position and seek Lopez's removal, it was, by definition, significant information. Moreover, since the jury had not yet been sworn, the trial court had the discretion to make the finding of good cause, and appellants cannot show that the court clearly abused that discretion. Similarly, the trial court did not violate appellants' right to a fair trial because it followed California law and simply reopened a fair and constitutional jury selection process while it still had the statutory authority to do so.

A. Procedural History

During voir dire, prospective Juror Lopez repeatedly stated that he would follow the law as given by the trial court and that any ambivalence he had shown on his questionnaire had been resolved in favor of following the trial

court's instructions. (11 RT 2033–2038; see 31 CT 8102–8143 [questionnaire].) In particular, the trial court noted that Lopez had indicated in his questionnaire that he might not be able to set aside his religious beliefs to follow the law. But Lopez answered that he was not sure at that point what the law was, and based on what he had heard thus far, his religious beliefs would not interfere with his ability to apply the law. (11 RT 2034–2035; see 6 CT 1658–1659 [this question was submitted by Cruz regarding questionnaire question number 73].)

Lopez repeatedly stated that he would be able to set aside his religious beliefs even if he had to impose the death penalty. (11 RT 2034–2036.) The trial court noted that Lopez had indicated on the questionnaire that he was "'undecided'" about the death penalty. Lopez said that, after hearing the trial court's explanation of his responsibility as a juror, he felt he could apply the law. (11 RT 2036.)

The prosecutor asked the trial court to follow-up on Lopez's answer to Question 55 in which he indicated his sister worked for the state judicial system. After Lopez indicated he did not know what office his sister worked for, the prosecutor and Cruz's attorney declined to raise a challenge. (11 RT 2039.)

Beck's attorney asked, "Mr. Lopez, under your current frame of mind, you know, what are your feelings about the death penalty?" Lopez answered, "That I'll follow the law." (11 RT 2039.) After Cruz passed for cause, Beck's attorney asked two more questions, and Lopez indicated that the death penalty "should be applied to some cases," but he did not have any preconceived ideas of what type of cases that would be. (11 RT 2039–2040.) Then the remaining defendants declined to challenge Lopez. (11 RT 2040.)

Voir dire continued for the rest of that day and into the next. (11 RT 2040–12 RT 2181, 2183.) After the full venire was seated and all the parties

passed for cause, the trial court prepared to swear-in the jury. The trial court asked the prospective jurors to raise their hands if they felt they could not be fair and impartial; if there were any court rules they disagreed with; and if there were any rules of law they could not follow. (12 RT 2181–2182.) The clerk began to swear in the jury, but then stopped and told the trial court that Lopez had raised his hand. Lopez asked to speak to the judge in private. (12 RT 2182.)

In chambers, Lopez said:

> I am not really certain about the death penalty, sir, whether I can render death penalty as a judgment. I would rather choose life in prison for the convicted person. I am not sure because of religion reasons and other reasons that, you know, I can render death penalty.
>
> I believe that [if] a man has done something wrong, that he should be punished. I just am not absolutely certain right now, due to religious reasons, that I'm doing the right thing if I have to decide on the death penalty.

(12 RT 2183.)

After a break to review the transcript of Lopez's voir dire the previous morning, the trial court asked the prosecutor if he had any questions. He requested the "*Witherspoon* questions," and appellants' counsel concurred. (12 RT 2184–2185.) Counsel for LaMarsh and Willey initially stated they had no questions, but then requested that the trial court not ask Lopez any questions. Appellants' attorneys then retracted their request for additional questions and joined LaMarsh and Willey's objection. (12 RT 2185.) The trial court overruled the objection and questioned Lopez. The trial court asked Lopez if he could impose the death penalty if he thought it was appropriate. Lopez responded, "[T]here is one case where I think I can vote for the death penalty, which is . . . [i]f the persons are repeat offenders or the Court can prove that they will kill again." (12 RT 2186.) The trial court asked several standard

questions about the death penalty, and Lopez said he would follow the law. (12 RT 2186–2187.) However, after Lopez again indicated "I am really not sure about the death

penalty in the sentencing of a person to death," Beck's attorney renewed his objection to further questioning. (12 RT 2187.)

After a couple more questions, Lopez said, "I'm not 100 percent sure whether I'm–I can [impose the death penalty] or not. I don't want to–if I get selected as a juror, I don't want to be the last person to say or to be the only different person." (12 RT 2188.) The trial court asked a few more questions, and Lopez grudgingly acknowledged that he did not have to agree with the other jurors. (12 RT 2188–2190.)

The trial court had Lopez leave chambers and the parties stated their positions. The prosecutor argued, "I'm not sure that we have a challenge for cause; but I would certainly, in any event, ask to reopen to exercise a peremptory challenge. I think it's rather obvious that he's having some very serious problems within himself over the issue . . . ." (12 RT 2190.) Attorneys for all four defendants argued against reopening voir dire. (12 RT 2190–2193.) Beck's attorney said, "It would be absolutely improper to do anything but swear the jury, and I'm going to demand at this time that the Court swear the jury." (12 RT 2192.)

The prosecutor argued:

> Your Honor, yesterday on Page 2039 and 2040 of the transcript, Mr. Lopez, when asked by the Court if he had any thoughts about when the death penalty should be imposed, when it shouldn't be and what cases should apply to and what cases it should not apply to, he answered, "I believe it should be applied to some cases."
>
> The Court asked if he had any preconceived ideas about what cases it should be applied; and he said, "No, I don't."

> In my notes here I've written, "No preconceived ideas, believes death penalty should be applied to some cases."
>
> The statement that he just made today flies in the face of that. When asked what kind of case he could vote for the death penalty, he said only one kind; and that's when you've shown that they've killed before and will do it again.
>
> And, obviously, that's something that didn't come up yesterday that certainly affects my opinion as to whether or not he can be a fair and impartial juror.

(12 RT 2193–2194.)

After a recess, the prosecutor argued that there was good cause for the trial court to reopen voir dire. Beck's counsel argued it was improper under Proposition 115 to conduct voir dire solely for the purpose of determining whether to exercise peremptory challenges. He also argued there was not good cause to reopen voir dire because Lopez's questionnaire should have put the prosecutor on notice that Lopez had conflicting feeling about the death penalty. (12 RT 2195–2198.)

The trial court acknowledged that if Lopez had stated in his first voir dire what he said in his second, the prosecutor may well have used a peremptory challenge. However, there was still insufficient basis to excuse him for cause, and the trial court declined to reopen so the prosecutor could exercise a peremptory challenge. However, the trial court agreed to not swear-in the jury for a few days so the prosecutor could apply for a writ or make further argument. (12 RT 2208–2217.)

Five days later, the prosecutor filed a written motion for reconsideration. (12 RT 2238; 6 CT 1685–1695.) The prosecutor argued that the new information made Lopez challengeable for cause. (12 RT 2244–2246.) "In any event, I don't think there's any harm to the defendants to allow reopening of voir dire under either situation, for cause or peremptory. They have many

challenges left, as do I, and the harm to the People in this case would be irreparable because there's no remedy at law." (12 RT 2246.)

The trial court ruled:

> In view of the answers given by Mr. Lopez in court last Thursday, coupled with the answers he had previously given, I believe, two days earlier, coupled with his answers in the questionnaire, the Court finds as it did last Thursday that Mr. Lopez's beliefs re the death penalty are not such as would make him unfit to serve as a juror in this case.
>
> Mr. Lopez has consistently been ambivalent about his ability to impose the death penalty. However, he has been clear that he understands what he has been told concerning the law about the death penalty, and he either believes that his feelings about the death penalty are not so strong as to interfere with his duty as a juror or that he's not sure if his beliefs are so strong as to interfere with his duties as a juror.
>
> Further, and perhaps what is most important, Mr. Lopez has clearly expressed and reiterated that if he came to the conclusion that his beliefs about the death penalty were so strong that he could no longer follow the law and perform his duties as a juror, he would tell us.
>
> I still find that Mr. Lopez is not challengeable for cause.
>
> So far as whether the Court does have the power to reconsider the ruling it made last Thursday, when there are no changes in the facts, under *Lopez versus Larson*, 1979, 91 Cal.App.3d 383, 392, it is clear that it does.
>
> I denied the motion, and the denial was a non-appealable order, just as it was in *Lopez*. And there are no new facts between the time of my ruling last Thursday and now, just as there was in *Lopez*.
>
> So far as whether the Court can allow reopening to exercise peremptory challenges, I'm sure I said last Thursday CCP 231(d)–it's either (d) or (e)–allows such if there is good cause.

In denying the motion last Thursday, I commented that the cases allowing the reopening dealt with reopening before any intervening challenges had been made and I did not want to speculate how the defendants may have exercised their peremptory challenges had Mr. Brazelton peremptorily excused Mr. Lopez before passing his challenge, or in particular at a time earlier when Mr. Lopez was originally questioned.

On reflection, the Court should not have entertained that consideration. That Mr. Brazelton could just as easily have exercised a challenge to Mr. Lopez on his last turn and the defendants would be in the same position that they will be if I allow the motion to reopen. It will simply be their challenge.

In determining whether there was CCP 231(d) good cause, I took into consideration all the information Mr. Brazelton had based on the answers in the questionnaire, Mr. Lopez's answers in open court. I coupled that with the erroneous consideration on my part with the effect on the defendants' exercise of their peremptory challenges.

Further, the Court was unaware of the *In re Mendes* case, 1979, 23 Cal.3d 847, which although factually inapposite to the instant case, does make it clear that reopening to exercise a peremptory challenge long after the jury–juror had been passed for cause, actually sworn, but before the entire panel was completed, is permissible if there was good cause for the failure to exercise the challenge earlier.

In the instant case there was a significant interval between the time Mr. Lopez was orally examined and the request to reopen. But in the instant case Mr. Lopez was not even personally sworn as a juror, as was the situation in *Mendes*.

In the jury selection process in the instant case, it's become abundantly clear that many of the prospective jurors have modified their opinions on various subjects, including the death penalty, between the time that they filled out the questionnaires and after being given a short lecture on the various rules of law that may apply to this case and answering orally in court.

> The reasonableness of Mr. Brazelton's declaration that he decided, based on Mr. Lopez's oral answers, not to peremptorily challenge him cannot be questioned.
>
> *People versus Niles*, 1991 case at 233 Cal.App.3d 315, it held that the good cause shown must relate to the reason to reopen, i.e., why was the challenge not made earlier? Good cause does not go to the reason for the peremptory challenge itself. Further, and partially relying on the *Niles* case to deny the motion last Thursday, the Court had only seen a synopsis of that case, and the Court commented that perhaps it was necessary to be able to state a challenge for cause before finding good cause to allow reopening to exercise a peremptory challenge. And after reading the entire *Niles* case, I withdraw that comment. What *Niles* did hold was that where the moving party presented absolutely no new facts in support of his motion to reopen, the Court did not abuse its discretion in finding no good cause to reopen.
>
> In the instant case there were new facts, Mr. Lopez's return to his questionnaire state of mind. Last Thursday the Court should have only considered that new state of facts and should not have further taken into consideration how the failure to earlier challenge Mr. Lopez would have affected the defendants' peremptory challenge. And if it had done so, the Court would have granted the motion then.
>
> The Court finds that Mr. Lopez's volunteered comments to the Court, along with his subsequent answers to questions put to him, establish the good cause for the district attorney to reopen to exercise peremptory challenges. It will be the district attorney's challenge, followed by the defendants . . . .

(12 RT 2246–2249.)

The next day, the trial court reopened voir dire. After the prosecutor peremptorily challenged Lopez, the trial court excused him and proceeded with further jury selection. (13 RT 2260.)

B. Legal Principles

A challenge to an individual juror may only be made before the jury is sworn." (Code Civ. Proc. § 126, subd. (a).)

> (a) In criminal cases, if the offense charged is punishable with death, or with imprisonment in the state prison for life, the defendant is entitled to 20 and the people to 20 peremptory challenges . . . .
>
> (d) Peremptory challenges shall be taken or passed by the sides alternately, commencing with the plaintiff or people; and each party shall be entitled to have the panel full before exercising any peremptory challenge. When each side passes consecutively, the jury shall then be sworn, unless the court, for good cause, shall otherwise order. The number of peremptory challenges remaining with a side shall not be diminished by any passing of a peremptory challenge.
>
> (e) If all the parties on both sides pass consecutively, the jury shall then be sworn, unless the court, for good cause, shall otherwise order. The number of peremptory challenges remaining with a side shall not be diminished by any passing of a peremptory challenge.

(Code Civ. Proc. § 231, subds. (a), (d), and (e).)

> [W]hen both sides consecutively pass on peremptory challenges, they indicate to the trial court that they are each satisfied with the composition of the jury and that the jury may be sworn. At that point, and even though the jury is not actually sworn, any remaining peremptory challenges may be exercised only at the discretion of the trial court, based upon a showing of good cause.[fn. 4]
>
> FN4. The good cause showing which we impose by our holding here does not require the party to show good cause for the challenge. The requirement applies only to the request to reopen. In other words, the party need not explain the basis for the peremptory challenge, but must make a sufficient showing to persuade the court to allow the belated exercise of that challenge.

(*People v. Niles* (1991) 233 Cal.App.3d 315, 320 & fn. 4 (*Niles*).)

Once both sides pass their peremptory challenges consecutively, they "no longer ha[ve] an unqualified right to exercise such a challenge . . . . At that point, the exercise of the remaining peremptory challenge [i]s no longer a matter of right but rather a matter within the discretion of the trial court,

contingent upon [the party's] showing of good cause. The trial court's exercise of that discretion will not be set aside absent a clear showing of abuse." (*Niles*, *supra*, 233 Cal.App.3d at pp. 320–321, citing *People v. Giminez* (1975) 14 Cal.3d 68, 72.)

C. The Trial Court Properly Used Its Discretion To Reopen Jury Selection

Code of Civil Procedure section 226, subdivision (d), provides, "If all the parties on both sides pass consecutively, the jury shall then be sworn, unless the court, for good cause, shall otherwise order." Appellants begin their argument by suggesting that the "good cause" provision is not integral to the statute, but rather is some kind of failsafe afterthought that can only be invoked in extreme circumstances. For example, when quoting the statute, appellants italicize the sentence only up until the part where it says "shall be sworn," as if suggesting that the remainder of the sentence is unimportant. (BOB 120; Cruz Joinder.) They assert that, here, after the parties had passed on the jury, "further use of peremptory challenges by either side was barred, and under the mandate of section 231(d) the trial court was required to swear the jury." (BOB 120; Cruz Joinder.) They assert that, by reopening voir dire, the trial court "disregar[ed] the mandate of section 231(d)." (BOB 121; Cruz Joinder.) And they falsely suggest that in *Niles*, the court found that the parties could exercise "peremptory challenges only until both sides pass consecutively, after which the jury *shall* be sworn."[61] (BOB 122, italics in original; Cruz Joinder.) Appellants are wrong. The good cause provision is an integral part of the statute, and the trial court had broad discretion to use it. In fact, a trial court's use of the good cause

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61. *Niles* was actually interpreting the language of former section 1088. However, the language is exactly the same, including, of course, the good cause exception. (*Niles*, *supra*, 233 Cal.App.3d at p. 319.)

provision can be overruled on appeal only if it was a clear abuse of discretion. (*Niles*, *supra*, 233 Cal.App.3d at pp. 320–321.)

Appellants try to use *Niles*, the main case on point, for the proposition that parties must make a substantial showing of changed circumstances before a trial court can use its discretion to apply the good cause provision. (BOB 123; Cruz Joinder.) However, while *Niles* found that a party had to make *some* showing of good cause, it did not address the quantum of that showing. Rather, *Niles* held only that the trial court's decision to not find good cause and not allow the defendant to use another peremptory challenge was not a clear abuse of discretion. (*Id.* at p. 321.) To the extent *Niles* said anything about the party's burden to prove good cause, it found that the defendant had not turned up *any* new information, but had merely reconsidered his decision from the previous day when he agreed the juror should remain on the panel. (*Ibid.*)

Therefore, properly read, *Niles* supports only the proposition that the trial court's discretion to apply or not apply the good cause exception is quite broad. While trial courts must have *some* reason to use their discretion, contrary to appellants' argument, *Niles* does not impose a substantial burden on the parties. Thus, in the present matter, *Niles* supports the People's position that the trial court had the discretion to reopen jury selection. As the trial court noted, "In the instant case there were new facts, Mr. Lopez's return to his questionnaire state of mind." (12 RT 2249.)

The record below shows that Lopez expressed some doubts about his ability to impose the death penalty on his questionnaire; then he reassured the parties and the trial court during voir dire that all of his doubts had been resolved; and then, literally seconds after the prosecutor passed for cause, he raised his hand to say that he was not so sure, after all, that he could put his religious feelings aside and follow the law.

Lopez raised his hand after the trial court asked, "Are there any rules of law that I explained that you could not follow?" (12 RT 2182.) That, alone, showed that Lopez had substantial doubts about his ability to follow the law. In chambers, Lopez said, "I am not really certain about the death penalty, sir, whether I can render death penalty as a judgment . . . . I am not sure because of religion reasons and other reasons that, you know, I can render death penalty." (12 RT 2183.) That statement cast serious doubt on whether Lopez would be able to fulfill his duty as a juror. (See *People v. Carpenter*, *supra*, 15 Cal.4th at p. 355.)

Similarly, Lopez later said the death penalty was justified only if the defendants were repeat offenders or the court could prove they would kill again. (12 RT 2186.) There was no evidence that appellants (or the other defendants) were repeat offenders. And Lopez was not allowed to make up his own rules for when to impose the death penalty. No human could possibly prove that appellants would definitely kill again if they were not put to death. Both of these preconditions rendered Lopez unfit to serve as a juror because they "would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" (*Wainwright v. Witt*, *supra*, 469 U.S. at p. 424.)

Appellants try to show that Lopez's statements were insignificant by asserting that "the state conceded it did not have a challenge for cause but moved to re-open jury selection to peremptorily challenge Mr. Lopez. (RT 2190.)" (BOB 119, footnote omitted; Cruz Joinder.) Appellants misread the record. The prosecutor actually said, "I'm not sure that we have a challenge for cause . . . ." (12 RT 2190.) Later, the prosecutor did move to excuse Lopez for cause. (12 RT 2244–2246.) "I would strongly urge the Court to allow a challenge to Mr. Lopez for cause or, in the alternative, to allow the reopening of peremptories." (12 RT 2245.)

Contrary to appellants' argument, Lopez's statements in camera constituted new information, and it contradicted Lopez's earlier assurances during voir dire. When the prosecutor passed for cause, he believed Lopez's representation that he could set aside his religious feelings and follow the law. However, Lopez's subsequent statements demonstrated that he had serious doubts about his ability to do so. Because the prosecutor had new information which changed his evaluation of Lopez's disposition towards the death penalty, he had good cause to seek the reopening of voir dire. The trial court did not clearly abuse its discretion by finding that the prosecutor's request had merit and was good cause to reopen jury selection. (See *Niles*, *supra*, 233 Cal.App.3d at p. 321.)

Nevertheless, appellants claim the trial court abused its discretion by reopening jury selection because, during his in camera voir dire, Lopez assured the trial court he would follow the law. (BOB 126.) However, appellants not only ignore what Lopez said in camera, they refuse to acknowledge that it was significant that Lopez voluntarily came forward and expressed his misgivings about imposing the death penalty. Moreover, by insisting that Lopez said nothing new, appellants seem to suggest that the prosecutor must have been irrational to suddenly seek Lopez's removal. Likewise, appellants imply that the trial court's thoughtful analysis was also based on a misconception. And finally, by insisting that Lopez merely repeated his intention to follow the law, appellants fail to explain why all the defendants tried so hard to stop the trial court from questioning Lopez further about his feelings on the death penalty. (12 RT 2185 [all four defendants objected to questioning Lopez]; 12 RT 2187 [Beck's attorney objected again: "I'm going to object to any further questioning . . . . I think that any further questioning is not necessary and would be prejudicial to the defendants."]; 12 RT 2192 [Beck's attorney again objected to further questioning: "It would be absolutely improper to do anything but swear the jury, and I'm going to demand at this time that the Court

swear the jury."]; but see BOB 134; Cruz Joinder [appellants acknowledge that Lopez "seemed inclined to give serious consideration to a sentence less than death"].)

Appellants claim that some of Lopez's answers on the questionnaire should have put the prosecutor on notice that Lopez had some ambivalence about the death penalty. That may be true. But those concerns were neutralized by Lopez's consistent statements during voir dire that he could set aside his religious feelings and apply the law as given. (11 RT 2033–2038.) The prosecutor correctly argued that during voir dire, Lopez said the death penalty should be applied in "some cases," but he did not have any preconceived ideas about which cases would be appropriate. The prosecutor argued that he took Lopez at his word. "In my notes here I've written, 'No preconceived ideas, believes death penalty should be applied to some cases.'" The prosecutor then complained, however, that Lopez had changed his mind and now believed the death penalty was appropriate only when the prosecutor could show the defendant had "killed before and will do it again. And, obviously, that's something that didn't come up yesterday that certainly affects my opinion as to whether or not he can be a fair and impartial juror." (12 RT 2193–2194.)

The trial court reasonably concurred with that assessment. "The reasonableness of Mr. Brazelton's declaration that he decided, based on Mr. Lopez's oral answers, not to peremptorily challenge him cannot be questioned . . . . In the instant case there were new facts, [i.e.,] Mr. Lopez's return to his questionnaire state of mind." (12 RT 2248–2249.) It was reasonable for the prosecutor to have relied on Lopez's voir dire answers, and to have believed that, over the course of a long voir dire process, Lopez had resolved any doubts he had about following the law. Similarly, it was reasonable for the prosecutor to reevaluate that position when Lopez volunteered that he was having doubt about his ability to follow the law.

Appellants also blame the trial court, arguing that since "the trial court conducted the questioning of Mr. Lopez any fault in failing to review Mr. Lopez's questionnaire responses falls upon the trial court." (BOB 126; Cruz Joinder.) That is doubtful, since as appellants acknowledge elsewhere, Lopez reassured the trial court that any doubts he had about imposing the death penalty had been resolved and he was ready to follow the trial court's instructions. Moreover, the length of the trial court's voir dire of Lopez was similar to its questioning of other prospective jurors who gave appropriate answers. But even if appellants were correct that the trial court conducted inadequate voir dire of Lopez, that does not mean there was no remedy. If the trial court was at fault, then it was justified in conducting further voir dire in chambers. And that further voir dire would serve no purpose if the trial court did not also have the discretion to use Lopez's answers to determine whether to reopen jury selection.

In summary, Lopez's change of heart regarding his ability to impose the death penalty was a sufficient basis for the trial court to find good cause to reopen voir dire. As discussed above, *Niles* and other cases which found that the trial courts did not abuse their discretion by *denying* motions to reopen voir dire do not help appellants. (See, e.g., *Niles*, *supra*, 233 Cal.App.3d at p. 320; *People v. Williams*, *supra*, Cal.4th at p. 229; *People v. Bradford*, *supra*, 15 Cal.4th at pp. 1354–1355.) Those cases do not stand for the proposition that parties have a heavy burden to convince a trial court of good cause to reopen jury selection. Rather, they teach that the trial court has broad authority to decided *whether* to reopen jury selection. Thus, in the present matter, they support the trial court's exercise of its discretion to reopen voir dire. Appellants cannot show that the trial court clearly abused its discretion. (See *Niles*, *supra*, 233 Cal.App.3d at pp. 320–321.)

D. The Trial Court Did Not Deprive Appellants Of Their Due Process Right To An Impartial Jury

Appellants complain they were deprived of their right to due process and a fair trial. But the People also had a right to a fair trial. Here, it was not even a full minute between the time the prosecutor made his final pass and Lopez advised the court that he had something he needed to say.[62] Once Lopez raised his hand, everyone was on notice that there was a problem. And once the trial court made its determination that voir dire should be reopened, it was no great detriment to appellants to return the trial to where it had been one minute before Lopez raised his hand.

Not only did appellants oppose turning the clock back one minute, they opposed even finding out what Lopez's concerns were. In chambers, as soon as Lopez stated that he wanted to talk to the trial court about his doubts about the death penalty, all of the defendants objected to further questioning. Thus, the defendants were not interested in a full hearing, an informed resolution, and a fair trial. Appellants' only interest was in seating a juror who was clearly favorable to the defense–even if that might mean having someone who was not willing to follow the law or fulfill his duties as a juror.

In short, appellants' due process rights could not have been violated by merely allowing the parties to resume jury selection. If Lopez had spoken up a minute earlier, there would not even be an issue. Unlike *People v. Cottle* (2006) 39 Cal.4th 246, which appellants cite for the proposition that the trial court was statutorily barred from reopening voir dire, here the jury had not been

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62. There are only eighteen lines (just over half a page) in the Reporter's Transcript between when the prosecutor passed on the jury and when the clerk advised the trial court that Lopez was raising his hand to say something. (12 RT 2181–2182.) It takes less than a minute to read those lines aloud with a normal cadence. By contrast, in *Niles*, months passed between the time the parties passed on the jury and the time the defendant asked to reopen jury selection. (233 Cal.App.3d at p. 318.)

sworn. (See Code Civ. Proc., § 126 [parties may exercise peremptory challenges until jury is sworn].) Moreover, there was no change in circumstances, nor detrimental reliance, that put appellants in a worse position than they were in before Lopez raised his hand.

The trial court acted on its clear statutory authority pursuant to Code of Civil Procedure section 231, subdivision (d). There was no lack of notice and the trial court acted pursuant to well-established procedures. Thus, appellants' rights to due process and a fair trial could not have been violated by the trial court's reasonable use of its statutory discretion. (See *People v. Griffin*, *supra*, 33 Cal.4th at p. 567, fn. 14 [since trial court's decision to not reopen jury selection was proper, there was no denial of due process].)

Finally, appellants' due process rights were not violated by allowing the prosecutor to peremptorily challenge Lopez on the basis of his views on the death penalty. As Beck's trial counsel correctly acknowledged, California law permitted the trial court to reopen voir dire for the purpose of allowing peremptory challenges. (12 RT 2197 ["the case law seems to allow the Court to allow further preempts on good cause"].) In a capital trial, both sides may exercise peremptory challenges "on the basis of specific juror attitudes on the death penalty." (*People v. Avila*, *supra*, 38 Cal.4th at p. 558, quoting *People v. Turner*, *supra*, 37 Cal.3d at p. 315, overruled on another ground in *People v. Anderson*, *supra*, 43 Cal.3d at p. 1115; also citing *People v. Brown* (2004) 33 Cal.4th 382, 403; *People v. Burgener* (2003) 29 Cal.4th 833, 864; *People v. Cox* (1991) 53 Cal.3d 618, 648-649.) "Excusing prospective jurors who have a religious bent or bias that would make it difficult for them to impose the death penalty is a proper, nondiscriminatory ground for a peremptory challenge." (*People v. Cash*, *supra*, 28 Cal.4th at p. 725, citing *People v. Ervin*, *supra*, 22 Cal.4th at p. 76 and *People v. Catlin* (2001) 26 Cal.4th 81, 118-119; see also *People v. Bolin*, *supra*, 18 Cal.4th at p. 317 [prosecutor's use of peremptory

challenges to excuse prospective jurors "who expressed scruples about imposing the death penalty" did not offend *Witt*, *Witherspoon*, or any constitutional rights].) "A juror's reluctance to impose the death penalty, even if insufficient to justify a challenge for cause, is a valid reason for a prosecutor to exercise a peremptory challenge." (*People v. Ledesma*, *supra*, 39 Cal.4th at p. 678, citing *People v. Johnson* (1989) 47 Cal.3d 1194, 1222.) Accordingly, the trial court properly exercised its authority to reopen voir dire, and that did not deprive appellants of due process or a fair trial. (See *People v. Avila*, *supra*, 38 Cal.4th at p. 558 [no constitutional violation in permitting peremptory challenges on the basis of specific juror attitudes on the death penalty]; *People v. Griffin*, *supra*, 33 Cal.4th at p. 567, fn. 14 [trial court's proper use of discretion regarding whether to reopen voir dire does not violate due process].)

E. Any Error Was Harmless

Appellants claim that the trial court should not have given the prosecutor the opportunity to exercise a peremptory challenge against Lopez. However, appellants have made no claim or showing that the juror was excused for an impermissible purpose. At most, the trial court abused its discretion by reopening voir dire. Therefore, any error was state law error. As discussed elsewhere, the evidence against appellants in both the guilt and penalty phases was overwhelming. Therefore, since appellants contend that Lopez would have followed the trial court's instructions–or would have been excused by the trial court when he told the court he could not follow the law[63]–they cannot show

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63. During the trial court's preliminary ruling, when it stated that Lopez would not be excused, it noted, "I'll again tell Mr. Lopez that if his feelings about the death penalty do become so strong that he feels he can no longer follow the law, he's to bring that to our attention at once . . . . And I'll advise counsel at that point he may well become challengeable for cause and replaced by an alternate." (12 RT 2210.) Later, Lopez assured the trial court that he would speak up if he felt he could not follow the law. (12 RT 2219.)

that there is a reasonable probability that if Lopez had remained on the panel, they would have received a better result. (See *Watson*, *supra*, 46 Cal.2d at pp. 836-837.)

XVIII.

THE JURY SELECTION PROCEDURES DID NOT FAVOR THE PROSECUTION; THE TRIAL COURT PROPERLY EXCLUDED JURORS WHO EXPRESSED THEIR UNEQUIVOCAL OPPOSITION TO THE DEATH PENALTY

Appellants assert that several aspects of the jury selection process were biased in favor of the prosecution. (BOB 140; Cruz Joinder.) However, none of the claims have merit. First, appellants argue that the trial court generally refused to ask defense counsel's written follow-up questions. That is incorrect. There are numerous examples of the trial court inviting defense counsel to either submit written questions or to ask them orally. And though the record is not as clear as it could be, there is no doubt that the trial court asked many of defense counsel's follow-up questions. Moreover, appellants never bother to show that the trial court treated the prosecutor's follow-up questions any differently.

Second, regarding the reopening of jury selection discussed in Argument XVII, appellants claim the trial court allowed only the prosecutor to use voir dire to determine whether to use a peremptory challenge. However, that was clearly an exceptional situation based on extenuating circumstances and good cause. Moreover, the purpose of reopening voir dire was not to give the prosecutor an advantage, but to remedy a situation in which the prosecutor had acted on misleading information.

Third, appellants claim the trial court allowed the prosecutor to rehabilitate prospective "pro death" juror Navarro, but did not allow the defendants to rehabilitate prospective jurors with scruples about the death penalty. However,

the trial court allowed the prosecutor to ask only *one* follow-up question of Navarro. Moreover, it also allowed defense counsel to ask follow-up questions for the purpose of rehabilitating other jurors.

Finally, appellants argue that in every instance in which a prospective juror stated he was opposed to the death penalty, the trial court refused to ask follow-up questions. Appellants are wrong. The trial court asked many questions of prospective jurors who expressed opposition to the death penalty, and it allowed defense counsel to do the same. It cut off further questioning only when it was apparent that the prospective jurors' beliefs would interfere with their ability to follow the law.

A. The Trial Court Treated The Follow-up Questions Equitably

Appellants argue that "although the trial court informed both sides that it would allow counsel to submit written questions to be asked of the jurors (RT 1262), the court, with rare exception, refused to ask defense counsel's proposed questions." (BOB 140, footnote omitted; Cruz Joinder.) Appellants are mistaken. First, they cannot prove their claim that the trial court discriminated against the defendants unless they show that the trial court treated the prosecution differently. Since appellants make no argument on this point, and do not cite the record for examples of disparate treatment or favoritism towards the prosecution, their argument necessarily fails. (See 10 RT 1858 [after the voir dire of numerous prospective jurors, the trial court noted, "The record should reflect that Mr. Amster is the only one who has submitted written questions for me to ask."]; 6 CT 1636–1673 [Cruz's written questions].) Moreover, the record has many examples of prospective jurors who were challenged by defense counsel after a relatively brief voir dire and no follow-up questions by the prosecutor. (See, e.g., 11 RT 2082–2084 [prior to the trial court granting the defendants' challenge for cause, Cruz argued, "I don't think there should be any attempt to rehabilitate her"]; 11 RT 2102 [Cruz argued,

"Your Honor, at this time I think that the juror has expressed her opinion enough that . . . there should not be an opportunity to rehabilitate her"; the trial court then excused the juror for cause].)

Second, appellants fail to show that it was a "rare exception" for the trial court to ask defense counsel's questions. The record is not very clear regarding the origin of the trial court's voir dire questions because the trial court generally did not specify who authored its questions. (See 6 CT 1636–1673 [Cruz's written follow-up questions]; 10 RT 1858 [trial court noted that no one else submitted written questions]; but see 42 CT 10710 [trial court's order settling the record found "it cannot be determined whether or not the questions asked were the questions actually submitted."].) Nevertheless, it does appear that many of its questions came from counsel.[64]

As appellants acknowledge, the trial court stated that it would ask the parties' follow-up questions. (BOB 140, citing 6 RT 1262; Cruz Joinder.) The record also shows that the trial court repeatedly asked counsel to submit written questions (see, e.g., 6 RT 1261–1263; 10 RT 1858, 1904–1905, 1938; 11 RT 2071; 14 RT 2425, 2501), and it seems unlikely that it kept doing that throughout voir dire, but never actually asked any of those questions. It also sometimes indicated that it had asked written follow-up questions; and it frequently invited counsel to ask follow-up questions orally.

Though it appears that the trial court generally asked defense counsel's follow-up questions without noting that fact for the record, there are numerous examples of the attorneys reminding the trial court to ask those questions, or defense counsel asking follow-up questions orally, or defense counsel complaining that the trial court asked only some of their questions. (See, e.g.,

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64. The trial court also noted that defense counsel were permitted to ask the prospective jurors a hundred questions on the questionnaire. (6 RT 1261.) A short while later, all counsel stated they were satisfied with the final draft of the questionnaire. (7 RT 1271.)

10 RT 1922 [Beck's counsel complained that the trial court had only asked some of the written questions submitted by Cruz]; 10 RT 1923 [trial court replied, "The Court feels that it has asked all of the follow-up questions necessary to assist counsel in exercising challenges to cause."]; 11 RT 1998–1999 [after the trial court concluded its questioning, Cruz reminded the court that he had additional questions and the trial court resumed its questioning]; 11 RT 2018 [Beck and Willey said they each had questions; the trial court directed them to hand them to the bailiff; then the trial court asked the questions]; 11 RT 2058–2059 [Beck complained that a question and answer about self-defense was inadequate and the trial court asked two additional questions]; 11 RT 2059 [LaMarsh asked a follow-up question]; 11 RT 2065 [trial court declined to ask Cruz and Beck's follow-up questions because it had already decided to grant their challenge for cause]; 13 RT 2309 [Willey stated he had a follow-up question; trial court asked him to hand it to bailiff, and trial court asked the question]; 13 RT 2315–2316 [trial court asked bailiff to bring it written questions from Beck and LaMarsh, and then it asked two more questions]; 13 RT 2372 [Willey asked the trial court to delve further into a questionnaire answer and the trial court asked a follow-up question]; 13 RT 2377 [trial court asked Beck's follow-up question]; 13 RT 2382 [Cruz reminded trial court about a follow-up question and trial court thanked counsel and asked the question]; 14 RT 2521 [Cruz said if the trial court asked a follow-up question he might pass for cause; trial court asked the question and Cruz passed for cause]; 14 RT 2598 [Cruz said he had follow-up questions and trial court asked two]; 14 RT 2608 [trial court asked Beck's follow-up question].)

A telling example pertains to prospective juror Lopez who is also discussed in Respondent's Argument XVII. In Cruz's list of questions to be asked of jurors, he requested that the trial court ask Lopez eleven follow-up questions. The trial court asked six of those questions, i.e., more than half. (6 CT

1658–1659; 11 RT 2036–2039 [trial court asked Cruz's questions about Lopez's sister being robbed; his sister's work; his father's work as a policeman; his answer to questionnaire question number 73 regarding whether defendants should be required to testify; his answer to questionnaire question number 92 regarding his feelings about psychology; and whether someone who commits multiple murders should automatically receive the death penalty]; also compare 6 CT 1670-1671 [Cruz's written questions for juror Sherburne] with 12 RT 2154–2158 [voir dire of Sherburne].)

In addition, defense counsel often complained when the trial court refused to ask follow-up questions of prospective jurors who had unequivocally indicated they would never vote for the death penalty. However, the trial court made it clear it was not allowing follow-up questions because the jurors were past rehabilitation–not because it had a policy of requesting follow-up questions that it never asked. If the trial court had categorically denied all follow-up questions, defense counsel would not have complained only when the trial court excused prospective jurors who were against the death penalty.

Third, appellants incorrectly complain that the trial court allowed only the prosecutor to ask *oral* follow-up questions. While the prosecutor asked many questions orally (see, e.g., 10 RT 1909–1910; 14 RT 2434), the trial court also allowed defense counsel to ask questions orally with roughly the same frequency (see, e.g., 10 RT 1901–1902, 1908–1909, 1938–1939; 14 RT 2521, 2583).

Accordingly, the trial court asked many of defense counsel's follow-up questions and appellants have failed to make any showing that the trial court showed favoritism towards the prosecutor.

B. The Trial Court Had Good Cause To Reopen Jury Selection, And That Was Not Part Of A Pattern Of Favoring The Prosecution

Appellants complain that "although the trial court stated it would not allow either side to use voir dire to aid in the exercise of peremptory challenges, as explained above, it allowed the prosecution this advantage to improperly exclude Juror Lopez." (BOB 140; Cruz Joinder.) However, as discussed in the previous argument, the trial court treated Lopez differently because he presented extenuating circumstances. The day after he assured the trial court (and the prosecutor) that he would follow the law, he expressed concern that his religious beliefs would not permit him to impose the death penalty.

Though appellants stubbornly insist that there was no significance to this revelation, the trial court and prosecutor reasonably thought otherwise. The trial court did not reopen voir dire to give the prosecutor an advantage, or "to aid in the exercise of peremptory challenges." It sought to remedy a situation in which the prosecutor had made an important decision with inaccurate information. Nor did the trial court ask Lopez questions to help the prosecutor decide whether to use peremptory challenges. The trial court simply sought to determine whether Lopez was fit to serve as a juror. That was a close question, and notwithstanding appellants' incorrect assertion otherwise (BOB 119; Cruz Joinder), the prosecutor did challenge Lopez for cause. (12 RT 2244–2246.)

In short, the trial court knew that if Lopez was not excused for cause, the prosecutor intended to peremptorily challenge him. But it did not reopen voir dire specifically for that purpose. Rather, it was simple fairness to allow the prosecutor to make a fully informed decision, i.e., with the knowledge that Lopez's reassurances that he would follow the law were less solid than they appeared during voir dire. Since nothing happened in the minute between when the prosecutor passed for cause and when Lopez expressed his concern, there

was no detrimental reliance and an easy remedy. Returning the parties to the status quo ante was fair; it was not an act of favoritism.

C. The Trial Court Allowed All Parties To Rehabilitate Prospective Jurors–except When It Became Clear That Their Feelings About The Death Penalty Would Interfere With Their Ability To Follow The Law

Appellants claim that the trial court "gave the prosecution the exclusive benefit of expanded voir dire to rehabilitate Juror Navarro, a pro death juror, while denying this opportunity to the defense." (BOB 140–141, footnote omitted; Cruz Joinder.) Appellants also claim that "the prosecutor was permitted by the trial court to pose several hypothetical questions to Mr. Navarro in order to rehabilitate this juror. (RT 1909–1912.)" (BOB 141; Cruz Joinder.) Appellants misread the record. The voir dire of Navarro was relatively short. The prosecutor asked *one* hypothetical question of Navarro. When he tried to ask another, Beck's attorney objected and the trial court did not allow the prosecutor to continue. (10 RT 1909–1910.) In addition, appellants omit the fact that Cruz's counsel also asked Navarro a question. The trial court broke it down into two parts and had Navarro answered both parts. (10 RT 1908–1909; see 6 CT 1647 [question came from Cruz's written follow-up questions].) Thus, there was nothing unfair about the way the trial court conducted voir dire of Navarro.

Appellants also claim that "the court went so far as to make its own attempt to rehabilitate [Navarro] *after* the prosecutor failed." (BOB 141; Cruz Joinder.) First, if the prosecutor "failed" in any way, it was in failing to convince the trial court to allow him to do further questioning. The fact that the trial court cut off the prosecutor after one hypothetical proves the trial court did not favor the prosecution. Second, the trial court did not try to "rehabilitate" Navarro; it asked one question and one clarifying follow-up question to make sure it understood Navarro's position. When Navarro made it clear that the only

circumstance in mitigation he would consider would be if the defendant were protecting his family, the trial court summarily granted the defendants' challenge for cause. (10 RT 1911–1912.) Contrary to appellants' argument, that does not show that the trial court tried to rehabilitate Navarro; nor did it demonstrate a pro-prosecution bias. It showed that the trial court was even-handed and thorough. (See *People v. Stitely*, *supra*, 35 Cal.4th at p. 539 [trial court has duty to devote sufficient time and effort to permit a reliable determination of whether the juror's views on capital punishment would prevent or substantially impair the performance of his or her duties].)

Next, appellants purport to contrast the supposed rehabilitation of "pro-death" Navarro, with the trial court's refusal to allow rehabilitation "in every instance where a prospective juror stated that he or she was opposed to the death penalty . . . ." (BOB 142.) As discussed above, there was virtually no rehabilitation of Navarro. Cruz, the prosecutor, and the trial court each asked one question of Navarro.

As for prospective jurors who stated they were "opposed to the death penalty," the record shows that the trial court asked each of them *many* questions before determining that they were unfit to serve as jurors. (See, e.g., 11 RT 2069–2071; 13 RT 2276–2280; 4 RT 2418–2424.) Appellants contend that, "unlike the instance with Juror Navarro, the trial court itself typically made no attempt to rehabilitate or inquire into these jurors' opinions." (BOB 143; Cruz Joinder.) However, the record reveals quite the opposite. The trial court asked the prospective jurors who opposed the death penalty more questions than it asked Navarro. Once Navarro made it clear that he was biased in favor of imposing the death penalty, the trial court granted the challenge for cause quickly.

To the extent appellants complain the trial court did not try to "rehabilitate" prospective jurors who were against the death penalty, they make a distinction

without a difference. The trial court asked all of the jurors many questions, and for the sake of their argument, appellants call the questions asked of Navarro "rehabilitation," but the questions asked of the anti-death penalty prospective jurors "voir dire." In fact, many of the questions asked by the trial court may have been based on the defendants' written follow-up questions. But in any case, the trial court did not need to "rehabilitate" prospective jurors once it became clear they would not put aside their beliefs and follow the court's instructions. (See *Lockhart v. McCree*, *supra*, 476 U.S. at p. 176; *People v. Avila*, *supra*, 38 Cal.4th at p. 529; *People v. Samayoa*, *supra*, 15 Cal.4th at p. 823 [trial court has discretion to deny all questioning by counsel when a prospective juror gives "unequivocally disqualifying answer[s]"]; *People v. Carpenter*, *supra*, 15 Cal.4th at p. 355 [trial court has discretion to refuse to allow defense counsel to question jurors for the purpose of rehabilitation if their answers made their disqualification unmistakably clear].) As discussed in the next argument, the trial court cut-off further voir dire only when it was clear that the prospective jurors would not be able to set aside their opposition to the death penalty and follow the law. (See e.g., 11 RT 2070 [juror stated, "I feel very strongly against the death penalty . . . but personally I feel like I could never vote for a death penalty."]; 13 RT 2280 [juror stated her opposition to death penalty was so strong it would interfere with his ability to function as a juror and she would never impose the death penalty].)

In conclusion, the trial court's jury selection process was fair and it was not biased in favor of the prosecution. Therefore, appellants cannot show that their right to due process and a fair trial were violated.

XIX.

THE TRIAL COURT DID NOT VIOLATE APPELLANTS' RIGHTS TO DUE PROCESS BY EXCLUDING PROSPECTIVE JURORS WHO OPPOSED THE DEATH PENALTY

Appellants contend that the trial court deprived them of due process by excusing prospective Juror Dobel and other prospective jurors who expressed opposition to the death penalty. While they concede that Dobel indicated she would have difficulty imposing the death penalty, they contend that the trial court abused its discretion because it should have found that Dobel could set aside her feelings and follow the law. (BOB 147–157; Cruz Joinder.) They are mistaken. Dobel not only articulated serious doubts about her ability to follow the law, she described the circumstances that might justify imposition of the death penalty. Her preconditions ruled out any possibility that she would impose the death penalty here–regardless of the weight of mitigating and aggravating factors.

Similarly, appellants cite the voir dire of nine prospective jurors who they contend were excluded solely on the basis of answers in their questionnaires which indicated opposition to the death penalty. (BOB 157–158.) Appellants are mistaken. Each of the challenged prospective jurors received adequate voir dire and were properly excused only when it became clear that they would not be able to follow the trial court's instructions and would never impose the death penalty.

A. The Trial Court Properly Excused Juror Dobel For Cause Because She Indicated She Could Not Set Aside Her Beliefs And She Would Not Follow The Death Penalty Law

This argument covers much of the same ground as Arguments III and IV-D-1. Therefore, Respondent asks that this Court refer to those arguments for a

general response. In particular, Argument III, subsections A (Procedural History) and B (Legal Principles) apply equally to both arguments.

As discussed in Argument III, Dobel's questionnaire is missing from the record. (19 CT 4449, 4462, 4464, 4595.) However, the full transcript of voir dire is in the record, and the trial court noted Dobel's significant questionnaire answers. After voir dire, the trial court invited the defendants to argue against excusing Dobel for cause, and they offered only one answer from her questionnaire as evidence that she would set aside her feelings and apply the law. (14 RT 2426 [LaMarsh cited Dobel's answer to Question No. 129].) However, the prosecutor had earlier cited Dobel's answer to that same question as evidence that she was unfit to serve as a juror. (14 RT 2424.) Question No. 129 asked, "Could you set aside your own personal feelings regarding what you think the law should be regarding the death penalty, and follow the law the Court instructs you?" (E.g. 29 CT 7302.) But even if Dobel answered that question affirmatively, her voir dire statements still cast serious doubt on whether she was fit to serve as a juror in a capital case.

During voir dire, the trial court asked Dobel, "Do you believe your feelings about the death penalty are so strong that they would substantially interfere with your ability to function as a juror in this case?" She answered, "Yes . . . . [I]t would take really a serious leap of some sort–and I'm not sure I'd be able to make it–to impose the death penalty." (14 RT 2422.) She stated she might be willing to impose the death penalty if the crime were "very bad, but I would still believe it was not to[o] right to have a part in the death of someone else in this manner." (14 RT 2423.) The trial court asked, "Is your belief such that you do not believe that you have the right to take part in a decision which would deprive a person of his life?" She answered, "Yes." (14 RT 2424.) The trial court noted that Dobel also indicated in her questionnaire that she did not believe in the death penalty; "'it hurts more than it helps'"; and she "strongly

opposes the death penalty" except in extreme "Dahmer-type cases." (14 RT 2428.) She also answered that she seriously doubted she would ever impose the death penalty and her feelings would affect her ability to find the defendants guilty. (14 RT 2430.) All of these reasons were sufficient for the trial court to excuse Dobel. (See *People v. Lewis*, *supra*, 26 Cal.4th at p. 353.)

Nevertheless, appellants argue that the trial court abused its discretion because Dobel said only that her feelings were "'possibly'" too strong to ever impose the death penalty; and the death penalty was appropriate in certain circumstances. (BOB 147; Cruz Joinder.) However, it is not an abuse of discretion when a trial court excuses a juror who states it is possible she will not follow the law. (*Lockhart v. McCree*, *supra*, 476 U.S. at p. 176 [a juror who is opposed to the death penalty may serve on a capital jury "so long as they *state clearly* that they are willing to temporarily set aside their own beliefs in deference to the rule of law" (italics added)].) Nor did the trial court abuse its discretion for excusing a juror who stated she would follow the law if the case met her preconditions. Dobel did say she would vote for the death penalty if she "felt it was appropriate." But after coyly stating "I guess the thing is whether or not I would believe it was appropriate," she submitted it was appropriate only in the most extreme "Jeffrey Dahmer"-type cases. (14 RT 2420–2411.)

While the murders in the present case were brutal, they did not rise to the level of Dahmer's crimes. Those murders extended over years; involved the sexual abuse and torture of his victims (including minors); involved dismemberment and the storage of human remains as trophies; and included a total of fifteen to seventeen victims. Therefore, because Dobel would impose the death penalty only in such an extreme case, she was unqualified to be a juror in the present matter. (See *People v. Fields*, *supra*, 35 Cal.3d at pp. 357-358 [trial court may excuse a juror who would automatically vote against the death

penalty in the case before him regardless of his willingness to consider the penalty in another case.] Similarly, Dobel also answered on the questionnaire that "the death penalty is never appropriate for first time offender." (14 RT 2429.) Here, appellants were first-time offenders. (41 RT 7367–7368 [Cruz testified in penalty trial that prior to this case, he had never been convicted of a felony and the only time he had been arrested was on a warrant for an outstanding traffic ticket]; 45 RT 8290 [trial court instructed Beck penalty jury that it could use lack of evidence of a prior felony as a factor in mitigation].) Thus, Dobel declared two prerequisites for imposing the death penalty, and both were missing from the crimes charged. Therefore, by Dobel's own terms, she would not have imposed the death penalty regardless of the relative weight of mitigating and aggravating circumstances. That, alone, was sufficient reason to excuse her for cause. (See *People v. Fields*, *supra*, 35 Cal.3d at pp. 357-358.) Combined with her other statements that she would not put aside her beliefs to follow the law, there can be no doubt that the trial court acted within its discretion to excuse a prospective juror whose views regarding capital punishment would substantially impair her ability to perform her duties as a juror. (See *Wainwright v. Witt*, *supra*, 469 U.S. at p. 424.)

B. The Trial Court Properly Excused For Cause Prospective Jurors Who Stated That Their Opposition To The Death Penalty Would Interfere With Their Ability To Follow The Law

Appellants list nine other prospective jurors who the trial court excused for cause. They do not bother to discuss their questionnaires or their answers during voir dire. Instead, they make the blanket argument that almost all of the "for-cause excusals were based . . . on the jurors[']written answers in the juror questionnaires"; there was no meaningful examination during voir dire; and defense counsel were not allowed to submit follow-up questions. (BOB 157–158; Cruz Joinder.) Appellants are mistaken. The trial court asked each

of the prospective jurors many questions; they all expressed strong opposition to imposing the death penalty; and in every instance, the trial court's primary basis for excusing the jurors was their oral answers during voir dire rather than their written answers on their questionnaires.

Similarly, the trial court's limitations on follow-up questions from defense counsel was proper because a trial court "possesse[s] discretion to conduct oral voir dire as necessary and to allow attorney participation and questioning as appropriate." (*People v. Robinson*, *supra*, 37 Cal.4th at p. 614.) The trial court also had broad discretion over the number and nature of questions on voir dire about the death penalty. (See *People v. Stitely*, *supra*, 35 Cal.4th at p. 540.) Further, the trial court had discretion to deny all questioning by counsel once the prospective juror gave "unequivocally disqualifying answer[s]." (See *People v. Samayoa*, *supra*, 15 Cal.4th at p. 823.) Nor did the trial court have any obligation to allow defense counsel to try to rehabilitate any of the jurors once their answers made their disqualification unmistakably clear. (See *People v. Carpenter*, *supra*, 15 Cal.4th at p. 355.) As seen in the short synopses below, every prospective juror discussed by appellants gave answers that made their disqualification unmistakably clear. Therefore, the trial court properly used its discretion to foreclose further questioning and excuse the jurors for cause. (*Ibid.*)

1. Juror Dorenzo stated, "I feel very strongly against the death penalty. I know that it's acceptable and it's the law, but personally I feel like I could never vote for a death penalty." She added she had felt that way as long as she could remember, and in various ways, she reiterated that she would never vote for the death penalty. (11 RT 2069–2074; see 28 CT 7053–7094 [questionnaire]; 28 CT 7086 ["I could never in good consci[ence] vote for the death penalty. I believe only God has that right."].)

2. Juror Sherburne stated that he disagreed with the death penalty law. He stated, "If the case puts the defendants at risk for the death penalty, then I believe my feelings are such that they would not make me a–an appropriate juror . . . . It would make me an inappropriate juror." The prosecutor noted Sherburne's answers to questionnaire Questions Nos. 115 [would never impose the death penalty under any circumstances] and 123 [state should "never" impose the death penalty] and challenged for cause. (12 RT 2154–2158; see 34 CT 8857–8898 [questionnaire]; 34 CT 8890 ["Neither men nor the state have a moral right to take life. Any who does so has God's judgement upon him. Men & states punish by killing–only to perpetuate the cycle, which is a sin against love."].)

3. As discussed in Argument IV-D-2, Juror Davis stated he was against the death penalty and believed it was imposed "randomly." The trial court noted that he indicated on the questionnaire that there were no circumstances that justified the death penalty. Davis added, "I don't believe in the death penalty. I don't believe it's my place to judge a man." Davis also said he would never impose the death penalty in any case and his feelings would interfere with his ability to function as a juror. (13 RT 2276–2280; see 29 CT 7347–7388 [questionnaire]; 29 CT 7380–7386 [although he answered all the other questions, Davis left almost half the questions about the death penalty blank]; 29 CT 7386 ["I can't change my opp[osition] of the death penalty"].)

4. Juror Denson stated he was against the death penalty. His feelings would prevent him from ever voting for a special circumstance and would prevent him from ever voting for the death penalty. He also said his feelings would substantially interfere with his ability to function as a juror. (13 RT 2295–2299; see 33 CT 8690–8731 [questionnaire]; 33 CT 8723 ["Because of the irrevers[i]bility of the [death] penalty and because of the chance . . . that an

innocent person could be found guilty, I do not believe that it is an appropriate penalty. Mistakes do happen."].)

5. As discussed in Argument IV-D-3, Juror Flores stated, "I would have a hard time going for the death penalty" and "I don't think [the death penalty] serves any purpose." She stated the death penalty was never appropriate; she would never be able to vote for a first degree murder conviction; she would never find a special circumstance true; she would never vote for the death penalty; and her feelings would substantially interfere with her ability to function as a juror. (13 RT 2333–2340; see 19 CT 4595; Master Alphabetical Index 12 [Flores' questionnaire was lost].)

6. Juror Mann stated that the death penalty was imposed too often; she would never impose the death penalty in any case; and her feelings would substantially interfere with her ability to sit as a juror. The trial court asked Beck's follow-up question regarding whether Mann could set aside her feelings and impose the death penalty. She replied, "I don't think so." (13 RT 2374–2378; see 19 CT 4595; Master Alphabetical Index 14 [Mann's questionnaire was lost].)

7. Juror Guesdon stated she was against the death penalty and would never vote to impose it. She stated that she "guessed" that her feelings would substantially interfere with her ability to function as a juror. She said she would not be able to put her beliefs against the death penalty aside and follow the law. (14 RT 2405–2417; see 19 CT 4595; Master Alphabetical Index 13 [Guesdon's questionnaire was lost].)

8. Juror Jeppson stated that she answered a questionnaire question about her religious beliefs the way she did because she would not impose the death penalty. She reiterated that she would never impose the death penalty and her feelings would "probably" interfere with her ability to function as a juror. She stated that even if the death penalty was appropriate under the law, she would

not vote to impose it. (14 RT 2526–2528; see 30 CT 7599–7640 [questionnaire]; 30 CT 7632 ["I am opposed to [the death penalty] because I don't think government should be in the position of taking human life"].)

9. Juror Murphy stated, "I'm against the death penalty and I feel I would be biased." Murphy also said she would never vote to impose the death penalty and her feelings would substantially interfere with her ability to function as a juror. (14 RT 2599–2602; see stipulation of parties to add Murphy's questionnaire to the record, filed December 26, 2007; see this Court's orders of January 23 and 25, 2008, accepting stipulation and making questionnaire part of the record]; see page 24 of questionnaire [in response to a question regarding whether she had any feelings about the penalty for the defendants, Murphy wrote, "I'm against the death penalty regardless of the crime"].)

As can be plainly seen, every single juror stated he or she would never vote for the death penalty. Because they unequivocally indicated they would not put their feelings aside and follow the law, the trial court had the discretion to deny all further questioning and grant the prosecutor's challenge for cause. (See *People v. Samayoa*, *supra*, 15 Cal.4th at p. 823.) Furthermore, because the trial court did not abuse its discretion, and complied with well established Supreme Court law, appellants were not deprived of their right to due process and a fair trial. (See *Wainwright v. Witt*, *supra*, 469 U.S. at p. 424.)

XX.

THE MISSING JUROR QUESTIONNAIRES DO NOT RENDER THE RECORD INADEQUATE FOR REVIEW

Appellants complain that their due process rights were violated because five prospective jurors were excused based on their questionnaires; but since those questionnaires are missing from the record on appeal, this Court cannot determine whether those jurors were properly excused. (BOB 161–166; Cruz Joinder.) Appellants are mistaken. First, only four of the questionnaires are

missing. Second, the trial court did not excuse the jurors solely on the basis of their questionnaires; the trial court conducted adequate voir dire of each of the prospective jurors and based its ruling primarily on their oral answers. Third, most of the jurors' significant questionnaire answers are discussed on the record, and defense counsel's general failure to cite rehabilitating answers suggests there was little in the questionnaires to contradict the prospective jurors' statements during voir dire. Fourth, the record demonstrates that every juror was properly excused for cause because their beliefs interfered with their ability to apply the law. Finally, appellants never acknowledge that it is their burden to prove that they were prejudiced by the incomplete record. (*People v. Haley*, *supra*, 34 Cal.4th at p. 305) Because they cannot carry that burden, they cannot show that their right to due process was violated.

A. Legal Principles

> Both the United States Constitution and the California Constitution entitle a criminal defendant to a record on appeal sufficiently complete to permit meaningful appellate review. (*People v. Howard* (1992) 1 Cal.4th 1132, 1165.) In *People v. Ayala* (2000) 24 Cal.4th 243, 270 (*Ayala*), and *People v. Alvarez* (1996) 14 Cal.4th 155, 196, footnote 8 (*Alvarez*), we held that lost juror questionnaires did not impede meaningful appellate review: "The record on appeal is inadequate . . . only if the complained-of deficiency is prejudicial to the defendant's ability to prosecute his appeal. [Citation.] It is the defendant's burden to show prejudice of this sort . . . . [¶]
>
> A trial judge may properly exclude a prospective juror in a capital case if the juror's views on capital punishment would prevent or substantially impair the performance of his or her duties as a juror in accordance with the court's instructions and the juror's oath. (*Wainwright v. Witt* (1985) 469 U.S. 412, 424; *People v. Jones* (2003) 29 Cal.4th 1229, 1246; *People v. Guzman* (1988) 45 Cal.3d 915, 955.) The determination of a juror's qualifications falls "'within the wide discretion of the trial court, seldom disturbed on appeal.'" (*People v. Kaurish* (1990) 52 Cal.3d 648, 675.) There is no requirement that a prospective juror's bias against the death penalty be proven with

> unmistakable clarity. (*People v. Carpenter* (1999) 21 Cal.4th 1016, 1035.) Instead, "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. Jones*, *supra*, 29 Cal.4th at pp. 1246-1247.) "On review, if the juror's statements [regarding the death penalty] are equivocal or conflicting, the trial court's determination of the juror's state of mind is binding. If there is no inconsistency, we will uphold the court's ruling if it is supported by substantial evidence." (*Carpenter*, *supra*, 15 Cal.4th at p. 357.)

(*People v. Haley*, *supra*, 34 Cal.4th at pp. 305–306.)

B. Only Four Questionnaires Are Missing From The Record On Appeal

As discussed in Argument V, the questionnaires were lost by the trial court; but the record was reconstructed from counsel's files and only a few remained unrecovered. (19 CT 4449, 4462, 4464, 4595.) Appellants assert that the questionnaires were never recovered for prospective jurors Guesdon, Dobel, Murphy, Flores, and Mann. However, after appellants filed their opening briefs, the parties stipulated to augment the record with Murphy's questionnaire. This Court accepted the stipulation on January 25, 2008. Therefore, only four of the challenged jurors' questionnaires are missing.

C. The Voir Dire Of Each Juror Was Adequate To Establish That Their Beliefs Would Prevent Them From Following The Law

The voir dire of prospective juror Dobel has already been discussed repeatedly. (See Arguments III, IV-D, and XIX-A.) The voir dire of each of the other challenged prospective jurors was summarized in Argument XIX-B.

For the convenience of this Court, Respondent briefly notes that Flores stated, "I would have a hard time going for the death penalty" and "I don't think [the death penalty] serves any purpose." She stated the death penalty was never appropriate; she would never be able to vote for a first degree murder

conviction; she would never find a special circumstance true; she would never vote for the death penalty; and her feelings would substantially interfere with her ability to function as a juror. (13 RT 2333–2340 [trial court asked 48 questions].)

The trial court denied defense counsel's request to ask additional follow-up questions, but they made no argument–and cited nothing from the questionnaire–that might support their opposition to excusing Flores for cause. (13 RT 2340.) On the other hand, the trial court did discuss four of her questionnaire answers, noting that "those answers clearly reflect her feeling, and the Court finds that those feelings and beliefs are not diminished by the one answer to 115 that she would consider the death penalty." (13 RT 2341.) Moreover, contrary to appellants' assertion that the trial court's decision was based exclusively on Dobel's questionnaire answers, the trial court specifically found "that the answers given here in open court clearly reflect Mrs. Flores's state of mind and belief against the death penalty. She would never impose it." (13 RT 2341.)

Mann stated that she would never impose the death penalty in any case; and her feelings would substantially interfere with her ability to sit as a juror. The trial court permitted Beck to ask a follow-up question and Mann indicated she did not think she could set aside her feelings and impose the death penalty. (13 RT 2374–2378 [trial court asked 27 questions].) Again, counsel were given the opportunity to make argument but offered nothing but objections to the process. The trial court cited seven of Mann's questionnaire answers and stated that its decision to excuse for cause was based on "the answers of Miss Mann, both *orally* and in writing, and the manner of giving those answers leads the Court to believe that Miss Mann has a belief against the death penalty which would substantially impair her ability to serve as a juror in this case." (13 RT 2379, italics added.)

Guesdon stated she was against the death penalty and would never vote to impose it. She stated that she "guessed" that her feelings would substantially interfere with her ability to function as a juror. She said she would not be able to put her beliefs against the death penalty aside and follow the law. (14 RT 2405–2417 [trial court asked 43 questions].) Counsel were given the opportunity to make argument but offered nothing but objections to the process. The trial court cited four of Guesdon's questionnaire answers and expressly stated its decision was based on those answers and Guesdon's oral answers during voir dire. (14 RT 2418.)

As noted above, the parties stipulated to adding Murphy's questionnaire to the record. In her questionnaire, before she even got to the section covering the death penalty, she offered, "I'm against the death penalty regardless of the crime." (Augmentation 24.) Later, she reiterated, "I'm against the death penalty"; she also indicated the death penalty was imposed randomly, served no purpose, and she would never impose it under any circumstances. (Augmentation 34, 36–37.) Finally, she indicated she could not set aside her feelings and follow the law, and she could not be completely fair and impartial. (Augmentation 40–41.) During voir dire, Murphy stated, "I'm against the death penalty and I feel I would be biased." Murphy also said she would never vote to impose the death penalty and her feelings would substantially interfere with her ability to function as a juror. (14 RT 2599–2602 [trial court asked 18 questions].) As with the other prospective jurors, defense counsel was given the opportunity to make argument but did not cite anything from Murphy's questionnaire and offered nothing but objections to the process. The trial court cited eleven of Murphy's questionnaire answers and expressly stated its decision was based on those answers and Murphy's oral answers during voir dire. (14 RT 2602–2603.)

During Dobel's voir dire, the trial court asked her 34 questions. (14 RT 2418–2424.) She said her feelings about the death penalty were so strong they would substantially interfere with her ability to function as a juror. "[I]t would take really a serious leap of some sort–and I'm not sure I'd be able to make it–to impose the death penalty." (14 RT 2422.) She also stated she did not believe she could participate in the death penalty process. (14 RT 2424.) Of the five prospective jurors discussed by appellants, Dobel is the only one who's questionnaire answers were actually cited by defense counsel. Cruz argued that Dobel's willingness to impose the death penalty in a Dahmer-type case suggested that further questioning might show she would follow the law. Beck argued that the fact that she would have difficulty imposing the death penalty was not enough to excuse her. LaMarsh argued that Dobel's answer to Question No. 129 indicated that she would set aside her feelings and follow the law. (14 RT 2424–2427; but see 14 RT 2424 [prosecutor cited Dobel's answer to Question No. 129 as evidence her views would interfere with her ability to serve as a juror].)

Notwithstanding counsel's arguments, Dobel's answers still showed that there was a substantial probability that she would not follow the law. The trial court discussed eleven of Dobel's questionnaire answers and carefully weighed a couple which suggested she was not challengeable for cause against other answers which indicated she was. (14 RT 2428–2430.) In particular, the trial court noted that Dobel indicated in her questionnaire that she did not believe in the death penalty; "'it hurts more than it helps'"; and she "strongly opposes the death penalty" except in extreme "Dahmer-type cases." (14 RT 2428; see Argument XIX-A [the current matter did not rise to level of the Dahmer-murders].) She also answered that she seriously doubted she would ever impose the death penalty and her feelings would affect her ability to find the defendants guilty. (14 RT 2430.) The trial court also noted that its decision to

excuse Dobel was based, in part, on her oral answers: "Miss Dobel has answered questions in court. She does have some concern about the ability to perform as a juror because of her feelings about the death penalty." (14 RT 2429.)

D. Appellants Cannot Demonstrate They Were Prejudiced By The Missing Questionnaires

Appellants contend that "the trial court conducted only a cursory questioning of each of these jurors, seeming to have predetermined from the jurors' questionnaires that these jurors would be excluded for cause." (BOB 165; Cruz Joinder.) Appellants' analysis is contradicted by the record. The trial court asked each of these jurors an average of 34 questions. That is a lot of questions and it does not constitute a "cursory" inquiry. Nor does it show that the trial court's ruling was predetermined by questionnaire answers. On the contrary, the trial court conducted a thorough voir dire of each prospective juror, and it discontinued the process only when it was clear from the jurors' answers that their beliefs would interfere with their ability to follow the law. Moreover, in every case, the trial court expressly stated that its decision was based, at least in part, on the prospective jurors' oral answers.

While it is unfortunate that four juror questionnaires are missing from the record, there is no chance that there were answers contained in those questionnaires that would have so seriously contradicted the jurors' voir dire answers that this Court would find the trial court abused its discretion. Certainly, if such answers existed, one would expect defense counsel to have mentioned them. But counsel did not cite any questionnaire answers for four of the jurors. They mentioned two of Dobel's questionnaire answers. But even if this Court assumes she indicated she would set aside her feelings and follow the law, her voir dire answers contradicted that representation.

Further, even if some of the prospective jurors gave answers in their questionnaires that suggested they would follow the law; and even if that made the jurors' willingness to impose the death penalty ambiguous; this Court would still give deference to the trial court's determination. (*People v. Haley*, *supra*, 34 Cal.4th at p. 305, quoting *People v. Carpenter*, *supra*, 15 Cal.4th at p. 357.) Moreover, the trial court was entitled to give greater weight to answers given during voir dire. Those answers were given later in the selection process, after the jurors had learned more about the law and had had time to reflect on their beliefs. (See *People v. Abilez*, *supra*, 41 Cal.4th at p. 493–494 [noting that jurors' views can change over the course of a long voir dire process].) The trial court's rulings are also entitled to deference because the court was in the position to view the prospective jurors and evaluate their answers. (*Uttecht v. Brown*, *supra*, 127 S.Ct. at p. 2224 ["Deference to the trial court is appropriate because it is in a position to assess the demeanor of the venire, and of the individuals who compose it, a factor of critical importance in assessing the attitude and qualifications of potential jurors."].)

Finally, appellants argue that "all the questions submitted by defense counsel to be asked by the trial court during voir dire are also missing. (CT 10710.) Consequently, there is no way to [evaluate] the extent of the harm, if any exists, caused by the trial court's rejection of these additional questions." (BOB 162, fn. 45; Cruz Joinder.) As discussed above, this is simply not true. Cruz's written follow-up questions are in the record and the trial court stated that, at least at that point, no other party had submitted written questions. (10 RT 1858; 6 CT 1636.) Moreover, appellants cannot show prejudice just because some requested questions are missing from the record. It is inconceivable that there may have been some fantastic written follow-up questions which had the potential to divest the prospective jurors of their scruples against the death penalty. Appellants are free to speculate about any

question they wish the trial court had asked. No question would discredit the trial court's reasonable determination that every one of these jurors could not be counted on to put aside their feelings and follow the law.

In sum, there is no possibility that if the missing questionnaires were found, this Court would find that the trial court abused its discretion by excusing the jurors. Murphy's recovered questionnaire is a perfect example of that fact. Accordingly, appellants cannot demonstrate they were prejudiced by the incomplete record. (See *People v. Haley*, *supra*, 34 Cal.4th at p. 305; *People v. Carpenter*, *supra*, 15 Cal.4th at p. 357; *People v. Roldan*, *supra*, 35 Cal.4th at p. 692 [defendant failed to explain how additional questions would have improved the jury selection process].)

Similarly, because there is no prejudice, appellants cannot show that their rights to due process and a meaningful appellate process were compromised. "[S]tate law entitles a defendant only to an appellate record 'adequate to permit [him or her] to argue' the points raised in the appeal. [Citation.] Federal constitutional requirements are similar. The due process and equal protection clauses of the Fourteenth Amendment require the state to furnish an indigent defendant with a record sufficient to permit adequate and effective appellate review. [Citations.] . . . . The defendant has the burden of showing the record is inadequate to permit meaningful appellate review. [Citation.]" (*People v. Rogers*, *supra*, 39 Cal.4th at pp. 857-858; accord, *People v. Rundle*, *supra*, 43 Cal.4th at pp. 110-111; *People v. Alvarez*, *supra*, 14 Cal.4th at p. 196, fn. 8; *People v. Howard* (1992) 1 Cal.4th 1132, 1165.) Because appellants cannot show the record is inadequate to permit meaningful review, they cannot show their constitutional rights were violated.

XXI.

HEIGHTENED COURTROOM SECURITY DID NOT DEPRIVE APPELLANTS OF A FAIR TRIAL

Appellants contends that heightened courtroom security created an inherently prejudicial environment which violated their due process rights to a fair and impartial jury and reliable guilt and penalty determinations. (BOB 167–168; Cruz Joinder.) Respondent disagrees.

First, appellants have forfeited this claim by failing to object. Appellants claim they objected to the presence of extra bailiffs, but that is incorrect. On the contrary, several times defense attorneys expressed their understanding that all of the bailiffs were necessary. Prior to trial, LaMarsh complained about three bailiffs sitting behind the defendants, but that was not an objection, and even if it were, appellants certainly never joined it. Similarly, Beck complained that his jail armband was visible because he was wearing a short sleeve shirt. However, the trial court offered to instruct the jury to disregard the fact that the defendants were in custody. Because Beck did not object to that remedy, or suggest that it was inadequate, he forfeited his claim.

Second, requiring spectators and witnesses to pass through more than one security entrance was not prejudicial because it did not affect the jurors; it would not have been perceived as intended to prevent violence from the defendants; and it was geared as much toward protecting the defendants as anyone else in the courtroom.

Third, appellants cannot show that they were prejudiced by the presence of four bailiffs in the courtroom. It is typical for there to be one or two bailiffs in a courtroom when there is only one defendant. Therefore, it was not unusual for there to be one bailiff for each defendant. If the unrestrained defendants had

outnumbered the bailiffs, it would have unquestionably constituted a security risk.[65/]

Fourth, appellants could not have been prejudiced by one or more defense attorneys telling their clients not to move when the lights suddenly went out during voir dire. Appellants do not claim the attorneys committed misconduct or rendered ineffective assistance, and the attorney's(s') exclamation was intended only to protect the defendants.

Fifth, appellants cannot show that they were prejudiced by bailiffs shining flashlights on the defendants' backs when the lights were dimmed for the presentation of slides. That was a minor imposition and did not approach the type of security procedures that have routinely been found to be nonprejudicial.

Sixth, Beck could not have been prejudiced by wearing a jail armband since the jury knew the defendants were in custody. Beck's attorney agreed that the trial court should inform the jury that the defendants were automatically kept in custody due to the nature of the charges. Moreover, Beck could not have believed the armband was prejudicial because he did not even bother to cover it up with a long-sleeve shirt or jacket–like all the other defendants.

In addition, this Court should reject appellants' overall claim because most of their legal argument is gleaned from shackling cases. This is not such a case. Accordingly, there was no need for the trial court to hold a hearing or establish on the record that the defendants' violence justified the heightened security. The security measures were standard procedures for multiple defendants charged with violent felonies and were far less coercive than even the most minimal form of visible shackling. Furthermore, appellants fail to even

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65. On February 13, 2008, this Court granted review in *People v. Stevens*, S158852, formerly published at 156 Cal.App.4th 537. The issue presented for review is: "Did the trial court abuse its discretion in requiring a uniformed, armed deputy sheriff to sit immediately beside the defendant during his testimony?" The matter was fully briefed as of August 11, 2008.

acknowledge that defense counsel repeatedly recognized the need for heightened security and on at least two occasions expressed concern about the potential for violence by the defendants.

Finally, appellants cannot show prejudice because the jury did not convict two of the four defendants. That proves the jury was not intimidated, coerced, or prejudiced by the presence of heightened security, and appellants' convictions could not have been caused by the presence of four deputies.

A. Procedural History

A few months before trial, on January 17, 1990, the prosecutor moved to exclude Starn from the courtroom except when testifying. "I'm advised by the bailiff and security people that a search of her person just a few moments ago revealed that she was in possession of a handcuff key, and that she's considered by the security people to be a definite serious security risk in these proceedings. I can have Sergeant Mercer or a deputy sworn to testify to that." (3 RT 386–387.) The trial court declined to exclude Starn, but ordered her to always sit at the back of the courtroom. (3 RT 387.)

A week before commencing voir dire, LaMarsh complained about the cramped seating arrangement in the courtroom. He objected to the defendants being seated behind counsel, making it difficult to communicate; and he complained that three deputies behind the defendants gave the defendants an "aura" of being dangerous. "I'm not questioning, you know, the security; but I think there are things that we can do to alleviate those elements of unfairness." (7 RT 1310.) LaMarsh suggested that the defense tables be moved into an L-configuration. Cruz suggested looking for a different courtroom. (7 RT 1311.) The prosecutor stated that a deputy said the other courtrooms were worse and the trial court moved on to other matters. (7 RT 1314.)

After a break, the trial court opined it did "not see any undue prejudice by having three deputy sheriffs seated against the back rail." (7 RT 1320.) Willey

asked about shackling, and the trial court said that "there are no orders for shackling during the trial." (7 RT 1321–1322.) Willey then argued, "What I think is prejudicial is having three deputies lined up directly behind the defendants . . . . [I]n the eyes of the jury that makes them look–it prejudices them because it makes them look exceedingly dangerous. I have no objection obviously to three to four deputies being in the courtroom, but as to this particular seating arrangement–." (7 RT 1322) The trial court replied, "If there were one defendant and three deputies, I think your point might be very well taken. But I don't think there's, you know, anything unusual or the jury's going to take any special note of the fact that there's one security personnel for each defendant." (*Ibid.*) After another break, the parties moved the defense table so there was more room for everyone. (7 RT 1325–1326.) Appellants did not object or join in any objection. Cruz did suggest various ways of reconfiguring counsel's tables or moving to a different court room. But he also said he would accept the courtroom layout, and conceded he had not seen the other court rooms. Beck did not say anything of consequence during the discussions. (7 RT 1310–1314, 1320–1327.)

Minutes before commencement of jury selection, Beck complained about his jail armband:

> MR. FAULKNER: I had mentioned this to the Court before about the armbands that the defendants are wearing. And my client is wearing a short-sleeved shirt without a jacket and the armband is quite visible. I think it's a real indicia of incarceration. I'd like to ask the Court to make some arrangements to have it either placed around the ankle or removed entirely.
>
> THE COURT: All right. Earlier I had mentioned that this will be a long trial. The defendants are in custody. Sometimes in spite of the best efforts by the Court and staff, the jury at some point comes to the conclusion that the defendants are in custody.

Do you want the Court to make any comment about that to the prospective jurors or not? . . . .

MR. FAULKNER: Well, if the Court makes a comment, I think the comment should be that all defendants are in custody. Because it would appear that it's possible that the other defendants are wearing jackets that might cover these armbands and so just at first glance it might appear that mine's the only one in custody.

THE COURT: If I were to make any comments to the prospective jurors, I would simply say that in a capital case the defendants have no right to bail, they're in custody, which is the customary proceeding in this type of case, and that the jury should not hold that against the defendants in any manner. If you want me to make that comment, I will. If not, I won't.

MR. FAULKNER: I believe that I would ask the Court to make that comment.

(7 RT 1464–1465.)

During voir dire, the trial court advised the prospective jurors:

> [I]n the State of California it's customary in capital or death penalty cases that the defendants, those persons charged, are in custody and are not entitled to bail. In this case the defendants are in custody. As I said, that's common in a capital case, and you should not hold that for or against the defendants or consider that in any manner throughout this trial.

(7 RT 1517.) The trial court gave a similar instruction to all subsequent groups of prospective jurors. (8 RT 1537, 1556, 1577, 1597, 1646, 1685–1686; 9 RT 1720–1721.)

About midway through the prosecution's case, the trial court stated:

> THE COURT: I did want to put on the record that this morning Mr. Magana, as a security measure, during one of our breaks during the testimony of Mr. Brasuell advised me that he was concerned for the safety of his client because of alleged looks or gestures given by Mr. Beck. That he had mentioned that to the bailiffs. That he was requesting that Mr. LaMarsh be reseated, and the bailiffs have not done so. I have noticed no

such gestures or looks. I did discuss the matter with the bailiffs and have told them of Mr. Magana's concern . . . . [¶]

MR. FAULKNER: I'll–I'll say on the record that I think there's–there appears to be some friction which is probably going to increase. And although I don't have any reason to think that it's going to become dangerous for anyone, I don't have any objection to a reseating as long as it's not prejudicial to my client. So–

MR. BRAZELTON: Just state for the record that I noticed that at one point in the testimony that Mr. Beck and Mr. LaMarsh were exchanging some rather harsh glances, or at least they appeared to be that way, but that was this morning. I have not noticed anything this afternoon . . . .

THE COURT: At this point unless all defense counsel are agreeable to some reseating arrangement, I don't see any way in the way the courtroom is laid out to reseat Mr. LaMarsh at a safer distance from Mr. Beck if–or vice versa. And the only alternative really is with four defendants, if there is some disruption there are always the security chairs. But again for the record at this point, I have seen nothing to suggest that they're needed at this point. Okay.

(21 RT 3689–3690.)

Prior to deliberations, the trial court instructed the jury, "The fact that there was increased courtroom security during the trial is not to be discussed or considered by you. Such security measures should have no bearing on your determination of the defendant's guilt or innocence." (36 RT 6470; 8 CT 1843.)

While the jury was deliberating, Cruz's attorney expressed his concern about Cruz's reaction to guilty verdicts:

MR. AMSTER: I think I would prefer–I have a question mark as far as where we should be seated or whatever during the reading of the verdicts. To be quite honest, I am not comfortable with my client sitting behind me. I don't know what his reaction might be if the verdict comes down bad. And I think that being in the position he's in, whatever, he could swing an arm around

me before any of the bailiffs could do anything. Therefore, if partial defendants' verdicts are read, partial defendants should be present, or I'd like to be either behind my client or away from him–

MR. MAGANA: Well, there would be extra security, won't there be?

THE COURT: There'll be plenty of security. The bailiffs have all the security that they feel is necessary.

MR. AMSTER: With all due respect, I feel somebody behind me, something could happen.

(38 RT 6849–6850.)

In the trial court's order settling the record, it found:

> There was increased security, including additional uniformed bailiffs in the courtroom, perhaps one per defendant, one in an adjoining room not visible to jurors. The courtroom was referred to as a "high security courtroom." Entrance to the courtroom was through more than one security entrance and could be locked preventing both entrance and exit. During jury selection, the lights went out for a minute or two, leaving the courtroom in total darkness. One or more defense counsel loudly told their clients not to move.[66]
>
> On one occasion when the lights were turned off during the presentation of slides, bailiffs shined flashlights on the

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66. During a hearing to settle the record, LaMarsh's attorney commented, "I didn't think anything inordinate happened other than the fact that the lights went out. I think everybody was well composed and did exactly what they were supposed to do. I don't think anybody made any attempt to make gestures to leave or whatever. I think all the lawyers had control of their clients. [¶] And as soon as we realized what happened, it just settled–I mean, not that there was anything that needed to be settled down, but everybody just relaxed and let the lights come back on or whatever. I never thought there was an issue of concern." (10 Appellate RT 187.)

> defendants.[67] The record speaks for itself as to any hearings and findings on security issues and defense objections. Judge Lacy did discuss security with the bailiffs and perhaps the courtroom clerk and court reporter. These discussions may not have been reported. No findings about the content of these discussions are possible.

(42 CT 10695.)

B. Legal Principles

A trial court has broad discretion to maintain an orderly and secure courtroom. (*People v. Hayes* (1999) 21 Cal.4th 1211, 1269.) Its decision regarding courtroom security measures is reviewed under an abuse of discretion standard. (*People v. Ayala* (2000) 23 Cal.4th 225, 253.) "Where necessary to ensure an orderly trial, no denial of due process results from the mere presence of armed officers in the courtroom." (*People v. Stabler* (1962) 202 Cal.App.2d 862, 863-864.)

There is no need for the trial court or prosecutor to establish a need for increased security personnel. (*People v. Marks* (2003) 31 Cal.4th 197, 223–224.) Unless security personnel are deployed in unreasonable numbers, there is no need for the trial court or prosecutor to justify their presence. (*People v. Duran* (1976) 16 Cal.3d 282, 291 & fn. 8 (*Duran*).)

By failing to raise a timely objection at trial, a defendant forfeits the right to challenge stigmatizing treatment such as being shackled or being forced to wear prison clothes. (*People v. Tuilaepa* (1992) 4 Cal.4th 569, 583; *People v. Taylor* (1982) 31 Cal.3d 488, 495-496.)

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67. During a hearing to settle the record, Cruz and LaMarsh's counsel agreed that the lights were turned all the way down only once. The other times that slides were shown, the lights were only dimmed and no flashlights were shown on the defendants. (10 Appellate RT 190.)

C. Appellants Forfeited Their Claim By Failing To Object

As a general principle, to preserve a claim on appeal, a defendant must make a timely objection so that the trial court has the opportunity to remedy the situation if possible. (*People v. Vera, supra*, 15 Cal.4th at pp. 275-276; § 1259 [appellate court "may" consider claims that were not raised below if they affect the defendants' substantial rights].) Moreover, when a trial court agrees to remedy a complaint with a jury instruction, the defendant forfeits his claim of error if he does not object to the instruction as inadequate or incomplete. (See *People v. Welch, supra*, 20 Cal.4th at p. 757.)

Here, appellants never objected to the fact that spectators and witnesses had to go through more than one security entrance to reach the courtroom. (See BOB 167 ["Throughout the guilt and penalty phase, all spectators and witnesses attending [appellants'] trial were required to pass through 'more than one security entrance' . . . ."]; Cruz Joinder.) Appellants never objected or asked for an admonishment when one or two attorneys told their clients to not move when the lights went out during voir dire. Appellants never objected to the deputies shining flashlights on the defendants while the lights were lowered for a slide presentation. Appellants never objected to the presence of four deputies in the courtroom. And as for the jury seeing Beck's jail armband, Beck did not object to the trial court admonishing the jury that it was customary for all capital defendants to be held in custody; nor did he contend that the remedy was inadequate. Accordingly, appellants forfeited all of their claims of error. (*People v. Vera, supra*, 15 Cal.4th at pp. 275-276; cf. *People v. Tuilaepa, supra*, 4 Cal.4th at p. 583 ["It is settled that the use of physical restraints in the trial court cannot be challenged for the first time on appeal. Defendant's failure to object and make a record below waives the claim here."]; see also *People v. Ward, supra*, 36 Cal.4th at p. 206; *People v. Taylor, supra*, 31 Cal.3d at pp. 495-496 ["A timely objection allows the court to remedy the situation before

any prejudice accrues."]; *People v. Ramirez* (2006) 39 Cal.4th 398, 450 [same]; *People v. Williams* (1968) 265 Cal.App.2d 888, 899 ["'A defendant may be precluded from raising an error as a ground of appeal where, by conduct amounting to acquiescence in the action taken, he waives the right to attack it.'"].)

Nevertheless, appellants assert, "Defense counsel objected to the increased security measures, but the objection was overruled. (RT 1309–1314, 1322.)" (BOB 168; Cruz Joinder.) It is true that LaMarsh and Willey objected to the presence of the deputies behind the defendants. But appellants did not make any argument on the subject and did not join their objections. Beck did object to the jury seeing his jail armband. But he accepted the trial court's remedy of instructing the jury to disregard the defendants' custody status. Because he did not object to that remedy, or request further relief, he forfeited his claim. Finally, appellants never objected to any of the other heightened security measures complained about on appeal. Therefore, they have not preserved this claim. (See *People v. Santos* (1994) 30 Cal.App.4th 169, 180, fn. 8 ["Generally, failure to join in the objection of a codefendant constitutes a waiver of the issue on appeal."], citing *People v. Mitcham*, *supra*, 1 Cal.4th at p. 1048.)

D. The Trial Court Had No Duty To Have A Hearing Or Find A "Manifest Need" Before Instituting Heightened Security

Relying almost exclusively on shackling cases–especially the seminal shackling case of *People v. Duran*, *supra*, 16 Cal.3d 282–appellants claim the trial court violated various federal and California constitutional rights by failing to hold a hearing to determine whether there was a need for heightened security measures. They also claim the trial court violated their constitutional rights by failing to make a record of the "manifest need" for such measures. (BOB 169; Cruz Joinder.) Appellants are mistaken. This Court has specifically

distinguished the need for a hearing and good cause in shackling case from cases that concern the deployment of security personnel. In *Duran*, this Court held, "Unless [armed guards] are present in unreasonable numbers, such presence need not be justified by the court or the prosecutor." (16 Cal.3d at p. 291, fn. 8; see also *People v. Marks*, *supra*, 31 Cal.4th at pp. 223–224.)

Here, of course, appellants cannot show that one deputy for each defendant was unreasonable. There can be no doubt that it would have been a serious security risk if the unshackled defendants outnumbered security personnel.

Holbrook v. Flynn (1986) 475 U.S. 560 (*Holbrook*) is dispositive of the issue. There, the Supreme Court stated, "The first issue to be considered here is thus whether the conspicuous, or at least noticeable, deployment of security personnel in a courtroom during trial is the sort of inherently prejudicial practice that, like shackling, should be permitted only where justified by an essential state interest specific to each trial. We do not believe that it is." (*Id.* at pp. 568-569.) The court stated that "while shackling ... [is an] unmistakable indication[ ] of the need to separate a defendant from the community at large, ... it is entirely possible that jurors will not infer anything at all from the presence of the guards." (*Id.* at p. 569.) Furthermore, "Our society has become inured to the presence of armed guards in most public places; they are doubtless taken for granted so long as their numbers or weaponry do not suggest particular official concern or alarm." (*Ibid.*)

The court continued:

> The courtroom security force in this case consisted of four uniformed state troopers, two Deputy Sheriffs, and six Committing Squad officers. Though respondent does not concede that the deployment of the uniformed Committing Squad officers was proper, his focus at every stage of his habeas proceedings has been exclusively on the prejudice he attributes to the four state troopers. The only question we need answer is thus whether the presence of these four uniformed and armed

officers was so inherently prejudicial that respondent was thereby denied his constitutional right to a fair trial . . . . [¶]

We do not minimize the threat that a roomful of uniformed and armed policemen might pose to a defendant's chances of receiving a fair trial. See ABA Standards for Criminal Justice 15-3.1(c) (2d ed. 1980). But we simply cannot find an unacceptable risk of prejudice in the spectacle of four such officers quietly sitting in the first row of a courtroom's spectator section. Even had the jurors been aware that the deployment of troopers was not common practice in Rhode Island, we cannot believe that the use of the four troopers tended to brand respondent in their eyes "with an unmistakable mark of guilt." [*Estelle v. Williams* (1976) 425 U.S. 501,] 518 (BRENNAN, J., dissenting). Cf. *Dorman v. United States*, 140 U.S.App.D.C. 313, 327 (1970) (greater danger of prejudice if jury aware that arrangements are extraordinary). Four troopers are unlikely to have been taken as a sign of anything other than a normal official concern for the safety and order of the proceedings. Indeed, any juror who for some other reason believed defendants particularly dangerous might well have wondered why there were only four armed troopers for the six defendants . . . . [¶]

[O]ur task here is not to determine whether it might have been feasible for the State to have employed less conspicuous security measures in the courtroom. While, in our supervisory capacity, we might express a preference that officers providing courtroom security in federal courts not be easily identifiable by jurors as guards, we are much more constrained when reviewing a constitutional challenge to a state-court proceeding. All a federal court may do in such a situation is look at the scene presented to jurors and determine whether what they saw was so inherently prejudicial as to pose an unacceptable threat to defendant's right to a fair trial; if the challenged practice is not found inherently prejudicial and if the defendant fails to show actual prejudice, the inquiry is over. Respondent has failed to carry his burden here.

(*Holbrook*, *supra*, 475 U.S. at pp. 570–572, footnote omitted.)

Similarly, here, appellants cannot show that the four deputies rendered the trial inherently prejudicial. Appellants have offered no evidence that the jurors made negative inferences about them stemming from the presence of the

deputies. (See *People v. Jenkins*, *supra*, 22 Cal.4th at p. 998 [defendant must show there was actual prejudice].) Further, the trial court admonished the jury to disregard appellant's custodial status in making their decisions, and this Court presumes the jurors followed the trial court's instruction. (*People v. Pinholster*, *supra*, 1 Cal.4th at p. 919.)

In *People v. Marks*, *supra*, 31 Cal.4th 197, the defendant complained about the stationing of a deputy next to him while he testified. (*Id.* at p. 222.) This Court observed:

> The distinction between shackling and monitoring is long-standing. The *David* court distinguished that case's deployment of security personnel with the physical restraints that caused prejudice in *People v. Harrington* (1871) 42 Cal. 165. (*People v. David* [1939] 12 Cal.2d [639,] 644.) [*People v. Harrington* (1871) 42 Cal. 165] was the primary authority on which *Duran* relied, and its reasoning indicates that courtroom monitoring by security personnel does not necessarily create the prejudice created by shackling. "'[A]ny . . . *physical burdens, pains and restraints* upon a prisoner during the progress of his trial, inevitably tends to *confuse and embarrass his mental faculties*, and thereby materially to abridge and prejudicially affect his constitutional rights of defense; and especially would such physical bonds and restraints in like manner materially impair and prejudicially affect his statutory privilege of becoming a competent witness and testifying in his own behalf.' " (*Duran*, *supra*, 16 Cal.3d at p. 288, italics added, quoting *Harrington*, *supra*, at p. 168.) The United States Supreme Court has likewise refused to find the "conspicuous, or at least noticeable, deployment of security personnel in a courtroom during trial [as] the sort of inherently prejudicial practice that, like shackling, should be permitted only where justified by an essential state interest . . . ." (*Holbrook v. Flynn* (1986) 475 U.S. 560, 568-569.) *Holbrook* observed, "While shackling and prison clothes are unmistakable indications of the need to separate a defendant from the community at large, . . . it is entirely possible that jurors will not infer anything at all from the presence of the guards . . . . Our society has become inured to the presence of armed guards in most public places; they are doubtless taken for

> granted so long as their numbers or weaponry do not suggest particular official concern or alarm." (*Id.* at p. 569.)
>
> We therefore maintain this distinction between shackling and the deployment of security personnel, and decline to impose the manifest need standard for the deployment of marshals inside the courtroom. (*Duran*, *supra*, 16 Cal.3d at p. 291, fn. 8.)

(*People v. Marks*, *supra*, 31 Cal.4th at pp. 223–224.)

Appellants, of course, never acknowledge the distinction this Court has made between shackling cases and cases involving security personnel. Therefore, to the extent their argument is based almost entirely on shackling cases (BOB 171–174; Cruz Joinder), it is fundamentally flawed and unpersuasive.

In *People v. Jenkins*, *supra*, 22 Cal.4th 900, there were two defendants, and the number of armed deputies fluctuated between three and four. (*Id.* at p. 998.) On appeal, the defendant claimed the trial court violated his due process rights by refusing to remove some of the deputies. (*Ibid.*) This Court rejected the claim:

> Contrary to defendant's contentions, no abuse of discretion or abrogation of judicial authority over courtroom security appears. We have explained that pursuant to United States Supreme Court authority, "the use of identifiable security guards in the courtroom during a criminal trial is not inherently prejudicial," in large part because such a presence is seen by jurors as ordinary and expected and because of the many nonprejudicial inferences to be drawn from the presence of such security personnel. (*People v. Miranda*, *supra*, 44 Cal.3d at pp. 114-115.) We examine on a case-by-case basis the question whether a defendant actually has been prejudiced by the presence of security officers. (*Id.* at p. 115.)

(*People v. Jenkins*, *supra*, 22 Cal.4th at p. 998.)

To the extent appellants claim they were denied equal protection (BOB 170; Cruz Joinder), that claim is summarily answered by *Holbrook*:

> [E]ven were we able to discern a slight degree of prejudice attributable to the troopers' presence at respondent's trial, sufficient cause for this level of security could be found in the State's need to maintain custody over defendants who had been denied bail after an individualized determination that their presence at trial could not otherwise be ensured. Unlike a policy requiring detained defendants to wear prison garb, the deployment of troopers was intimately related to the State's legitimate interest in maintaining custody during the proceedings and thus did not offend the Equal Protection Clause by arbitrarily discriminating against those unable to post bail or to whom bail had been denied.

(*Holbrook, supra*, 475 U.S. at pp. 571–572.) Similarly, here, by virtue of the crimes charged, appellants and the other defendants were not entitled to bail. (See, e.g., 7 RT 1492.) Appellants cannot show that there is no principled reason why multiple defendants require multiple deputies. Nor can they show that it is arbitrary to have increased security measures for defendants charged with multiple vicious murders.

The only other "security measure" which even arguably rose to the level of requiring a hearing was the jail armband.[68/] Beck asked to have it removed and the trial court offered, instead, to instruct the jury that it was customary for defendants accused of murder to be held in custody. Beck accepted the trial court's remedy. (7 RT 1465.) Nevertheless, Beck argues that the trial court violated his due process rights because the armband was analogous to forcing a defendant to wear prison clothes. He is wrong.

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68. Because the other defendants' jail armbands were apparently covered, and they raised no objection, Respondent assumes this subsection of the argument applies only to Beck–even though Cruz joined the general argument. To the extent Cruz may argue that he was prejudiced by Beck's armband, Respondent submits that Cruz could not have been prejudiced if Beck was not prejudiced.

In *People v. Williams* (1995) 33 Cal.App.4th 467, the defendant complained that the trial court violated his constitutional rights by refusing to allow him to remove his jail wristband. (*Id.* at p. 361.) The court opined:

> As authority for his contention that the trial court erred in refusing to allow him to remove his wristband, Williams cites *People v. Taylor* (1982) 31 Cal.3d 488. In that case, a defendant was compelled to stand trial in jail clothes rather than ordinary clothing. The California Supreme Court found reversible error, holding that the trial judge's denial of the defendant's request to dress in street clothes constituted a violation of due process and equal protection. (*Id.* at pp. 494-495.)
>
> The principal difference between *Taylor* and the instant case is that the wristband worn by Williams along with his civilian clothes was far less obvious and more subtle than the prison garb which Taylor was forced to wear. Second, whereas Taylor's in-custody status was highlighted by two prosecution witnesses identifying him in court as the defendant "'wearing blue county clothes'" and the one dressed in a "'blue jail suit'" (*Taylor, supra*, 31 Cal.3d at p. 500), no mention was made of Williams's wristband during his trial. Third, unlike *Taylor* (*id.* at p. 501), it does not appear that Williams's credibility was at all influenced by his wristband as a symbol of his incarceration.
>
> Thus, we find that if the trial court's refusal to permit Williams to remove his wristband in any way violated his constitutional rights, it amounted to error that was "harmless beyond a reasonable doubt." (*Chapman v. California* (1967) 386 U.S. 18.)

(*People v. Williams, supra*, 33 Cal.App.4th at p. 476.) Similarly, here, there is no evidence that the jurors notice or cared about Beck's armband. (See *People v. Jenkins, supra*, 22 Cal.4th at p. 998 [defendant must show there was actual prejudice].) Beck's claim that his jail armband constituted "jail garb" was specifically rejected by the *Williams* court. (*People v. Williams, supra*, 33 Cal.App.4th at p. 476.)

Beck also claims that "This display of the defendant in jail garb, which was acknowledged by the trial court in its admonishment to the jury (RT 6470, CT

1843) readily identified Beck as 'a person apart or as worthy of fear and suspicion.'" (BOB 176–177.) Not so. The admonishment, which Beck requested, advised the venire that *all* of the defendants were in custody. It said nothing about "jail garb" and did not single out Beck. (See, e.g., 8 RT 1537.) Similarly, the instruction prior to jury deliberations admonished the jury to not consider increased security measures in its deliberations. (36 RT 6470.) Both instructions helped Beck and did not single him out for derision.

In conclusion, this was not a shackling case, and the trial court had no duty to hold a hearing on the increased security measures. Nor was there was there any need for the trial court to make a finding of manifest need for those measures. Similarly, appellants make no argument and cite no authority which suggests the trial court needed to hold a hearing regarding: the lights going out for two minutes and one or two defense attorneys telling their clients not to move; the deputies shining flashlights on the defendants' back when the courtroom was darkened for a slide presentation; and the use of more than one security entrance and metal detectors. All of these security measures were routine and were instituted without objection. Appellants cannot show the trial court had to make a finding of manifest need for these standard safety measures.

E. Any Error Was Harmless

Even if the trial court erred by failing to make a specific finding that heightened security measures were required, the error was harmless under any standard. There was ample evidence that additional security was necessary, and if the trial court had held a hearing, it would have certainly made that finding.

For starters, there were four defendants. Three of them were quite large, and they were all charged with multiple brutal murders and five capital charges. As the trial court remarked, it was hardly unusual to have a deputy for each defendant. (7 RT 1322) Since three of the defendants were large men at their peak strength years, it was questionable whether one deputy per defendant was

even enough. Given that they were charged with stabbing and bludgeoning four people, and could be sentenced to death, it was not unreasonable to fear they might act violently because they were caught and had nothing to lose.

Even before trial began, Starn tried to bring a handcuff key into the courtroom. (3 RT 386–387.) That showed that the defendants might be contemplating an escape which could easily turn violent.

On at least two occasions, defense counsel acknowledged the need for heightened security and additional deputies. (7 RT 1310 [LaMarsh's counsel stated, "I'm not questioning, you know, the security."], 7 RT 1322 [Willey's counsel had "no objection obviously to three to four deputies being in the courtroom"].)

Similarly, statements by counsel during the trial showed that they were concerned about the defendants acting violently. During the prosecution's case, the trial court stated for the record that LaMarsh's attorney was "concerned for the safety of his client because of alleged looks or gestures given by Mr. Beck." Beck's attorney acknowledged that "there appears to be some friction which is probably going to increase." The prosecutor added, "I noticed that at one point in the testimony that Mr. Beck and Mr. LaMarsh were exchanging some rather harsh glances, or at least they appeared to be that way . . . ." (21 RT 3689–3690.) While the jury was deliberating, Cruz's attorney expressed his concern about Cruz's reaction to guilty verdicts. He and LaMarsh's counsel expressed the need for adequate security. Cruz's attorney explained, "I am not comfortable with my client sitting behind me. I don't know what his reaction might be if the verdict comes down bad . . . . [¶] With all due respect, I feel somebody behind me, something could happen." (38 RT 6849–6850.) Thus, there was simply no questioned that heightened security measures were appropriate.

Appellants emphasize how the bailiffs gave the impression that the defendants were dangerous. However, the presence of the bailiffs also had a mitigating effect. The defendants were accused of multiple vicious murders. Three of them were very large men. If there had been only one bailiff to guard them, it is likely that some of the jurors would have felt at risk. However, because the number of bailiffs was proportional to the number of defendants, the jurors were able to focus on the evidence and not on their fear of the defendants.

Appellants make the dubious claim that "[t]he heightened security measures imposed against [appellants] were more obvious, and potentially more troublesome, than those involved with shackling." (BOB 188; Cruz Joinder.) However, this Court has maintained a long-standing distinction between shackling and monitoring. (*People v. Marks*, *supra*, 31 Cal.4th at p. 223.) Whereas the trial court must find a "manifest need" for shackling, no such requirement is placed upon the deployment of a reasonable number of security personnel. (*Id.* at pp. 223–224.) While visible shackling without a showing of manifest need is generally reversible, this Court has repeatedly held that trial courts do not even have to have a hearing about deploying additional security guards. And the United States Supreme Court has held that a reasonable number of additional guards is not inherently prejudicial. (*Holbrook*, *supra*, 475 U.S. at p. 570.) Therefore, appellants have no basis to claim that having a few deputies in the courtroom was worse than having the defendants shackled.

As the Supreme Court noted in *Holbrook*, "Four troopers are unlikely to have been taken as a sign of anything other than a normal official concern for the safety and order of the proceedings." (475 U.S. at p. 571.) Appellants are certain to try and distinguish *Holbrook* because there were six defendants in that case. However, the opposite argument applies. The defendant in *Holbrook*

focused on the four troopers, but they were over and above the contingent of "two Deputy Sheriffs[] and six Committing Squad officers." (*Id.* at p. 570.) Thus, there were a total of twelve uniformed officers in the courtroom for six defendants, i.e., two officers for every one defendant. Here, of course, there was only one officer for every defendant–plus one in the next room whom the jury could not see. Accordingly, if twelve officers in the courtroom were not prejudicial in *Holbrook*, the four bailiffs could not have been prejudicial here.

Moreover, the present matter is not distinguishable by the fact that three of the troopers sat behind the defendants. In *Holbrook*, the "four uniformed state troopers [sat] in the first row of the spectators' section; the officers *were not far behind*, but were separated by the 'bar' from, the seats assigned to the defendants for the duration of the trial." (475 U.S. at p. 562, italics added.) Here, the trial court noted that there were "three deputy sheriffs seated against the back rail." (7 RT 1320.) The bailiffs in the present matter were probably closer than the troopers in *Holbrook*, and they were not separated by the back rail. Theoretically, *if* the jury in the current matter made negative inferences about the bailiffs' presence, then the fact that the bailiffs were closer than the troopers in *Holbrook* could have increased those concerns. However, the distinction between *Holbrook* and the present matter is too insignificant to demonstrate prejudice. Even with the bailiffs sitting directly behind the defendants, Cruz's counsel expressed concern that Cruz "could swing an arm around me before any of the bailiffs could do anything." (38 RT 6849.) Thus, Cruz's attorney certainly did not feel that the bailiffs were too close.

Moreover, as explained in *People v. Marks*, *supra*, 31 Cal.4th 197, "The *Duran* holding encompassed not only the standard positioning of officers but also their unusual deployment, as is shown by its citation to *People v. David* (1939) 12 Cal.2d 639, 644, where a deputy drew up his chair immediately behind where the defendant was sitting. (See *Duran*, at p. 291, fn. 8.)" (*Id.* at

p. 223.) In other words, just as *Duran* held that there was no need to justify the presence of armed guards, it also implied that trial courts had no duty to justify the *placement* of those guards near defendants.

As for Beck's jail armband, the jury knew that all of the defendants were in custody. So the armband did not communicate anything they did not already know. Pursuant to Beck's request, the trial court admonished the jury during voir dire and prior to deliberations not to consider the defendants' custody status. (7 RT 1517; 36 RT 6470.) Beck argues that "the fact that defense counsel requested this instruction [did not] lessen or negate the prejudice." (BOB 189.) However, he makes no argument on this point and fails to explain why he requested the instruction if it had no effect. (Cf. *People v. Pinholster*, *supra*, 1 Cal.4th at p. 919 [appellate courts presume the jury followed the law].) Moreover, it is clear that Beck's argument is disingenuous because he could have covered up the armband if he really thought it was prejudicial. Unlike the other defendants who wore long-sleeve shirts or jacket over their armbands, Beck *chose* to wear a short-sleeve shirt and expose his armband.[69] (See 7 RT 1464–1465.)

Appellants claim that the security measures were conspicuous because the "co-defendants were tried in a 'high security courtroom' and closely guarded by their own individual bailiffs who sat directly behind them for the duration of the trial . . . ." (BOB 177; Cruz Joinder.) In fact, the record shows that there

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69. A week before asking the trial court to permit Beck to remove his armband, counsel complained that the sports jacket he had received for Beck was too "garish" to use. He asked to be reimbursed for the $560 he had spent for proper attire for Beck. (7 RT 1299.) This not only shows that Beck had a garish sports coat he could have worn, but he most likely also had another sports jacket or suit jacket which he chose not to wear. That is so because it seems extremely unlikely that Beck's counsel could have spent $560 in 1992-dollars on just pants and shirts. It is fair to assume he also bought Beck a replacement sports jacket or suit.

were four bailiffs in the courtroom, but only three of them sat behind the defendants. (7 RT 1310, 1320, 1322.) Therefore, the defendants did not each have "their own individual bailiffs who sat directly behind them." One bailiff apparently stood at the usual position at the front of the courtroom. More importantly, appellants simply cannot show that one bailiff per defendant was unreasonable. Clearly, it was a prudent security precaution.

Similarly, the jury would not have considered the presence of metal detectors or multiple screening entrances coercive. It was not unusual in 1992 for courtrooms to have metal detectors. And even though the metal detectors apparently did not stop Starn from sneaking-in a handcuff key, that episode certainly shows that such security was necessary.

In sum, appellants have failed to cite anything in the record that suggests that the jury was affected by any of the security measures they complain about on appeal. Therefore, they cannot prove prejudice. (See *People v. Jenkins*, *supra*, 22 Cal.4th at p. 998 [appellate court considers claim of prejudicial security measures on a case-by-case basis to determine whether there was actual prejudice].)

Finally, with regard to all of the elements of heightened security, they were necessarily harmless because the jury hung on LaMarsh and Willey. If the jury had actually based its verdicts on the "aura of danger" arising from the presence of the deputies and the other security measures, that prejudice would have inured to *all* of the defendants. The fact that the jury did not convict two of the four defendants shows that its verdicts were based on individual considerations and were not the result of generalized prejudice from heightened courtroom security. For all the above reasons, plus the weight of the evidence against appellants, any error was harmless beyond a reasonable doubt. (See *Chapman*, *supra*, 386 U.S. at p. 24.)

XXII.

WILLEY'S ATTORNEY DID NOT VIOLATE APPELLANTS' RIGHT TO REMAIN SILENT BY COMMENTING THAT CRUZ SHOULD NOT HAVE TAKEN THE STAND IF HE DID NOT WANT TO ANSWER QUESTIONS

After Cruz testified in his own defense, Willey's attorney cross-examined him. Cruz's attorney objected to a question and, in response, Willey's attorney stated, "If Mr. Amster didn't want his client questioned, he shouldn't have put him on the stand." (30 RT 5220.) Beck immediately asked for a sidebar and Cruz moved for a mistrial. The trial court denied both requests in front of the jury. (30 RT 5220–5521.) After a few more questions, the trial court held a sidebar conference. Beck moved for a mistrial, claiming that the comment by Willey's attorney would prejudice Beck if he decided not to testify. Cruz and LaMarsh joined the motion. (30 RT 5222–5224.) The trial court denied the motion, admonishing the attorneys, "Counsel are to make legal objections and not direct comments to each other." (30 RT 5225.)

According to the caption of their argument, appellants claim that the trial court deprived them of their federal and state due process rights by denying their mistrial motion. (BOB 190; Cruz Joinder.) However, in the body of their argument, appellants never claim that the trial court erroneously denied their mistrial motion, nor do they even mention their due process rights. (BOB 190–195; Cruz Joinder.) Rather, appellants claim that "Mr. Miller's remark violated [their] right to remain silent as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution, as well as the California analogs . . . ." (BOB 195; Cruz Joinder.) Therefore, as a preliminary matter, appellants have forfeited the claim in their caption by failing to support it with proper argument and citation to authority. (Cal. Rules of Court, rules 8.520(b)(1), 8.402 (a)(1)(B); *People v. Stanley* (1995) 10 Cal.4th 764, 793

[every argument must be supported by analysis and citation to authority]; *People v. Baniqued* (2000) 85 Cal.App.4th 13, 29; *People v. Turner*, *supra*, 8 Cal.4th at p. 214, fn. 19 [court considers only those claims that are "sufficiently developed to be cognizable"].) Moreover even if appellants' claim were cognizable without supporting argument, it would fail.

A. The Trial Court Did Not Abuse Its Discretion By Denying Appellants' Mistrial Motion

Contrary to the caption of appellants' argument, a trial court's denial of a mistrial motion is reviewed for an abuse of discretion–not for whether it complies with due process. (*People v. Avila*, *supra*, 38 Cal.4th at p. 573.) "'Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions.'" (*People v. Ledesma*, *supra*, 39 Cal.4th at p. 686.) Here, the trial court's denial of the motion was reasonable because the remark was merely a snide comment directed towards counsel rather than an explication of the defendants' rights under the law. The trial court could reasonably conclude that the jury would disregard it along with other inconsequential snipes.

Moreover, Willey's attorney did not even comment on Cruz's *silence*. How could he?–Cruz was in the midst of testifying. He commented on counsel's decision to have Cruz testify. In other words, the gist of his comment was merely that Cruz could have chosen not to testify. It could not have been prejudicial for counsel to note that Cruz had the right not to testify because the jury had been advised along the same lines by the trial court and such advisements do not offend the Fifth Amendment. (See *Lakeside v. Oregon* (1978) 435 U.S. 333, 340–341 [instructing jury that it could not make negative inferences from defendant's decision not to testify "over the defendant's

objection does not violate the privilege against compulsory self-incrimination guaranteed by the Fifth and Fourteenth Amendments"]).

Further, every juror had to answer on their jury questionnaire whether a defendant should be required to testify; whether he or she would hold it against the defendant if he did not testify; and to explain their answers if they did not answer "no" to both questions. (Question No. 73; see, e.g., 29 CT 7281–7282.) During voir dire, the trial court routinely asked those same questions and followed-up on those questions whenever the juror indicated he or she might hold a defendant's silence against him. In addition, the trial court explained to the venire:

> Let me tell you that under the 5th Amendment of the United States Constitution and the law of the State of California, a criminal defendant has an absolute right not to incriminate himself, and that right includes the absolute right not to testify in a criminal case where he is the defendant. There may be many reasons why a criminal defendant does not wish to testify. You may not hold a defendant's decision not to testify against him in any manner, nor may you even discuss the subject, nor may you fill in any holes, if there are any, in the prosecution's case by that failure to testify.
>
> Now that I have told you what the law is regarding the right of a criminal defendant not to testify, do all of you understand that law?
>
> Do any of you disagree with the law that gives a criminal defendant absolute right not to testify in his own trial? If so, please raise your hand.
>
> I see no affirmative responses.

(10 RT 1832–1833; see also 14 RT 2407; [same general instruction].) Thus, the jurors repeatedly heard the trial court discuss the right to remain silent during voir dire. And as appellants acknowledge, the trial court also instructed the jury that counsel's statements and arguments were not evidence, and it should follow only the trial court's instructions on the law. (36 RT 6468 [trial

court instructed the jury, "You must accept and follow the law as I state it to you, whether you agree with the law or not. 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"].) Therefore, the comment by Willey's attorney was no more than a backhanded way of saying what the jury had already heard many times. Because the jurors already knew that the defendants had the right to remain silent, and the attorney's remark actually concerned Cruz's decision to *testify*, the comment could not have been so prejudicial that the trial court clearly abused its discretion by denying the mistrial motion. (See *People v. Ayala*, *supra*, 23 Cal.4th at p. 282.)

To the extent Beck suggests that the comment forced him to testify, there is no evidence or reason to believe that is the case. It simply is unbelievable that Beck would let that little remark alter his trial strategy. Moreover, once Beck testified, there is no way that the jury could have logically held the attorney's comment against him. On the contrary, if they gave it a second thought, they would have remembered that Beck had the right to remain silent, but freely chose to testify. That would have only added to his credibility. Thus, appellants cannot demonstrate that the trial court abused its discretion by denying the mistrial motion because they cannot show that their chances of receiving a fair trial were irreparably damaged. (See *People v. Ayala*, *supra*, 23 Cal.4th at p. 282; *People v. Cox* (2003) 30 Cal.4th 916, 953; *People v. Bolden*, *supra*, 29 Cal.4th at p. 555.) Similarly, any affect on the jury was not so egregious that it rendered the trial unfair and constituted a denial of due process. (See *Chapman*, *supra*, 386 U.S. at p. 24.)

B. Counsel's Comment Did Not Violate Appellants' Right To Remain Silent

In the body of appellants' argument, they assert that Willey's attorney violated their right to remain silent. It is true that "in a joint trial of multiple

codefendants, comment by an attorney representing one defendant on the silence of a codefendant violates the codefendant's constitutional right to freedom from adverse comment on his silence at trial." (*People v. Hardy*, *supra*, 2 Cal.4th at pp. 153–154, 157; see also *People v. Greenberger*, *supra*, 58 Cal.App.4th at p. 347 ["established authority . . . states that comment by an attorney representing one defendant on the silence of a codefendant violates the codefendant's constitutional right to remain silent"].) However, counsel still have greater leeway than prosecutors.

> Although it is error for either the prosecutor or counsel for a codefendant to comment on a defendant's silence, we recognize that the identity of the speaker can make a difference when determining whether an improper remark was harmless beyond a reasonable doubt. Thus, a comment alluding to the silence of a defendant that would require reversal if made by a prosecutor may be deemed harmless–or even not error–if made by a codefendant's attorney.

(*People v. Hardy*, *supra*, 2 Cal.4th at p. 157.)

As discussed above, Willey's attorney did not even comment on Cruz's silence. He commented on the decision of Cruz's attorney to have him testify. Remarking on a defendant's decision to testify is often considered helpful, since it shows that the defendant had nothing to hide. In fact, an attorney may want to praise his own client for testifying. And even "if such argument indirectly or obliquely refers to a codefendant's silence, the error is generally found harmless." (*People v. Hardy*, *supra*, 2 Cal.4th at p. 158.) Here, the attorney's comment was addressed towards Cruz's attorney while Cruz was testifying. Later, Beck also testified. It is simply inconceivable that the comment about Cruz's attorney's choice to have Cruz testify somehow impugned appellants' right to remain silent.

In addition, a defendant who elects to testify waives his Fifth Amendment right. (*Harrison v. United States* (1968) 392 U.S. 219, 222; *People v. Coffman*, *supra*, 34 Cal.4th at p. 72; see *Brown v. United States* (1958) 356 U.S. 148,

154-155 [where a defendant in a criminal case voluntarily "takes the stand and testifies in his own defense his credibility may be impeached and his testimony assailed like that of any other witness . . . ."]; *People v. Barnum* (2003) 29 Cal.4th 1210, 1227, fn. 3 [by testifying in his own defense, a defendant relinquishes "his privilege against compelled self-incrimination with respect to cross-examination on matters within the scope of the narrative testimony he provided on direct examination, as well as on matters that impeached his credibility as a witness"].) Here, all of the defendants waived their Fifth Amendment rights by testifying. Thus, because appellants voluntarily and knowingly did not exercise their right to remain silent, they cannot show that right was violated.

Nor have appellants shown that the attorney's comment forced Beck to testify. At trial, Beck's attorney claimed the comment would affect the way he conducted his case. (30 RT 5223.) And on appeal, appellants claim the comment put Beck in an "untenable position." (BOB 195.) However, it is simply not plausible that Beck's decision whether to testify was influenced by such an inconsequential remark. In effect, appellants suggest that, absent the attorney's brief comment about Cruz, the jury would not have noticed that he was the only defendant who did not testify. Not so. The trial court repeatedly told the jury that it could not hold it against a defendant for not testifying. If Beck had chosen not to testify, he could have also had the trial court give the same instruction prior to deliberations. Beck certainly knew that if the jury was going to hold his silence against him, it was not because of a silly comment by codefendant's counsel.

As for appellants' complaint that the trial court did not give the jury a curative instruction, it was reasonable for the trial court to conclude that justice was better served by moving on without such an instruction. Though appellants note that the prosecutor suggested that any error could be cured by such an

instruction, they gloss over the fact that neither they nor the other defendants asked for such an instruction. Even in cases where a prosecutor improperly comments on the defendant's silence, defense counsel often forego a corrective instruction, preferring not to return the jury's attention to the fact that the defendant did not testify. (See *People v. Galloway* (1979) 100 Cal.App.3d 551, 561 [expressing doubts about the efficacy of a curative instruction].) To the extent that appellants argue a curative instruction would have "inform[ed] the jury that this remark was improper, should be stricken, and should not be considered by the jury" (BOB 195; Cruz Joinder), they offer no explanation why they and LaMarsh did not ask for such an instruction. Therefore, because the possibility of a curative instruction was raised by the prosecutor, but not endorsed by any of the defendants, it is reasonable to assume they made a conscious decision that such an instruction would serve no purpose or do more harm than good.

Appellants are also incorrect when they suggest that the jury would have given the same consideration to a "gratuitous" (30 RT 5222) comment by codefendant's counsel as it would have given to a comment by the prosecutor. In *People v. Hardy*, this Court noted:

> A . . . reason why comment by a codefendant's counsel on a defendant's silence is different from comment by a prosecutor is the unique role a prosecutor plays in a criminal trial. "Given the prosecutor's institutional role, when the prosecutor merely 'comments' on the failure of an accused to testify, the reference is in all likelihood calculated to encourage the jury to equate silence with guilt; reasonable judicial economy thus permits a finding of reversible error. When the 'comment' comes from an actor (such as counsel for a codefendant) without an institutional interest in the defendant's guilt, however, it would be inappropriate to find reversible error as a matter of course. Instead, the court should ask whether the comment *actually* or *implicitly* invited the jury to infer guilt from silence."

(*People v. Hardy, supra*, 2 Cal.4th at pp. 158–159, italics in original quotation from *United States v. Mena* (1989) 863 F.2d 1522, 1534.)

In *People v. Hardy*, the defendant complained that in closing argument, a codefendant's attorney referred to his failure to testify by arguing, "'If you know a man has nothing to hide, he gets up on that witness stand and he tells you what's on his mind . . . .'" (2 Cal.4th at p. 159.) This Court opined:

> This statement most clearly illustrates the difference between prosecutorial comment and comment by another defense attorney. If the challenged statement was made by the prosecutor, it might constitute reversible error as to Reilly because, coming from a prosecutor, the probable meaning of the statement is a call to the jury to improperly infer guilt from Reilly's silence. Coming from a prosecutor, it might be difficult to conclude the error was harmless beyond a reasonable doubt.
>
> The remark here, however, was uttered by a lawyer for a codefendant. We thus cannot be so quick to conclude Stone necessarily intended the prohibited inference. Instead, the comment is subject to the equally plausible interpretation that the jury should believe Morgan's testimony because he took the stand and subjected himself to cross-examination. Indeed, that is how the trial court interpreted the remark.
>
> Under such circumstances, "[we] should ask whether the comment actually or implicitly invited the jury to infer guilt from silence."

(*People v. Hardy, supra*, 2 Cal.4th at pp. 159–160.)

Here, the attorney's comment about Cruz was too brief and vague to have invited the jury to infer the appellants' guilt from silence. Nor did it violate either appellants' right to remain silent since they both testified. And even if it could be construed as commenting on appellants' right to remain silent, as this Court has observed in other cases, "defendant offers nothing to question the applicability of the general rule that [i]ndirect, brief and mild references to a defendant's failure to testify, without any suggestion that an inference of guilt be drawn therefrom, are uniformly held to constitute harmless error." (*People*

v. Monterroso, *supra*, 34 Cal.4th at p. 770, quoting *People v. Boyette*, *supra*, 29 Cal.4th at pp. 455–456 and citing *People v. Coffman*, *supra*, 34 Cal.4th at p. 66; *People v. Vargas* (1973) 9 Cal.3d 470, 478; internal quotation marks omitted)

Again, Willey's attorney did not even refer to Cruz's failure to testify, and all the defendants *did* testify. Therefore, because the comment did not suggest in any way that appellants were afraid to testify or were guilty, any error had to be harmless beyond a reasonable doubt. (See *People v. Monterroso*, *supra*, 34 Cal.4th at p. 770; *Chapman*, *supra*, 386 U.S. at p. 24; *People v. Hardy*, *supra*, 2 Cal.4th at p. 157 ["When improper comment on a defendant's silence occurs, the error requires reversal of the judgment unless a reviewing court concludes the error was harmless beyond a reasonable doubt"]; see 30 RT 5523 [Beck's counsel argued the comment would prejudice Beck *if he chose not to testify*].) Likewise, because the evidence against appellants was overwhelming, any error had to be harmless beyond a reasonable doubt. (See *People v. Hardy*, *supra*, 2 Cal.4th at p. 158 ["improper comment by counsel does not warrant reversal where the reference is indirect or there is substantial incriminating evidence against all defendants].)

XXIII.

THE TRIAL COURT PROPERLY REOPENED WILLEY'S CASE-IN-CHIEF TO PERMIT HIM TO ENTER A PHOTOGRAPH OF A STAB WOUND ON COLWELL'S ABDOMEN

The day after Willey rested, he realized he had failed to enter Exhibit 185, which was an autopsy photograph of Colwell. The photograph showed a stab wound to Colwell's stomach, and Willey claimed that the photograph showed that Colwell's injury was identical to a wound on Ritchey. According to Willey, because LaMarsh testified that Beck stabbed Colwell in the stomach, and Ritchey had an identical wound, Beck must have also stabbed Ritchey

before Ritchey ran out of the Elm Street house. Presumably, if the jury could tie one of Ritchey's stab wounds to Beck, it could tie all of them to Beck. That was important to Willey because the prosecution's theory was that Willey inflicted the stab wounds to Ritchey's body while they were fighting on the lawn (and then Cruz cut Ritchey's throat). Thus, the photograph would corroborate Willey's claim that Ritchey received the stab wounds before Willey ever touched Ritchey.

Appellants assert that the trial court violated their state and federal due process rights by allowing Willey to reopen his case to admit Exhibit 185. (BOB 196; Cruz Joinder.) Appellants are wrong for several reasons. First, a trial court's ruling on a motion to reopen is initially reviewed for an abuse of discretion–not due process. Second, the trial court had broad discretion to allow Willey to reopen, and it is inconceivable that it abused that discretion by allowing Willey to admit a single relevant photograph. Third, appellants could not have been prejudiced by the ruling because nothing transpired in front of the jury between the time that Willey rested and the time he asked to reopen. Fourth, the ruling could not have deprived appellants of their right to due process because the single photograph was relevant, and it merely supplemented expert testimony on Colwell's injuries.

Furthermore, without any explanation or analysis, appellants assert that the same factors that show that a trial court abused its discretion automatically demonstrate a violation of due process. (BOB 197; Cruz Joinder.) Appellants are mistaken. Not only do they fail to demonstrate that the trial court abused its broad discretion, they cannot show why the purported error was so significant that it rendered the trial fundamentally unfair.

A. Procedural History

During his direct testimony, LaMarsh testified that he saw Beck stab Colwell in the stomach. (32 RT 5657, 5752–5753.) During his direct

testimony, Willey testified that he had a fistfight with Ritchey on the front lawn of the Elm Street house; but he never stabbed Ritchey; then Beck knocked him off of Ritchey and cut Ritchey's throat. (34 RT 5992–5998.) During cross-examination, Willey speculated that Ritchey had already been stabbed before he came out of the house. (34 RT 6099.)

Willey rested on May 12, 1992, at 3:00 p.m. (35 RT 6245, 6251.) For the last hour of the day, the trial court and parties discussed various matters outside the presence of the jury. (35 RT 6251–6274.) The next morning, the parties resumed discussing jury instructions outside the presence of the jury. (35 RT 6275–6326.) After a lunch break, the parties continued their discussion of jury instructions, and also discussed exhibits and the prosecutor's plan to recall Dr. Ernoehazy during rebuttal. (35 RT 6327–6332.) The discussion reminded Willey's attorney that he had wanted to admit Exhibit 185, which was an autopsy photograph of a stab wound on Colwell's stomach.[70] (35 RT 6332.) He asked to reopen his case to admit the photograph–preferably by stipulation. The prosecutor and the other defendants agreed to the stipulation, but when Beck refused, Cruz withdrew his consent as well. (35 RT 6332–6333.)

After Beck refused to stipulate, the trial court stated that Willey would have to call a witness to authenticate the exhibit. Willey stated that he would recall Dr. Ernoehazy. The prosecutor also said that if there was no stipulation, he also intended to have Dr. Ernoehazy authenticate the photograph. Beck objected to any further testimony by Dr. Ernoehazy. (35 RT 6333–6336.)

The prosecutor's theory for introducing the evidence was that since Beck testified he did not hurt anyone, and LaMarsh testified that Beck plunged a knife into Colwell's stomach, the prosecutor should be allowed to show a

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70. Willey mistakenly identified the autopsy photograph as Exhibit 137, and the court clerk noted that Exhibit 137 had been previously admitted. (35 RT 6332; see 10 CT 2458.)

photograph of that wound to corroborate LaMarsh's account and rebut Beck's testimony. (35 RT 6334.) On the other hand, Willey sought to introduce the evidence to show that the similarity between wounds on Colwell and Ritchey proved that Beck not only stabbed Colwell, but must have also stabbed Ritchey before Ritchey ran out of the house. (35 RT 6336.)

Willey's attorney explained that he did not offer the photograph sooner because he "mistakenly thought that it was that particular photograph which was in evidence since it was a photograph of a major wound." (35 RT 6335.) The court stated it would allow Willey to reopen for the one purpose of introducing the photograph. (35 RT 6336.)

Because Dr. Ernoehazy was not immediately available, the trial court allowed the prosecutor to begin his rebuttal before Willey reopened his case. (35 RT 6336–6337.) After two witnesses testified for the prosecution, Willey called Dr. Ernoehazy. He authenticated Exhibit 185 and the trial court asked whether anyone objected. Appellants submitted the matter and the trial court admitted the exhibit. The photograph was viewed by the jury. (35 RT 6368–6369.) The prosecutor then resumed his rebuttal with Dr. Ernoehazy as his last witness. (35 RT 6370.)

Later that same day, Cruz called two witnesses in surrebuttal. A few days later, LaMarsh called one witness. Beck and Willey did not offer any surrebuttal. (35 RT 6398; 36 RT 6467.)

B. Legal Principles

A trial court's ruling on a motion to reopen a case is reviewed for an abuse of discretion. (*People v. Ayala*, *supra*, 23 Cal.4th at p. 282; see § 1094 [trial court has discretion to change the order of trial procedures for good reason].)

"[T]he trial court has broad discretion to order a case reopened and allow the introduction of additional evidence. [Citations.] No error results from granting a request to reopen in the absence of a showing of abuse. [Citation.]

Moreover, the appellate court decisions upholding an order allowing the prosecution to reopen its case are legion [even after the defense has rested]. [Citations.]" (*People v. Rodriguez* (1984) 152 Cal.App.3d 289, 294-295.) "'Factors to be considered in reviewing the exercise of [the trial court's] discretion include the stage the proceedings had reached when the motion was made, the diligence shown by the moving party in discovering the new evidence, the prospect that the jury would accord it undue emphasis, and the significance of the evidence.' [Citation.]" (*Id.* at p. 295, italics omitted; see also *People v. Jones*, *supra*, 30 Cal.4th at p. 1110 [factors to consider when a trial court has *denied* a defendant's request to reopen].)

C. The Trial Court Properly Used Its Discretion To Reopen Willey's Defense So He Could Enter An Autopsy Photograph

As a preliminary matter, Cruz never objected to Willey reopening his defense, and when Willey offered the autopsy photograph into evidence, neither Cruz nor Beck objected. Therefore, Cruz forfeited his claim, and Beck arguably forfeited his claim by failing to renew his objection at the time the exhibit was entered into evidence.

But even if appellants did not forfeit their claim, it fails on the merits. As the court observed in *People v. Rodriguez*, "appellate court decisions upholding an order allowing the prosecution to reopen its case are legion." (*People v. Rodriguez*, *supra*, 152 Cal.App.3d at p. 295.) There are also many cases that affirm a trial court's discretion to not allow a party to reopen. However, it is the rare case that holds that a trial court abused its discretion by permitting a defendant to reopen his case. In fact, Respondent was not able to locate any such California case, and appellants certainly offer none. (See BOB 196–199; Cruz Joinder [appellants cite only two cases in their argument, and only for general principles of law].)

Nevertheless, the general factors considered in reviewing a trial court's ruling on a motion to reopen include: (1) the stage of the proceedings when the motion is made; (2) the diligence made by the moving party in discovering or presenting the new evidence; (3) the possibility that the jury would accord the new evidence undue emphasis; and (4) the significance of the evidence. (*People v. Rodriguez, supra*, 152 Cal.App.3d at p. 295; *People v. Jones, supra*, 30 Cal.4th at p. 1110.) Appellants, of course, claims that "none of these enumerated factors justify the trial court's decision." (BOB 197.) Respondent disagrees.

1. Stage Of The Proceeding: The Motion To Reopen Was Made After Willey Rested–But Before Any Further Evidence Was Admitted

Appellants argue that Willey's motion to reopen "was made after the parties had finished presenting evidence, except for minor rebuttal which had no impact on the area of the evidence being raised by Mr. Miller's motion to reopen." (BOB 197; Cruz Joinder.) What appellants do not bother to mention is that nothing transpired in front of the jury between the time that Willey rested and the time he asked to reopen. Thus, there was no tactical or meaningful difference between admitting the exhibit at the end of Willey's case, or the next day when he briefly reopened.

To the extent that Willey could not enter the evidence immediately, that was solely caused by Beck's refusal to stipulate to the admission of the evidence. Beck had the right not to stipulate, but he cannot complain that forcing Willey to admit the exhibit through Dr. Ernoehazy meant that Willey would have to reopen his case in the midst of the prosecution's rebuttal. In any case, Willey entered the evidence the day after he originally rested. Since appellants did not offer any evidence in the interim, or do anything else in reliance on Willey having completed his defense case, they could not have suffered prejudice.

Furthermore, appellants miss the point when they observe that the defendants did not address the new evidence in their surrebuttal. The issue is not *whether* they responded to that evidence, but rather the fact that they had the *opportunity* to do so. The evidence was not introduced so late in the trial that the other parties did not have a chance to offer rebuttal evidence. Appellants had that opportunity; they just did not use it.

2. Diligence Of Moving Party: Willey Moved To Introduce The Evidence As Soon As He Realized It Had Not Been Admitted

Appellants argue that "there was no diligence on Mr. Miller's part in previously obtaining and presenting the use of the evidence, and there was no allegation that it was new evidence recently discovered." (BOB 197; Cruz Joinder.) However, Willey's attorney explained that he did not offer the photograph sooner because he mistakenly confused it with another photograph of a major wound and, therefore, thought that Exhibit 185 had already been admitted. (35 RT 6335.) Since he thought the exhibit had already been admitted, it did not occur to him to try and obtain and admit it. Moreover, while it may be necessary to prove that evidence is newly discovered to warrant a new trial, there is no requirement that evidence be newly discovered to reopen a party's case. Furthermore, contrary to appellants' argument, Willey was diligent about presenting the new evidence. He realized his mistake less than 24 hours after he rested and was able to enter it just an hour or two after that.

The fact that Willey's attorney made a mistake was hardly a shock, since it was a long complicated trial with multiple defendants and numerous exhibits. There was no reason to prevent Willey from reopening his case to rectify that mistake–except that it was not in appellant's interest.[71/] However, the fact that

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71. It is also understandable that Willey lost track of Exhibit 185 because he expected to use different evidence to make the same point. During closing argument, Willey explained that he had told the jury during opening

probative evidence will be detrimental to another party is not a factor that weighs against permitting a party to reopen his case. Every time a trial court allows a party to reopen, the purpose is to admit advantageous evidence. In an adversarial system, an advantage for one party is generally at the expense of another party. Therefore, appellants cannot prove that the trial court abused its discretion just because they lost the benefit of Willey's oversight.

"Presumably one of the reasons underlying the requirement of diligence is that a jury may accord undue weight to evidence which is admitted close to the time deliberations begin." (*People v. Rodriguez, supra*, 152 Cal.App.3d at p. 295.) Here, the evidence was presented the day after Willey initially rested. The jury did not begin deliberations for another week. (7 CT 1795.) Willey could not have gained any meaningful advantage by having the evidence admitted seven–rather than eight–days before the commencement of deliberations. "[A]nother reason for the requirement of diligence is that a defendant must be informed of the nature of the evidence against him so that he can properly defend the action." (*Ibid.*) Again, appellants could not have been prejudiced because they had already rested, and they could not have done anything differently if the exhibit had been admitted during Willey's original defense. Similarly, appellants' chance for surrebuttal came after Willey admitted the exhibit, so they were not deprived of the opportunity to rebut the

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statements that he had "irrefutable evidence that Mr. Ritchey was stabbed in the house. Of course, I was relying on Dr. Ernoehazy's previous testimony and not the testimony that he was going to give here." (37 RT 6688.) He then argued that Dr. Ernoehazy had previously testified that Ritchey received stab wounds from three different knives, but in the current trial he said there were only two knives. (37 RT 6688–6689.) Absent that evidence, Willey could no longer argue that Ritchey must have been stabbed in the house because Willey could not have been wielding three knives. Thus, Willey was forced to instead argue that the similarity between the wounds to Colwell and Ritchey proved that Beck must have stabbed both Colwell and Ritchey in the house.

evidence. (See 36 RT 6467 [Beck declined to call any witnesses in surrebuttal].)

3. The Possibility That The Jury Would Accord The New Evidence Undue Emphasis: The Time Taken To Admit The Photograph Was Minimal, And The Trial Immediately Continued With The Same Witness Testifying In The Prosecution's Rebuttal Case

Appellants argue that "there was a substantial risk that the jury would place too large an emphasis on this evidence . . . ." (BOB 198; Cruz Joinder.) Not so. The photograph was authenticated and admitted without any fuss. Dr. Ernoehazy merely testified that it was an autopsy photograph of Colwell, and then it was shown to the jury. (35 RT 6368–6369.) There is no reason to believe the jury gave the exhibit any special attention. Moreover, any small risk that the evidence would be given additional attention by the jury was largely of Beck's own making. Beck glosses over the fact that Willey tried to move the photograph into evidence pursuant to a stipulation. Because Beck refused to do so, Willey was forced to have Dr. Ernoehazy take the stand and authenticate the photograph.

Moreover, if Beck had agreed to the stipulation, no trial proceedings would have taken place between the time that Willey initially rested and the time the trial court would have reopened for the stipulated admission of the photograph. But because Beck forced Willey to use Dr. Ernoehazy to authenticate the photograph, and Dr. Ernoehazy was not immediately available, Willey could not reopen until after the prosecutor had already called two rebuttal witnesses. Thus, Beck's obstinance caused a bigger disruption in the flow of the proceedings, and drew more attention to the introduction of that exhibit, than was necessary.

4. The Significance Of The New Evidence: The Photograph Was Significant To Willey's Case Because It Suggested That Ritchey Received His Stab Wounds Before Willey Fought With Him

The photograph had probative value for Willey. But it could not have been very prejudicial to appellants because it merely corroborated expert testimony. Moreover, Willey's theory of its relevance conflicted with the prosecutor's theory of who stabbed Ritchey. Appellants claim that "the sole relevance of the photograph was an attempt to bolster Willey's version of the Colwell killing . . . ." (BOB 199; Cruz Joinder.) Not so. The evidence was intended to show that Willey did not stab Ritchey. Willey contended that Colwell and Ritchey had identical wounds. So if Beck stabbed Colwell (per LaMarsh's testimony), and Ritchey had the same wound, then Beck probably stabbed Ritchey too–before Ritchey came out of the house. (35 RT 6336; 37 RT 6692.) That would corroborate Willey's testimony that Ritchey received his stab wounds before Willey fought him. Thus, contrary to appellants' assertion, the evidence was not intended merely to corroborate that Beck killed Colwell, but to establish that Willey did not stab or murder Ritchey.[72]

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72. More specifically, LaMarsh testified that Beck stabbed Colwell in the stomach. (32 RT 5657, 5752–5753.) Willey testified that he fought with Ritchey, but he never stabbed him; Beck was the person who knocked him off of Ritchey and cut his throat. (34 RT 5992–5998.) The prosecution's theory was that Willey stabbed Ritchey multiple times, and Cruz cut his throat. (36 RT 6534.) At the hearing on reopening Willey's case, Willey noted that Exhibit 115 was a photograph of the stab wound to Ritchey's chest and Exhibit 185 was a photograph of the stab wound to Colwell's stomach. Willey argued that the wounds were "almost identical." (35 RT 6336.) Thus, the relevance was that if the stab wound to Ritchey's chest matched the stab wound that Beck inflicted on Colwell, then perhaps Beck stabbed Ritchey before Ritchey ran out of the house. (37 RT 6696–6698; 37 RT 6692 [Willey argued that autopsy photographs of wounds to Ritchey and Colwell were "almost identical"].) That would corroborate Willey's testimony that he did not have a knife; he never stabbed Ritchey; and Ritchey was probably stabbed before Willey ever touched

Appellants contend that the autopsy photograph "had previously been excluded by the court at a hearing in which Mr. Miller had the full opportunity to participate." (BOB 198; Cruz Joinder.) However, they offer no citation to the record and do not describe anything about the hearing. Apparently, they are referring to when the prosecutor argued that he should be allowed to enter the photograph to rebut Beck's claim that he did not harm anyone. But the prosecutor (and trial court) noted only that a *slide* of the wound to Colwell's stomach had been rejected in an in limine hearing. (35 RT 6334–6335.) The exhibit, however, was a *photograph*. Moreover, the prosecutor referred to the slide as either number 11 or number 99 (*ibid.*), whereas the photograph was number 185. Therefore, it is unclear whether they were the same image. In any case, there was nothing improper about the prosecutor renewing his request to introduce evidence even if it had been denied in the past. Likewise, Willey could seek admittance of evidence even if the prosecutor's motion had been denied in the past.

Appellants argue that "the trial court did not fully consider the impact upon Beck whose case had been fully submitted to the jury, absent some minor rebuttal that did not directly affect his case." (BOB 199; Cruz Joinder.) However, like appellants' claim that the trial court erred by reopening jury selection, this is just another "gotcha" claim. In Argument XVII, appellants claimed that they were prejudiced by reopening voir dire even though absolutely nothing transpired in the short interval between the time the prosecutor passed for cause and the time he sought to reopen. Similarly, here, appellants argue prejudice even though their defense case was already over and it made no difference to them whether Willey presented evidence in his defense, or briefly in a reopened defense a little while later. Therefore, appellants cannot

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him. (34 RT 5993–5998, 6021, 6099; but see 35 RT 6212 [Willey testified he did not see anything wrong with Ritchey when he tackled him].)

show they were harmed because they cannot demonstrate detrimental reliance or actual prejudice.

Similarly, as discussed above, the issue is not whether there was "some minor rebuttal." But rather that appellants' opportunity for rebuttal came *after* Willey introduced his new evidence. Therefore, the timing of the new evidence had absolutely no effect on appellants' ability to put on a defense.

In conclusion, for all of the reasons discussed above, the trial court did not abuse its broad discretion by permitting Willey to briefly reopen to admit one relevant photograph. (See *People v. Ayala*, *supra*, 23 Cal.4th at p. 282; *People v. Rodriguez*, *supra*, 152 Cal.App.3d at p. 295.)

D. The Ruling Did Not Violate Appellants' Right To Due Process, And Any Error Was Harmless

Appellants offers no authority for the proposition that a trial court violates a defendant's right of due process by allowing a codefendant to reopen his case to admit an exhibit. Nor can appellants show that Exhibit 185 was so prejudicial that its admission violated their state or federal constitutional rights. On the contrary, one photograph could not have been very significant in such a long trial with so many exhibits–especially when it merely corroborated prior testimony. (See 18 RT 3100 [Dr. Ernoehazy testified that Colwell's cause of death was stab wounds to abdomen and neck].) In addition, the photograph did have probative value under either the prosecutor or Willey's theory. Moreover, since the exhibit was admitted by Willey, and Willey's theory of the photograph's relevance (i.e., to show that Beck rather than Willey stabbed Ritchey) contradicted the prosecutor's theory of the case, its prejudicial value had to be small. Accordingly, there could not have been any violation of appellants' due process rights. (See *People v. Falsetta* (1999) 21 Cal.4th 903, 913 ["The admission of relevant evidence will not offend due process unless

the evidence is so prejudicial as to render the defendant's trial fundamentally unfair."].)

Similarly, even if the trial court somehow abused its discretion by allowing Willey to reopen, the error was necessarily harmless because the prosecutor would have introduced the same evidence at virtually the same time. That is so because the prosecutor made it clear he intended to have Dr. Ernoehazy authenticate the same photograph in his rebuttal case. So if Willey had not been allowed to reopen his case for Dr. Ernoehazy to authenticate the photograph, the prosecutor would have had the doctor do the exact same thing at virtually the exact same time. (See 35 RT 6333, 6368–6371; see BOB 199 [appellants assert that "Beck's testimony that he did not inflict any injury on Colwell did not warrant the introduction of the doctor's testimony or the photograph in rebuttal," but offer no explanation why]; Cruz Joinder.) In addition, because the photograph merely corroborated the testimony of the prosecutor's expert, it could not have been very prejudicial. On the other hand, the evidence against appellants was overwhelming. Therefore, any error in admitting the photograph had to be harmless beyond a reasonable doubt. (*Chapman*, *supra*, 386 U.S. at p. 24.)

XXIV.

THE TRIAL COURT PROPERLY DENIED APPELLANTS' REQUEST FOR REBUTTAL ARGUMENT

As discussed in Argument I-D, the trial court determined that closing arguments would proceed in the following order: the prosecutor, Cruz, Beck, LaMarsh, Willey, and rebuttal by the prosecutor. Cruz requested permission to make a rebuttal argument between Willey's closing argument and the prosecutor's rebuttal. (36 RT 6454.) He argued that section 1093 set forth the order of argument, but section 1094 gave the trial court discretion to depart

from that order. He also argued that he had a constitutional right to rebut the other defendants' arguments. "I'm asking this to be done before the District Attorney's [rebuttal] argument. And I don't have any problem with anybody having rebuttal after me, as long as the rebuttal stays within what I might argue at that point." (36 RT 6455–6456; see BOB 202 [citing *People v. Cory* (1984) 157 Cal.App.4th 1094, 1105, appellants acknowledge that the prosecutor had the right to make the final argument]; Cruz Joinder.) Beck joined the motion. LaMarsh, Willey, and the prosecutor objected. They all argued that defendants never have the right to rebut the prosecution's rebuttal, so Cruz and Beck had no right to rebut the codefendants' arguments. The trial court denied the motion. (36 RT 6456–6458; 7 CT 1792.)

Appellants claim that their trial was "unusual," and that by refusing their request for rebuttal argument, the trial court deprived them of their rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments. (BOB 200–202 [appellants specify the federal constitutional rights purportedly violated only in the caption of their argument; in the argument itself, they cite only the applicable constitutional amendments]; Cruz Joinder.) However, it is hardly unusual for a criminal trial to have multiple defendants with overlapping and conflicting interests. What is unusual is appellants' claim that they had a constitutional right to rebuttal argument. They offer no authority which even remotely supports the claim.

Moreover, there was nothing unfair about the order of the arguments. Defendants always make their closing argument without knowing what the prosecutor will say in rebuttal. As for the arguments of the codefendants who would go after appellants, Cruz indicated that he knew exactly what argument he wanted to rebut. "I feel that there might be an argument put forward that Mr. Cruz, Mr. Vieira, and Mr. Beck entered into a conspiracy, which there has been some evidence or attempt on evidence of that brought forward to the jury." (36

RT 6456.) Since Cruz (and Beck) knew what the evidence was, and knew the argument they wanted to rebut, there was no reason why they could not address the codefendants' anticipated arguments in their ordinary closing argument. That may have been more technically challenging. But it was certainly within counsel's ability. Since appellants knew the argument they wanted to rebut, they could not have been afraid of being ambushed by codefendants. Rather, they merely sought the tactical advantage of being able to respond and/or to have additional opportunities for argument.

Section 1093, subdivision (e), provides the order of argument, and it is up to the parties to persuade the trial court to deviate from that order pursuant to section 1094. Appellants acknowledges that "[t]he trial court has broad discretion in this area." (BOB 201; Cruz Joinder.) Therefore, if the trial court had broad discretion, it could not have violated four different Amendments to the federal constitution by exercising that discretion in accordance with almost every case in recent United States history. To the extent appellants complain that the trial court denied their motion "[w]ithout explanation," they utterly fail to show that the trial court had any duty to provide such an explanation. It was appellants who had to explain why the trial court should deviate from the customary and statutorily prescribed order.

Further, it is presumed that the trial court knew the statutory and case law and properly performed its judicial duties. (Evid. Code, § 664; *People v. Coddington*, *supra*, 23 Cal.4th at p. 644.) Moreover, in the present matter, it is quite evident that the trial court did understand its discretion. After Cruz raised his motion, the trial court stated, "Unless counsel can point something out to me in the guilt phase, Mr. Brazelton will argue, defense counsel will argue in order, and then Mr. Brazelton will close." (36 RT 6454–6455.) Thus, the trial court understood that it *could* deviate from the prescribed order if Cruz made a compelling argument. Appellants simply failed to do so. In fact, Beck

made no argument at all. (36 RT 6456–6457; see 36 RT 6467 [Beck also did not offer any evidence in surrebuttal].)

Furthermore, the proposed modification would have either been unfair to the other defendants, or would have led to additional rounds of rebuttal. Though Cruz identified the argument he wanted to rebut, he did not clearly limit himself to that topic. "And all that I'm asking is the ability to do a real short argument, just rebutting what specifically might have been said that talks about that conspiracy *or anything else that would be detrimental to my client* and prejudicial on those grounds." (36 RT 6456, italics added.) It is unclear whether Cruz was asking for the right to rebut *any* detrimental argument from defense counsel, or only argument about the possibly limited dimension of the conspiracy. In either case, it certainly would have been unfair to allow Cruz to determine the scope of his own rebuttal, but limit the other defense attorneys rebuttal to what Cruz chose to address. (See *ibid.* [Cruz argued, "I don't have any problem with anybody having rebuttal after me, as long as the rebuttal stays within what I might argue at that point."].) On the other hand, if all defense attorneys received the opportunity to make general rebuttal arguments against defendants who argued after them, then, as the prosecutor argued, "We could end up being here all month doing rebuttal arguments." (36 RT 6457.)

In short, the trial court properly denied the motion because there was no good reason to deviate from the prescribed order; rebuttal arguments could quickly become unwieldy if all defendants received an equal opportunity to rebut one another; and two codefendants and the prosecutor objected to the modification. (36 RT 6456–6457.) Accordingly, appellants cannot show that the trial court abused its discretion by denying the motion. (*People v. Seastone* (1969) 3 Cal.App.3d 60, 67 [the order of procedure at trial is within discretion of trial judge and must stand unless a clear abuse of discretion is shown].) For the same reasons, appellants cannot show that the trial court deprived them of

their federal rights to due process, a fair trial, to present a defense, and to a reliable verdict. (See *Herring v. New York* (1975) 422 U.S. 853, 862 [arguments by the parties are subject to the broad control and discretion of the trial court]; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1184; § 1093, subd. (e).)

XXV.

THERE WAS SUBSTANTIAL EVIDENCE THAT APPELLANTS CONSPIRED TO COMMIT MURDER

Appellants claim that there was insufficient evidence to support the conspiracy convictions because Evans' testimony was "inherently unreliable" and it was not adequately corroborated as required by law.[73] (BOB 203; Cruz Joinder.) Appellants are wrong. Evans' testimony was credible; it was corroborated by an abundance of testimony and physical evidence; and it was far more reliable than the defendants' testimony, since she would lose her plea bargain if she lied, and the defendants could lose their lives if they told the truth. Moreover, Evans' testimony provided overwhelming evidence of appellants' participation in the conspiracy; and the modest corroboration requirement for accomplice testimony was more than satisfied.

Furthermore, conspiracies are typically proven with circumstantial evidence, and even aside from Evan's testimony, there was substantial evidence

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73. Appellants do not discuss the fact that, after the prosecutor completed his case-in-chief, they moved for acquittal on their conspiracy charge pursuant to section 1118.1. (See 26 RT 4511–4514.) Consequently, they do not argue that this Court should review the trial court's denial of that motion based on the evidence admitted up to that point. Nevertheless, it appears that this Court should not only review the entire record for sufficient evidence, but should also review the trial court's ruling to determine whether there was sufficient evidence at the close of the prosecution's case. (See *People v. Cole*, *supra*, 33 Cal.4th at p. 1212.) Of course, it would be an unusual case where the trial court's ruling was found to be correct, but a review of the entire record would fail to reveal sufficient evidence for the conviction.

that appellants participated in the conspiracy to commit murder. For example, the evidence showed that Cruz, Beck, and Vieira lived, worked, ate, and socialized together for years; on the night of the murders, Beck or LaMarsh drove to another town to bring Willey back to the Camp; after everyone was assembled, they armed themselves; and then they drove together to the murder scene. Once there, they used the weapons they had brought to kill four people. That alone was enough to infer that the murders were conspiratorially planned.

Nor did the defense cases help appellants. While Cruz, Beck, and LaMarsh claimed they went to the Elm Street house to help Evans retrieve clothes, Willey testified they went to move furniture. (29 RT 5069 [Cruz testified that Evans wanted to get her wedding gown]; 30 RT 5294 [Beck testified they went to get clothes and things for Evans]; 32 RT 5636 [LaMarsh testified they went to get Evans' clothes and her sisters' things]; 34 RT 5976–5978, 6045 [Willey testified they went to move furniture].)

All of the defendants' testimony confirmed the closeness of their group and their animosity towards Raper, Colwell, and Smith. That was strong evidence of motive for the conspiracy.

All of the defendants confirmed that they went to the Elm Street house in the middle of the night armed with various weapons. They offered no evidence to suggest that the victims were doing anything other than sitting around the house minding their own business. Two of the victims were women–one of whom was sleeping. Raper was an older frail alcoholic. According to Willey, Ritchey tried to run away. (34 RT 5992–5993.) And according to LaMarsh, Colwell was held down on the ground and was "kicking like a kid." (32 RT 5657.) On the other hand, five of the six assailants were young men and three of them were very large. Thus, there was virtually no chance that the hapless victims started the fight, nor was there any evidence that appellants acted in self-defense. Therefore, contrary to appellants' claim that violence broke out

spontaneously, the circumstances showed that the armed assailants not only started the violence, but specifically went to the house in the middle of the night with the intention of killing the victims.

A. Procedural History

At the conclusion of the prosecutor's case-in-chief, Cruz moved for dismissal of the conspiracy charge pursuant to section 1118.1 [acquittal for insufficient evidence].[74] (26 RT 4511.) He argued, "I feel that the only evidence that the People have brought forward at this time as far as a conspiracy goes is Michelle Evans's testimony, and I think there is a prima facie showing that Michelle Evans is definitely an accomplice in this matter, as required by the law . . . . [¶] Evans testified that there was an agreement entered into and that they went over to the house. There has been no other corroborating evidence as far as the conspiracy goes." (*Ibid.*) Beck joined the motion, but did not offer any additional argument. (26 RT 4514.) LaMarsh and Willey also joined. (26 RT 4515.)

The prosecutor argued that it was often necessary to prove a conspiracy charge with circumstantial evidence:

> In this particular case, there is ample circumstantial evidence that there was a conspiracy. The testimony of Mr. Duval who saw four people leaving the Elm Street address in single file heading towards the railroad tracks, the testimony of Mr. Creekmore that he saw two people attacking Mr. Ritchey in the street, the testimony of Kathy Moyers. She saw two people attacking the person in the street. The testimony of Patricia Badgett, that all of these people came to Mr. Willey's home immediately after the offense. All of the testimony of the officers, finding the weapons there at the scene and the tire tracks and so forth, all of those things corroborate the testimony of Miss Evans; and all of those things, even without the testimony of

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74. Cruz stated he had "a short 1118 motion." (26 RT 4511.) However, he was actually referring to section 1118.1.

Miss Evans, show that two or more people combined together to commit these murders.

And, also, you have the testimony of the other people who were acquaintances of the victims and of the defendants telling the Court and the jury about the animosity between Mr. Raper, Mr. Colwell, Mr. Beck and Mr. Cruz, and so forth, and Mr. LaMarsh. All of those things combined, of course, give more than adequate circumstan[t]ial evidence to support the conspiracy count.

(26 RT 4515–4516.)

The trial court ruled:

Keeping in mind that each and every aspect of the accomplice's testimony need not be corroborated and that if after removing the testimony of the accomplice, the remaining evidence connects the defendants with the crime, there is corroboration; and the Court feels that there is corroboration of Miss Evans's testimony in this matter.

There is evidence–additional evidence that the defendants were armed.

There is additional evidence that the defendants drove and rode in a vehicle to the area of the scene of the murders.

There is evidence that some or more of them used military-type face masks. There's corroborative evidence of that.

Corrob[or]ative evidence that they entered the residence.

And there is corrob[or]ative evidence that the victims were killed in the furtherance of the conspiracy.

So I'm going to deny the motion based on the argument there is not sufficient corroboration of the conspiracy.

(26 RT 4518–4519.)

Prior to deliberations, the trial court instructed the jury pursuant to CALJIC Nos. 3.11, 3.12, 3.13, 3.14, and 3.16:

A defendant cannot be found guilty based upon the testimony of an accomplice unless such testimony is corroborated by other evidence which tends to connect such defendant with the commission of the offense.

Testimony of an accomplice includes any out-of-court statement purportedly made by the accomplice received for the purpose of proving what the accomplice stated was true.

To corroborate the testimony of an accomplice there must be evidence of some act or fact related to the crime which, if believed, by itself and without any aid, interpretation, or direction from the testimony of the accomplice tends to connect the defendant with the commission of the crime charged.

However, it is not necessary that the evidence of corroboration be sufficient in itself to establish every element of the crime charged, or that it corroborate every fact to which the accomplice testifies.

In determining whether an accomplice has been corroborated, you must first assume the testimony of the accomplice has been removed in the case. You must then determine whether there is any remaining evidence which tends to connect the defendant with the commission of the crime.

If there is not such independent evidence which tends to connect the defendant with the commission of the crime, the testimony of the accomplice is not corroborated.

If there is such independent evidence which you believe, then the testimony of the accomplice is corroborated.

The required corroboration of the testimony of an accomplice may not be supplied by the testimony of any or all of his or her accomplices, but must come from other evidence.

Merely assenting to or aiding or assisting in the commission of a crime without knowledge of the unlawful purpose of the perpetrator and without the intent or purpose of committing, encouraging, or facilitating the commission of the crime is not criminal. Thus a person who assents to, or aids, or assists in, the

> commission of a crime without such knowledge and without such intent or purpose is not an accomplice in the commission of such crime.
>
> If the crime of murder or the crime of conspiracy to commit murder was committed by anyone, the witness Michelle Evans was an accomplice as a matter of law and her testimony is subject to the rule requiring corroboration.

(36 6485–6487; 8 CT 1878–1883.)

In denying Beck's motion to reduce his sentence to life without the possibility of parole, the trial court opined: "[T]he evidence presented clearly establishes that Mr. Beck was present when the murders were planned and that he armed himself and secured the presence of Mr. Willey to participate in the murders. [¶] And the evidence further clearly establishes that Mr. Beck personally murdered at least one and perhaps two of the victims." (45 RT 8413.)

B. Legal Principles

"The necessary elements of a criminal conspiracy are: (1) an agreement between two or more persons; (2) with the specific intent to agree to commit a public offense; (3) with the further specific intent to commit that offense; and (4) an overt act committed by one or more of the parties for the purpose of accomplishing the object of the agreement or conspiracy. [Citations.]" (*People v. Liu* (1996) 46 Cal.App.4th 1119, 1128; *People v. Morante* (1999) 20 Cal.4th 403, 416; *People v. Herrera*, *supra*, 70 Cal.App.4th at p. 1464.)

To convict a defendant of conspiracy, there must be proof of an overt act by one of the conspirators in furtherance of the conspiracy. (*People v. Swain*, *supra*, 12 Cal.4th at pp. 599-600.) Even when multiple overt acts are alleged, the prosecution need prove only one of those overt acts. (*People v. Alleyne* (2000) 82 Cal.App.4th 1256, 1260.) Since a conspiracy conviction can rest on a single overt act, the reviewing court determines whether there is sufficient

evidence to support any of the charged overt acts. (*People v. Russo*, *supra*, 25 Cal.4th at pp. 1131-1136; *People v. Alleyne*, *supra*, 82 Cal.App.4th at p. 1260.)

For purposes of section 1111, a coconspirator is an accomplice. (*People v. Garcia* (2000) 84 Cal.App.4th 316, 325; *People v. DeJesus* (1995) 38 Cal.App.4th 1, 23.) Section 1111 provides that a conviction cannot be based on an accomplice's testimony unless that testimony is corroborated. "A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof." (§ 1111.)

The law, however, requires only "'slight'" corroboration, and the evidence need not corroborate the accomplice as to every fact to which he testifies. (*People v. Williams*, *supra*, 16 Cal.4th at pp. 680-681.) "The corroborating evidence may be circumstantial or slight and entitled to little consideration when standing alone, and it must tend to implicate the defendant by relating to an act that is an element of the crime. The corroborating evidence need not by itself establish every element of the crime, but it must, without aid from the accomplice's testimony, tend to connect the defendant with the crime." (*People v. McDermott* (2002) 28 Cal.4th 946, 986; see also *People v. Rodrigues*, *supra*, 8 Cal.4th at p. 1128; *People v. Avila*, *supra*, 38 Cal.4th at p. 563; *People v. Narvaez* (2002) 104 Cal.App.4th 1295, 1303.) The corroborative evidence must connect defendant with the crimes without aid or assistance from the accomplice's testimony. (*People v. Davis*, *supra*, 36 Cal.4th at p. 543.) The testimony of one accomplice is not sufficient to corroborate another accomplice's testimony. (*Id.* at pp. 543-544 .) However, "[t]he necessary corroborative evidence for accomplice testimony can be a defendant's own admissions." (*People v. Williams*, *supra*, 16 Cal.4th at p. 680; see 35 RT 6197

[prosecutor and trial court agreed "a defendant's testimony can be used to corroborate an accomplice."].)

There is sufficient evidence of the existence of a conspiracy whenever the evidence permits an inference that the parties "positively or tacitly came to a mutual understanding to commit a crime. [Citation.] The existence of a conspiracy may be inferred from the conduct, relationship, interests, and activities of the alleged conspirators before and during the alleged conspiracy." (*People v. Cooks* (1983) 141 Cal.App.3d 224, 311.) One need not be a member of a conspiracy from its inception but may join after it is formed and actively participate in it, thereby adopting the other conspirators' acts and declarations. (*People v. Aday* (1964) 226 Cal.App.2d 520, 534.) It is not necessary that all conspirators fully comprehend the scope of the conspiracy, act together rather than in separate groups, or use the same means known to all of them, as long as their actions were committed in furtherance of the conspiracy. (*People v. Cooks, supra*, 141 Cal.App.3d at p. 312.) "It need not be shown that the parties met and actually agreed to jointly undertake criminal action. [Citation.] The agreement may be inferred from the conduct of the defendants in mutually carrying out a common purpose in violation of a penal statute. [Citation.]" (*People v. Cockrell* (1966) 63 Cal.2d 659, 667.)

Circumstantial evidence suffices to establish the existence of a conspiracy, and, conspiracies are generally shown only by such evidence. (*People v. Robinson* (1954) 43 Cal.2d 132, 136.) The overt acts themselves may serve as circumstantial evidence of the conspiracy's existence. (*People v. Herrera, supra*, 70 Cal.App.4th at p. 1464.)

> In reviewing a challenge to the sufficiency of the evidence under the due process clause of the Fourteenth Amendment to the United States Constitution and/or the due process clause of article I, section 15 of the California Constitution, we review the entire record in the light most favorable to the judgment to determine whether it discloses substantial evidence–that is,

> evidence that is reasonable, credible, and of solid value–from which a reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt. (*People v. Johnson* (1980) 26 Cal.3d 557, 578; *People v. Berryman* [1993] 6 Cal.4th 1048, 1083; see also *Jackson v. Virginia* (1979) 443 U.S. 307, 317-320.)
>
> In ruling on a motion for judgment of acquittal pursuant to section 1118.1, a trial court applies the same standard an appellate court applies in reviewing the sufficiency of the evidence to support a conviction, that is, "'whether from the evidence, including all reasonable inferences to be drawn therefrom, there is any substantial evidence of the existence of each element of the offense charged.' (*People v. Ainsworth* (1988) 45 Cal.3d 984, 1022 . . .; see *People v. Mincey, supra*, 2 Cal.4th 408, 432, fn. 2.)" (*People v. Crittenden, supra*, 9 Cal.4th 83, 139, fn. 13.) "Where the section 1118.1 motion is made at the close of the prosecution's case-in-chief, the sufficiency of the evidence is tested as it stood at that point." (*People v. Trevino* (1985) 39 Cal.3d 667, 695, disapproved on another point in *People v. Johnson* (1989) 47 Cal.3d 1194, 1219-1221.) . . . . [¶]
>
> We review independently a trial court's ruling under section 1118.1 that the evidence is sufficient to support a conviction. (See *People v. Trevino, supra*, 39 Cal.3d 667, 695; see also, e.g., *People v. Hatch* (2000) 22 Cal.4th 260, 275.) We also determine independently whether the evidence is sufficient under the federal and state constitutional due process clauses.

(*People v. Cole, supra*, 33 Cal.4th at p. 1212.)

C. The Trial Court Properly Denied Appellants' Motion For Acquittal Because The Prosecution's Case-In-Chief Contained Substantial Evidence Of The Conspiracy

At the end of the prosecutor's case-in-chief, all of the defendants moved for acquittal on the conspiracy charge for lack of sufficient evidence. (26 RT 4514–4515; see § 1118.1.) The trial court denied the motion, finding that the evidence admitted at that point connected the defendants to the crimes charged, and also that Evans' testimony had been sufficiently corroborated. In particular,

the trial court noted that there was evidence that the defendants armed themselves, drove to the murder scene, wore masks, entered the Elm Street house, and killed the victims in a way that suggested it was planned. (26 RT 4518–4519.)

Evans' testimony was very strong direct evidence of the conspiracy to murder Raper and his friends at the Elm Street house. There can be no doubt that it was more than adequate to withstand a challenge for insufficiency of the evidence. Appellants claim, however, that this Court should not consider Evans' testimony because (1) it was inherently unreliable as a matter of law and (2) it was not corroborated. (BOB 204; Cruz Joinder.) Therefore, since Evan's testimony was "the only evidence available to the jury to support the state's conspiracy theory," there was insufficient evidence to support the conviction. (BOB 206; Cruz Joinder.) Appellants are wrong. Evans' testimony was reliable–certainly more so than appellants'. It was not inconsistent–even though inconsistencies would be expected in testimony that covered numerous events that took place during a stressful and shocking event two years earlier. And Evans' testimony was corroborated in numerous ways by other witnesses as well as substantial physical evidence.

1. Evans' Testimony Was Not Unreliable

Appellants claim that Evans' testimony was so unreliable that its admission violated their due process rights. However, appellants cannot show that the trier of fact had no right to consider Evans' testimony just because she did not recall every minor detail perfectly, or because she had personal interests to consider. "[T]rial testimony from a witness sworn to tell the truth and subject to cross-examination is not considered, as a general proposition, to be unreliable." (*People v. Allen* (2008) 44 Cal.4th 843, 865.)

Appellants claim that Evans' testimony was so contradictory that it was unreliable. But they, in fact, discuss only one supposed contradiction in Evans'

entire testimony, and it is such a contrived argument that it proves the paucity of their claim. Evans testified that when Cruz explained the murder plot to the others, he said, "do them all and leave no witnesses." (24 RT 4209.) Evans repeatedly testified that she understood the instruction to "do them all" to mean to kill everyone. (24 RT 4211, 4250, 4297, 4401–4402; see 31 RT 5553 [Rosemary McLaughlin testified that Beck told her the day after the murders that "they had to do them"].) However, appellants claim Evans contradicted herself when she later testified that she did not plan to kill anyone and she did not really believe anyone would be killed. (BOB 208; Cruz Joinder; 24 RT 4375–4376.) Appellants are overreaching. It is common sense that a person can know *what* someone means and, nevertheless, not completely believe that they actually *mean* it. Evans knew what "do them all" meant. She just thought Cruz was talking tough and would not actually follow through when the time came. Furthermore, contrary to appellants' claim, nowhere in their citation to the record did Evans testify that she thought "do them all" meant "beat them up." (BOB 208–209, citing 24 RT 4375–4376, 4414; Cruz Joinder.)

Appellants also claim that "on at least one occasion [Evans] lied on the witness stand." (BOB 207 & fn. 53; Cruz Joinder.) But they do not even identify the lie, except that in a footnote they discuss conflicting testimony by a defense witness. According to appellants, Evans testified she did not threaten Michelle Mercer or tell her about the murders, and did not have a relationship with Paris. On the other hand, Mercer testified (for Cruz) to the contrary. (*Ibid.*) However, just because a defense witness contradicted Evans, that does not prove that it was Evans who lied. It was clear from her testimony that Mercer disliked Evans intensely (26 RT 4531–4558) and wanted to cast Evans in the most negative light possible. Moreover, if all it took to prove that a key prosecution witness's testimony was unreliable was some tangential impeachment testimony by a defense witness, no defendant with a friend would

ever be convicted again. And, of course, the fact that Evans had broken up Mercer's previous relationship suggested that Mercer was neither objective nor credible. (26 RT 4558.)

Appellants rely on *People v. Casillas* (1943) 60 Cal.App.2d 785, for the proposition that an appellate court may reverse a conviction when it rests on testimony that is so unbelievable or improbable that the verdict is unreliable. (BOB 209; Cruz Joinder.) However, in that case, the victim gave three distinct and contradictory versions of the crime, and to some extent, her testimony was necessarily perjurious. (*Id.* at pp. 793–794.) Moreover, the court found its authority to reverse contingent on there being "no substantial or credible evidence in the record to support [the verdict] or where the evidence relied upon by the prosecution is apparently so improbable or false as to be incredible . . . . as a matter of law." (*Id.* at p. 794.) As discussed below, this case is nothing like *People v. Casillas*. Evans' pressures and interests were common for a witnesses testifying pursuant to a plea agreement; her testimony was internally consistent; her testimony was corroborated in innumerable ways; and nothing about Evans' testimony was incredible.

Appellants point to the fact that Evans' testimony deviated from her initial statements to police; she had a motive to avoid prosecution; she was threatened with losing custody of her children; and she sold drugs and committed theft. (BOB 207; Cruz Joinder.) However, Evans admitted that she initially lied to police–just as appellants admitted doing. (29 RT 5128–5129; 30 RT 5322; but see 27 RT 4736, 4761 [Detective Deckard testified that during his second interview with Evans, she admitted that most of what she had previously told him and Officer Ottoboni had been lies].) The fact that Evans initially lied to police does not prove that she did not later tell the truth. Further, contrary to appellants' claim, Evans was not threatened with losing custody–she testified she had already lost custody of her daughter. (24 RT 4431.) And it is hardly

unusual for witnesses who associate with criminal defendants to be involved in illegal activity themselves.

Appellants claim that Evans' testimony was inherently unreliable "because she possessed a monumental motivation to lie to save her life." (BOB 207; Cruz Joinder.) However, Evans' testimony was far more reliable than that of the defendants' because she had a "monumental motivation" to tell the truth. According to the terms of the plea agreement, Evans was required to testify truthfully and would lose the benefit of her bargain if she lied. (24 RT 4175.) Therefore, even if she had lied to the prosecution about certain details, once she executed her agreement, it was in her interest to tell the truth to keep her benefit.

Appellants also note that the plea agreement had to be renegotiated because Evans originally failed to mention that she had a knife during the murders. (BOB 207; Cruz Joinder; see 27 RT 4724 [Detective Deckard testified that Evans called him a day after their third interview to tell him she had been armed with a knife; she did not want anyone to accuse her of lying].) However, that suggests only an error of memory or, at worst, Evans' tardy realization that she would be better off by admitting every detail. It was the defendants, of course, who had a "monumental motivation" to lie. If any one of them admitted the conspiracy, they would all certainly be found guilty of all of the charges. Therefore, appellants are in no position to call *Evans'* testimony "inherently unreliable." Because the plea agreement *did not* require Evans to conform her testimony to predetermined facts, and *did* require her to testify truthfully, appellants cannot show that her testimony was coerced or unreliable. (See *People v. Medina* (1974) 41 Cal.App.3d 438, 455; *People v. Allen*, *supra*, 42 Cal.3d at pp. 1251–1252.)

Though appellants claim that Evans' testimony was so untrustworthy it should have been kept from the jury, they fail to explain why the jury found it

much more credible than all four defendants' testimonies put together. To the extent Evans' testimony was inconsistent with other witnesses or physical evidence, those inconsistencies were minor; did not undermine the main narrative of her testimony; and were of the sort that is exceedingly common in the recollection and testimony of multiple witnesses years after the events. Finally, to the extent the jury hung on LaMarsh and Willey, that did not prove that Evans' testimony was incredible. Every juror believed that Cruz and Beck were involved in the conspiracy; only one juror doubted that Willey was involved in the conspiracy; and all but two jurors believed that LaMarsh was involved in the conspiracy. (See 38 RT 6903–6905.) Just because one or two jurors had some doubt about LaMarsh and Willey's awareness of what was being planned, that did not detract from the fact that they believed beyond a reasonable doubt that Cruz and Beck planned, orchestrated, and led the conspiracy. In sum, appellants have offered nothing to demonstrate that Evans' testimony was so flawed it could not possibly be true. (*People v. Maxwell* (1979) 94 Cal.App.3d 562, 577.) Moreover, none of appellants' arguments demonstrate that Evans' testimony was "so inherently untrustworthy that a conviction based upon it would violate due process of law." (*Id.* at p. 579.)

2. Evans' Testimony Was Corroborated By Other Testimony And Physical Evidence Which Independently Connected Appellants To The Conspiracy

Appellants claim that Evans' testimony was not corroborated. To support their argument, they discuss a small sampling of the evidence and give it the most narrow interpretation possible. Appellants also claim that even if the evidence "corroborates the enumerated overt acts . . . [they] do not in themselves prove a conspiracy." (BOB 217; Cruz Joinder.) However, the corroboration did not have to prove the conspiracy; it just had to provide "slight" corroboration of Evans' testimony. (See *People v. McDermott, supra,*

28 Cal.4th at p. 986.) Moreover, unlike appellants' analysis, this Court does not dismiss the significance of evidence whenever possible; it reviews the evidence in the light most favorable to the conviction. (See *People v. Cole*, *supra*, 33 Cal.4th at p. 1212.) More importantly, appellants overlook a litany of testimony and physical evidence that supported the conspiracy charge. That evidence far surpassed the requirement for circumstantial or slight corroboration; and even without reference to Evans' testimony, that evidence firmly connected appellants to the conspiracy. (See *People v. McDermott*, *supra*, 28 Cal.4th at p. 986.)

a. Evidence That Appellants Lived Together And Had A Close Relationship Was Probative Of Them Acting In Concert And Having A Common Understanding Of The Conspiracy

Evidence of the defendants' and Vieira's close relationship helped prove that they were all involved in the conspiracy. (See *People v. Tinnin*, *supra*, 136 Cal.App. at p. 319; *People v. Massey*, *supra*, 151 Cal.App.2d at pp. 652–653.) Evans testified that Cruz, Starn, and their children lived in an apartment; LaMarsh lived alone in a trailer near Cruz; and Beck lived with Vieira in a trailer next to LaMarsh. (24 RT 4180–4181.)

Richard Ciccarelli testified that Cruz and Beck lived next to each other and LaMarsh sometimes visited. (19 RT 3268–3269.)

Mike Wierzbicki testified that Cruz, Beck, and Vieira lived next to each other. He also testified that people at the Camp affected LaMarsh; his personality changed; and he became quieter during the couple of months preceding the murders. (20 RT 3386–3397.)

Dee Ann Messinger testified that Cruz and Starn lived in a house; Beck and Vieira lived in a trailer; and LaMarsh and Evans lived in another trailer near the house. (21 RT 3544–3547, 3565.)

Kevin Brasuell testified that Cruz, Starn and two children lived in studio behind a modular home; Vieira and Beck stayed in a trailer; LaMarsh frequently stayed in a smaller trailer behind that one; and Evans often stayed with LaMarsh. (21 RT 3574–3575.) Brasuell also testified that sometime in May he went to LaMarsh's trailer. Cruz, Beck, Vieira, and Willey were there. Beck got a knife and LaMarsh cut his finger. (21 RT 3622.) Brasuell did not explain why LaMarsh cut himself, but the testimony showed that the group was close.

Taken together, evidence that most of the conspirators lived next to each other; socialized together; had an adverse impact on LaMarsh's demeanor; and attended LaMarsh's finger-cutting, showed that they were a very tight group that could be expected to act together.

b. Evidence Of Conflicts With Raper, Colwell, And Smith Gave Appellants A Motive To Plan The Murder Conspiracy

Evidence that appellants and the other defendants had conflicts with two of the victims, and one intended victim, helped establish a motive to plan the killings. Evans testified that LaMarsh and Raper were not getting along. (24 RT 4185.) Raper accused LaMarsh of burning his car. LaMarsh accused Raper of stealing his gun. A few days before the murders, LaMarsh and Raper got in a fistfight. (24 RT 4188–4190.) Later that night, Cruz and Beck's group saw Raper's friend, Colwell, drive slowly by the Camp. They caught him and Colwell took out an icepick and tried to stab Willey. But the group overpowered Colwell and roughed him up. LaMarsh and Willey took Colwell's car for a short ride without his permission. (24 RT 4191–4197, 4269.) Evans testified that Cruz said, "He was tired of Raper ruining everybody's day." (24 RT 4473.)

That evidence demonstrated appellant's motive for the murder conspiracy, and it was corroborated by other witnesses. David Jarmin testified that a couple

of months before the murders, he was with Raper and LaMarsh. When LaMarsh passed out, Jarmin stole his gun and lied to LaMarsh about it later. (23 RT 4083–4086.)

Mike Wierzbicki testified that Raper's guests sometimes got loud; he was not well liked in the community; Cruz and LaMarsh said they did not like Raper; and they said they wanted to get their hands on him. (20 RT 3387, 3390.) Wierzbicki also testified that he saw Cruz, Beck, and LaMarsh push Raper's car from the Camp. They left Raper's car in a field across the street; it was full of Raper's things and, later, Wierzbicki saw that the car had been burned. (20 RT 3398–3399.)

Dee Ann Messinger testified she signed a petition started by Starn to evict Raper. She was concerned about Raper dealing drugs. She sent a letter asking to have Raper and Jimmy Smith removed from the Camp. (21 RT 3556–3558.)

Kevin Brasuell testified that he spoke to Raper about his drug trafficking, cars coming at all hours, and a syringe his daughter found. Brasuell testified that Raper was belligerent towards another resident of the Camp who disconnected Raper's extension cord when he refused to pay his share of the electric bill. Brasuell testified that LaMarsh was mad at Raper or Jimmy Smith. Brasuell testified that Beck towed away Raper's trailer with his Chevy van. Fifteen minutes later, Brasuell joined Cruz, Beck, LaMarsh, and Vieira, as they pushed Raper's car down the block. Gasoline was all over the car. A little while later Brasuell saw that the car was on fire. On the day of the murders, LaMarsh told Brasuell that Vieira had set the car on fire. (21 RT 3581–3595, 3603.)

Jimmy Smith testified that about three or four weeks before the murders, LaMarsh got in an argument with him and Raper. LaMarsh swung a wooden bat at the trailer, and hit it four to six times. Then Smith hit LaMarsh in his elbow with a lamp and LaMarsh left. (23 RT 4038–4040.)

David Jarmin testified that six weeks to three months before the murders, he saw Cruz, Beck, LaMarsh, Vieira, and Brasuell yell and beat on Raper's trailer. Beck cranked down the jack, and Jarmin helped Raper get out of the trailer. Beck towed away the trailer with his white van. Later, the men pushed Raper's car, which was doused with gas, towards the road. They said they were going to burn it, and an hour later the car was on fire. (23 RT 4075–4082.)

All of the foregoing testimony not only corroborated Evans' testimony that appellants had a motive for the murder conspiracy, but added substantial circumstantial evidence to that theory.

c. Evidence That Appellants Assembled The Assailants Helped Prove There Was A Conspiracy

Evidence that the defendants gathered to discuss the plan to attack the Elm Street house proved that there was a murder conspiracy. Evans testified that Cruz asked her to draw a diagram of the Elm St. house for him and she did. (24 RT 4200, 4255.) Cruz had Vieira call Willey. When Vieira said he was unable to get Willey on the phone, Cruz became angry and told Vieira to call again because they needed every man. (24 RT 4254–4255.) Cruz had LaMarsh pick up Willey. When everyone was assembled, all of the defendants and Evans and Vieira had a conversation in LaMarsh's trailer. (24 RT 4205.)

Evans' testimony was corroborated by Willey's girlfriend, Patricia Badgett. She testified that the night of the murders, Cruz called and asked Willey to come over. Willey was reluctant, but Cruz convinced him to go. Willey left with LaMarsh between 10:30 p.m. and midnight. (20 RT 3490–3504.)

d. Evans Testified That Cruz Told The Others How They Would Commit The Murders

Evidence that the defendants were all present when Cruz explained the murder plot proved they all participated in the conspiracy. However, because the defendants denied the conspiracy, and there was no one else there besides

Vieira and Evans, Evans' testimony was not corroborated.[75] Nevertheless, because numerous other aspects of her testimony were corroborated, Evans' entire testimony must be considered in evaluating whether there was substantial evidence of the conspiracy. (See *People v. McDermott*, *supra*, 28 Cal.4th at p. 986.)

Evans testified that Cruz handed out assignments for going to the Elm Street house. (24 RT 4207.) Cruz referred to the diagram Evans drew and told each person where to enter the house. (24 RT 4208.) Cruz said, "do them all and leave no witnesses." Evans and LaMarsh were supposed to go in first; Evans was supposed to count the people; get them into the living room; go to the back bedroom; open the window; let Beck and Vieira in the window; and tell Beck how many people there were in the house. Cruz and Willey were supposed to come in the side door. (24 RT 4209.) Vieira was supposed to recheck the rooms to make sure they were empty. (24 RT 4210.) He was also supposed to guard the hallway so no one got back out. Evans understood the instruction to "do them all" as to kill them. (24 RT 4211.) The plan was to kill everyone in the living room. (24 RT 4402.) Evans testified that Cruz said he hoped Jimmy Smith and Debbie Smelser would be there so he could kill them. (24 RT 4401.)

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75. In Vieira's own trial, the prosecution introduced extrajudicial statements in which he "admitted he participated in planning the murders and that he was present at the murder scene." (*Vieira*, *supra*, 35 Cal.4th at p. 276; see 26 RT 4512 [Cruz's attorney noted that "in the Vieira trial you have statements from Ricky Vieira that corroborated the conspiracy."] In the present matter, the prosecutor made a tactical decision to reserve Vieira's statements for rebuttal so he could discredit the defendants' testimony. But while the trial court ruled that the evidence would have been admissible in the prosecution's case-in-chief, it excluded it from rebuttal because it was "not proper rebuttal evidence." (35 RT 6250; cf. *Crawford v. Washington* (2004) 541 U.S. 36, 53–54 [the confrontation clause of the Sixth Amendment bars "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination."].)

Cruz instructed them not to use guns because the noise would attract neighbors. (24 RT 4403.) Cruz said if anyone did not do their job correctly they would join the victims. (24 RT 4404.)

e. Evidence That The Conspirators Armed Themselves And Brought Masks Showed There Was A Plan To Commit Murder

Evidence that the defendants armed themselves and wore masks proved that the violence was not spontaneous, but rather was part of a plan. Evans testified that Cruz handed out weapons: he gave a Wildcat knife with serrated edges on both sides to Willey; Beck had his own M-9 knife, which had a dark green plastic sheath; Cruz had his Ka-Bar knife and the baton he wore on his belt; Vieira had a bat and a knife; LaMarsh had his own bat and a .22 caliber handgun. (24 RT 4218–4222.) Cruz, Beck, Vieira, and Willey all had masks, and those masks resembled the ones found at the crime scene. (24 RT 4232–4233; Exh. 21.)

Kathy Moyers saw some of the violence at the Elm Street house. She testified that after the people who resembled Cruz and Willey went inside the house, they came out with two other people who matched Beck and LaMarsh. (17 RT 2941.) All four were dressed in dark clothes with ski caps that resembled the knit cap found at the murder scene. (17 RT 2942–2943.)

Kevin Brasuell testified that Cruz had an aluminum bat. (21 RT 3636–3637.) Dee Ann Messinger testified that on the night of the murders, Vieira came to her door dressed in camouflage clothes and black boots. He wore a dark ski cap and had a silver bat. The ski cap and bat looked liked the trial exhibits. (21 RT 3547–3549.)

Phillip Wallace testified he sold or traded an M-9 knife to Cruz about a month before the murders. (22 RT 3814, 3847.)

Detective Darrell Freitas testified that he searched Cruz's home and seized two receipts from Crescent Supply Company–one for four masks, and the other for two knives and two Sais. (15 RT 2756; Exhs. 4(a) and (b), 5.)

Sylvia Zavala testified that she worked at Crescent Supply Army surplus store in Modesto. She sold a Ka-Bar knife, a camouflage mask, and a plastic mask to Cruz. Willey was with him, and she had also seen LaMarsh and possibly Willey at other times. She authenticated a receipt for four masks from Crescent Supply dated February 27, 1990, which was found in Cruz's home. Another receipt was dated March 13, 1990, and it was for a Ka-Bar knife and another knife. (21 RT 3657–3676.)

Steve Miller testified that he worked at Gun Country gun store in Modesto. A week before the murders, he sold a police baton to Beck and Cruz; it matched the baton in evidence. (21 RT 3691–3693; Exh. 19.)

Detective Dan Bennett testified that he found a camouflage ski mask and knit cap on the front lawn. Another camouflage mask was found between Ritchey's legs. (16 RT 277–2780.) Bennett authenticated a photograph of a mask and knit cap found in the front yard. (16 RT 2847; Exh. 37.) He also found a metal police baton, a bloody aluminum baseball bat, and a bloody large K-Bar brand knife near the crime scene. (16 RT 2781–2782, 2786–2787.)

Sergeant Fred Winters found a Bianchi brand aluminum police baton. He also found a bat with blood on it, a large hunting knife, and a sheath in the grass near the murder scene. (16 RT 2919–2920.)

Criminalist Marianne Vick testified there was a great deal of Ritchey's blood on the interior and exterior of the mask found between Ritchey legs. (22 RT 3882–3883.)

Criminalist John Yoshida testified that the blue fibers found in the grip of the baton matched the unusual carpet from Cruz's car. (22 RT 3976–3983.)

Dr. Ernoehazy testified that all of the victims' numerous injuries were caused by baseball bats, a baton, and military knives. (18 RT 3075–3123.)

All of the weapons evidence was consistent with Evans' testimony and connected appellants to the murders. While the fact that appellants' weapons were found at the murder scene did not prove that the violence was the result of a conspiracy, the masks certainly did establish that fact. It is not possible that the defendants went to the Elm Street house with weapons and masks, but the violence was not planned.

f. Evidence That The Conspirators Traveled To The Elm Street House To Commit The Murders

Evidence that the defendants drove to the crime scene in the middle of the night proved that there was a conspiracy to surprise the victims and kill them. Evans testified that Cruz drove the six assailants in his white Mercury Zephyr. They arrived at the Elm Street house at midnight. Cruz dropped off Evans and LaMarsh and they went into the house. Raper was sitting in a chair in the living room sharpening a survival knife. Colwell was sitting in the living room; he smiled and said hello. (24 RT 4223–4228.)

Private Investigator Robert Crayton qualified as an expert in tire track identification. (16 RT 2893, 2898.) The tires on Cruz's Zephyr had the same tread pattern as the tracks left at the crime scene. (16 RT 2899, 2901; Exhs. 40, 41, 42.) Crayton had never seen that tire tread before. (16 RT 2904.) That was "slight" corroboration of Evans' testimony that Cruz drove them to the Elm Street house. Combined with the weapons and mask evidence, it helped prove that appellants drove to the crime scene.

g. Evidence That The Defendants Corralled The Victims In The Living Room And Entered The House From Multiple Locations Proved The Attack Was Planned

Evidence that Evans and LaMarsh forced the victims into the living room and prevented them from escaping proved that there was a plan to kill them. Evans testified that after she entered the Elm Street house, she checked all the rooms and found that the back bedroom was locked. She banged on the door and told Alvarez to get out. Then Evans went into the bedroom and locked the door. When she saw Beck, Willey, Vieira, and Cruz coming towards the house, she opened the window and let Beck and Vieira in. Vieira and Beck were wearing masks. (24 RT 4229–4230, 4232, 4411.) As soon as Beck got inside, he pulled out his M-9 knife and headed down the hall. (24 RT 4218, 4235.) Vieira had a bat and he rechecked some rooms to make sure they were empty. (24 RT 4235–k4236.) Evans also testified that later, LaMarsh bragged about exiting the front bedroom window, circling around to the front door, and hitting three people with his bat to stop them from escaping. (24 RT 4391, 4396, 4406, 4411.)

Donna Alvarez testified she had gotten Raper's permission to sleep in the back bedroom. (17 RT 2982.) Evans woke her up at about midnight. (17 RT 2983–2984.) Evans told her to leave because her sister needed the room. Alvarez went to the living room and stayed for a minute. (17 RT 2984, 3001–3002, 3007.) That corroborated Evans' testimony that the plan was to move everyone into the living room; and also that the plan was to open the rear bedroom window for Beck and Vieira.

Alvarez also testified that she went to the front bedroom with Ritchey, but LaMarsh was already there. (17 RT 2985–2986.) LaMarsh pulled back the slide on a silver gun that resembled Exhibit 87 and ordered them into the living room. (17 RT 2987–2988.) She had no doubt that LaMarsh was the man who pointed the gun at her. (17 RT 2990–2991.) LaMarsh said, "'Everyone into the

living room.'" When Alvarez came out of the front bedroom, she saw that Evans was standing in the back bedroom. (17 RT 2994, 3005.) Alvarez's testimony strongly corroborated Evans' testimony that the plan was to move everyone into the living room. It also confirmed that Evans was still in the back bedroom where she let in Beck and Vieira through the window.

Detective Gary Deckard testified that he arrived at the elm Street house before 2:00 a.m. on the night of the murders. He showed Donna Alvarez a photographic lineup, and she identified LaMarsh as the person who pointed a gun at her. (23 RT 4132–4135.) The fact that LaMarsh used his gun to force Alvarez into the living room corroborated Evans' testimony in two ways. First, it corroborated the fact that the plan was to move the victims into the living room. Second, because LaMarsh had a gun, but all of the murders were committed with bats and knives, Alvarez's testimony corroborated Evans' testimony that the plan was to not fire guns to avoid attracting neighbors.

Neighbor William Duval testified that a window was wide open and the screen was on the ground. (19 RT 3330.) Detective Dan Bennett testified that the rear bedroom window was open and the screen was off. (16 RT 2778–2779.) He authenticated a photograph of the bedroom window with the screen off. (16 RT 2847; Exh. 37.) That evidence also corroborated Evans' testimony that the plan was for Beck and Vieira to come into the house through the back bedroom window.

h. Evidence That LaMarsh Beat Raper To Death Even Though He Pleaded For Mercy Proved That The Attack Was Planned Retribution And Not The Result Of Spontaneous Violence Or Self-Defense

Evans testified that LaMarsh told her that Raper raised his arm and said, "'Don't hit me.'" But LaMarsh still broke Raper's arm with his bat. (24 RT 4391, 4396, 4406.) Evans testified that later, she dictated a letter in which she said that LaMarsh bragged that he beat Raper to death. (24 RT 4396.) A

reasonable jury could infer that since LaMarsh killed Raper so violently, he was motivated by revenge, and the revenge was part of a larger plan.

Detective Dan Bennett testified there was an open pocket knife on floor next to Raper. (16 RT 2826.) In the light most favorable to the prosecution, that corroborated Evans' and Alvarez's testimony that Raper was sharpening a knife prior to the attack. Further, Bennett's testimony that none of the defendants had cuts or injuries (16 RT 2890) supported the inference that the defendants were the aggressors, and they went to the house armed and with the intent to attack.

Dr. Ernoehazy performed the autopsy on Raper. He testified that Raper suffered numerous blows from a baseball bat; the shape of his head and face were deformed; both bones in his forearm were broken; and his throat was cut. (18 RT 3073, 3088–3097.) That corroborated Evans' testimony that LaMarsh admitted beating Raper to death. The viciousness of the beating also suggested that it was carried out in anger rather than self-defense. That supported the inference that the attack was motivated by revenge and was planned. The same considerations, of course, apply to Dr. Ernoehazy's description of the horrific injuries to the other victims, as well as his testimony that the victims suffered many defensive injuries. (18 RT 3075–3123.) A reasonable jury could infer that the magnitude of the injuries was more consistent with a planned revenge killing than a spontaneous fight.

Richard Ciccarelli testified that he had known LaMarsh for a couple of years and he saw him two days after the murders. LaMarsh admitted he had been at the house. He claimed that Raper had threatened him with a knife and they got in a fight. (19 RT 3266, 3274, 3276.) Later, Ciccarelli admitted that LaMarsh had told him that he obtained a bat outside the door of the house and broke Raper's arm. (19 RT 3287.) Then the other defendants came into the house. (19 RT 3296.) LaMarsh also told him that Evans left the house before anything

happened. (19 RT 3286, 3294.) That testimony established that the defendants were at the crime scene. It also corroborated Evans' testimony that LaMarsh initially left his bat outside the house; LaMarsh broke Raper's arm; and that she left the house without seeing any murders.

Kevin Brasuell testified that Raper was about 50 years old. (21 RT 3655.) David Jarmin testified that Raper weighed only 110 pounds. (23 RT 4119.) That evidence showed that Raper was not much of a threat, and it was more likely that LaMarsh was the aggressor.

i. Evidence That Cruz And Willey Caught And Beat Ritchey Proved That The Attack Was Planned And Not The Result Of Spontaneous Violence Or Self-Defense

Evans testified that Cruz, Beck, Willey, and Vieira approached the rear bedroom window, but then Cruz and Willey split off and ran towards the front door. (24 RT 4234.) When they were approaching the house, Ritchey ran out the front door; Cruz yelled, "'Get 'im, get 'im.'" Moments later she saw Willey sitting on Ritchey's back and beating him. She heard Ritchey yelling, "'Help me, help me.'" (24 RT 4238–4239.) Evans also testified that she saw Cruz bend over Ritchey and do something to him. (24 RT 4242.) That evidence showed that the assault was coordinated, with multiple points of attack. It also showed that Ritchey tried to get away, but Cruz told Willey to catch him and he did. That also showed that the defendants were operating under a plan of attack.

Kathy Moyers testified she saw three people fighting in the street, and one kept falling down. (17 RT 2931.) The other two kept picking him up and fighting with him. He kept saying, "'Please don't, no, please,' and 'help me.'" (17 RT 2932.) One assailant matched Cruz's figure and she identified Cruz in court. (17 RT 2933, 2937.) The other one matched Willey's figure and Willey's ponytail, and she identified Willey in court. (17 RT 2934–2936; Exh.

83.) That corroborated Evans' testimony that Cruz and Willey beat Ritchey even though Ritchey was crying for help. That was consistent with the plan to kill everyone at the house.

Earl Creekmore testified that when he saw Ritchey come out of house, he screamed, "'Oh, God, help me.'" (20 RT 3427.) Cruz and Willey beat Ritchey in front of the house. They beat and kicked Ritchey even though he was down on his knees. (20 RT 3413–3417, 3436–3437, 3467.) Cruz went in the house, and when he returned, he picked up Ritchey and cut his throat. (30 RT 3419–3421, 3428, 3435.) Again, that corroborated Evans' testimony that Willey beat Ritchey; that Ritchey called for help; and that Cruz and Willey worked in concert as part of a plan to kill.

j. Evidence Of Flight Proved Consciousness Of Guilt And That The Attack Had Been Planned

Evans testified that when Cruz came out of the house, he had his baton in his hand. (24 RT 4242.) He lifted his mask over his face and it could have looked like someone wearing a cap with a bill. (24 RT 4400.) When LaMarsh ran to the car, he had his bat in his hand. (24 RT 4243, 4248.) Evans testified that when they got back to the car, there was blood all over appellants. Beck's knife was also covered in blood. Then Cruz drove them to Willey's house in Ceres. (24 RT 4245–4247.) Evans testified that once they got to Willey's house, Willey introduced a woman as his girlfriend. Everyone put their weapons on a table. (24 RT 4251–4252, 4400.) Vieira, Willey and Beck took the weapons and masks outside, and when they returned they said they had put them under the house. Cruz also told Vieira to wash the blood from the car and he did that. Everyone discussed alibis. Beck was going to use a motel room as an alibi; Cruz was going to say he was sick at his mother's house in Oakdale. (24 RT 4253–4254, 4259, 4412.) Again, the use of weapons and masks proved that there was a conspiracy to commit murder. Moreover, the fact that everyone

acted together to destroy evidence and work-out alibis–rather than discussing how everything went out of control–suggested that the whole operation had been planned.

Kathy Moyers testified that when Cruz came out of the house, he was wearing a ski cap. (17 RT 2934.) That corroborated Evans' testimony that with his mask pulled up on his head, Cruz looked like he was wearing a ski cap.

Patricia Badgett testified that Willey, Cruz, Beck, Vieira, LaMarsh, and Evans came home to Willey's house at 1:30 a.m. (20 RT 3506–3526.) That also corroborated Evans' testimony, as well as flight.

William Duval testified that four men who matched the physical appearance of Cruz, Beck, Vieira, and Willey left the Elm Street house after the murders. They trotted single file, "double-time" or "dogtrot" west towards the railroad tracks. They were holding their hands at "port arms position." (19 RT 3325–3335.) He also testified that the man who resembled LaMarsh was pushing the man who resembled Cruz. (19 RT 3336–3338.) That showed that the assailants were working in military-style collaboration, and suggested a plan rather than spontaneous violence.

k. Extrajudicial Statements Proved That The Murders Had Been Planned

Evans testified that Vieira said he threw his Ka-Bar knife and Cruz's baton down in the field while they were coming back to the car. Beck "said it was a waste that they only got three dudes and a chick." (24 RT 4249.) When Willey said a man watched him kill Ritchey out front, Cruz became mad because the plan was to kill any witnesses. (24 RT 4250.) Beck responded to LaMarsh's question whether Raper was dead by saying, "'He's dead. I saw his face crumble as I was walking out the door.'" (24 RT 4339.) Cruz was disappointed Smelser had not been there. (24 RT 4405–4406.) At Willey's house, Vieira said he left his mask and hat behind; Willey said he left his mask.

(24 RT 4400.) Evans testified that LaMarsh admitted breaking Raper's arm with a baseball bat. (24 RT 4391, 4396, 4406.)

Beck's statement that it had been "a waste" to kill only four people implied that the intent was to kill many more people and things did not go as planned. Cruz's anger that they had let Creekmore get away corroborated Evan's testimony that the plan was to kill all witnesses. Cruz's statement that he wished Smelser had been there to be killed proved that the plan was to kill people who bothered Cruz. And Willey and Vieira's statements that they left behind their masks also proved the murders were planned because people generally do not bring masks with them unless they are planning something illegal.

McLaughlin's boyfriend, Phillip Wallace, testified that Beck came to their house the night after the killings and "said 'we' or 'I slit some throats.'" When Wallace asked Beck if he was serious, Beck smiled or smirked. (22 RT 3798–3801.) That corroborated Evans' testimony that Beck was part of the conspiracy and drew his knife as soon as he entered the house.

Deputy Sheriff Mark Ottoboni testified that two days after the murders, he searched Willey's home. The only newspaper in the house was the May 22, 1990, Modesto Bee with the article about this case marked with red or purple stars and some circles. Willey came home forty-five minutes after Ottoboni arrived, and he had scabs on his right wrist. (23 RT 4006–4010.) He interviewed Patricia Badgett about Willey's whereabouts on the night of the murders; but later she admitted that what she had told him was not true. (23 RT 4011.) That corroborated Evans' testimony that Willey participated in the murders.

The recovery of Cruz's baton; Vieira's knife, bat, and mask; and Willey's mask corroborated Evans' testimony that they said they left those items behind.

(16 RT 2779–2782, 2786–2788; 24 RT 4248–4249, 4252.) Again, the masks were particularly strong evidence of the conspiracy.

In sum, Evans' testimony was substantial evidence of the conspiracy. Her testimony was available to the jury because other testimony and the physical evidence of the injuries to the victims, recovered weapons and masks, tire tracks, and the open window combined to far exceed the requirement that an accomplice's testimony be "slightly" corroborated.

"The corroborating evidence may be circumstantial or slight and entitled to little consideration when standing alone, and it must tend to implicate the defendant by relating to an act that is an element of the crime. The corroborating evidence need not by itself establish every element of the crime, but it must, without aid from the accomplice's testimony, tend to connect the defendant with the crime." (*People v. McDermott*, *supra*, 28 Cal.4th at p. 986; see also *People v. Rodrigues*, *supra*, 8 Cal.4th at p. 1128; *People v. Avila*, *supra*, 38 Cal.4th at p. 563; *People v. Narvaez*, *supra*, 104 Cal.App.4th at p. 1303.) Here, one of the elements of the crime was an overt act in furtherance of the conspiracy. (See *People v. Liu*, *supra*, 46 Cal.App.4th at p. 1128.) The prosecutor alleged five overt acts in the information: the defendants armed themselves; they drove to the scene of the murders; they put on masks to conceal their identities; they entered the Elm Street house; and they killed the four victims. (6 CT 1613; see 9 CT 2293–2294.) As discussed above, even without Evans' testimony, there was slight–and sometimes overwhelming–evidence of each of the overt acts. Therefore, because only one of the overt acts needed to be slightly corroborated, there is no doubt that Evans' testimony was corroborated. Accordingly, Evans' testimony was available to the jury; there was substantial evidence of the conspiracy charge; and the trial court properly denied the defendants' motion for acquittal.

D. Evidence Admitted After The Close Of The Prosecution's Case-In-Chief Provided Additional Substantial Evidence Supporting The Conspiracy Conviction

As already discussed, there was sufficient evidence in the prosecution's case to support the conspiracy conviction. Nevertheless, since this Court also reviews the record as a whole (*People v. Cole*, *supra*, 33 Cal.4th at p. 1212), Respondent also submits a synopsis of the evidence admitted after the close of the prosecution's case-in-chief.

Cruz's witness, James Lee Richardson, testified that Evans told him she planned the murders. (26 RT 4573.) That might suggest that Evans' testimony minimized her role in the conspiracy. But more importantly, in the light most favorable to the prosecution, it corroborated Evans' testimony that there was a conspiracy–and all of the defendants participated.

Cruz's witnesses, Greg Boynton and David Anderson, testified that they had numerous run-ins with Raper at their repair shop. Raper parked his trailer next to their business and dealt drugs at all hours and left trash around. One time they got in a fight with Raper and Jimmy Smith. Boynton broke Raper's arm. (27 RT 4648–4672.) Boynton's father also testified that Raper threatened him once, but did not follow through on it. (28 RT 4900.) That evidence did *not* show that Raper was likely to have started the confrontation that led to the murders. Rather, like all the other negative testimony about Raper, it showed that Raper was loud and obnoxious and made threats, but never actually carried out any of his threats. For example, Boynton specifically testified that he and Anderson were the aggressors; they attacked Raper when Raper's car stalled. (27 RT 4654.) That evidence proved only that Raper was extremely annoying; but he was also all talk and no action. Therefore, the evidence corroborated the fact that appellants had good reason to dislike Raper and had a motive to plan the murders.

Cruz's witness, Deputy Sheriff Jane Irwin, testified that almost a year before the murders, she made a traffic stop on Raper. When she ordered him out of the car, he was verbally combative and uncooperative. She thought he was all mouth, no action. She also testified that Raper was 51 years old, five-foot-nine, and 105 pounds. (28 RT 4877–4889.) That showed that Raper was annoying and confrontational, but not a physical threat. Again, that supported the inference that the defendants had reason to be angry with Raper and plan the murders; but it was unlikely that Raper ever attacked them.

Cruz's witness, Detective Michael Dulaney, investigated the crime scene; he assumed Raper did not struggle with his attacker and never got out of his chair when he was attacked. (28 RT 4857, 4866.) That showed that the defendants were not provoked, and a reasonable jury could infer that the attack was planned.

Cruz's witness, Detective Deckard, testified that shortly after their arrests, there were no visible injuries to Evans, Cruz, Beck, LaMarsh, or Willey–though Willey did have some older scabbing on his hands. (27 RT 4737–4739.) That supported the inference that the defendants were the aggressors and, therefore, had gone to the Elm Street house with the intent to kill.

Cruz's witness, Detective Mark Ottoboni, testified that he interviewed Evans the day after the murders. Evans said she told Alvarez to get out of the back bedroom. (28 RT 4915–4922.) She said she saw LaMarsh break Raper's arm with a baseball bat, but then a big guy beat Raper to death. (28 RT 4933–4934.) Evans said that Beck was not involved, but when Ottoboni put them in the same room together, they discussed the murders in a whisper. (28 RT 4947–4948.) Though Evans later admitted that much of what she told Ottoboni was a lie, these few details corroborated her testimony that there was a conspiracy to commit the murders.

Cruz's witness, Deputy Sheriff Bryan Grimm, testified that he took a police report from Cruz about Raper. Later, Cruz made a citizen's arrest on Raper concerning destruction of a fence, and Grimm came back to the Camp and took Raper to jail. Raper said that after he posted bail, he would soon "be back on the street to harass Mr. Cruz." (28 RT 4974–4979.) That showed the antagonism between the men, and appellants' motive to come to the Elm Street house and kill Raper.

Cruz testified that he was close to Beck and Vieira, and other witnesses indicated their relationship far surpassed typical friendships (29 RT 5013, 5015, 5135; see 31 RT 5541; 32 RT 5601–5602; 32 RT 5619 [LaMarsh testified he put a blood fingerprint on paper to join group]; 34 RT 5695 [Willey testified he saw LaMarsh cut his finger and mark the paper; Willey had done the same thing years earlier]); they worked together and pooled their money (29 RT 5017; 30 RT 5288; 31 RT 5563); they lived together for years (29 RT 5014–5015; 30 RT 5288); and they all participated in prior serious confrontations with two of the victims–Raper and Colwell (29 RT 5028–5031, 5054–5059; 30 RT 5340). Moreover, all of the defendants admitted they were at the Elm Street house while the murders were committed (29 RT 5068–5069; 30 RT 5297–5304; 32 RT 5636; 34 RT 5982–5983); several witnesses testified that Vieira always did what Cruz and Beck told him to do (24 RT 4312–4313;31 RT 5543–5544, 5560–5564; 32 RT 5600–5601; 34 RT 5960–5961); and Cruz and Beck both implied in their testimony that Vieira killed Colwell (29 RT 5089, 5099, 5104; 30 RT 5305, 5352). Taken together, this evidence showed that Cruz, Beck, and Vieira acted in concert with the other defendants, and it was probative of a conspiracy to commit the murders.

As the court stated in the infamous Manson trial in which the defendants were charged with conspiracy to commit murder, "The very nature of this case and the theory of the prosecution compel reference to circumstantial evidence

of the conduct and relationship of the parties." (*Manson, supra*, 61 Cal.App.3d at p. 126.) Here, evidence that Cruz, Beck, and Vieira operated as a cohesive unit, living and working together, and visiting gun shops, were all relevant to prove the conspiracy.

Appellants testified about various problems with Raper, Colwell, (and Smelser who they hoped would be at the house). (29 RT 5023–5028, 5045, 5056–5059; 30 RT 5340–5342; see 34 RT 5971–5972.) Aside from evicting Raper and catching Colwell prowling near the Camp, Cruz also testified that Raper repeatedly threatened to kill him. Sometimes Colwell was with Raper when he threatened Cruz. And Smelser may have also threatened him. (29 RT 5169–5171.) This all reinforced the prosecution's theory that appellants had a great deal of animosity towards Raper, Colwell, Smelser, and Smith, and that was their motivation for the conspiracy.

The defendants also testified that they brought various weapons with them. (29 RT 5609 [Cruz claimed that Vieira took Cruz's baton and Cruz took only his cane to the house]; 29 RT 5610 [Cruz testified that LaMarsh had a bat and Evans had a bat and knife]; 30 RT 5296 [Beck testified that Evans and LaMarsh had bats and Vieira had a knife]; 32 RT 5639–5641, 5644 [LaMarsh testified he had a bat and handgun, Vieira had a knife and bat, Cruz had his baton, and Beck had a knife]; 34 RT 5991, 6004 [Willey testified that Cruz had his baton, Beck had a knife, LaMarsh had a bat, and Vieira had a bat and knife].) As discussed above and in previous arguments, this was evidence of the group's intent to attack the people in the Elm Street house. Appellants' claim that they suddenly decided to go to the house at midnight to retrieve clothes was not credible, and the weakness of that defense also supported the inference that they went there for another purpose.

Cruz claimed that they brought knives and bats as "defensive" weapons. However, Cruz's claim made no sense. Normally, when people want to bring

weapons for protection, they bring the most effective weapons they have–not only for greater protection, but to dissuade the attacker from even contemplating violence. For example, LaMarsh testified he initially avoided violence by drawing his gun on three people. (32 RT 5650–5652.) Here, the evidence showed that appellants had an arsenal of semi-automatic weapons. If they had really gone to the Elm Street house in fear of attack, they would have brought their firearms for protection. Their use of bats and knives was far more consistent with Evans' testimony that the plan was to not use firearms to avoid attracting neighbors. Moreover, Cruz's claim that they were concerned with being stopped by police was obviously contrived. If their weapons were legally possessed, and were properly stored in the trunk of the car, then they had nothing to fear from the police. Moreover, the Elm Street house was just a few blocks away. Certainly Cruz and the others had more pressing concerns than worrying about being stopped by police during the one or two minutes it took to drive to the murder scene.

Similarly, the defendants' testimony that the group decorated their area with military netting, had masks for paintball "war games," usually wore camouflage clothing, frequented gun supply stores, and owned a large collection of weapons was relevant to validate the testimony of eyewitness William Duval. (29 RT 5075–5076, 5113; 30 RT 5254; 34 RT 5963; see 19 RT 2689; 20 RT 3397, 3402; 21 RT 3562, 3638, 3665–3669, 3687, 3694; 24 RT 4314.) Duval testified that he saw four men leave the Elm Street house at the same time. They trotted single-file, "double-time" or "dogtrot" west towards the railroad tracks, and "[t]hey were holding their hands at port arms position." (19 RT 3325, 3328.) That evidence helped prove the conspiracy by showing the defendants operated like a disciplined troop conducting a military exercise. That contradicted appellants' claim that the violence occurred spontaneously and haphazardly. As the prosecutor argued, "Bill Duval, says

that he sees the four people dogtrotting single file down Mason Avenue towards the railroad tracks, military-type formation, port arms, that type thing. Fits right in with the militaristic organization." (37 RT 6736.) That was probative of the conspiracy. A jury could reasonably conclude that the defendants acted like they were conducting a military exercise because they had planned the whole attack.

Cruz and Beck admitted that Cruz arranged for Willey to come to the Camp. (29 RT 5068; 30 RT 5291.) That supported Evans' testimony that he was brought to the Camp specifically to help in the assault on the Elm Street house.

Beck admitted that he punched Colwell in the ribs three or four times. (32 RT 5305–5306.) That corroborated other evidence that Beck beat and stabbed Colwell.

Several prosecution witnesses testified that the assailants wore masks. LaMarsh also testified that Cruz owned a mask and Beck wore a mask. (33 RT 5665, 5766–5767.) Two masks were found at the murder scene. Cruz admitted he had purchased four camouflage masks and could not explain why none of them could be found at this house. (29 RT 5076, 5253; see 35 RT 6339–6340 [Lieutenant Myron Larson testified he searched Cruz's home and could not find any masks].) The fact that the defendants brought and wore masks proved that the attack was planned.

All of the conspirators testified that Cruz dropped off Evans and LaMarsh and parked up the road to avoid arousing suspicion. (29 RT 5078–5079; 30 RT 5300; 32 RT 5644–5645; 34 RT 5985.) Even LaMarsh, who denied there was a conspiracy, testified that he and Evans were dropped off in front of the house while the other drove on. Moreover, he chased three people back into the living room–just as required by the plan described by Evans. (32 RT 5644–5645, 5648–5652; see 24 RT 4209 [Evans explained that this was part of the plan to corral the victims in the living room before the other assailants attacked]; 17 RT

2984, 2992 [Alvarez testified that Evans forced her from the back bedroom into the living room, and then LaMarsh forced her from the front bedroom back into the living room].) That evidence corroborated Evans' testimony that there was a plan to corral the victims in the living room before the rest of the conspirators attacked.

Willey testified that Beck and Vieira came in through the back bedroom window (34 RT 5991), just as Evans said the plan provided.

LaMarsh's witness, Rosemary McLaughlin, testified that the night before the murders, Cruz called on the phone and told her "the guys were going to go even a score, get in a fight." (31 RT 5547–5548.) That showed that the attack was planned, and not spontaneous. Cruz also told McLaughlin that one of the targets was Jimmy Smith. That corroborated Evans' testimony that Cruz had said he hoped that Smith would be at the Elm Street house so he could kill him, too. (24 RT 4209, 4401.)

McLaughlin also testified that Beck came to her house the day after the murders. He told her that Vieira had to wipe the blood off of everyone's shoes. Beck smiled while he explained that his shoes would not come clean, so he had to buy a new pair. (31 RT 5549–5550.) Beck was wearing "[b]rand new white sneakers" and he told her his old ones "were covered with blood." That evidence might prove only that they committed murders, rather than the conspiracy. However, Beck also told McLaughlin, "they had to do them," and that echoed and validated Evan's testimony that Cruz said the plan was to "do them all and leave no witnesses." (24 RT 4209; 31 RT 5553.)

Evans, LaMarsh, and Willey testified that when they were driving away from the murder scene, Cruz became upset when he found out that Alvarez had escaped. (24 RT 4250; 32 RT 5663; 34 RT 6005.) That corroborated Evans' testimony that there had been a plan to kill everyone and leave no witnesses. (24 RT 4209.)

In short, there can be no doubt that the record as a whole, viewed in the light most favorable to the prosecution, contains sufficient evidence to sustain appellants' conviction on conspiracy to commit murder. (See *People v. Cole*, *supra*, 33 Cal.4th at p. 1212.)

XXVI.

APPELLANTS' DEATH SENTENCE FOR THE CONSPIRACY CONVICTIONS SHOULD BE CONVERTED TO A TERM OF 25 YEARS TO LIFE

As discussed in Argument XII, Respondent agrees with appellants and submits that their death sentences for conspiracy to commit murder should be converted to a consecutive term of 25 years to life. (BOB 222; Cruz Joinder; *Vieira*, *supra*, 35 Cal.4th at pp. 294, 306; *People v. Lawley*, *supra*, 27 Cal.4th at pp. 171–172.)

XXVII.

THE TRIAL COURT IMPROPERLY INSTRUCTED THE JURY THAT CONSPIRACY TO COMMIT MURDER COULD BE BASED ON IMPLIED MALICE, BUT THE ERROR WAS HARMLESS; THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON SUDDEN QUARREL AND HEAT OF PASSION, THE PROCEDURE FOR REACHING VERDICTS ON GREATER AND LESSER OFFENSES, AND THE PERSONAL USE OF A DANGEROUS WEAPON; THE TRIAL COURT PROPERLY REFUSED TO INSTRUCT THE JURY ON SELF-DEFENSE BECAUSE THERE WAS NO EVIDENCE TO SUPPORT THAT INSTRUCTION

Appellants contend that the trial court deprived them of their Fifth, Sixth, and Fourteenth Amendment rights by giving the jury several erroneous instructions and withholding instructions on self-defense. (BOB 223, 379; COB 257, 268; Cruz Joinder.)

Respondent concedes that the trial court erroneously instructed the jury that implied malice could support a conviction for conspiracy to commit murder. (See BOB 224, 379; COB 257; Cruz Joinder.) However, as discussed in Argument VII-A, the error was harmless because the other verdicts demonstrate that the jury necessarily found that appellants planned to kill the victims, i.e., harbored express malice.

Appellants claim that the trial court erred by deleting from CALJIC No. 8.40 [Voluntary Manslaughter–Defined] the portion concerning unreasonable self-defense. (BOB 238, 379; COB 268; Cruz Joinder.) As discussed in Argument VIII, there was no evidence that appellants feared an imminent attack; and there was no evidence that they acted in any kind of self-defense. Therefore, they had no right to any self-defense instructions.

Appellants contend that the trial court erred by denying their request for four supplemental instructions regarding sudden quarrel and heat of passion. (BOB 244; Cruz Joinder.) However, the trial court's instruction pursuant to CALJIC No. 8.40 was adequate, and appellants' proposed instructions were either improper or unnecessary.

Appellants contend that during deliberations, the trial court erroneously instructed the jury that it had to unanimously find a defendant not guilty of the crime charged before it could consider lesser included offenses. (BOB 254; Cruz Joinder.) However, the instruction did not tell the jury it could not *consider* lesser included offenses first. The trial court correctly told the jury it could not reach a *verdict* on lesser included offenses before it reached a not guilty verdict on the greater offenses.

Appellants contend that the trial court erred by instructing the jury that it could consider lesser included charges for some of the defendants and that self-defense applied only to the charge that LaMarsh killed Raper. (BOB 263; Cruz

Joinder.) However, the trial court properly instructed the jury only on theories that were supported by the evidence.

Appellants contend that the trial court erred by refusing their requests for an instruction on reasonable self-defense. (BOB 267; Cruz Joinder.) However, since there was no evidence that appellants actually acted in self-defense, they were not entitled to an instruction on that theory.

Finally, appellants contend that there was insufficient evidence to support the jury's determination that each of their murder convictions involved the personal use of a deadly weapon. (BOB 273; Cruz Joinder.) However, because there was substantial evidence that both appellants used deadly weapons while all the crimes were committed, the enhancement was properly imposed.

A. The Trial Court Erroneously Instructed The Jury That Conspiracy To Commit Murder Could Be Based On Implied Malice, But The Error Was Necessarily Harmless

As discussed in Argument VII-A, the trial court instructed the jury that conspiracy to commit murder could be based on malice. However, that instruction incorrectly suggested that even implied malice would be sufficient, whereas only express malice could support the conviction. (See *People v. Swain*, *supra*, 12 Cal.4th at pp. 599–607.) The claims in Cruz and Beck's briefs are almost identical. So Respondent asks that this Court refer to Respondent's Argument VII-A for an explanation of why the instructional error was harmless beyond a reasonable doubt.

B. The Trial Court Properly Deleted The Portion Of CALJIC No. 8.40 Concerning Unreasonable Self-Defense

Appellants requested that the trial court instruct the jury pursuant to CALJIC No. 8.40 [Voluntary Manslaughter–Defined]. (35 RT 6189, 6259.) The trial court agreed to give the portion of the instruction concerning sudden quarrel and heat of passion, but omitted the portion concerning unreasonable self-

defense. As discussed in Argument VIII, the trial court did not err. There was no substantial evidence that supported an instruction on unreasonable self-defense.

Respondent asks this Court to refer to Respondent's Argument VIII for a response to appellants' claim that the trial court should have instructed the jury on unreasonable self-defense.

C. The Trial Court Properly Rejected Appellants' Supplemental Instructions On Sudden Quarrel And Heat Of Passion

Appellants claims that the trial court erred by denying appellants' request for special instructions on the definition of sudden quarrel and heat of passion. (BOB 244; Cruz Joinder.) Respondent disagrees because they were improper or unnecessary.

1. Defendant's Special Instruction FF

Appellants requested that the trial court instruct the jury with Defendant's Special Instruction FF:

> Sudden quarrel
>
> The right of self-defense is available to a person engaged in a sudden quarrel.
>
> The mere fact that the parties are engaged in a sudden quarrel, which may be a mere altercation of words, cannot deprive one of the right to defend himself against real or apparent danger.

(8 CT 2080; 36 RT 6412 [Cruz joined request].) On the proposed instruction, the trial court inserted brackets around the phrase "which may be a mere altercation of words" and wrote "Denied. [Bracketed phrase] not the law. Also [CALJIC] No. 5.50 given." (*Ibid.*) At the hearing on jury instructions, the trial court told Beck that Defendant's Special Instruction FF did not apply to him. (36 RT 6422.)

The trial court did not err. As discussed in Respondent's Argument VIII, appellants had no right to any kind of self-defense instruction. Moreover, it is established that words alone, unaccompanied by a threat of bodily injury, never justifies an assault. (*People v. Chavez* (1968) 268 Cal.App.2d 381, 384; *People v. Michaels*, *supra*, 28 Cal.4th at p. 529 [the defendant's unreasonable fear cannot be trivial; it must be fear of death or great bodily harm]; *People v. Humphrey*, *supra*, 13 Cal.4th at p. 1082; see CALJIC No. 9.11 [Insulting Words—Not Justification for Assault].) Therefore, appellants certainly had no right to an instruction on the use of deadly force in response to "a mere altercation of words."

Moreover, even if appellants had been entitled to the proposed instruction, there is not a reasonable probability that it would have resulted in a more favorable verdict. (See *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1144.) Since there was no evidence that there was any "altercation of words" between the victims and appellants, the instruction could not have helped them. (See *ibid.*)

2. Defendant's Special Instructions DDD

Appellants requested Defendant's Special Instruction DDD:

> Heat of passion defined
>
> The passion necessary to constitute heat of passion need not mean rage or anger but may be any violent, intense, overwrought or enthusiastic emotion which causes a person to act rashly and without deliberation and reflection.

(8 CT 2101; 36 RT 6412 [Cruz joined request].) On the proposed instruction, the trial court wrote that it denied the request because CALJIC Nos. 8.42–8.44 were adequate. (*Ibid.*) At the hearing on jury instructions, the trial court stated, "DDD, EEE, and FFF, the Court feels that heat of passion, provocation,

duration of provocation, are adequately defined and instructed upon in CALJIC 8.42, 8.43, 8.44, so I will not give those three." (36 RT 6436.)

Appellants claim that "the trial court only provided the jury with CALJIC No. 8.44" even though Defendant's Special Instruction DDD was necessary "to properly inform the jury of the full nature and scope of heat of passion . . . ." (BOB 248–249; Cruz Joinder.) Not so. The trial court specifically declined the instruction because the law was adequately covered by *three* instructions: CALJIC Nos. 8.42, 8.43, and 8.44. (8 CT 2101.) Contrary to appellants' argument, those instructions did not "limit[] the jury's ability to consider fully the lesser crime of voluntary manslaughter." (BOB 249; Cruz Joinder.) The instructions gave extensive and expansive explanations and made clear that the emotions underlying heat of passion were not limited to rage or anger. In particular, the instruction pursuant to CALJIC No. 8.44 provided, "*Any or all* of such emotions may be involved in a heat of passion that causes judgment to give way to impulse and rashness." (36 RT 6496, italics added; 8 CT 1905.) Accordingly, the standard instructions were legally adequate to apprize the jury of the extent of emotions that could form the basis of sudden quarrel or heat of passion. (*People v. Gutierrez*, *supra*, 28 Cal.4th at p. 1144 [trial court's standard manslaughter instructions pursuant to CALJIC Nos. 8.40, 8.42, 8.43, 8.44, and 8.50 adequately covered the points set forth in the defendant's special instructions].) Moreover, even if the instructions were inadequate, it is not reasonably probable that appellants would have received a more favorable verdict if the requested supplemental instruction had been given. Both appellants testified they were "concerned"; both appellants testified they were scared; neither appellant claimed they were angry, "overwrought" or "enthusiastic." Therefore, the proposed instruction would not have helped them receive a more favorable verdict. (See *ibid.*)

3. Defendant's Special Instructions EEE

Appellants requested Defendant's Special Instruction EEE:

> Verbal provocation
>
> Any type of provocation is sufficient if it is of such character and degree as naturally would excite and arouse such heat of passion, and verbal provocation may be sufficient.

(8 CT 2102; 36 RT 6412 [Cruz joined request].) On the proposed instruction, the trial court wrote that it denied the request because CALJIC No. "8.40 uses [the] word quarrel [and] quarrel means verbal argum[en]t." (*Ibid.*) At the hearing on jury instructions, the trial court stated that EEE was adequately covered by other instructions. (36 RT 6436.)

Appellants claim that Defendant's Special Instruction EEE was necessary to "inform[] the jury that the provocation sufficient to reduce the crime alleged from murder to manslaughter need only be verbal provocation." (BOB 249; Cruz Joinder.) However, the instruction pursuant to CALJIC No. 8.40 provided, "There is no malice aforethought if the killing occurred upon *sudden quarrel* . . . ." (36 RT 6494, italics added; 8 CT 1902.) CALJIC Nos. 8.42, 8.43, and 8.50 also use the term "sudden quarrel" regarding reducing murder to manslaughter (36 RT 6494–6497; 8 CT 1903–1904, 1906.) And in closing arguments, appellants used that term ten times. (36 RT 6544–37 RT 6610.)

As the trial court noted, "quarrel means verbal argument." (8 CT 2102.) Because the instructions and attorneys repeatedly indicated that a "quarrel" could justify reducing a murder to manslaughter, there was no possibility that Beck's proposed instruction was necessary to inform the jury that "verbal" provocation was sufficient. Accordingly, the standard instructions were legally adequate. (*People v. Gutierrez*, *supra*, 28 Cal.4th at p. 1144 [trial court's standard manslaughter instructions pursuant to CALJIC Nos. 8.40, 8.42, 8.43, 8.44, and 8.50 adequately covered the points set forth in the defendant's special

instructions]; *People v. Kelly*, *supra*, 1 Cal.4th at pp. 525–526 [in determining whether instructions misled the jury, reviewing court considers instructions as a whole and also counsel's argument].) Moreover, even if the instructions were inadequate, it is not reasonably probable that appellants would have received a more favorable verdict if the requested supplemental instruction had been given. There was no evidence whatsoever that any of the victims *said anything* to appellants–other than crying out for help. (See *ibid.*; see 17 RT 2932; 30 RT 3427; 24 RT 4238)

4. Defendant's Special Instructions FFF

Appellants requested Defendant's Special Instruction FFF:

> Duration of provocation
>
> A defendant may act in the heat of passion at the time of the killing as a result of a series of events which occur over a considerable period of time.
>
> Where the provocation extends for a long period of time, you must take such period of time into account in determining whether there was a sufficient cooling period for the passion to subside.
>
> The burden is on the prosecution to establish beyond a reasonable doubt that the defendant did not act in the hea[t] of passion.

(8 CT 2103; 36 RT 6412 [Cruz joined request].) On the proposed instruction, the trial court wrote it was denied because CALJIC No. 8.42 was adequate. (*Ibid.*) At the hearing on jury instructions, the trial court stated that FFF was adequately covered by other instructions. (36 RT 6436.)

Appellants claim that Defendant's Special Instruction FFF was necessary to inform the jury that the provocation might occur over a long period of time. "None of the instructions given informs the jury that the period of provocation might occur over 'a considerable period of time' . . . ." (BOB 246–247; Cruz

Joinder.) Not so. The trial court correctly noted that this principle was contained in CALJIC No. 8.42. (8 CT 2103; 36 RT 6436.) Accordingly, it properly and adequately instructed the jury that, "Legally adequate provocation may occur in a short, or *over a considerable, period of time.*" (36 RT 6495, italics added; 8 CT 1903; CALJIC No. 8.42.) The standard instruction was legally adequate. (*People v. Gutierrez, supra*, 28 Cal.4th at p. 1144 [trial court's standard manslaughter instructions pursuant to CALJIC Nos. 8.40, 8.42, 8.43, 8.44, and 8.50 adequately covered the points set forth in the defendant's special instructions].)

Moreover, even if the instruction were inadequate, it is not reasonably probable that appellants would have received a more favorable verdict if the requested supplemental instruction had been given. Appellants are correct that there was ample evidence that they were provoked by Raper over a considerable period of time. (BOB 250–251; Cruz Joinder.) However, all of the defendants testified that they went to the Elm Street house to get clothes or move furniture–not for revenge; appellants expressly testified that they were not angry; and there was no evidence whatsoever that any of the victims did or said anything to appellants to provoke them.

Further, to the extent appellants could have been provoked by threats over a "considerable period of time," Beck's own instruction advised the jury to assess whether there was a sufficient cooling period. Contrary to *Cruz's* implausible conspiracy-as-self-defense theory, no reasonable trier of fact could believe that appellants acted in the heat of the moment based solely on events and threats that happened days or weeks earlier. Therefore, even if the jury had received Beck's proposed instruction, it still would not have found that old affronts caused appellants to act in the heat of passion. (See *People v. Gutierrez, supra*, 28 Cal.4th at p. 1144.)

D. The Trial Court Properly Instructed The Jury That It Should Reach A Verdict On The Crime Charged Before It Reached A Verdict On Lesser Included Offenses

Appellants complain that the trial court improperly responded to a jury question by instructing the jury that it had to find a defendant not guilty of a greater offense before it considered the lesser offense. (BOB 254–262; Cruz Joinder.) Appellants misread the record. The trial court did not tell the jury it could not *consider* lesser offenses first. It told the jury only that it could not reach *verdicts* on lesser offenses before finding a defendant not guilty of the greater offense. Further, appellants agreed with the proposed instruction before the trial court read it to the jury. Therefore, appellants forfeited their claim of error.

The trial court originally instructed the jury pursuant to CALJIC No. 17.10:

> [Y]ou are to determine whether the defendants are guilty or not guilty of the crime charged and any degree thereof or of any lesser crime as specified in this instruction. In doing so, you have discretion to choose the order in which you evaluate each crime or consider the evidence pertaining to it. You may find it productive to consider and reach a tentative conclusion on all charges and lesser crimes before reaching any final verdicts. However, the Court cannot accept a guilty verdict on a lesser crime unless you have unanimously found the defendant not guilty of the crime charged.

(36 RT 6504.)

On May 27, 1992, the trial court put on the record its discussions concerning the jury's question and the trial court's response:

> [THE COURT:] Mr. Faulkner is here through Mr. Amster and Mr. Brazelton is not [here].
>
> May the record reflect that the jury has sent out a question which reads as follows: "CALJIC 17.10. Please clarify must be found unanimously not guilty of each applicable count before considering lesser charge."

When I received this note I prepared a response and have discussed that proposed response with all counsel, including Mr. Brazelton and Mr. Faulkner. Mr. Brazelton and Mr. Faulkner both agree that the proposed response which I recited to them can be read to the jury in their absence.

Mr. Brazelton has consented to the reading being done in his absence, even though Mr. Amster, Mr. Magana, and Mr. Miller are present.

Mr. Amster has heard my proposed response and is agreeable to it being read to the jury, correct?

MR. AMSTER: That is correct, Your Honor.

THE COURT: Mr. Magana, likewise with you?

MR. MAGANA: Yes.

THE COURT: Mr. Miller, let me–I understand you probably agree through Mr. Magana's paraphrasing of this to you, but let me read it verbatim . . . .

MR. MILLER: That's agreeable.

THE COURT: All right. Let's bring the jurors in . . . . [¶] In response to your question, "please clarify must be found unanimously not guilty of each applicable count before considering lesser charge," let me tell you there is a very lengthy CALJIC instruction dealing with lesser included offenses which has not been read to you. If you want that instruction read to you, I will read it to you tomorrow morning.

However, in the meantime, I will attempt to respond to your specific question with the following instruction: For example, before you can find a defendant guilty of second degree murder as to a particular count, all 12 of you must find him not guilty of first degree murder as to that count.

Before you can find him guilty of voluntary manslaughter as to that count, all 12 of you must find him not guilty of both first and second degree murder as to that count. Before you can find

> him guilty of one of the lesser non-homicide crimes, as to that count, all twelve of you must find him not guilty of first and second degree murder and voluntary manslaughter as to that count. Okay?
>
> If you will go back on in to the jury room and continue your deliberations, please.

(37 RT 6827–6830; see 37 RT 6830 [the long CALJIC instruction the trial court referred to was No. 8.75 [Jury May Return Partial Verdict—Homicide].)

It is established that a defendant forfeits his claim that the trial court erroneously instructed the jury when he fails to object or agrees to the instruction. (*People v. Bolin*, *supra*, 18 Cal.4th at p. 326 [defendant waived claim where defense counsel agreed instruction was appropriate and raised no objection]; *People v. Jennings* (1991) 53 Cal.3d 334, 374 [failure to object to special instruction forfeits claims on appeal]; see also *People v. Vera*, *supra*, 15 Cal.4th at p. 275 [as a general rule, appellate court will not consider claims of error that could have been–but were not–raised in trial court]; *People v. Viray* (2005) 134 Cal.App.4th 1186, 1209 [some claims are waived by failure to object even when they involve substantial rights].) As the record clearly shows, appellants agreed to the trial court's instruction. The trial court stated that Beck's attorney was not present, but it had read the proposed instruction to him and he agreed to the instruction. The trial court also stated that Cruz's attorney was representing Beck's attorney during the hearing. Cruz's attorney stated at the hearing that the response was agreeable to him. (37 RT 6827.) Therefore, appellants forfeited this claim. (See *People v. Bolin*, *supra*, 18 Cal.4th at p. 326.) Moreover, the instruction did not involve appellants' substantial rights because it correctly told the jury not to reach verdicts on lesser offenses before disposing of greater offense. (*People v. Fields* (1996) 13 Cal.4th 289, 309; see § 1259.)

Appellants argue, "Even though trial counsel acquiesced in the reading of this instruction, there was no invited error." (BOB 259; Cruz Joinder.) However, they offer no authority for the proposition that they did not forfeit their claim. They argue only that trial courts have a general obligation to instruct the jury when it is apparent the jury is confused about the law. (*Ibid.*) The trial court did, of course, instruct the jury on its question. And contrary to appellants' argument, the trial court's instruction was a correct statement of the law. Moreover, the trial court stated it would give the jury a CALJIC instruction if it was still confused. But since the jury did not ask for that instruction, the trial court's instruction presumably resolved the jury's question. (See 37 RT 6832–6833 [parties reconvened two days later to discuss two new questions; no request for CALJIC No. 8.75].)

Even if appellants did not forfeit their claim, it fails on the merits. CALJIC No. 17.10 is known as the *Kurtzman* instruction, conveying the holding in *People v. Kurtzman* (1988) 46 Cal.3d 322.

> [It] established that the jury may deliberate on the greater and lesser included offenses in whatever order it chooses, but that it must acquit the defendant of the greater offense before returning a verdict on the lesser offense. [Citation.] In this manner, when the jury renders its verdict on the lesser included offense, it will also have expressly determined that the accused is not guilty of the greater offense.
>
> The acquittal-first rule, requiring the jury to expressly acquit the defendant before rendering a verdict on the lesser offense, serves the interests of both defendants and prosecutors . . . .

(*People v. Fields*, *supra*, 13 Cal.4th at p. 309.) Thus, in *Fields*, this Court encouraged "trial courts to continue the practice of giving the so-called *Kurtzman* instruction set forth in CALJIC No. 17.10 (1989 re-rev.) at the outset of jury deliberations." (*Ibid.*; see also *People v. Dennis* (1998) 17 Cal.4th 468, 536; *People v. Berryman*, *supra*, 6 Cal.4th at p. 1073.)

Appellants contend that the trial court's supplemental instruction "suggest[ed] a deliberation procedure that is specifically prohibited by well-established principles" and "reinforced the jurors' erroneous suggestion that they must unanimously find the defendants not guilty of each applicable count before considering any lesser charge." (BOB 257–258; Cruz Joinder.) Appellants are mistaken. Even if the jury ignored the plain language of CALJIC No. 17.10 and erroneously believed that it could not "consider" lesser charges before dispensing with the greater charge, the trial court did not "reinforce" that misconception. The trial court's instruction specifically addressed *verdicts*–not deliberations. The trial court said the jury could not find a defendant *guilty* of a lesser charge before finding him not guilty of the greater charge. Nowhere in the instruction did the trial court say that the jury could not *consider* lesser charges. Therefore, the supplemental instruction was a correct statement of the law. (See *People v. Fields*, *supra*, 13 Cal.4th at p. 309.)

Moreover, even if the supplemental instruction failed to clarify the law, the jury could have gone back to the original instruction and determined that it could consider greater and lesser charges in any order. In deciding whether an instructional error occurred, the appellate court determines whether it is reasonably likely that the trial court's instructions caused the jury to misapply the law. (*Estelle v. McGuire*, *supra*, 502 U.S. at p. 72; *People v. Clair*, *supra*, 2 Cal.4th at p. 688; *People v. Cain*, *supra*, 10 Cal.4th at p. 36; *People v. Kelly*, *supra*, 1 Cal.4th at pp. 525-527; *Boyde v. California*, *supra*, 494 U.S. at p. 380.) "It is well established that the instruction 'may not be judged in artificial isolation,' but must be considered in the context of the instructions as a whole and the trial record." (*Estelle v. McGuire*, *supra*, 502 U.S. at p. 72.)

Here, the jury cited CALJIC No. 17.10 in its question, so it was certainly aware of that instruction. (37 RT 6827.) It is established that this Court must assume that the jurors were intelligent persons capable of understanding,

correlating, and following all instructions. (*People v. Phillips* (1985) 41 Cal.3d 29, 58; *People v. Laws* (1993) 12 Cal.App.4th 786, 796; *People v. Mills* (1991) 1 Cal.App.4th 898, 918.) Thus, if the jury was still confused after the trial court's supplemental instruction, it would have re-consulted the instruction it was trying to understand. That instruction unambiguously provided, "[Y]ou have discretion to choose the order in which you evaluate each crime or consider the evidence pertaining to it. You may find it productive to consider and reach a tentative conclusion on all charges and lesser crimes before reaching any final verdicts." (36 RT 6504.) Given the plain language of CALJIC No. 17.10, the jury would not have thought it could not consider lesser charges before reaching a verdict on the crime charged.

Finally, appellants acknowledge that "this Court has held that this error implicates state law error only," but claim that the purported instructional error deprived them of their federal constitutional right to due process and a jury determination on lesser included offenses. (BOB 261; Cruz Joinder.) Appellants are mistaken. This Court observed:

> It is clear, as a matter of state constitutional law, that trial courts are required to give instructions on all lesser offenses necessarily included within the filed charges, when there is substantial evidence supporting a conviction for a lesser offense, regardless of whether the parties request such instructions or even oppose them. (*Breverman*, *supra*, 19 Cal.4th at pp. 154-155.) As we explained in *Breverman*, however, the related federal constitutional right is more circumscribed, prohibiting only in capital cases those situations in which the state has created an "artificial barrier" preventing the jury from considering a noncapital verdict other than a complete acquittal and thereby calling into question the reliability of the outcome. (*Id.* at pp. 166-168, citing *Beck* [*v. Alabama* (1980)] 447 U.S. 625, *Schad v. Arizona* (1991) 501 U.S. 624, and *Hopkins v. Reeves* (1998) 524 U.S. 88 (Reeves).)

(*People v. Rundle*, *supra*, 43 Cal.4th at p. 142.)

This was not a case where the trial court failed to instruct the jury on lesser offenses, thereby forcing the jury to make an "all or nothing" choice between acquittal and the crime charged. Since the jury certainly understood that there were lesser offenses available, there was no "'artificial barrier'" to the lesser offenses; any error did not implicate federal constitutional law. (See *People v. Rundle*, *supra*, 43 Cal.4th at p. 142.) Therefore, error, if any, requires reversal only if it is reasonably probable that a result more favorable to appellant would have been reached in the absence of the error. (See *People v. Flood*, *supra*, 18 Cal.4th at pp. 487, 490 [misdirection of the jury, including incorrect, ambiguous, conflicting, or wrongly omitted instructions that do not amount to federal constitutional error, are reviewed under the harmless error standard articulated in *Watson*].)

However, under any standard, the error was harmless. Considering the weight of the evidence against appellants and the slightness of any instructional error, it is certain beyond a reasonable doubt that the jury would have returned the same verdicts regardless of the order in which it considered the greater and lesser offenses. (See *Chapman*, *supra*, 386 U.S. at p. 24.)

E. The Trial Court Properly Instructed The Jury On Lesser Included Offenses

Appellants contend that the trial court erred by refusing to instruct the jury on self-defense and "[b]y selecting each defendant and directing the jury to consider certain defenses and lesser charges only to particular defendants . . . ." (BOB 263–265; Cruz Joinder.) Appellants are mistaken. As discussed in Argument VIII, appellants were not entitled to any self-defense instructions because there was no evidence that they acted in self-defense. Respondent asks this Court to refer to Argument VIII for a response to that aspect of appellant's claim.

As for appellants' assertion that the trial court should have instructed on the same lesser offenses for all of the defendants, they fail to cite any authority for the proposition that they were entitled to instructions on lesser charges that did not apply merely because their codefendants received them.

The trial court instructed the jury that all of the defendants were charged with four counts of murder and one count of conspiracy to commit murder. (36 RT 6489–6491.) It further instructed:

> If you are not satisfied beyond a reasonable doubt that a defendant is guilty of a crime charged, you may nevertheless convict him of any lesser crime if you are convinced beyond a reasonable doubt that the defendant is guilty of such crime.
>
> As to the defendant Gerald Cruz, the crimes of assault with a deadly weapon and assault by means of force likely to do great bodily injury are lesser to that of murder of Franklin Raper as charged in Count II . . . . [¶]
>
> As to the defendant James David Beck, the crime of assault with a deadly weapon is lesser to that of murder of Dennis Colwell as charged in Count III.
>
> As to the defendant Jason LaMarsh, the crimes of assault with a deadly weapon and assault by means of force likely to do great bodily injury are lesser to that of murder of Franklin Raper as charged in Count II.
>
> As to the defendant Ronald Willey, the crime of battery is lesser to that of murder of Richard Ritchey as charged in Count I, and the crime of accessory to a felony is lesser to all charges against him.
>
> As to all defendants, the crime of voluntary manslaughter are lesser to that of murder in Counts I through IV, and the crime of conspiracy to commit voluntary manslaughter are lesser to that of conspiracy to commit murder in Count V.

(36 RT 6503–6504.)

That instruction properly provided options for lesser offenses based on the evidence against each defendant. Respondent is unaware of any principle of law requiring that instructions on lesser offenses be the same for all defendants regardless of the evidence.

> "[V]oluntary manslaughter, *whether it arises from unreasonable self-defense or from a killing during a sudden quarrel or heat of passion*, is not a defense but a crime; more precisely, it is a lesser offense included in the crime of murder. Accordingly, when a defendant is charged with murder the trial court's duty to instruct sua sponte, or on its own initiative, on unreasonable self-defense is the same as its duty to instruct on any other lesser included offense: this duty arises whenever the evidence is such that a jury could reasonably conclude that the defendant killed the victim in the unreasonable but good faith belief in having to act in self-defense. [Citation.]"

(*Breverman*, *supra*, 19 Cal.4th at p. 159.) As discussed in *Breverman*, trial courts must instruct on lesser offenses, including voluntary manslaughter based on unreasonable self-defense, whenever there is sufficient evidence for a jury to reasonably apply that defense. (*Ibid.*) There is no duty, however, to instruct on lesser offenses just because the evidence supported such an instruction for a codefendant. Therefore, the trial court did not err by instructing the jury only on lesser offenses that, according to the evidence, applied specifically to each defendant.

Appellants complain that by instructing the jury "that LaMarsh and Willey were entitled to some theory of self-defense and some lesser charges, the trial court conveyed to the jury that these defendants were less culpable and that [appellants were] more responsible for the killings." (BOB 267; Cruz Joinder.) However, the trial court instructed the jury on self-defense *only* as to LaMarsh. (36 RT 6509–6511.) The self-defense instruction was properly limited to LaMarsh because he was the *only* defendant who claimed that the victims threatened him. (32 RT 5650–5651 [LaMarsh testified that Ritchey and Colwell told him to leave and LaMarsh feared they would physically throw him

out of the house]; 32 RT 5653–5654 [LaMarsh testified that Raper said "'I'll kill you'"; Raper got out of his chair and came at LaMarsh; and Raper had his knife in one hand and reached for LaMarsh's bat with the other hand].) Further, contrary to appellants' argument, the trial court instructed on some lesser charges for *all* of the defendants. (36 RT 6503–6504.) And if the jury rejected vicarious liability, the evidence *did* justify different lesser charges for different defendants.

Appellants contend, "Even if the jury accepted the testimony of [appellants] that [they] did not intend to kill anyone and only tried to break up the fight between Raper's group and [appellants'] friends, the jury was unable to consider this defense because the trial court refused to instruct on these defenses and lesser charges." (BOB 266; Cruz Joinder.) Appellants' argument does not make sense. If the jury had believed appellants' testimony that they never intended to hurt anyone and did not, in fact, hurt anyone, the jury would have acquitted appellants of all the charges. Appellants' contention that the jury required self-defense instructions or instructions on additional lesser offenses to avoid convicting them of conspiracy to commit murder and four counts of special circumstance first degree murder is an unsupportable exaggeration and runs counter to every finding the jury made. At a minimum, appellants fail to explain why the jury failed to take advantage of the lesser offenses that *were* offered for every charge–i.e., conspiracy to commit manslaughter and voluntary manslaughter. Nor can appellants explain how the jury could have believed appellants "did not intend to kill anyone" and only acted to stop the fighting, but still convicted them of the greatest offenses available.

Finally, any error requires reversal only if it is reasonably probable that a result more favorable to appellant would have been reached in the absence of the error. (See *People v. Flood*, *supra*, 18 Cal.4th at pp. 487, 490.) But even if appellants were correct that there was error and it implicated their federal

constitutional rights, it would still be harmless beyond a reasonable doubt. Given the weight of the evidence, and the absence of any evidence of provocation or self-defense, the jury would have returned the same verdicts even if the trial court had instructed the jury on all possible lesser included offenses. (See *Chapman*, *supra*, 386 U.S. at p. 24.)

F. The Trial Court Properly Refused To Instruct The Jury On Self-Defense Because There Was No Evidence That Appellants Acted In Self-Defense

Appellants contend that the trial court erred by denying Beck's request to have the jury instructed on various aspects of self-defense. (BOB 267–273; Cruz Joinder.) Specifically, Beck requested the following supplemental instructions. Defendant's Special Instruction BB: "It is not necessary for the defendant to establish self-defense by evidence sufficient to satisfy the jury that the self-defense was true." (8 CT 2077.) Defendant's Special Instruction CC: "The Defendant need not establish or prove that he acted in self-defense; the prosecution has the burden of proving beyond a reasonable doubt that the defendant did not act in self-defense." (8 CT 2078.) Defendant's Special Instruction HH: "The killing of another person in self-defense is justifiable and not unlawful when the person who commits the act resulting in death has reasonable ground to believe and does believe that the other person is about to inflict bodily harm on him." (8 CT 2082.)

However, appellants denied acting in self-defense and there was no evidence supporting an instruction on that theory. As discussed in Argument VIII, appellants were not entitled to an instruction on unreasonable self-defense instructions. Therefore, they certainly had no right to an instruction on perfect self-defense. Respondent asks that this Court refer to Argument VIII for a general response to appellants' claims.

As a supplement to Argument VIII, Respondent notes that Cruz did not join Beck's request for these instructions at the trial court; therefore, he cannot raise the claim here. (See *People v. Andersen, supra*, 26 Cal.App.4th at p. 1249; 36 RT 6422.) And though Beck did submit the supplemental instructions, he made no argument on why they were necessary. Nor did he object when the trial court said the instructions did not apply. (36 RT 6422.) Arguably, Beck also forfeited his claim. However, even if the claim is preserved for both appellants, it still fails.

Appellants repeat their argument that although they testified they did not participate in any violent acts, the jury could have still found they acted in self-defense "based on other evidence presented at trial." (BOB 271; Cruz Joinder.) However, that "other evidence" is primarily the purportedly "ample evidence that Raper was a violent, dangerous individual." (*Ibid.*) However, defendants were not entitled to kill Raper in self-defense just because he supposedly had a violent history. Absent any evidence that Raper *actually* threatened appellants, they were not entitled to a self-defense instruction. (See *People v. Elize, supra*, 71 Cal.App.4th at pp. 615-616 [one can infer self-defense from the circumstances only when there is actual evidence from which one could infer that the defendant acted in self-defense].)

Moreover, while there was ample evidence that Raper was a caustic and annoying individual, there was no evidence that Raper was actually violent, i.e., *initiated* violence. Witnesses testified that Raper and LaMarsh got in a fight shortly before the murders, but LaMarsh admitted that he started the physical violence by slapping Raper, and Evans testified that LaMarsh got the better of Raper. (24 RT 4190; 36 RT 5625.) Contrary to appellants' argument, virtually all of the evidence showed that Raper was the *victim* of violence–not the perpetrator. (See, e.g., 27 RT 4651–4652 [Greg Boynton testified that he had an argument with Raper and he pushed Raper to the ground]; 27 RT

4651–4654, 4672 [Boynton and Dave Anderson testified that Raper threatened them and Boynton broke Raper's arm; afterward Raper left them alone]; 27 RT 4656–4657 [Boynton conceded that Raper was not a threat to him because Raper was 50 years old and weighed only 90–100 pounds]; 28 RT 4877–4889 [Deputy Sheriff Jane Irwin testified that Raper was all mouth and no action]; 32 RT 5623–5625 [LaMarsh testified that he hit Raper's trailer with a bat several times; shortly before the murders, LaMarsh hit Raper and they had a short scuffle].) In addition, various witnesses testified that appellants' group towed away Raper's trailer and burned his car. Thus, appellants' conclusory assertion that Raper was "violent" has virtually no evidentiary basis. Appellants had no right to an instruction on self-defense just because Raper had annoyed them over the months preceding the murders.

Because there was no evidence that supported an instruction on reasonable or unreasonable self-defense, the trial court properly declined to instruct on those theories. (See *Breverman, supra*, 19 Cal.4th at p. 159; *In re Christian S., supra*, 7 Cal.4th at p. 783 [no need to instruct on self-defense when there is insufficient evidence to support the instruction].) Similarly, because there was no evidentiary support for any defense theory, the result would have been the same even if the trial court had given the requested instructions. (See *People v. Flood, supra*, 18 Cal.4th at pp. 487, 490 [inadequate instruction reviewed to determine if different result was reasonably probable]; *Chapman, supra*, 386 U.S. at p. 24 [constitutional violation reviewed to determine if error was harmless beyond a reasonable doubt].)

G. The Jury's Determination That All Of Appellants' Convictions Involved The Personal Use Of A Deadly Weapon Was Supported By Substantial Evidence

Appellants argue that substantial evidence did not support the jury's findings that they personally used a deadly weapon during each of the crimes

charged. The argument is based on the proposition that there was evidence that they personally participated in some–but not all–of the murders. Therefore, they could not have "personally" used a deadly weapon against victims they did not personally assault. Specifically, appellants contest Beck's enhancements for the use of a deadly weapon in his convictions for the murders of Raper and Paris.[76] (BOB273–279; Cruz Joinder.) However, the argument has no merit. Even if appellants did not necessarily use deadly weapons *on* every victim, there was substantial evidence that appellants *used* deadly weapons *during* the commission of all of the crimes.[77]

Section 12022, subdivision (b), provides: "Any person who personally uses a deadly or dangerous weapon in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment in the state prison for one year, unless use of a deadly or dangerous weapon is an element of that offense."

The trial court instructed the jury pursuant to CALJIC No. 17.16:

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76. Presumably, if Cruz had authored this claim rather than joined it, he would have made a similar argument regarding some of the use enhancements. However, there was substantial evidence that Cruz used a deadly weapon on all of the victims. (34 RT 5991 [Willey testified that Cruz had his police baton at the Elm Street house]; 18 RT 3108, 3220, 3255, 3261 [Dr. Ernoehazy testified that Paris's contusions were most likely caused by Cruz's police baton]; 22 RT 3878, 3958 [Criminalist Marianne Vick testified that Colwell's blood was found on Cruz's baton]; 20 RT 3419, 3436, 3467 [Creekmore testified that Cruz bent over and cut Ritchey's throat]; 24 RT 4241–4242 [Evans testified that Cruz bent over and did something to Ritchey]; 32 RT 5656–5657 [LaMarsh testified that Cruz beat Raper's head with his baton].)

77. In Vieira's trial, the prosecution's theory was that Vieira personally killed only Paris. However, the trial court imposed enhancements for the personal use of a deadly or dangerous weapon (§ 12022, subd. (b)) for each of his four murder convictions. Vieira did not challenge those enhancements in his appeal before this Court. (*Vieira*, *supra*, 35 Cal.4th at pp. 273, 275.)

> It is alleged in Counts I, II, III, IV, and V that in the commission of the crime charged the defendants James David Beck, Gerald Dean Cruz, Jason Ian LaMarsh, and Ronald Wayne Willey each personally used deadly or dangerous weapons, to wit, baseball bats, knives, and baton.
>
> If you find a defendant guilty of the crime thus charged or of a lesser included crime, you must determine whether or not such defendant personally used a deadly or dangerous weapon in the commission of such crimes.
>
> A deadly or dangerous weapon means any weapon, instrument, or object that is capable of being used to inflict great bodily injury or death.
>
> The term "used a deadly or dangerous weapon" as used in this instruction means to display such a weapon in an intentionally menacing manner or intentionally to strike or hit a human being with it.
>
> The People have the burden of proving the truth of this allegation. If you have a reasonable doubt that it is true, you must find it to be not true.
>
> You will include a special finding on that question in your verdict using a form that will be supplied for that purpose.

(36 RT 6514; 8 CT 1955.)

The jury found the enhancement pursuant to section 12022, subdivision (b), true for every count against both appellants. (9 CT 2272–2285; 38 RT 6882–6891, 6903.)

The trial court imposed the personal use enhancement for every count, but stayed execution on counts two through five, resulting in a one-year addition to each appellant's term. (10 CT 2650; 45 RT 8426.)

In reviewing the sufficiency of the evidence supporting a sentence enhancement, appellate courts apply the same standard used to review the sufficiency of the evidence supporting a conviction. (*People v. Carrasco* (2006) 137 Cal.App.4th 1050, 1058.) The court views the evidence in the light

most favorable to the prosecution to determine whether any rational trier of fact could have found the elements of the charge beyond a reasonable doubt. (*People v. Young* (2005) 34 Cal.4th 1149, 1175.)

"Although the use of a firearm connotes something more than a bare potential for use, there need not be conduct which actually produces harm but only conduct which produces a fear of harm or force by means or display of a firearm in aiding the commission of one of the specified felonies." (*People v. Bland* (1995) 10 Cal.4th 991, 997; *In re Tameka C.* (2000) 22 Cal.4th 190, 197 ["We have said that a firearm-use allegation may be established as true if the defendant 'utilized the gun at least as an aid in completing an essential element of the (underlying) crime . . . .' (Citation.)"]; *In re Shull* (1944) 23 Cal.2d 745, 749 [section 12022 does not define a crime, but rather increases punishment based on a reason personal to the defendant when he committed the crime].)

"In order to find 'true' a section 12022(b) allegation, a factfinder must conclude that, during the crime or attempted crime, the defendant himself or herself intentionally displayed in a menacing manner or struck someone with an instrument capable of inflicting great bodily injury or death." (*People v. Wims* (1995) 10 Cal.4th 293, 302, overruled on another ground in *People v. Sengpadychith* (2001) 26 Cal.4th 316, 326.)

Here, there was substantial evidence that Cruz used his Ka-Bar knife and police baton during the crimes. LaMarsh testified that Cruz beat Raper's head with his baton; Moyers testified that Cruz helped Willey beat Ritchey; Evans testified that Cruz bent over Ritchey and Creekmore testified that Cruz cut Ritchey's throat; and the prosecutor's expert testified that the blunt force injuries on Paris's head were most likely caused by a police baton like the one used by Cruz. (17 RT 2931; 18 RT 3088, 3090, 3092, 3108, 3220; 20 RT 3419; 24 RT 4242; 32 RT 5656.)

There was also substantial evidence that Beck used his M-9 knife during the crimes. Evans testified that Beck held out his knife when he went down the hall towards the living room and all the victims; LaMarsh testified that Beck stabbed Colwell in the stomach; the prosecutor's expert testified that Colwell's head was beaten with the handle of a military knife like the one used by Beck; and Willey testified that Beck cut Ritchey's throat. (18 RT 3102, 3156; 24 RT 4235; 32 RT 5657, 5752–5753; 34 RT 5997–5998.) To find appellants liable for the personal use of a deadly or dangerous weapon enhancement for all counts, the prosecutor did not have to prove that appellants actually used their weapons on every murder victim. He had to prove that appellants used their weapons during the commission of–and in aid of–all the crimes. (*People v. Bland*, *supra*, 10 Cal.4th at p. 997; CALJIC No. 17.16.) Here, there is certainly sufficient evidence that while the conspirators were in the midst of the conspiracy, and in the midst of killing the four victims, appellants were using their weapons to aid the commission of all the crimes.

Appellants argue that *People v. Cole* (1982) 31 Cal.3d 568, 571–572, 576 stands for the proposition "that in construing whether sentence enhancements can apply vicariously, the Legislature's inclusion of the word 'personally' is limited in its applicability to the defendant who performs the act directly inflicting the injury." (BOB 275; Cruz Joinder.) Appellants are mistaken. *Cole* concerned an enhancement for the personal infliction of great bodily injury pursuant to section 12022.7. While the "personal" act in *Cole* was the *infliction of harm*, in the present matter, the "personal" act was the *use of a deadly weapon* (§ 12022, subd. (b)). Appellants could *use* their dangerous weapons in the commission of the crimes without actually harming the victims. (See *In re Tameka C.*, *supra*, 22 Cal.4th at p. 197 [weapons use allegation requires that defendant utilized the weapon as an aid in completing an essential element of the underlying crime]; *People v. Wims*, *supra*, 10 Cal.4th at p. 302

[it is sufficient evidence of a violation of section 12022, subdivision (b), that the defendant intentionally displayed in a menacing manner or struck someone with a dangerous weapon].) Thus, appellants were liable for *personally using* their weapons during the commission of the crimes because there was no doubt they took out their weapons and helped the other conspirators commit the crimes. Of course, appellants did more than merely take out their weapons, but that alone was enough to sustain the enhancements.

In sum, there was ample evidence that Beck used a knife and Cruz used a knife and baton during the commission of all the crimes. Since there is no doubt those were dangerous or deadly weapons, the trial court properly imposed the personal use enhancements pursuant to the jury's true findings on all counts.

XXVIII.

THE TRIAL COURT PROPERLY PERMITTED REBUTTAL EVIDENCE IN BECK'S PENALTY TRIAL

As discussed in Argument XVI-D, the main point of Beck's penalty defense was that he had been a religious church-going youth, a good man, and a good father. But then he met Cruz. Cruz controlled Beck and turned him into a sadistic and heartless man.

To demonstrate who Beck had been before he met Cruz, Beck called numerous witnesses to testify to his good character, including his kind treatment of his own and others' children. The trial court allowed the prosecution to rebut that testimony with an audiotape of Beck, Cruz, and Vieira screaming at Cruz's daughter, Alexandra, while she was falling asleep.[78] The audiotape conveyed the sound of men yelling three or four times and then a baby crying.

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78. In Cruz's penalty trial, Starn testified that Cruz said he made Alexandra cry to strengthen her lungs. (39 RT 6994–6995.)

Beck claims the trial court erred by admitting the evidence during rebuttal because it should have been admitted during the prosecution's main penalty phase case. Beck also claims the evidence should have been excluded pursuant to Evidence Code section 352 as more prejudicial than probative. Finally, Beck contends that admission of the evidence deprived him of due process, a fair trial, and a reliable penalty determination as guaranteed by the Eighth and Fourteenth Amendments. (BOB 280–285.) Respondent disagrees.

The evidence that Beck joined the others in yelling at Alexandra was not admissible during the prosecution's penalty case-in-chief because it was not evidence of criminal activity. (See § 190.3, subd. (b).) It was, however, proper rebuttal evidence. Beck tried to establish his good character with extensive testimony that he was a good father and good to other people's children. The prosecutor was entitled to provide the jury with a more balanced view with evidence that, on at least one occasion, Beck had treated a child badly. Further, Beck cannot show that his constitutional rights were violated, or that any error was prejudicial, because the challenged evidence was relatively mild compared to the prosecution's other penalty evidence.

A. Procedural History

During Beck's penalty defense, Beck's sister, Angela Morgan, testified that as a young man, Beck taught children about the Bible. As a father, Beck often took care of his children when his wife was away. He was a good parent and he never abused his children. He never hung them in a rack; he never spanked their feet with a stick; and he never blew marijuana smoke in their faces. (43 RT 7800, 7813–7814.) Beck's brother, Steven Beck, testified that Beck's wife did not take good care of their children; but Beck was never mean to them; he fed and bathed them; "[a]nd he was a real good father." (43 RT 7831–7832.) Beck's sister-in-law, Karen Beck, testified that even though Beck worked hard and long, and did not get a lot of help from his wife, he still took good care of

his children. (43 RT 7857–7858.) "Just about anything a mom could do, he could do . . . . [H]e would, you know, change their diapers. He would feed them, you know. If they were into something, he would get up and get them out of it, you know." He was a caring father, and it was obvious that his children loved him. (43 RT 7858–7859.) Beck's former father-in-law testified that Beck was a very good father and son-in-law, and never acted violently or mean. He treated his children "[r]eal good. As far as I know he was good to his children." (43 RT 7885.) Beck's half-sister, Linda Willis, testified that Beck was a "very good" parent. "Very concerned and caring father." (43 RT 7961.)

Three witnesses also testified that Beck was good with other people's children. Raymond Greer testified that he had been Beck's friend for eighteen years. Beck always carried his Bible; he attended prayer meetings; and he led youth groups. Beck "was always [at prayer meetings] with the young kids . . . . [I]f any of the kids had a problem or anything like that, he'd take his Bible with them, you know. He'd tell them, 'Let's pray about it,' you know, 'Let's see what the problem is and see if we can't help you out.'" (44 RT 7996–7997.) Bill Simao testified that he used to work with Beck. Simao's children spent time with Beck and they "loved him." (44 RT 8026.) Beck's cousin, Christy Shulze, testified that Beck's wife was not a good mother, but Beck was a very good parent; he was very good with Shulze's children; he never mistreated any children; and he had not changed from who he had always been. (44 RT 8045–8049.)

Many of these same witnesses, and others, testified that after Beck met Cruz, he stopped caring about his family; he became overly serious; he seemed to be under Cruz's control; and he became interested in occult practices. (See 43 RT 7799–7818, 7862–7863, 7901, 7950, 7960–7966; 44 RT 7999, 8075, 8092, 8102, 8120, 8150–8154, 8199–8209.)

After the conclusion of Beck's penalty defense, the trial court held a hearing to determine whether to allow Starn to testify in the prosecution's rebuttal. The trial court asked the prosecutor for an offer of proof, and it allowed the parties to argue on whether Starn's testimony was admissible:

> MR. BRAZELTON: . . . . Miss Starn would testify that when her daughter Alexandra was, as I recall, about six months old, she was placed in a dark room at night to go to sleep. And as she would doze off to sleep, Mr. Beck and Mr. Cruz would together in unison scream into the baby's ears causing it to awaken and cry, under the pretext of strengthening the child's lungs.
>
> And Miss Starn would testify that on one occasion she made a tape recording of this conduct and that she has a copy of that tape recording which lasts about a minute and a half possibly, and the sounds that can be heard on that are the defendant and Mr. Cruz whispering "one, two, three" and then yelling, and then the baby can be heard crying as it's awakened. And this is done two or three times. As the baby settles down the screaming continues by the defendant and Mr. Cruz, causing the baby to awaken and cry some more.
>
> THE COURT: Mr. Faulkner.
>
> MR. FAULKNER: Your Honor, I–as rebuttal I don't think it's relevant in that it doesn't demonstrate in and of itself a cruelty to children, number one.
>
> Number two, I think it's highly prejudicial and extremely prejudicial. I believe the probative value under 352 is outweighed by the prejudicial effect on the defendant, especially in the penalty phase.
>
> The testimony that was given was that David was a good father to his children and that the abuse was meted out by Gerald Cruz and not by Mr. Beck. And I'm not sure that–that whatever the tape is purported to represent is in fact going to come within the category of child abuse.
>
> THE COURT: Mr. Brazelton, what–what were you going to rebut with this particular evidence?

MR. BRAZELTON: Well, Mr. Faulkner elicited from a couple of witnesses including–I don't recall the gentleman's name–Sondeno possibly, that had children of his own, and Mr. Faulkner at some length questioned him about how Mr. Beck was with his children and around children in general and elicited that he was loving and caring and the kids all loved him and so forth and so on.

This is merely rebuttal of that type of evidence. He put it on for mitigation. I'm certainly entitled to put on anything to combat that.

I couldn't put it on in my case in chief because it doesn't go–I don't think would come in as an act of violence per se. But it certainly is rebuttal for the mitigating evidence that was presented . . . .

THE COURT: All right. Back on the record. I've reviewed my notes of Jennifer Starn's testimony in the penalty phase for Mr. Beck.

The proposed testimony would not be of the type the district attorney could present in this case in chief in that it is not per se criminal activity or violence. Mr. Beck did present evidence that he was good around other children, including his own. However, Miss Starn testified that Mr. Beck never abused Alexandra but that if Mr. Cruz asked, Mr. Beck would bring Alexandra–Alexandra to him at which time he would place her in what's been described as the rack.

It would seem that the proposed evidence would be in the nature of abuse, at least such that the jury could determine whether or not it was in the nature of abuse.

If the tape is authenticated by Miss Starn and if the yelling is as described by Mr. Brazelton, the Court will allow it to be presented.

(44 RT 8247–8249.)

The next day, the trial court held a hearing pursuant to Evidence Code section 402 to determine whether Starn's rebuttal testimony would conform to

the prosecutor's offer of proof. Starn testified about the incident and authenticated the audiotape, Exhibit 245. It included Cruz, Beck, and Vieira screaming and making Alexandra cry, as well as three threatening phone calls from Cruz and a phone call from Perkins. Starn testified that she copied the portion concerning Alexandra onto another audiotape, Exhibit 246. The prosecutor played Exhibit 246, and it lasted about two minutes and fifteen seconds. (45 RT 8254–8268.) Starn testified that she notified the prosecutor of the existence of Exhibit 246 shortly before the start of Cruz's penalty trial. (45 RT 8266.) However, the prosecutor did not learn about the original audiotape with calls from Cruz and Perkins until the morning of the current hearing. (45 RT 8269.)

Beck argued that the Alexandra recording was prejudicial and not probative of anything relevant. The trial court ruled, "It may not be aggravating, but it's rebuttal to Mr. Beck's mitigating evidence about his conduct with children, his or other people's, so the objection is overruled." (45 RT 8267–8268.) Beck then moved for a continuance to evaluate the phone calls from Cruz and Perkins. After the parties listened to the tape and made arguments, the trial court ruled that Beck could enter the three phone calls from Cruz, but not the phone call from Perkins. (45 RT 8275.)

During the prosecutor's rebuttal, Starn testified and authenticated Exhibits 245 and 246. Both exhibits were admitted into evidence, but only Exhibit 246 was played during direct examination. Starn explained, "They put [Alexandra] up in her crib in the dark and put a tape recorder next to her, and as she was drifting off to sleep they snuck up on her, screamed at her." (45 RT 8279–8281.)

In cross-examination, Beck immediately cast the recording as additional evidence that Cruz was a bad man who controlled the people around him. Beck elicited testimony that the incident was Cruz's idea; Starn acknowledged that

you could hear Cruz counting off before the screaming started; and Starn testified that she would have called for help, but she was afraid of Cruz. (45 RT 8282.)

Beck played for the jury two of the threatening phone calls from Cruz. Starn testified that she received many threatening phone calls from Cruz while he was in jail. The calls stopped only when Cruz found out that Starn would be testifying in his trial. The "ranting and raving" in Cruz's phone call was typical of his other recent threatening calls. (45 RT 8282–8284; Exh. 245; see 10 CT 2445; Exh. 247 [recording made from Exhibit 245 containing only the March 24 and April 4, 1992, phone messages from Cruz was admitted but not played].) Starn also testified that Cruz's screaming, threatening, and use of foul language was common when they were living at the Camp. (45 RT 8284.) On redirect, Starn acknowledged that Cruz "occasionally" spoke that way to Beck, too. (45 RT 8285.)

B. Legal Principles

When a defendant places his character at issue during the penalty phase, the prosecution is entitled to respond with character evidence of its own. "The theory for permitting such rebuttal evidence and argument is not that it proves a statutory aggravating factor, but that it undermines defendant's claim that his good character weighs in favor of mercy." (*People v. Rodriguez* (1986) 42 Cal.3d 730, 791 (*Rodriguez*).) Once the defendant's "general character [is] in issue, the prosecutor [is] entitled to rebut with evidence or argument suggesting a more balanced picture of his personality." (*Ibid.*) . . . . [¶] The scope of proper rebuttal is determined by the breadth and generality of the direct evidence.

(*People v. Loker, supra*, 44 Cal.4th at p. 709.)

> The decision to admit rebuttal evidence rests largely within the discretion of the trial court and will not be disturbed on

> appeal in the absence of demonstrated abuse of that discretion. [Citations.] . . . . "[P]roper rebuttal evidence does not include a material part of the case in the prosecution's possession that tends to establish the defendant's commission of the crime. It is restricted to evidence made necessary by the defendant's case in the sense that he has introduced new evidence or made assertions that were not implicit in his denial of guilt." Restrictions are imposed on rebuttal evidence (1) to ensure the presentation of evidence is orderly and avoids confusion of the jury; (2) to prevent the prosecution from unduly emphasizing the importance of certain evidence by introducing it at the end of the trial; and (3) to avoid "unfair surprise" to the defendant from confrontation with crucial evidence late in the trial.

(*People v. Young*, *supra*, 34 Cal.4th at p. 1199.)

In a capital penalty trial, "'The admission of rebuttal evidence is a matter for the sound discretion of the trial court.'" (*People v. Chatman*, *supra*, 38 Cal.4th at p. 401, quoting *People v. Raley* (1992) 2 Cal.4th 870, 912.) "The court's decision in this regard will not be disturbed on appeal in the absence of 'palpable abuse.'" (*People v. Hart*, *supra*, 20 Cal.4th at p. 653.) Even when challenged evidence is only marginally relevant to the penalty issue in a capital trial, it is not an abuse of the trial court's broad discretion to permit such evidence in rebuttal. (*People v. Martinez* (2003) 31 Cal.4th 673, 695-696.)

C. The Audiotape Was Properly Admitted During Rebuttal

Beck complains that the audiotape was available before his penalty trial began, so the prosecutor should have used it in his case-in-chief. (BOB 282–283.) However, the prosecutor argued–and trial court agreed–that the evidence was not admissible in the prosecutor's case-in-chief because it was not evidence of criminal activity. (44 RT 8248–8249; see § 190.3, subd. (b).) Beck acknowledges in another part of his Opening Brief that the evidence was *not* admissible in the prosecutor's penalty case-in-chief. (BOB 309 ["the trial court understood that such evidence could not properly be admitted as evidence in aggravation"].) And Beck acknowledged at trial that the evidence *was*

admissible as rebuttal evidence. (45 RT 8270 [Beck's attorney called the evidence "proper rebuttal" evidence].) But rather than addressing the actual reason the evidence was not introduced until rebuttal, Beck instead tries to prove that the prosecutor unfairly saved the evidence to maximize its affect. That argument fails because Beck has no evidence the prosecutor had an ulterior motive; the prosecutor explained that he did not present the evidence during his case-in-chief because he did not think it was admissible; the trial court agreed with the prosecutor; and *Beck* agreed with the prosecutor (when it was to his advantage to do so).

Noting the testimony of Bill Simao and others, the prosecutor argued that Beck elicited evidence during his defense that he was good with his children and other people's children and that he was loving and caring towards children. "This is merely rebuttal of that type of evidence. He put it on for mitigation. I'm certainly entitled to put on anything to combat that. [¶] I couldn't put it on in my case in chief because it doesn't . . . come in as an act of violence per se." (44 RT 8248.) The trial court reviewed its notes from Starn's testimony and ruled: "The proposed testimony would not be of the type the district attorney could present in this case in chief in that it is not per se criminal activity or violence. Mr. Beck did present evidence that he was good around other children, including his own . . . . [¶] If the tape is authenticated by Miss Starn and if the yelling is as described by Mr. Brazelton, the Court will allow it to be presented." (44 RT 8248–8249.) After Starn testified at the Evidence Code section 402 hearing, the trial court ruled, "It may not be aggravating, but it's rebuttal to Mr. Beck's mitigating evidence about his conduct with children, his or other people's, so the objection is overruled." (45 RT 8267–8268.)

Considering Cruz's Argument XIII, in which he complained that evidence about his mistreatment of Alexandra was improperly admitted because it was not criminal activity, it is striking that Beck claims that a small fraction of

similar evidence *should have been admitted* during the prosecution's penalty case-in-chief against him. However, while the evidence admitted in Cruz's penalty trial consisted of numerous acts of abuse that combined to constitute the crime of ongoing child abuse, the one incident admitted into Beck's penalty trial was not clearly criminal. Therefore, it is doubtful that it was admissible in the prosecutor's penalty case-in-chief. (See § 190.3, subd. (b).)

But while the evidence was probably not admissible in the prosecutor's case-in-chief, it was admissible in rebuttal. As summarized above, Beck offered numerous witnesses who testified that he was a good father, took excellent care of his children, and also treated other children well. (43 RT 7800–44 RT 8049.) "When a defendant places his character at issue during the penalty phase, the prosecution is entitled to respond with character evidence of its own. 'The theory for permitting such rebuttal evidence and argument is not that it proves a statutory aggravating factor, but that it undermines defendant's claim that his good character weighs in favor of mercy.'" (*People v. Loker*, *supra*, 44 Cal.4th at p. 709, quoting *People v. Rodriguez* (1986) 42 Cal.3d 730, 791.)

Here, Beck flooded the jury with evidence that he was a good father and good to children. The prosecution was entitled to offer a very short rebuttal which showed that he was not always so nice. As this Court recently observed, "the prosecutor was entitled to rebut with evidence or argument suggesting a more balanced picture of his personality." (*People v. Loker*, *supra*, 44 Cal.4th at p. 709, quoting *People v. Rodriguez* (1986) 42 Cal.3d 730, 791.)

Beck complains, "This tape and the incident was not listed in the Notice of Aggravation which had been filed in the case." (BOB 280.) However, that was consistent with the prosecutor not intending to use the evidence during his case-in-chief. "[N]o evidence may be presented by the prosecution in aggravation unless notice of the evidence to be introduced has been given to the defendant

within a reasonable period of time as determined by the court, prior to trial. *Evidence may be introduced without such notice in rebuttal to evidence introduced by the defendant in mitigation.*" (§ 190.3, italics added.)

Moreover, after Beck complained about the late disclosure of the phone calls from Cruz and Perkins, the trial court asked if Beck was also raising a late discovery argument regarding the recording of Alexandra crying. Beck replied, "I think that–I think *that the yelling business is proper rebuttal*, and, therefore, I don't think I can make a late discovery objection." (45 RT 8270, italics added.) Thus, Beck conceded at trial that the recording of Beck yelling at Alexandra was "proper rebuttal" of his evidence that Beck was good to children. He has no ground to argue the contrary on appeal.

In *People v. Hart, supra*, 20 Cal.4th 546, several witnesses testified in the penalty phase that the capital defendant was a "loving and devoted husband." (*Id.* at p. 652.) Over objection, the trial court allowed the prosecutor to enter rebuttal testimony from the defendant's sister-in-law that the defendant had made several unwelcome sexual overtures towards her. (*Ibid.*) This Court cited *People v. Bacigalupo, supra*, 1 Cal.4th 103 (vacated on other grounds, 506 U.S. 802, judg. affd. on remand, 6 Cal.4th 457) for the proposition that a "defendant's presentation of evidence in mitigation as to his good character 'open[s] the door to prosecution evidence tending to rebut' that specific aspect of defendant's personality." (*Id.* at p. 653.) This Court held, "In the present case, the trial court did not abuse its discretion in concluding that defendant, by introducing character evidence suggesting that he was a good and loving husband, "opened the door" to the prosecution's evidence in rebuttal." (*Ibid.*, footnote omitted.)

Similarly, here, Beck opened the door to rebuttal evidence by repeatedly insinuating that he had a good character because he treated children well. Beck

has no basis to complain because the prosecutor was entitled to offer the jury a more balanced picture.

Beck complains that his evidence was introduced to show that he treated children well *before* he met Cruz and, therefore, evidence that he treated Alexandra poorly after he met Cruz was not relevant. (BOB 281.) But that is not completely accurate. Beck's cousin, Christy Shulze, testified that Beck was very good with children and *he had not changed from whom he had always been*. (44 RT 8045–8049.) Moreover, Beck did not have the right to introduce voluminous evidence of his good character and then preclude the prosecutor from rebutting that characterization by arguing the evidence was admitted for a limited purpose. There is no doubt that Beck wanted the jury to believe that he was, fundamentally, a person of good character. "Once the defendant's 'general character [is] in issue, the prosecutor [is] entitled to rebut with evidence or argument suggesting a more balanced picture of his personality.'" (*People v. Loker*, *supra*, 44 Cal.4th at p. 709.) Here, Beck's evidence put his character in issue, and the prosecutor was entitled to rebut with contrary evidence.

Beck also complains that the door was open to the Alexandra evidence during Beck's cross-examination of Starn. Beck argues that he questioned Starn "about Cruz's bizarre beliefs about child rearing," but on redirect examination, the prosecutor asked her only if Beck blew marijuana smoke in Alexandra's face. According to Beck, the prosecutor could have entered the recording of Beck screaming at Alexandra at that point, but he "waited until the day the jury was scheduled to hear closing argument and then moved the court to permit the tape to be played to the jury." (BOB 282.)

However, the prosecutor elicited testimony about Beck blowing marijuana smoke in Alexandra's face solely in response to testimony that Beck had elicited. Beck specifically asked Starn if she allowed Alexandra to get high on

marijuana and if Cruz blew marijuana smoke in Alexandra's face. (43 RT 7783–7785.) Therefore, the prosecutor's redirect questioning regarding Beck blowing smoke in Alexandra's face was intended to clarify the testimony that Beck had elicited. Evidence that Beck screamed at Alexandra was tangentially related, but it was not so clearly relevant that the prosecutor had some duty to enter it then or not at all.

Furthermore, the prosecutor did not necessarily even plan to introduce that evidence. Beck argues that the prosecutor reserved the evidence for tactical reasons, but he offers no proof that was the case. The prosecutor probably did not know beforehand that Beck was going to have most of his witnesses testify that Beck was good to children. And even if he did, he still could not have entered the evidence during his penalty case-in-chief because it was not criminal activity. Therefore, the prosecutor reasonably believed he could not enter that evidence during his case-in-chief and he properly offered it in rebuttal.

D. The Audiotape Evidence Was Not More Prejudicial Than Probative

Beck argues, "Even if this evidence was proper rebuttal evidence, the trial [court] erred by failing to exclude it under Evidence Code section 352 as more prejudicial than probative." (BOB 284.) However, the trial court did not abuse its broad discretion to permit such evidence in rebuttal even if the challenged evidence was only "marginally relevant to the penalty issue." (*People v. Martinez, supra*, 31 Cal.4th at pp. 695-696.) As discussed above, Beck entered extensive testimony that he treated children well to show that he had good character. The trial court could reasonably find that a two-minute audiotape was an efficient way to allow the prosecutor to give a more balanced picture of Beck's personality. (See *People v. Loker, supra*, 44 Cal.4th at p. 709.)

The trial court could also reasonably find that the evidence was not so dramatic that it was substantially more prejudicial than probative. (See Evid. Code, § 352.) Evidence is unduly prejudicial within the meaning of section 352 if it "'uniquely tends to evoke an emotional bias against the defendant as an individual . . . .'" (*People v. Karis*, *supra*, 46 Cal.3d at p. 638.) Here, the evidence was not intended to evoke an emotional bias, but rather to give a more balanced view of Beck than was suggested by his own witnesses. Unlike her testimony in Cruz's trial, Starn did not portray Beck as routinely mistreating and abusing Alexandra. On the contrary, she testified that Beck played only a secondary role in that abuse.[79] Starn testified, "I don't remember him ever actually abusing Alexandra, okay? He never actually hurt her; but like if Gerald wanted her, you know, he'd say, 'Hey, Dave, get me Alexandra,' and Dave would pick up Alexandra and take him–take her over to Gerald." (43 RT 7766.) Therefore, the evidence of Beck joining Cruz and Vieira to yell at Alexandra was intended only to rebut Beck's testimony that he was a good person because he was good to children. It was not intended to prove, in itself, that Beck had a pattern of abusing children.

While the evidence was more powerful because it was an actual recording, it was not so provocative that the jury was likely to sentence Beck to death just for yelling at a baby and making her cry. For example, in *People v. Prince* (2007) 40 Cal.4th 1179, the capital defendant complained about a videotape that was entered during his penalty trial. "It comprise[d] a 25-minute interview with the victim, Holly Tarr, conducted at a local television station . . . . The

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79. Beck argues that "Jennifer Starn testified that Cruz and Beck would *regularly scream at her baby* as the girl was dozing off to awaken her and have her scream. (RT 8279.)" (BOB 280, italics added.) Beck misreads the record. The prosecutor asked Starn to describe only the incident that was recorded on Exhibit 246. There was no testimony that Beck or Cruz made a regular practice of screaming at Alexandra. (45 RT 8279.)

interviewer devoted nearly the entire interview to Tarr's training and interest in acting and singing, adding a few questions concerning Tarr's ability to balance school and artistic commitments." (*Id.* at p. 1287.) This Court held, "Although we caution courts against the routine admission of videotapes featuring the victim, we do not believe that prejudicial error occurred under the circumstances of the present case. The videotaped evidence did not constitute '"irrelevant information or inflammatory rhetoric that divert[ed] the jury's attention from its proper role or invite[ed] an irrational, purely subjective response."'" (*Id.* at pp. 1289–1290, quoting *People v. Edwards*, *supra*, 54 Cal.3d at p. 836.) Likewise, here, the *audio*tape was relevant to rebut Beck's evidence. Moreover, it could not have been nearly as inflammatory as a long *video*tape of a victim showing off her talent and potential. The prejudicial potential of the audiotape was further diminished by the fact that it was Cruz's idea to scare Alexandra, and Beck and Vieira merely followed his lead.

Therefore, because the evidence was relevant and brief, Beck cannot show that its admission constituted "'palpable abuse'" of the trial court's broad discretion. (*People v. Hart*, *supra*, 20 Cal.4th at p. 653.) Similarly, Beck cannot show that the evidence was so prejudicial that it compromised his rights to due process, a fair penalty trial, and a reliable penalty determination. (BOB 284.) Beck opened the door to the evidence by having numerous witnesses testify that he was good to children and children loved him. He did not have any constitutional right to enter good character evidence and preclude the prosecutor from challenging that characterization with brief rebuttal evidence. Because the evidence was relevant, and not overly prejudicial, it did not render Beck's penalty trial fundamentally unfair. (See *People v. Jablonski*, *supra*, 37 Cal.4th at p. 805.)

E. Any Error Was Harmless

Even if the trial court abused its discretion or violated Beck's federal constitutional rights by admitting the audiotape, the error was harmless. During Beck's defense, many witnesses testified that Beck changed for the worse after he met Cruz. Beck's sister, Angela Morgan, specifically testified that after Beck became close to Cruz, he stopped caring about his family. (43 RT 7817.) Beck's brother, Steven, testified that Beck changed after he started spending time with Cruz. Under Cruz's influence, Beck threatened to put a curse on Steven's children. (43 RT 7842–7846.) Therefore, even without the audiotape evidence, there was evidence from Beck's own witnesses that Beck had stop being kind towards children. Therefore, evidence that Beck once joined Cruz and Vieira in screaming at Cruz's daughter could not have been more detrimental to Beck's defense than his own witnesses testifying that he had threatened his nephews and abandoned his own three children. (See 43 RT 7817, 7846.) Moreover, since the Alexandra incident occurred after Beck had purportedly fallen under Cruz's influence, it actually helped Beck's main defense theory that everything he did that was bad was because he was controlled by Cruz.

Indeed, Beck's attorney immediately turned the evidence to Beck's advantage. In cross-examination of Starn, he elicited testimony that it was Cruz counting "'one, two, three'" before they all screamed at Alexandra. Starn also acknowledged that the whole scheme to scare Alexandra was Cruz's idea and that she would have called for help if she had not been afraid of Cruz. (45 RT 8282.) That tied into Beck's own penalty evidence that Cruz controlled him. Beck also had the other portion of the audiotape played for the jury to show that Cruz often screamed, threatened, and used foul language when they lived at the Camp. (45 RT 8284.) On redirect, Starn acknowledged that Cruz "occasionally" spoke that way to Beck, too. (45 RT 8285.) Thus, the

challenged evidence could not have been very prejudicial because Beck was able to use it to prove his main defense theory. Since the screaming incident was Cruz's idea, and Cruz clearly led the others by counting "'one, two, three,'" the evidence actually supported Beck's theory that he was under Cruz's control.

Beck notes that the prosecutor discussed the recording in closing argument and suggests that this exacerbated the prejudicial impact. (BOB 285.) Beck does not mention, however, that the main thrust of the prosecutor's argument was that the jury could *not* use the evidence in aggravation. Rather, the jury could use that evidence *only* to help it evaluate Beck's mitigating evidence that he was good with children.

> You just heard that tape [of Alexandra crying]. And that tape, by the way, I want to make clear to you is not in aggravation because that probably doesn't come in under an act of violence per se. But the reason that that tape was played for you is because the defendant presented in evidence to you through some witnesses that he was good with children, good with the other–his kids, and one of the other witness's children. And that, of course, would be mitigating evidence presented by the defendant. This tape is presented to you in rebuttal of that, to show to you that the defendant is not always real good with–with children. And you can put whatever weight you want on that tape as to whether or not it offsets any mitigating evidence that was presented to you. It's not aggravation though.

(45 RT 8290–8291.) Because the prosecutor thoroughly advised the jury that the recording could not be regarded as criminal activity or a factor in aggravation, and could only be used to challenge Beck's mitigating evidence, the prejudicial impact had to be minor.

Finally, in light of the other penalty evidence, especially Beck's torture of Vieira and Perkins (see 44 RT 8087–8088 [Beck's expert testified that Vieira and Perkins were tortured, and the majority of that torture was carried out by Beck]), and the brutal circumstances of the crimes charged, any error in admitting the evidence that Beck helped Cruz and Vieira scare Alexandra had

to have been harmless beyond a reasonable doubt. (*Chapman, supra*, 386 U.S. at p. 24.)

XXIX.

THE TRIAL COURT PROPERLY EXCLUDED THE RECORDING OF PERKINS' PHONE CALL FROM BECK'S PENALTY TRIAL

As discussed in Argument XXVIII, Starn made an audiotape of three threatening phone calls from Cruz and one phone call from Perkins. (Exh. 245.) Later, she discovered that on that same audiotape there was a recording of Cruz, Beck, and Vieira screaming at Alexandra while she was falling asleep. Starn copied the portion concerning Alexandra onto another audiotape (Exh. 246) and gave it to the prosecutor shortly before the beginning of Cruz's penalty trial. The prosecutor did not find out about Exhibit 245 until the same morning the trial court planned to admit rebuttal evidence and hold closing arguments in Beck's penalty trial. When the prosecutor sought permission to play Exhibit 246 for the jury, Beck complained about the late disclosure of Exhibit 245. He moved for a continuance so he could listen to the tape, have it transcribed, and decide how to use it. However, the trial court and the parties listened to Exhibit 245 right away. Afterward, the trial court ruled that Beck could introduce the three phone calls from Cruz, but not the phone call from Perkins.

Beck contends that by excluding the phone call from Perkins, the trial court deprived him of his right to present a defense and his right to a reliable sentencing hearing in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. (BOB 286–288.) However, the trial court properly used its discretion to exclude that evidence because its probative value was minimal and it had the potential to substantially delay the completion of the penalty trial. Contrary to Beck's argument, Perkins' phone call did not prove that Cruz

controlled Beck. It proved only that Perkins was mad at Starn for the way she was treating Cruz–his best friend. Also contrary to Beck's argument, admission of that evidence had the potential for greater delays because Beck had moved for a continuance and the prosecutor might have decided to recall Perkins to rebut any inference that Cruz had forced Perkins to leave the phone message for Starn.

Furthermore, even if the trial court erred, it was harmless beyond a reasonable doubt. At most, that evidence proved that Perkins remained loyal to Cruz and was mad about the way that Starn was treating Cruz. It did not prove, however, that Cruz was controlling Perkins; and it had even less probative value regarding Cruz's purported control over Beck. Moreover, in light of the prosecution's overwhelming aggravating evidence from the circumstances of the crimes and Beck's treatment of Vieira and Perkins, the exclusion of Perkins' phone message had to be harmless beyond a reasonable doubt.

A. Procedural History

After the trial court granted the prosecutor's request to admit the abridged tape containing only the incident with Alexandra (Exhibit 246), Beck moved for a continuance:

> Obviously, the original tape is highly probative to this case. As everyone knows, the defense in this penalty phase involves acts of Gerald Cruz, the domination of Gerald Cruz, the high control of Gerald Cruz of not only Mr. Beck, but everyone in the group; and at the very least, I should have an opportunity to listen to the tape, to have it transcribed, and decide whether or not it's important. I haven't had any of those opportunities.

(45 RT 8268–8269.) After some further argument, Beck clarified that he was not objecting to admission of the Alexandra incident, but he was making a late discovery objection regarding the calls from Cruz and Perkins. (45 RT 8270.)

The trial court decided that the most efficient course of action was for it and

the parties to immediately listen to the audiotape of phone calls from Perkins and Cruz. (45 RT 8271.) According to Starn's introductory comments on the tape, Perkins left his threatening phone message on January 26, 1992. Starn also said that the threats in the message were directed towards her and "George Hill." (Exh. 245.) However, Respondent could not find any reference to "George Hill" elsewhere in the record, so it is unclear how he was connected to Starn. It is unlikely that Hill was Starn's boyfriend because a few months later Starn testified that she was engaged to someone named Larry Cortinez. (39 RT 7013.) That was confirmed by the prosecutor as well as Cruz's phone messages. (45 RT 8273–8274; Exh. 245.)

Respondent needed to listen to Perkins' phone message several times to understand most of its content. Perkins seems to say that if Starn did not visit Cruz the next day, then Hill would receive a visit from him. Perkins said, "We know where he lives" and it was "stupid" of Starn "to relinquish that information." He also said that Starn could make a clean break with Cruz (by seeing him the next day), or things would get messy very quickly. Perkins concluded by saying he did not "give a shit" which option Starn chose. (Exh. 245.)

On the phone message of March 17, 1992, Cruz demands that Starn pick up the phone; he tells her to stop ignoring his calls; he demands that she bring him his Tarot Cards; and he also says he is "tired of her bullshit." (Exh. 245.) In the March 24, 1992, phone message, Cruz again demands that Starn answer the phone; he says he knows that Starn has been "fucking around with Larry (Cortinez)" and that Larry is a "piece of fucking shit." Cruz uses foul language to describe Cortinez and Starn, but there are no explicit threats. (Exh. 245.) In the third phone message, from April 4, 1992, Cruz again tells Starn to pick up the phone; he says he just wants to talk. After calling Larry and Starn names, Cruz directs his comments directly to Cortinez and complains that Larry

stabbed him in his back, "but you'll get yours. People like you always do." Cruz also said that if he ever heard that his children called him "Uncle Larry," he would regret it. "You don't fuck me and get away with it." Cruz also said that if Starn did not start communicating with him, he would put her out of business by undercutting the fees for her consulting services. (Exh. 245.)

After listening to the audiotape, the trial court asked if Beck still wanted a continuance. (45 RT 8270–8271.) Beck did not directly answer the trial court, instead arguing that Perkins' phone call was a threat and should be admitted along with Cruz's phone calls to show that Cruz dominated the entire group, including Beck. (45 RT 8271–8273.) The prosecutor argued that Cruz had other reasons for being angry at Starn, including the fact that she was engaged to another man and was not helping him as much as he wanted. So any threats Cruz made against her relating to their romantic relationship and children had nothing to do with Beck. "As far as Mr. Perkins goes, I didn't hear anything on there that sounded like threats, although it was kind of hard for me to hear it." The prosecutor also conceded that the phone calls might be "stretched" to show Starn's bias, presumably because she might take out her anger against Cruz on Beck.[80] 45 RT 8273–8274.)

The trial court ruled:

> Under 352 of the Evidence Code, I'm not going to allow the part of Mr. Perkins. We are here ready to instruct the jury. Counsel should have been arguing. If that taped conversation was allowed to be in, that might well require the reappearance of Mr. Perkins. The Court feels that the relevance of this phone conversation between Miss Perkins–Miss Starn and Mr. Perkins–the time consumption outweighs any probative value.

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80. As the prosecutor argued, it was doubtful that the phone calls were relevant to the issue addressed in rebuttal because they had nothing to do with Beck's treatment of children. (45 RT 8273.) However, since the phone calls were not discovered until after Beck completed his defense, the trial court had discretion to allow Beck to reopen or present this evidence during rebuttal.

> The conversations or Mr. Cruz's phone calls of March 17th, 24th, and April the 4th, the Court will admit, if Mr. Faulkner chooses to introduce them.

(45 RT 8275.)

During Starn's rebuttal testimony, the prosecutor played the recording of Cruz, Beck, and Vieira screaming at Alexandra. (45 RT 8281.) During cross-examination, Beck played Cruz's phone messages from March 24, and April 4, 1992. (45 RT 8283–8284; 10 CT 2444–2445; Exh. 247.) Though the trial court ruled that Beck could play all three of Cruz's phone calls (45 RT 8275), Beck chose not to play Cruz's message from March 17, 1992. (Exh. 247; 10 CT 2445.)

B. Legal Principles

An appellate court applies the abuse of discretion standard of review to any ruling by a trial court on the admissibility of evidence, including a ruling concerning relevance and Evidence Code section 352. (*People v. Waidla*, *supra*, 22 Cal.4th at pp. 717, 723-725; *People v. Memro* (1995) 11 Cal.4th 786, 864.)

> Section 352 provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." "[A] trial court's exercise of discretion under Evidence Code section 352 will not be reversed on appeal absent a clear showing of abuse. [Citations.] It is also established that "'Evidence Code section 352 must bow to the due process right of a defendant to a fair trial and his right to present all relevant evidence of significant probative value to his defense."' [Citations.] This does not mean that an unlimited inquiry may be made into collateral matters; the proffered evidence must have more than 'slight-relevancy' to the issues presented. [Citation.] . . . [Citation.] The proffered evidence must be of some competent, substantial and significant value. [Citations.]" (*People v. Northrop* (1982) 132 Cal.App.3d 1027, 1042, disapproved on

> other grounds in *People v. Smith* (1984) 35 Cal.3d 798, 807-808, italics omitted.) A trial court's exercise of discretion under section 352 "will not be disturbed except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice. [Citation.]" (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10.)

(*People v. Tidwell* (2008) 163 Cal.App.4th 1447, 1457.)

C. The Trial Court Did Not Abuse Its Discretion By Excluding Perkins' Phone Call

The trial court excluded Perkins' phone call because any probative value it might have was outweighed by the probability that its admission would necessitate undue consumption of time. (45 RT 8275.) Beck contends that the evidence was "critical" to his penalty defense and it would not have taken long to play the tape for the jury. (BOB 287.) Beck is mistaken. The evidence was irrelevant, tangential, and cumulative; and it could have substantially delayed the proceedings because Beck had asked for a continuance. Moreover, if the trial court had granted that continuance, the prosecutor might have decided to introduce further rebuttal evidence.

At trial, Beck argued that threats made by Perkins against Starn showed that Cruz still controlled Perkins and, by extension, showed that Cruz had controlled Beck. (45 RT 8273.) However, after listening to the recording, Beck argued, "I think that Steve Perkins' phone call *appears* to be a threat." (45 RT 8271, italics added.) The prosecutor then argued, "As far as Mr. Perkins goes, I didn't hear anything on there that sounded like threats, although it was kind of hard for me to hear it." (45 RT 8274.) Beck did not contest the prosecutor's characterization, nor did he make any further argument on the subject. Thus, any threats on the recording were difficult to perceive, and since the jury did not

receive a transcript, it is doubtful that playing the recording for the jury would have been very helpful.[81/]

Nevertheless, this Court has the ability to listen to the Exhibit over and over again to decipher its content. Perkins does seem to say that if Starn does not visit Cruz, he would pay a visit to someone named George Hill and things would get "messy." (Exh. 245.) There is no way to evaluate the relevance of the threat against Hill because Respondent does not know who he is. The threat against Starn, if any, is vague. But it is clear that Perkins is mad at her for not communicating with Cruz.

The fact that Perkins was angry at Starn for the way she was treating Cruz was neither surprising nor probative of anything in Beck's penalty trial. Starn had been Cruz's girlfriend, and they had three children together, including one after Cruz was incarcerated. However, at the time of Perkins' phone message, Starn had stopped helping or communicating with Cruz, and she probably had begun seeing another man (Cortinez). Since Perkins considered Cruz a best friend, it is understandable that he would be upset with Starn and feel that she was betraying Cruz. It would also make sense that he would threaten Starn to try and get her to help his friend and do what, in his mind, was certainly the right thing. But there is no indication that Cruz told Perkins to make the vague threat that things would get messy for Starn. And even if a jury could make that

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81. There was not time to make a transcript for the jury because the trial court wanted to give the case to the jury that day. (45 RT 8276; see 10 CT 2445.) Though Beck sought a continuance, in part, to prepare transcripts (45 RT 8269), he cannot complain about the lack of transcripts now. First, because Beck's argument on appeal is that admission of this evidence "would not have taken a lot of time" (BOB 287), it would undermine his entire argument to assert that the trial court should have granted a continuance for the preparation of transcripts. Second, the trial court asked Beck to prepare a transcript for the record on appeal. By not objecting, he implicitly agreed to proceed with the trial without a transcript. (45 RT 8276.)

inference, that did not prove that Cruz controlled Perkins. It just showed that Perkins was conveying a message for his friend.

Further, even if Cruz told Perkins to threaten Starn, that did not prove anything about Cruz controlling Beck. It is not unusual for a person who is in custody to ask a friend to relay a message–even a threat–to someone he cannot reach on the phone. That does not prove the incarcerated person is controlling the other person. And it is even less probative of the incarcerated person's control over a different person.

Tellingly, Beck never discusses the content of Perkins' phone message. He merely asserts that it contains threats and, therefore, would have helped his case. (BOB 286–288; see Exh. 245.) However, Perkins' phone call proved only that he was trying to bully Starn into helping his incarcerated friend. Evidence that Perkins was trying to help Cruz did not prove that Cruz controlled Beck. Hence, it was not relevant to Beck's penalty defense. (See Evid. Code, §§ 220, 350 [only relevant evidence is admissible]; *People v. Garceau* (1993) 6 Cal.4th 140, 177 ["The test of relevance is whether the evidence tends 'logically, naturally, and by reasonable inference' to establish material facts such as identity, intent, or motive."], overruled on another ground in *People v. Yeoman*, *supra*, 31 Cal.4th at pp. 117–118.)

Similarly, the trial court excluded the evidence because it found that any minor probative value was outweighed by the undue consumption of time, particularly because the prosecutor might want to recall Perkins to rebut any suggestion that his phone call was ordered by Cruz. (45 RT 8275.) Beck complains that the trial court abused its discretion because admission of the Perkins phone call would not have taken a significant amount of time and neither party indicated they would recall Perkins if the evidence were introduced. (BOB 287.) However, Beck neglects to mention that he asked for a continuance to listen to the tape, have it transcribed, and to decide what to do

with it. (45 RT 8268–8269.) After he listened to the tape, the trial court asked him if he still wanted a continuance. (45 RT 8271.) Beck did not answer that question directly, but he seemed to maintain his position that a continuance was necessary because the phone calls from Cruz and Beck were relevant and admissible, and he needed time to evaluate them. (45 RT 8271–8274.) Moreover, according to the clerk's minute order, Beck did not withdraw his motion to continue until *after* the trial court made its ruling pursuant to Evidence Code section 352. (10 CT 2444.) Thus, Beck's request for a continuance to transcribe the recordings and decide how to use them was still pending at the time the trial court made its ruling.

The trial court, in effect, split the difference. It denied Beck's request for a continuance, but it allowed him to play Cruz's phone calls for the jury without a transcript. It did not allow Beck to play Perkins' phone call because it was not clear that he made a threat against Starn, and it was even less clear that any threat against Starn had probative value as to Cruz's control of Beck.

Further, even if Perkins' message somehow had probative value, it is doubtful that the jury would have perceived it without a transcript. (See 45 RT 8274.) And if time were taken to create a transcript, then the prosecutor might have also wanted to recall Perkins to testify that Cruz did not order him to threaten Starn and Cruz did not control him or anyone else. Thus, the trial court reasonably found that Perkins' phone call had little or no probative value; its admission could result in Beck insisting that he needed time to transcribe and analyze it; and the prosecutor could request further rebuttal testimony. Since the evidence had little probative value, and the trial court intended to give the case to the jury that day, it reasonably excluded the phone message pursuant to Evidence Code section 352. (See *People v. Tidwell, supra*, 163 Cal.App.4th at p. 1457 [trial court's exercise of discretion under section 352 should not be

disturbed unless it was exercised in an arbitrary, capricious, or patently absurd manner].)

Beck complains that the trial court overruled his Evidence Code section 352 objection and admitted the recording of Alexandra crying; but relied on section 352 to exclude the call from Perkins. "An impartial decision maker would have examined both matters in the same manner; but here the trial judge abused the discretion he had and allowed the introduction of evidence favorable to the prosecution and denied the evidence favorable to the defense." (BOB 287.) Beck misreads the record. There were at least six separate recordings at issue on Exhibit 245: Alexandra crying; three phone calls from Cruz; one phone call from Perkins; and numerous recordings of only Starn's voice–either dictating thoughts to herself or just her end of phone conversations. Beck conceded that the evidence of Alexandra crying was proper rebuttal evidence. (45 RT 8270.) Beck conceded that recordings with only Starn's voice were not admissible. (45 RT 8271.) And the trial court granted Beck's request to admit the three phone calls from Cruz. (45 RT 8275.)

Thus, the only evidence that the trial court excluded was the one phone message from Perkins. Thus, Beck's argument that the trial court "denied the evidence favorable to the defense" ignores the fact that the trial court admitted three out of the four recordings that Beck sought to enter. In sum, Beck has distorted the record to suggest that the trial court was partial towards the prosecution and denied all of the evidence favorable to Beck. In fact, Beck got most of what he wanted.

In sum, for the reasons given above, the trial court did not abuse its discretion by excluding Perkins' phone call. (See *People v. Tidwell*, *supra*, 163 Cal.App.4th at p. 1457.) Moreover, because the ruling was proper and the evidence had negligible probative value to Beck, there was no violation of Beck's right to a defense, a fair trial, and a reliable sentencing hearing. (See

People v. Lewis (2006) 39 Cal.4th 970, 990, fn. 5 [rejection of claim that trial court erred necessarily disposes of claim that trial court violated federal constitutional rights].)

D. Any Error Was Harmless

Beck claims that exclusion of the phone message from Perkins violated his various federal constitutional rights. However, this Court has held that generally, "the application of ordinary rules of evidence like Evidence Code section 352 does not implicate the federal Constitution, and thus we review allegations of error under the 'reasonable probability' standard of [*People v.*] *Watson* [(1956)] 46 Cal.2d [818,] 836." (*People v. Marks*, *supra*, 31 Cal.4th at p. 226.) Here, it is not reasonably probable that Beck would have received a better result at the penalty trial if he had been allowed to introduce Perkins' phone message. As discussed above, its probative value was negligible. Since Perkins had good reason to be upset with the way Starn was treating his friend, evidence that Perkins made a vague threat against Starn did not prove in any meaningful way that Cruz controlled Perkins–much less Beck.

Moreover, Beck entered substantial lay testimony that he had changed for the worse after he fell under Cruz's control. He offered substantial expert testimony that Cruz was the leader of a cult and he controlled Vieira, Perkins, and Beck. He elicited testimony from Perkins' father that Perkins remained close to Cruz and he received as many as 15–20 collect phone calls per month from Cruz. (42 RT 7613.) And Starn specifically testified that Perkins had made threatening phone calls to her. (45 RT 8283.) Therefore, because any probative value of Perkins' phone message was tenuous, and Beck had already introduced far more compelling evidence that Perkins remained close to Cruz or was controlled by Cruz, any prejudice from excluding Perkins' phone message had to be exceedingly minor.

Finally, in light of the other penalty evidence, especially Beck's torture of Vieira and Perkins (see 44 RT 8087–8088 [Beck's expert testified that Beck carried out most of the torture of Vieira and Perkins]), and the brutal circumstances of the crimes charged, any error in excluding Perkins' phone call had to have been harmless beyond a reasonable doubt. (*Chapman*, *supra*, 386 U.S. at p. 24.)

XXX.

EVEN IF THE PROSECUTOR MADE IMPROPER REFERENCES TO THE BIBLE DURING HIS CLOSING ARGUMENT IN BECK'S PENALTY TRIAL, BECK FORFEITED HIS CLAIM OF ERROR BY FAILING TO OBJECT, AND THE ERROR WAS HARMLESS

Beck claims that the prosecutor committed misconduct during his penalty phase argument (1) by claiming that the Bible and God sanctioned the death penalty; (2) by suggesting that the jury should be ashamed to impose anything less than the death penalty; (3) by improperly comparing Beck's convictions to crimes that did not warrant the death penalty; and (4) by improperly relying on Willey's testimony that Beck cut Ritchey's throat even though it contradicted the prosecutor's own theory of the crime. (BOB 289–305.) Only Beck's first claim has any merit. However, Beck forfeited all of his claims by failing to object, and by failing to argue on appeal that an objection and admonition would have been futile. Moreover, even if all of the claimed instances of misconduct were preserved on appeal, there was no prejudice because there is not a reasonable probability that, absent the alleged errors, the jury would have returned more favorable verdicts.

A. Legal Principles

A prosecutor's intemperate behavior violates the federal constitution when it comprises a pattern of conduct so egregious that it infects the entire trial with

such unfairness as to make the conviction a denial of due process. (*People v. Samayoa* (1997) 15 Cal.4th 795, 841.) "A defendant's conviction will not be reversed for prosecutorial misconduct, however, unless it is reasonably probable that a result more favorable to the defendant would have been reached without the misconduct. [Citation.] Also, a claim of prosecutorial misconduct is not preserved for appeal if defendant fails to object and seek an admonition if an objection and jury admonition would have cured the injury." (*People v. Crew* (2003) 31 Cal.4th 822, 839.)

"[W]hen the claim focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion." (*People v. Ayala*, *supra*, 23 Cal.4th at p. 284.) "'Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves """the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury."""'" (*People v. Hill*, *supra*, 17 Cal.4th at p. 819.)

B. Beck Forfeited His Claim By Failing To Object

Generally, a defendant cannot raise a prosecutorial misconduct claim on appeal unless he first makes an assignment of misconduct at trial and requests that the jury be admonished to disregard the impropriety. (*People v. Samayoa*, *supra*, 15 Cal.4th at p. 841.) A timely objection is not necessary if it would have been futile, and the failure to request that the jury be admonished does not forfeit the issue for appeal if an admonition would not have cured the harm caused by the misconduct. (*People v. Hill*, *supra*, 17 Cal.4th at p. 820.) "To determine whether an admonition would have been effective, [the reviewing court] consider[s] the statements in context." (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1030.) The burden is on the defendant to prove that an admonition would have been ineffective. (*People v. Adanandus* (2007) 157 Cal.App.4th

496, 512 [on appeal, defendant failed to show objection or admonition would have been futile], citing *People v. Cole*, *supra*, 33 Cal.4th at pp. 1201-1202.)

Here, Beck makes no argument regarding his failure to object, so he has failed to show an objection or admonition would have been futile. Consequently, he has forfeited all of his claims of prosecutorial misconduct. (*People v. Adanandus*, *supra*, 157 Cal.App.4th at p. 512.) Moreover, even if Beck had made an argument, he could still not show an admonition would have been futile.

Beck claims the prosecutor argued that the Bible called for the death penalty in his case. Even if that characterization were true, the trial court could have corrected that assertion and explained to the jury that it had to follow the law as it provided. Moreover, this Court has already held that such arguments are not irreparable and are forfeited by the failure to object. (*See People v. Zambrano*, *supra*, 41 Cal.4th at p. 1169 [defendant forfeited claim by failing to object to prosecutor's argument that Bible "demands[] the death penalty for murder."]; *Vieira*, *supra*, 35 Cal.4th at p. 297; *People v. Slaughter* (2002) 27 Cal.4th 1187, 1209.)

Beck claims the prosecutor argued that the jury should be ashamed to impose anything less than the death penalty. Even if that were true, the trial court could have instructed the jury to disregard that comment and reiterate that it was to make its decision solely on the basis of mitigating and aggravating factors.

Beck claims the prosecutor argued that the crimes committed by Beck were more deserving of the death penalty than other lesser crimes. However, to the extent Beck complains that the prosecutor asked the jury to rely on improper considerations, he could have asked the trial court to remind the jury that its task was to evaluate mitigating and aggravating circumstances.

Finally, Beck claims the prosecutor argued that the jury should impose the death penalty because *Beck* killed Ritchey, even though the prosecutor had argued in the guilt phase that *Cruz* had cut Ritchey's throat. However, *if* it appeared that the prosecutor was improperly arguing that he personally believed conflicting factual scenarios, the trial court could have admonished the jury that it was up to the jury to determine the facts.

In sum, it is doubtful that the jury interpreted the prosecutor's arguments in any improper way. But even if it could have, Beck forfeited his claim of prosecutorial misconduct by failing to object at trial and by failing to show on appeal that an admonishment would have been futile. (See *People v. Hill*, *supra*, 17 Cal.4th at p. 820.)

C. The Prosecutor's References To The Bible May Have Been Misconduct, But The Error Was Not Prejudicial

In *Vieira*, *supra*, 35 Cal.4th at page 297 and *People v. Zambrano*, *supra*, 41 Cal.4th at page 1168, the prosecutor argued that, according to the Bible, "capital punishment for murder is necessary in order to preserve the sanctity of human life." This Court found that argument which suggests that the Bible "demands" capital punishment is improper. (*Vieira*, *supra*, 35 Cal.4th at p. 298; *People v. Zambrano*, *supra*, 41 Cal.4th at page 1169.) Accordingly, Beck claims that, here, the prosecutor argued "that the Bible *required* the imposition of the death sentence . . . ." (BOB 295, italics added.) However, the prosecutor in the present matter did not use language that was quite as strong as in *Vieira* and *Zambrano*, and the general gist of his argument was that the Bible *allowed* capital punishment–not that it required it. In addition, the prosecutor's argument was more appropriate in this case because Beck offered numerous witnesses who testified that Beck was devoted to his church, always carried and read his Bible, and often taught the Bible to children. That may have made religious jurors more concerned about whether the Bible conflicted with

California's death penalty law. Nevertheless, it appears that the prosecutor's argument is similar enough to the argument in *Vieira* that this Court would find that it constituted misconduct.

In *Vieira*, the prosecutor argued:

> "Something I want to touch on. And I want to tell you this is not an aggravating factor. I only bring up the subject in the event any of you have any reservations about it, then hopefully I can . . . help with that.
>
> "That's the subject of religion. This is not aggravating at all. People from time to time have a problem because they say, 'Gee, in the Bible it says "Thou shall not kill," and "Vengeance is mine sayeth the Lord. I will repay."' That's found in Romans. But in the very next passage . . ., it goes on and calls for capital punishment and says, '[t]he ruler bears not the sword in vain for he is the minister of God, a revenger to execute wrath upon him that doeth evil.' He's talking about the ruler, the government, whatever.
>
> "Now, the Judeo-Christian ethic comes from the Old Testament–I believe the first five books–called the Torah in the Jewish religion. And there are two very important concepts that are found there. And that's, one, capital punishment for murder is necessary in order to preserve the sanctity of human life, and, two, only the severest penalty of death can underscore the severity of taking life.
>
> "The really interesting passage is in Exodus, chapter 21, verses 12 to 14: 'Whoever strikes another man and kills him shall be put to death. But if he did not act with intent but they met by act of God, the slayer may flee to a place which I will appoint for you.' Kind of like life without possibility of parole, haven, sanctuary. 'But if a man has the presumption to kill another by treachery, you shall take him even from my altar to be put to death.' There is no sanctuary for the intentional killer, according to the Bible.
>
> "Now, I'll leave it at that. That was just in the event any of you have any reservations about religion in this case."

(*Vieira, supra*, 35 Cal.4th at pp. 296–297.[82])

In Beck's penalty trial, the prosecutor argued:

> Very briefly, I want to touch on a subject that you've heard a lot of evidence on in this phase of the trial. It's not aggravating in any sense. The subject of religion. Mr. Beck had a very strong religious upbringing. It's very obvious. Mr. Beck preached the Bible to others, carried it with him all the time, knew it front to back. If any of you have any problem with the role that the death penalty plays in religion, I'd like to indicate to you that there are a number of passages in the Bible that deal with the subject. I'm sure that Mr. Beck is aware of it.
>
> One especially fitting is in Exodus where it indicates that–the Lord of the Christian religion speaking, "Whoever strikes another man and kills him shall be put to death, but if he did not act with intent, but they met by act of God, the slayer may flee to a place which I will appoint for you." This is an accidental, unintentional killing.
>
> The Lord says there's a sanctuary, "I will keep you safe." I suggest to you that it's like life without parole.
>
> But the Lord goes on to say, "If a man has a presumption to kill another by treachery, you shall take him even from My altar to be put to death." "Taken from My altar." There is no haven, there is no sanctuary, for an intentional, treacherous killer. That's exactly what you have here.

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82. Beck asserts that "[t]he prosecutor has used almost this identical argument in at least three other cases." (BOB 290, fn. 68, citing *People v. Slaughter, supra*, 27 Cal.4th at pp. 1208–1209, *Vieira, supra*, 35 Cal.4th at p. 309, and 41 RT 7530–7531 [Cruz's penalty trial.) Beck is correct that the same prosecutor made similar arguments in *Vieira* and *Slaughter*. However, this Court found the arguments in those cases was not prejudicial. (*Vieira*, at p. 298; *Slaughter*, at pp. 1210–1211.) The prosecutor also made a similar argument in Cruz's penalty trial. But since Cruz was jointly tried with Beck, that was not "[an]other case[]." More importantly, that argument provided more citations to the Bible and was longer than the one in Beck's penalty trial. (41 RT 7530–7532.) But Cruz does not raise a claim of prosecutorial misconduct in this appeal.

> Again, it's not aggravation. It's just in case any of you have any problems with religion in the case.
>
> I'm going to conclude shortly. I would like to read a statement that was made many, many years ago by a Justice in a country other than ours, a Justice in England, that in spite of the fact that they didn't have a death penalty, made a very fitting statement. And it goes: "Punishment is the way in which society expresses it's denunciation of wrongdoing; and in order to maintain respect for law, it is essential that the punishment inflicted for grave crime should adequately reflect the revulsion felt by the great majority of citizens for them. It is a mistake to consider the object of punishment as being a deterrent or reformative or preventive and nothing else. The truth is that some crimes are so outrageous that society insists on adequate punishment because the wrongdoer deserves it."

(45 RT 8310–8312.)

As conceded above, the prosecutor's argument in Beck's penalty trial is similar enough to his argument in *Vieira* that this Court would likely find that it was also improper. (35 Cal.4th at pp. 297–298.) However, as in *Vieira*, this Court should also find that the error below was not prejudicial. In *Vieira*, this Court explained that "the biblical argument quoted above was only a small part of a prosecutorial argument that primarily focused on explaining to the jury why it should conclude that the statutory aggravating factors outweighed the mitigating factors. We therefore conclude that the misconduct was not prejudicial." (*Id.* at p. 298; see also *People v. Slaughter*, *supra*, 27 Cal.4th at pp. 1210 [even though prosecutor's biblical references were neither "'brief'" nor "'undeveloped,'" they were still harmless because they "were part of a longer argument that properly focused upon the factors in aggravation and mitigation."]; but see *Vieira*, 35 Cal.4th at pp. 309–310, conc. and dis. opn. of Kennard, J. [finding the prosecutor's improper biblical argument prejudicial].[83])

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83. In *Vieira*, 35 Cal.4th 264, Justice Kennard wrote a separate concurring and dissenting opinion in which she concluded that the prosecutor's

Here, the prosecutor's argument occupies 27 pages in the Reporter's Transcript. (45 RT 8287–8314.) His discussion of the Bible takes one page. (45 RT 8310 [line 20]–8311 [line 19].) The vast majority of the overall argument focused on the circumstances of the crimes and the factors in mitigation and aggravation. Therefore, just as in *Vieira*, this Court should find the prosecutor's biblical argument was not prejudicial. (35 Cal.4th at p. 298.)

In addition, unlike in *Vieira*, Beck introduced a substantial amount of testimony about the Bible in his penalty defense. No less than eight of Beck's witnesses testified that Beck was devoted to his church; always carried a Bible; was always reading his Bible; and taught the Bible to children. (43 RT 7799–7804, 7826–7829, 7893, 7928–7931, 7944, 7946–7948; 44 RT 7996–7997, 8046; see also 45 RT 8321, 8323–8324 [during defense counsel's closing argument, he mentioned three times how the evidence showed that Beck was always reading and teaching the Bible].) By placing such a large emphasis on his religious background, Beck implied that his dedication to the Bible made him less deserving of capital punishment. He also may have aroused in religious jurors the type of concerns about biblical doctrine that the prosecutor

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improper biblical argument was prejudicial. (*Id.* at pp. 309–310.) Justice Kennard opined that even if she agreed that the improper argument in *People v. Slaughter*, *supra*, 27 Cal.4th 1187, was harmless, she would not make that same finding in *Vieira* because the murder was "not as aggravated" and Vieira was less culpable because he acted under the extreme duress of Cruz's domination. (*Vieira*, 35 Cal.4th at p. 310.) Here, on the other hand, Beck was not dominated–he was the other person who dominated Vieira. He not only participated in the conspiracy and murders willingly, he expressed regret afterward that they did not kill more people. (24 RT 4249.) And according to Beck's own expert, even at the time of trial two years later, Beck still did not show remorse. (44 RT 8126, 8136.) In addition, as discussed in Arguments I-G-2, XVI-D, and XXVIII-E, evidence that Beck regularly beat and tortured Vieira and Perkins was particularly disturbing. Therefore, because the aggravating factors were far more egregious here than in *Vieira*, it is far more likely that the prosecutor's biblical argument was harmless.

sought to allay in his argument. Thus, the prosecutor prefaced his remarks about the Bible by saying that he "want[ed] to touch on a subject that you've heard a lot of evidence on in this phase of the trial." (45 RT 8310.) In fact, Beck specifically argues that the prosecutor's biblical argument were intended to undercut his mitigation evidence. (BOB 297–298)

Respondent is not suggesting that it was Beck's evidence that prompted the prosecutor to make his Bible argument. However, Beck's evidence certainly could have brought religious concerns to the forefront of some jurors' minds, and the prosecutor was entitled to address those concerns. Moreover, from the jury's perspective, the prosecutor's argument was not as gratuitous as it might have appeared in other cases. Here, it would have seemed natural for the prosecutor to address the issue since it was a major focus of Beck's defense. Therefore, even if Beck's evidence and argument did not technically invite the prosecutor's biblical argument, it certainly made it less prejudicial.

In addition, while the prosecutor argued that the California death penalty law was compatible with biblical doctrine, it was Beck who expressly argued that the jury should follow the Bible and *not* the law. Near the end of his closing argument, defense counsel said:

> Mr. Brazelton talked about the Bible. One thing you have to remember, there was a passage in the Bible I think is so important in this particular context. And as I recall it very vaguely, the circumstances, someone was going to punish somebody else I think by killing them, and God said "Vengeance is mine." "Vengeance is mine," saith the Lord. It doesn't belong to you. And he was talking to people, to human beings. He said "I take vengeance. I punish."

(45 RT 8354.)

By this, Beck explicitly told the jury that, according to the Bible, the jury had no right to impose the death penalty because *only God* could kill another person in retribution. That was more improper than anything the prosecutor said because it specifically contradicted California law and told the jurors they

had no right to impose the death penalty. Therefore, any prejudice from the prosecutor's argument was neutralized by Beck's improper argument. As this Court has noted, "That defendant himself invoked religious principles is further evidence he suffered no unfair damage at the prosecutor's hands." (*People v. Zambrano*, *supra*, 41 Cal.4th at p. 1169.)

Finally, after the prosecutor discussed the Bible, he read a quote from "a Justice in England." (45 RT 8311–8312.) Beck includes that in his quotation from the prosecutor's argument, but Beck makes no argument that it was improper. Rightly so. In *Vieira*, this Court found that the same quote did not constitute misconduct. (35 Cal.4th at p. 298.)

For the reasons discussed above, this Court should find that there is not a reasonable probability that, absent any improper references to the Bible, Beck would have received a more favorable penalty verdict. (See *People v. Crew*, *supra*, 31 Cal.4th at p. 839; *People v. Ayala*, *supra*, 23 Cal.4th at p. 284.) Because the argument was not prejudicial, it did not render Beck's trial fundamentally unfair; nor did it violate Beck's federal rights of due process and a reliable penalty determination. Moreover, any misconduct was harmless beyond a reasonable doubt. (See *Chapman*, 386 U.S. at p. 24.)

D. The Prosecutor Properly Argued That The Death Penalty Was Proportionate Punishment For Beck's Crimes

Beck quotes one sentence out of context and claims the prosecutor's "argument improperly attempt[ed] to shame the jury into imposing a sentence of death by suggesting that they individually should be ashamed of themselves if they d[idn]'t impose death . . . ." (BOB 299.) However, in context, the prosecutor merely argued that it was appropriate to impose the severest punishment for the most egregious crimes:

> And all the People ask you on this case is to consider everything that you've heard and to arrive at an appropriate decision. The severest punishment in our society is death.

> What's the point of the death penalty? It's severe punishment. It's punishment for what you did. That's justice. Justice is what you get for what you did. If it's anything less than you deserve, it's not justice. It's unjust enrichment. This defendant does not deserve to be unjustly enriched by you, the jury. He deserves just punishment for what he did.
>
> The death penalty does not make punishment cruel and unusual. The highest courts of our land have routinely held that to be true. It distinguishes punishment from therapy. The purpose of imprisonment or punishment is not rehabilitation any longer. We used to think that. Our legislature years ago has said the purpose of punishment is not rehabilitation. We punish to serve justice by giving people in hideous enough circumstances what they deserve. We use the criminal justice system to punish, and it protects society from physical danger and strengthens society by administering fitting punishments that express and nourish the vigor of our values.
>
> We should be ashamed, and indeed alarmed, to live in a society that does not intelligently express through you, members of our jury, the public's proper sense of proportionate punishment for the likes of people like James David Beck.

(45 RT 8309–8310.)

Beck quotes only the last sentence of the preceding excerpt. However, this Court considers how the statement would or could have been understood by a reasonable juror in the context of the entire argument. (*People v. Dennis*, *supra*, 17 Cal.4th at p. 522; *People v. Benson* (1990) 52 Cal.3d 754, 793.) No misconduct exists if a juror would have taken the statement to state or imply nothing harmful. (*Benson*, at p. 793.) Appellate courts "'do not lightly infer' that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements." (*People v. Frye* (1998) 18 Cal.4th 894, 970.) Here, taken as a whole, the prosecutor's point was not that the jury should be ashamed to impose anything besides the death penalty. Rather, the prosecutor argued that the system was just because it meted out punishment in proportion

to the seriousness of the crime–and the jury would rightly be ashamed if it were otherwise.

As discussed above, in *Vieira*, this Court addressed the prosecutor's quotation from "a judge 'in the old Court of Appeal in England.'" (35 Cal.4th at p. 298.) This Court's observation applies equally in the present context:

> There was no misconduct. The prosecutor in this case merely asked the jury to make the individualized determination that this defendant deserved death for these crimes because they were particularly outrageous, regardless of whether or not his execution would deter other crimes. There was no likelihood the argument would have obscured the jury's proper understanding of its role at the penalty phase.

(*Vieira, supra*, 35 Cal.4th at p. 298; see *People v. Ainsworth* (1988) 45 Cal.3d 984, 1033 [prosecutor's argument that jury had to determine whether the death penalty was proportionate to the circumstances of the crime, and whether it was appropriate for the defendant, rendered deficiencies in trial court's instructions harmless]; *United States v. Mejia* (9th Cir. 1992) 953 F.2d 461, 468 ["Basic notions of fairness dictate that defendants should be sentenced in proportion to their crimes."].)

While it was unnecessary for the prosecutor to use the term "ashamed," his argument was proper. He merely told the jury that the purpose of the criminal justice system was to punish offenders in proportion to the severity of their crimes. And if it found under the law that Beck deserved the death penalty, it should not hesitate to impose it. Contrary to Beck's argument, the prosecutor did not argue that the jury represented the community or that the community was relying on it for protection. (BOB 300–301.) Nor did the prosecutor imply that the jury should feel ashamed if it did not impose the death penalty for the benefit of their community. On the contrary, the prosecutor argued that criminal system was fair, and that the jury did not have to worry that by

imposing the death penalty, it would be participating in a system that was disproportionate, arbitrary, or shameful.

Moreover, even if the argument was improper, it was harmless because there is not a reasonable probability that absent the brief remark, the jury would have returned lesser verdicts. (See *People v. Crew*, *supra*, 31 Cal.4th at p. 839.) Similarly, even if the argument implicated the federal constitution, the misconduct was harmless beyond a reasonable doubt. (See *Chapman*, 386 U.S. at p. 24.)

E. The Prosecutor Properly Compared Beck's Crimes To Lesser Offenses That Did Not Warrant The Death Penalty

Beck contends that it was improper for the prosecutor to compare his crimes with lesser crimes which were not eligible for the death penalty. The prosecutor did compare Beck's convictions to other lesser crimes. But it is not clear to Respondent why Beck thinks this was improper because he makes no argument and cites no authority.

The prosecutor argued:

> There are murders that we can–we can understand, not condone but understand. A person comes home and catches his wife unfaithful, we can understand if he pulls a gun, shoots his wife and his neighbor, his best friend. We can say it's not right, but we understand it. And the death penalty is probably not appropriate in that particular case, depending on the individual, of course.
>
> And we can understand it if a guy is under so much pressure at work that he flips out, as we've seen time and again, flips out, kills the boss, kills a co-worker. We don't condone that at all. It's not right. And–but at least there's some underlying circumstances that help us appreciate what's happened and help us determine what's the appropriate punishment.

(45 RT 8307.)

As discussed above, it is not improper to argue that some crimes are so outrageous that only the most severe punishment is appropriate. (See *Vieira*, *supra*, 35 Cal.4th at p. 298; *People v. Ainsworth*, *supra*, 45 Cal.3d at p. 1033.) Nor does Beck offer any authority for the proposition that it is improper to illustrate that fact by comparing the defendant's crimes to murders that are not eligible for capital punishment.

Accordingly, Beck fails to demonstrate error. Nor is there any possibility that, absent the prosecutor's argument, Beck would have received a more favorable sentence. (See *People v. Crew*, *supra*, 31 Cal.4th at p. 839.) Similarly, even if the argument implicated the federal constitution, any misconduct was harmless beyond a reasonable doubt. (See *Chapman*, 386 U.S. at p. 24.)

F. The Prosecutor Properly Argued That Death Was The Appropriate Punishment Regardless Of Which Version Of The Crimes The Jury Believed

The jury found Beck guilty of conspiracy to commit murder and four counts of first degree premeditated murder. However, there was conflicting evidence, and there was no way to determine which version of the facts the jury used to reach its verdicts. Therefore, the prosecutor argued that whichever witnesses the jury believed, the evidence justified the death penalty:

> [Section 190.3, subdivision] (j), whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor. Sure he was an accomplice. But was his participation in the commission of the offense relatively minor? We know that it was not relatively minor. He played a major part in the commission of those murders. Regardless of which witness that you want to believe or all the witnesses you want to believe, his part in those murders was major. In fact the testimony of Jennifer Starn–strike that–the testimony of Michelle Evans, you know, he came through the back window like Rambo with his–with his big knife charging down the hallway. The testimony of Jason LaMarsh that this is

> the man right here that he saw thrust that big knife all the way up to the hilt in the belly of Dennis Colwell. The testimony of Ron Willey that this is the man right here that came out and knocked him off of Richard Ritchey and cut his throat while he lay in the street pleading for his life. Now, I don't know what part of those testimonies that you believe: Any, all, or none. That's entirely up to you. But there was ample evidence presented at the penalty phase of this trial that Mr. Beck took a major part in the commission of these crimes.

(45 RT 8803–8804.)

Beck takes one sentence out of context and suggests that the prosecutor argued only that Willey testified that Beck cut Ritchey's throat. (BOB 302.) However, the prosecutor argued that there were at least three witnesses who testified that Beck played a major role in the murders. He also argued that he did not know whose testimony the jury believed, but regardless of what the jury had concluded, there was ample evidence that Beck was a major participant. Therefore, the jury should not find that a mitigating factor was that Beck had a minor role. (45 RT 8803–8804.) There was nothing improper about that argument because the jury did not have to unanimously agree on which factors it found in aggravation and mitigation. (See *People v. Mendoza* (2007) 42 Cal.4th 686, 707; *People v. Brasure*, *supra*, 42 Cal.4th at p. 1068.)

Moreover, contrary to Beck's assertion, the prosecutor did not "argu[e] two theories of the same facts . . . ." (BOB 303.) He argued that different witnesses testified to different facts. But regardless of which facts the jury believed, it should not find a mitigating factor under section 190.3, subdivision (j). Nor did the prosecutor abandon his theory that Cruz cut Ritchey's throat. He merely argued that if the jury believed evidence that supported other facts, it should still not apply factor (j).

Because Beck distorts the prosecutor's argument, and offers no argument or authority on the prosecutor's actual argument, he has not demonstrated that the prosecutor committed misconduct. Further, it is elemental that a prosecutor

must argue for punishment even when he does not know which theory of the crime the jury used to find the defendant guilty. It makes no sense to restrict a prosecutor to arguing his own theory of the crime when it is not completely clear which defendant killed which victim. So long as the prosecutor is consistent about his theory, it is not misconduct to also argue that any other theory the jury might be using would also support the requested punishment.

Furthermore, even if the argument was misconduct, it is not reasonably probable that absent that argument, Beck would have received a more favorable sentence. (See *People v. Crew*, *supra*, 31 Cal.4th at p. 839.) Since the prosecutor did not try to convince the jury to change their theory of the crimes, the jury certainly based its sentence determination on the same facts it had settled on before the prosecutor's argument. Therefore, even if the argument implicated the federal constitution, any misconduct was harmless beyond a reasonable doubt. (See *Chapman*, 386 U.S. at p. 24.)

Finally, even if the prosecutor's statements about the Bible were cumulated with other purported prosecutorial misconduct; and even if the cumulative errors implicated the federal constitution; for the reasons given above, the errors were harmless beyond a reasonable doubt. (See *Chapman*, 386 U.S. at p. 24; *People v. Fields*, *supra*, 35 Cal.3d at p. 363 [prosecutorial misconduct was harmless error when the evidence was overwhelming].)

XXXI.

PURSUANT TO CALJIC NO. 8.87, THE TRIAL COURT PROPERLY INSTRUCTED BECK'S PENALTY JURY REGARDING PRIOR CRIMINAL ACTIVITY

CALJIC No. 8.87 is intended to instruct a capital penalty jury that it can use prior criminal activity as an aggravating circumstance if (1) it involved the use or threat of violence and (2) the jury finds beyond a reasonable doubt that the defendant actually committed the criminal activity. The standard instruction

provides for the trial court to list the specific criminal activity that the jury can consider. However, in Cruz and Beck's penalty trials, the trial court did not identify the criminal activity for the jury.

As Cruz claimed in Argument XIII, Beck asserts that the instruction was inadequate because by omitting the list, it "failed to limit the consideration of aggravation under Penal Code section 190.3, subd[ivision] (b)[,] and thus [it] permitted the jury to consider evidence which is not permitted by the statute and which violate[d] Beck's right to a fair trial, to due process of law and to a reliable penalty determination in a capital case as guaranteed by the Fifth, Sixth, Eight[h] and Fourteenth Amendments." (BOB 307.) Beck is mistaken.

First, Beck forfeited his claim by failing to object to the trial court's instruction; by failing to ask the trial court to augment the instruction; and by failing to ask the trial court to provide the jury with a list of criminal activities. Second, the instructions proposed by Beck would not have fixed the purported problem because they did not include a list of criminal activities, nor did they include a space to insert that list. Third, the trial court had no sua sponte duty to provide the jury with a list of criminal activities. Fourth, this Court has specifically found that the instruction given here was proper. Finally, any error was necessarily harmless because the prosecutor identified the criminal activities during closing argument.

A. Procedural History

Beck requested that his penalty jury be instructed with two instructions on prior criminal activity. Defendant's Special Instruction E provided:

> The criminal activity which I have set forth as an aggravating factor is limited solely to conduct of the defendant other than that for which he has been convicted in this case and for which the death penalty is a possible punishment.

(10 CT 2498.)

Defendant's Special Instruction G provided:

> Before you may consider any of the factors which I have listed for you as aggravating, you must find that the factor has been established by evidence presented in this case beyond a reasonable doubt. You may not consider any factor as a basis for imposing the punishment of death on the defendant unless you are first convinced beyond a reasonable doubt that it is true.

(10 CT 2500.)

At the hearing on penalty instructions, the trial court stated, "Mr. Faulkner, instead of your special instruction G, I think CALJIC 8.87 would perhaps be more appropriate. CALJIC 8.87 is the instruction telling the jury that for any other criminal conduct or activity that they find to be an aggravating circumstance, they have to find it beyond a reasonable doubt." (44 RT 8012–8013.) Beck's attorney did not object. His only comment was to clarify that the trial court was discussing CALJIC No. 8.87. (44 RT 8013 ["That would be 8–"]; see 10 CT 2500). A little while later, the trial court reiterated that it would not give Defendant's Special Instruction G and Beck did not object. (44 RT 8019.)

The trial court also stated that Defendant's Special Instruction "E I think is covered in factor (b) of CALJIC 8.85." Beck's attorney said, "All right." And the trial court concluded, "So I'll not give E." (44 RT 8018; see 10 CT 2498.)

The trial court instructed the jury pursuant to CALJIC No. 8.85 (and section 190.3, subdivision (b)). That instruction 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 hereafter and have been heretofore instructed. You shall consider, take into account, and be guided by the following factors, if applicable:
>
> (B) The presence or absence of criminal activity by the defendant, other than the crimes for which the defendant has been tried in the present proceedings, which involve the use or attempted use of force or violence or the expressed or implied threat to use force or violence.

(44 RT 8243; 10 CT 2480; see 44 RT 8243–8245; 10 CT 2480–2482 [entire instruction].)

The trial court instructed the jury pursuant to CALJIC No. 8.87 (and section 190.3, subdivision (b)):

> Evidence has been introduced for the purpose of showing that the defendant has committed criminal activity which involved the express or implied use of force or violence or the threat of force or violence. Before a juror may consider any of such criminal activity as an aggravating circumstance in this case, a juror must first be satisfied beyond a reasonable doubt that the defendant did in fact commit such criminal activity. A juror may not consider any evidence of any other criminal activity as an aggravating circumstance.
>
> It is not necessary for all jurors to agree. If any juror is convinced beyond a reasonable doubt that such criminal activity occurred, that juror may consider that activity as a factor in aggravation. If a juror is not so convinced, that juror must not consider that evidence for any purpose.

(44 RT 8245; 10 CT 2483.[84])

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84. The standard template for CALJIC No. 8.87 provides, "Evidence has been introduced for the purpose of showing that the defendant [_____] has committed the following criminal [act[s]] [activity]: [_____] which involved [the express or implied use of force or violence] [or] [the threat of force or violence]. Before a juror may consider any criminal [act[s]] [activity] as an aggravating circumstance in this case, a juror must first be satisfied beyond a reasonable doubt that the defendant [_____] did in fact commit the criminal [act[s]] [activity]. A juror may not consider any evidence of any other criminal [act[s]] [activity] as an aggravating circumstance. [¶] It is not necessary for all jurors to agree. If any juror is convinced beyond a reasonable doubt that the criminal activity occurred, that juror may consider that activity as a fact in aggravation. If a juror is not so convinced, that juror must not consider that evidence for any purpose."

The Use Note for CALJIC No. 8.87 provides: "This instruction must be given sua sponte in all cases where the People claim any criminal activity and especially where CALJIC 8.85, subparagraph (c), is given. [¶] Although the court has no sua sponte duty to give an instruction defining the elements of

During closing argument, the prosecutor told the jury that the factor (b) activities were Beck's abuse of Perkins, McLaughlin, Jennifer Starn, Cynthia Starn, and Vieira. (45 RT 8290, 8295–8296.) The prosecutor explained, however, that the recording of Cruz, Beck, and Vieira yelling at Alexandra was not criminal activity and was not an aggravating factor. (45 RT 8290.)

B. Legal Principles

Section 190.3, subdivision (b), provides, in part:

> If the defendant has been found guilty of murder in the first degree, and a special circumstance has been charged and found to be true . . . the trier of fact shall determine whether the penalty shall be death or confinement in state prison for a term of life without the possibility of parole [¶] . . . .
>
> In determining the penalty, the trier of fact shall take into account any of the following factors if relevant: [¶] . . . .
>
> (b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence.

Section 190.3 "expressly excludes evidence of criminal activity, except for felony convictions, which activity 'did not involve the use or attempted use of force or violence or which did not involve the express or implied threat to use force or violence.'" (*People v. Boyd*, *supra*, 38 Cal.3d at p. 776.) However, nonviolent and nonthreatening conduct is admissible under section 190.3,

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"other" crimes, it should do so when requested by the defendant or the people or if it determines on its own motion that it is appropriate or vital to a proper consideration of the evidence (i.e., there is no prohibition to doing so). (*People v. Davenport*, 41 Cal.3d 247, 281–282 (1985).)"

subdivision (b), if that conduct resulted in a felony conviction. (*Ibid.*; *People v. Monterroso*, *supra*, 34 Cal.4th at p. 774; *People v. Cain*, *supra*, 10 Cal.4th at p. 75.)

The "criminal activity" contemplated by section 190.3, subdivision (b), is conduct that constitutes an "'actual crime,'" i.e., an offense proscribed by statute. (*People v. Lancaster*, *supra*, 41 Cal.4th at p. 93; *People v. Kipp*, *supra*, 26 Cal.4th at p. 1133.)

Allowing a jury to consider unadjudicated criminal activity as an aggravating factor in its death penalty determination is not unconstitutional and it does not render a death sentence unreliable. (*People v. Morrison*, *supra*, 34 Cal.4th at p. 729; *People v. Brasure*, *supra*, 42 Cal.4th at p. 1068.)

A trial court has no sua sponte duty to instruct the penalty phase jury on how to use evidence of prior criminal activity. (*People v. Hughes*, *supra*, 27 Cal.4th at p. 383; *People v. Lewis*, *supra*, 25 Cal.4th at p. 666.) If a trial court instructs on prior criminal activity, it has no sua sponte obligation to specify precisely which criminal activities are addressed by the instruction. (*People v. Lewis*, *supra*, 25 Cal.4th at p. 666, citing *People v. Medina*, *supra*, 11 Cal.4th at pp. 770–771.) But if the trial court elects to specify the prior criminal acts, it is the defendant's responsibility to point out any omissions from that list. (*People v. Lewis*, *supra*, 25 Cal.4th at p. 666.)

Evidence of nonviolent criminal activity that did not result in a felony conviction is inadmissible as an aggravating factor during a capital penalty murder trial. (*People v. Visciotti*, *supra*, 2 Cal.4th at p. 72.) However, when a capital defendant fails to make a timely objection, he forfeits his right to complain that the conduct did not involve the use of force or violence. (*People v. Pinholster*, *supra*, 1 Cal.4th at p. 960.)

The improper admission of evidence of criminal activity that did not involve the use or threat of force or violence is reviewed under the state standard of

harmless error to determine whether it is reasonably probable that absent the error, the defendant would have obtained a better result. (*People v. Pinholster*, *supra*, 1 Cal.4th at p. 963; *People v. Lewis*, *supra* 25 Cal.4th at p. 666.)

C. Beck Forfeited This Claim By Failing To Object Or Request An Augmentation

Beck requested two instructions which conveyed two of the main principles of CALJIC No. 8.87: (1) the criminal activity had to be conduct other than the underlying crimes charged, and (2) before the jury could consider any criminal activity as an aggravating factor, it had to find beyond a reasonable doubt that Beck committed the activity. (10 CT 2498, 2500.) Though the first instruction alluded to "[t]he criminal activity which I have set forth as an aggravating factor . . . ," it did not actually provide a list of criminal activity; nor did it provide a space for the insertion of criminal acts. The sole purpose of that instruction was to advise the jury that it could consider only *other* criminal activity. (10 CT 2498, citing *People v. Melton* (1988) 44 Cal.3d 713, 763 [criminal activity must be based on crimes other than crimes charged]; *People v. Kimble*, *supra*, 44 Cal.3d at pp. 504–505 [same].)

At the hearing on penalty instructions, Beck did not object or request augmentation when the trial court advised him that it would substitute its modified version of CALJIC No. 8.87 for Defendant's Special Instruction G. (44 RT 8012–8013, 8019; see 10 CT 2500.) Nor did Beck object when the trial court stated that it would not give Defendant's Special Instruction E because the law was adequately covered in CALJIC No. 8.85. (44 RT 8018; see 10 CT 2498.)

The standard instructions clearly conveyed the same principles contained in Beck's proposed instructions. To the extent Beck's proposed instructions constituted some kind of objection to the trial court's instructions, it still did not preserve Beck's claim because it did not contain, require, or request a list of criminal activities. Because Beck never asked the trial court to provide a list of

criminal activities and did not object to the trial court's instruction, he forfeited his claim of error. (*People v. Pinholster*, *supra*, 1 Cal.4th at p. 960 [when a capital defendant fails to make a timely objection, he forfeits his right to complain that an instruction on criminal activity was inadequate].)

Though Beck makes no argument against waiver, his failure to object would not necessarily operate as a forfeiture if the claimed error affected his substantial rights. (§ 1259.) However, as discussed in Argument XIII, it is clear that a trial court's failure to instruct the jury with a list of possible criminal activities does not affect the defendant's substantial rights. In *People v. Medina*, *supra*, 11 Cal.4th 694, this Court held that the trial court had no sua sponte duty to provide a list of other crimes involving force or violence. (*Id.* at p. 771; see also *People v. Hughes*, *supra*, 27 Cal.4th at p. 383; *People v. Lewis*, *supra*, 25 Cal.4th at p. 666.) It is not possible that trial courts have no duty to include instructions that affect a defendant's substantial rights. Therefore, it is implicit in that holding that section 1259 does not apply to the trial court's omission of the list of criminal activities. Furthermore, this Court has repeatedly held that by failing to object, a defendant forfeits his claim that factor (b) evidence was erroneously admitted. (See, e.g., *People v. Lewis*, *supra*, 43 Cal.4th at p. 529; *People v. Roldan*, *supra*, 35 Cal.4th at p. 738.) If a claim that other criminal evidence was improperly admitted is not preserved on appeal, then there is no chance that a defendant can attack the instruction that deals with that evidence without having objected at trial. Moreover, with the exception of that list, the trial court instructed the jury with all of CALJIC No. 8.87. That instruction provided more guidance and limitations than the instructions requested by Beck. Therefore, Beck cannot show that his substantial rights were affected.

Furthermore, as a general principle, "'[A] party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general

or incomplete unless the party has requested appropriate clarifying or amplifying language.'" (*People v. Lewis*, *supra*, 25 Cal.4th at p. 666.) Here, when the trial court stated it would give its own version of CALJIC No. 8.87, Beck did not "request clarifying or amplifying language," so he forfeited his claim. (*Ibid.*)

In *People v. Lewis*, *supra*, 25 Cal.4th 610, this Court observed:

> Respondent argues that because a trial court is under no obligation to specify for the jury the violent criminal activity that could be considered (*People v. Medina*, *supra*, 11 Cal.4th at pp. 770-771), it was incumbent on defense counsel to point out the omission of [one of the incidents of criminal activity] and request a more complete instruction on the subject. We agree. The instruction as given was not erroneous, only incomplete, and "a party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language." (*People v. Andrews* (1989) 49 Cal.3d 200, 218.)

(*People v. Lewis*, *supra*, 25 Cal.4th at p. 666.) For the same reasons, Beck forfeited his claim of error by failing to ask the trial court to include in the instructions a list of other criminal activity. (*Ibid.*; *People v. Pinholster*, *supra*, 1 Cal.4th at p. 960.)

D. The Instruction Was Legally Correct

This Court has repeatedly held that trial courts have no sua sponte duty to instruct capital penalty juries on the use of evidence of criminal activities. (*People v. Hughes*, *supra*, 27 Cal.4th at p. 383; *People v. Lewis*, *supra*, 25 Cal.4th at p. 666.) Moreover, this Court has upheld instructions pursuant to CALJIC No. 8.87, and has held that trial courts have no duty to instruct juries on the specific criminal activities that it could consider. (*People v. Lewis*, *supra*, 25 Cal.4th at p. 666; *People v. Sapp*, *supra*, 31 Cal.4th at p. 314; *People v. Harris*, *supra*, 43 Cal.4th at p. 1312.) Most importantly, in *People v. Mitcham*, *supra*, 1 Cal.4th 1027, this Court specifically found that an

instruction pursuant to CALJIC No. 8.87 that did not include a list of criminal activities adequately instructed the jury on how to use evidence under section 190.3, factor (b). (*Id.* at p. 1075.)

Beck offers *Robertson, supra*, 33 Cal.3d 21, as authority for the proposition that "this Court has held that the jury should be instructed as to the specific crimes being alleged by the prosecution in order to make certain that the jury will not improperly consider other acts." (BOB 308.) Beck does not offer a pinpoint cite, but he is no doubt referring to a *footnote* in *Robertson* in which this Court recommended that prosecutors request that the instruction enumerate the criminal activity he or she is relying upon. (33 Cal.3d at p. 55, fn. 19.) Though that recommendation is reflected in CALJIC No. 8.87 and its Comment, it is clearly dictum. *Robertson* reversed the death sentence because–unlike in the present matter–the trial court failed to instruct the penalty jury that it had to find beyond a reasonable doubt that the defendant committed the criminal activity before it could consider that activity as an aggravating circumstance. (*Id.* at pp. 53–54.) Thus, because the court reversed on that ground, any additional observations were dictum. (See *People v. Mitcham, supra*, 1 Cal.4th at p. 1075 [the statement in *Robertson* that the prosecutor should request an instruction specifically listing the other crimes was "a suggestion"].)

Nevertheless, it is significant that *Robertson* placed the responsibility on the *prosecutor* to request the enumeration of the criminal activity. While it is obviously the prosecutor who has that information, the court could have still given the responsibility of requesting the list to defendants. The *Robertson* court's choice suggests that it viewed the list of criminal activities as a helpful practice, but not essential to protecting the defendant's rights. That view is bolstered by the fact that trial courts have no sua sponte duty to provide the jury with a list. (*People v. Hughes, supra*, 27 Cal.4th at p. 383; *People v. Lewis*,

supra, 25 Cal.4th at p. 666.) In fact, some defendants might prefer not to list their criminal activities all in one place–which might be another real reason this Court made the prosecutor responsible for requesting it.

Further, because *Robertson's* advice to provide the list was not central to its holding, *Robertson* did not explain what the consequences would be when the prosecutor did not ask the trial court to list the criminal activities. Nor is there any authority on how to evaluate a trial court's denial of a prosecutor or defendant's request to include a list of other crimes. But this Court need not reach those questions here because neither the prosecutor nor Beck requested the list. Therefore, the trial court had no duty to provide it, and there could not have been any error. (See *People v. Hughes*, *supra*, 27 Cal.4th at p. 383; *People v. Lewis*, *supra*, 25 Cal.4th at p. 666; *People v. Mitcham*, *supra*, 1 Cal.4th at p. 1075.) Moreover, because the trial court had no sua sponte duty to provide the jury with a list of criminal activity, it was *Beck's* responsibility to ask for augmentation of the trial court's proposed instruction. (See *People v. Lewis*, *supra*, 25 Cal.4th at p. 666.) Therefore, *Robertson* does not help Beck and does not prove the instruction that was given was erroneous.

To the extent *Robertson* cautioned that a list of other criminal activity was necessary "to avoid potential confusion over which 'other crimes'–if any–the prosecution is relying on as aggravating circumstances in a given case . . . ." (33 Cal.3d. at p. 55, fn. 19), there was no danger of that occurring here because the prosecutor told the jury which criminal activities he wanted them to consider as factors in aggravation. (See *People v. Mitcham*, *supra*, 1 Cal.4th at p. 1075 [the trial court's omission of a list of factor (b) criminal activities could not have affected the verdict because the prosecutor listed them in closing argument to the penalty jury].) The prosecutor told the jury that the factor (b) activities were Beck's abuse of Perkins, McLaughlin, Jennifer Starn, Cynthia Starn, and Vieira. (45 RT 8290; 45 RT 8295–8296.) The prosecutor gave a

particularly long description of the evidence concerning Beck's abuse of Perkins. (45 RT 8292–8295, 8298–8299.) The prosecutor explained that the criminal activity relating to McLaughlin was putting a loaded rifle in her mouth. (45 RT 8295.) And he explained that the criminal activity relating to Vieira was the "orange line treatment" and punching Vieira with the understanding that he would not fight back. (45 RT 8299.)

Contrary to Beck's argument, the instruction did not "fail[] to limit the consideration of aggravation under Penal Code section 190.3, subd[ivision] (b) . . . ." (BOB 307.) The instruction, as well as the instruction pursuant to CALJIC No. 8.85, properly limited the jury to considering evidence of *other* criminal activity; that involved violence or threats of violence; and that was proven beyond a reasonable doubt.

Finally, Beck asserts that the instruction pursuant to CALJIC No. 8.87 exacerbated the evidence of Alexandra crying–which was discussed in Argument XXXVIII. (BOB 308–309.) However, like the instruction requested by Beck (10 CT 2500), the instruction pursuant CALJIC No. 8.87 advised the jury that it had to find beyond a reasonable doubt that Beck committed other criminal activity. (44 RT 8245; 10 CT 2483.) Beck does not explain how his proposed instructions would have limited the jury's use of the Alexandra evidence any better than the instruction the trial court gave.

Moreover, Beck does not acknowledge that the prosecutor specifically told the jury that Beck yelling at Alexandra was not criminal activity and could not be used as an aggravating factor under factor (b). Instead, Beck argues that "even the prosecutor called [the Alexandra evidence] aggravation at one point." (BOB 310.) Though Beck does not include a citation to the record, he is apparently referring to that portion of the prosecutor's argument where he included the Alexandra incident in his list of factor (b) evidence. What Beck does not bother to mention, however, is that the prosecutor immediately

corrected himself by saying, "I want to make clear to you [it] is not in aggravation because that probably doesn't come in under an act of violence per se." (45 RT 8290.)

The following is the prosecutor's entire argument concerning Alexandra:

> But under factor (b), the prior felony convictions, you heard a number of things that the defendant allegedly had done to Steve Perkins, to Rosemary McLaughlin, to Jennifer Starn, Cynthia Starn, and the baby, of course, Alexandra. You just heard that tape. And that tape, by the way, I want to make clear to you is not in aggravation because that probably doesn't come in under an act of violence per se. But the reason that that tape was played for you is because the defendant presented in evidence to you through some witnesses that he was good with children, good with the other–his kids, and one of the other witness's children. And that, of course, would be mitigating evidence presented by the defendant. This tape is presented to you in rebuttal of that, to show to you that the defendant is not always real good with–with children. And you can put whatever weight you want on that tape as to whether or not it offsets any mitigating evidence that was presented to you. It's not aggravation though.

(45 RT 8290–8291.) Thus, the prosecutor did mistakenly refer to the Alexandra tape as criminal activity. But he immediately corrected himself and told the jury that the recording of Beck and Cruz screaming at Alexandra was not an act of violence; could not be used in aggravation; and was only to be used as rebuttal to Beck's mitigation evidence. Moreover, Beck did not object or indicate that the prosecutor's correction was inadequate.

Finally, the prosecutor's statement that the Alexandra evidence was not criminal and could not be used as an aggravating factor was certainly more helpful to Beck than anything contained in his proposed instructions. (See *People v. Mitcham*, *supra*, 1 Cal.4th at p. 1075 [the trial court's omission of a list of factor (b) criminal activities could not have affected the verdict because the prosecutor listed them in closing argument to the penalty jury].) Therefore,

Beck has no basis to argue that the jury probably thought the incident was criminal activity that could be used under factor (b).

E. Any Error Was Harmless

Even if the trial court erred by not providing the jury with a list of criminal activities, it was harmless. Contrary to Beck's argument that a variety of his federal constitutional rights were implicated by the purportedly erroneous instruction, this Court has repeatedly found that errors concerning factor (b) evidence is reviewed under the state standard of harmlessness. (*People v. Pinholster*, *supra*, 1 Cal.4th at p. 963; *People v. Lewis*, *supra* 25 Cal.4th at p. 666; see also *People v. Michaels*, *supra*, 28 Cal.4th at p. 538.) Moreover, even if Beck's constitutional rights were violated, the error was harmless beyond a reasonable doubt. (See *Chapman*, *supra*, 386 U.S. at p. 24.)

In *People v. Mitcham*, this Court opined:

> The prosecutor, however, during closing argument explicitly identified the evidence to be considered as other crimes under factor (b), and the jury instructions (quoted ante) explicitly required that such evidence be considered only if it involved violence or the threat of violence. Therefore, the trial court's failure to list the other crimes relating to factor (b) could not have affected the verdict.

(1 Cal.4th at p. 1075.) Similarly, here, the prosecutor told the jury that the factor (b) activities were Beck's abuse of Perkins, McLaughlin, Jennifer Starn, Cynthia Starn, and Vieira. (45 RT 8290; 45 RT 8295–8296.) Therefore, the omission of the list of criminal activities could not have affected the verdict. (See *People v. Mitcham*, *supra*, 1 Cal.4th at p. 1075.)

Beck objected to the audiotape of Alexandra crying and claims the instruction allowed the jury to use that evidence improperly. But as discussed above, the prosecutor told the jury that screaming at Alexandra was not criminal conduct. (45 RT 8290–8291.) The prosecutor's argument safeguarded Beck's interests better than a list of criminal activities because the prosecutor expressly

told the jury that it could not use that evidence in aggravation. While a list of criminal activity would have omitted the Alexandra incident, it would not have offered any guidance to the jury about how it *could* use that evidence. Nor would it have explicitly advised the jury that yelling at Alexandra was not criminal conduct and could not be used as a factor in aggravation.

Beck claims that the instruction did not have sufficient limits to prevent the jury from improperly using other evidence–particularly from the guilt trial–as factors in aggravation. (BOB 308.) However, the instruction explained exactly what kind of evidence could be used, i.e., other criminal acts proven beyond a reasonable doubt. The instruction also "explicitly required that such evidence be considered only if it involved violence or the threat of violence." (*People v. Mitcham, supra*, 1 Cal.4th at p. 1075; 44 RT 8243, 8245.) This Court found that the same instruction, without a list of criminal activities, adequately explained the law. (*People v. Mitcham*, *supra*, 1 Cal.4th at p. 1075.) Moreover, the prosecutor told the jury which criminal acts it could consider, and it is unlikely that the jury sought out other unqualified activities in the limited time it took to reach its verdicts. Therefore, any prejudice had to be minimal. On the other hand, if the instruction had listed the criminal acts the jury could use as factors in aggravation, it would have only helped the jury to focus its attention on every possible criminal act. Accordingly, at least to some degree, Beck benefitted from the omission of the list of criminal activities, and any overall prejudicial effect was minor or nonexistent.

Finally, in light of the other penalty evidence, especially Beck's torture of Vieira and Perkins (see 44 RT 8087–8088 [Beck's expert testified that Beck carried out most of the torture of Vieira and Perkins]); the brutal circumstances of the crimes charged; and the fact that the prosecutor told the jury which criminal acts qualified under factor (b); it is not reasonably probable that Beck would have received more favorable verdicts if the trial court had provided the

jury with a list of his criminal activities. (See *People v. Pinholster*, *supra*, 1 Cal.4th at p. 963; *People v. Lewis*, *supra* 25 Cal.4th at p. 666.) For the same reasons, even if the instructions provided inadequate guidance to the jury, the error was harmless beyond a reasonable doubt. (*Chapman*, *supra*, 386 U.S. at p. 24.)

XXXII.

THE TRIAL COURT PROPERLY DENIED APPELLANTS' MOTIONS FOR A NEW TRIAL

Appellants made nearly identical motions for new trials after the jury returned verdicts of death, but before imposition of sentence. Appellants based their motions on two grounds: (1) newly discovered evidence that LaMarsh had admitted to another inmate that he and Evans had tricked appellants into going to the Elm Street house so they could retrieve drugs; and (2) the discovery that the prosecutor had suppressed statements that Starn made to Detective Deckard which would have been helpful to appellants' defense. Appellants claim the trial court's denial of their new trial motions violated their federal constitutional rights to due process, a fair trial, and reliable guilt and penalty determinations. (BOB 311; Cruz Joinder.) Respondent disagrees.

The newly discovered evidence was based on a letter from an incarcerated and convicted murderer who refused to sign an affidavit or testify at the new trial hearing. Because the letter was hearsay and possessed absolutely no indicia of reliability, the trial court properly exercised its discretion by finding the evidence insufficient to grant the new trial motion. The trial court also properly found that there was not a reasonable probability that the newly discovered evidence would have enabled appellants to obtain more favorable verdicts.

Likewise, the trial court found that there was not a reasonable probability that the suppressed statements would have led to more favorable verdicts for

appellants. Detective Deckard conducted an extensive interview with Starn, but appellants discuss only four statements which they claim would have been helpful to their defenses. According to Starn: (1) Cruz told her that things did not go well at the Elm Street house and things got out of hand; (2) Starn had previously overheard Raper threaten to kill Cruz; (3) LaMarsh blamed everything on Cruz; and (4) Cruz's shoes were cleaned at the motel after leaving Willey's house–purportedly discrediting Evans' testimony that Vieira had cleaned the blood from Cruz's shoes at Willey's house.

It is unlikely that appellants would have had any way to enter any of this evidence since it was hearsay and Starn did not even testify at the guilt trial. However, even if the evidence could be admitted somehow, it would not have made any difference. Briefly, evidence that Cruz said things did not go well and got out of hand did not prove there was no plan; it proved that the conspiracy did not go according to plan. Evidence that Starn had previously heard Raper threaten Cruz was cumulative to similar evidence and merely helped prove appellants' motive for the conspiracy. Evidence that LaMarsh was biased and blamed everything on Cruz was clear from the evidence admitted: LaMarsh had to testify that Cruz beat Raper with his baton to deflect responsibility for beating Raper's head with his bat–which was the prosecutor's theory of the crime. Finally, evidence that Cruz's shoes were cleaned at the motel did not undermine Evans' testimony. Even though Evans testified that Vieira cleaned Cruz's shoes at Willey's house, it could have been difficult for him to remove all of the blood while Cruz was wearing his shoes. Therefore, since Cruz was concerned with eliminating all evidence of the crimes, it would be reasonable for him to later remove his shoes at the motel so they could be cleaned more thoroughly.

In sum, Starn's statements would not have helped appellants' defense. Therefore, the trial court properly exercised its broad discretion by denying the

new trial motions on the ground that there was not a reasonable probability that if appellants had been aware of the suppressed evidence, they could have obtained more favorable verdicts.

A. Procedural History

Almost three months after the jury returned its death verdicts, Cruz and Beck each moved for a new trial. (10 CT 2591–2600 [Cruz], 10 CT 2601–2609 [Beck].) Both motions raised the same two grounds. First, there was newly discovered evidence that LaMarsh and Willey confessed to another inmate, Alfred Kip McDonnell. According to a letter from McDonnell dated September 23, 1992, LaMarsh told him that he and Evans tricked Cruz and Beck into going over to the Elm Street house. LaMarsh and Evans had drugs there and they wanted Cruz and Beck to fight with Raper and his friends so they would all be distracted while LaMarsh and Evans retrieved the drugs. McDonnell heard LaMarsh tell Willey that if he went along with LaMarsh's fabricated testimony to blame everything on Cruz and Beck, LaMarsh and Willey would both be found not guilty. (10 CT 2592, 2598–2600, 2606; see 10 CT 2611 [Cruz's motion to remove McDonnell from jail in order to testify at new trial hearing]; 10 CT 2612 [trial court's order granting motion to remove McDonnell].)

Second, the prosecutor failed to provide exculpatory statements that Jennifer Starn made to Detective Gary Deckard in a recorded interview. Starn said that Cruz told her soon after the murders that "'something had gone wrong'" and the violence "'just took on a life of its own.'" Starn said that Cruz's shoes were cleaned at the motel–in contrast to Evans' testimony that Vieira cleaned Cruz's shoes at Willey's house. Starn said that LaMarsh told her the whole situation was Cruz's fault. Starn said that she overheard Raper say to Cruz, "'Hey maybe if you don't leave me alone I'm going to kill you.'" (10 CT 2593–2595, 2598, 2606–2607.)

In the People's opposition to the motions, the prosecutor argued that the newly discovered evidence did not warrant even a hearing on a new trial. The prosecutor noted that it was up to the trial court to evaluate the credibility of a witness offering newly discovered evidence; McDonnell was a convicted burglar and murderer; and his letter was not signed under penalty of perjury. Citing *People v. Pic'l* (1981) 114 Cal.App.3d 824, 877 (*Pic'l*) (overruled on another ground in *People v. Kimble* (1988) 44 Cal.3d 480, 498) and section 1181, subdivision 8, the prosecutor argued that a new trial motion that was based on newly discovered evidence had to be decided solely on the basis of sworn affidavits. (10 CT 2635–2637.)

The prosecutor acknowledged that Detective Deckard interviewed Starn on May 8, 1992. The prosecutor advised appellants of the interview after the completion of their guilt trial–but before their penalty trials. The prosecutor argued that Starn's statements were made in the presence of her attorney in the course of plea negotiations. A condition of the negotiations was that the prosecutor would not disclose them unless and until an agreement was reached. An agreement to utilize Starn as a witness was not completed until after the conclusion of the guilt phase. The prosecutor argued that he had no duty to disclose Starn's statements earlier because she had previously made most of the statements to Cruz's defense investigator and any statements that were not previously made were cumulative, inadmissible hearsay, or part of an inadmissible plea offer. (10 CT 2637–2643, citing *People v. Tanner* (1975) 45 Cal.App.3d 345; Evid. Code, § 1153 ["an offer to plead guilty to the crime charged or to any other crime, made by the defendant in a criminal action is inadmissible in any action or in any proceeding of any nature . . . ."]; § 1192.4 ["withdrawn [plea] may not be received in evidence in any criminal, civil, or special action or proceeding of any nature"]; see also 45 RT 8405.)

On October 23, 1992, the trial court held a hearing to consider appellants' new trial motions. (45 RT 8398.) Cruz introduced the audiotape recordings of Starn's interview. (10 CT 2649, 2651; 45 RT 4505; Exhs. 3, 4.) The prosecutor entered the transcripts for the interview. (10 CT 2649, 2651; 45 RT 4505; Exhs. 1, 2.)

Cruz's attorney noted that the prosecutor's opposition to the new trial motion asserted that newly discovered evidence had to be presented in the form of an affidavit. Counsel told the trial court, "I caused my investigator to have one of his associates go out to Folsom to have Mr. McDonnell sign an affidavit that is basically the same thing as what's in the letter. Mr. McDonnell refused to sign the affidavit. He also advised us that if he was brought to court he would take the Fifth." (45 RT 8399–8400.) When the trial court asked Beck if he wanted to add anything, counsel said, "No, Your Honor. I was basically relying on the fact that Mr. McDonnell was going to be here." (45 RT 8400.) The prosecutor argued that the trial court could not rely on McDonnell's letter because it was "totally unreliable hearsay. Although the Court can rely on hearsay in a motion for new trial, it's not evidence that is credible at all. And even if the statements therein were true, they would not give rise to a motion for new trial." (*Ibid.*)

The trial court ruled on the ground of newly discovered evidence:

> All right. It would seem that under the *Pic'l, People versus Pic'l* case, 1981, at 114 Cal.App.3d 824 at 877, 879, that a declaration is required before bringing a motion for new trial on the ground of newly discovered evidence.
>
> However, even if the Court were to treat this handwritten letter as a declaration and as signed by Mr. Alfred McDonnell, the Court still feels that in view of the evidence presented at the trial that no different result would have occurred had Mr. McDonnell testified in accord with his letter.

> His letter deals only with the testimony of co-defendants Mr. LaMarsh and Mr. Willey. There's substantial other evidence which the jury is certainly entitled to rely on in reaching their verdict of guilty for Mr. Cruz and Mr. Beck.
>
> So on the grounds of newly discovered evidence, the motion for new trial is denied.

(45 RT 8402.)

Regarding the suppressed evidence, appellants obtained a stipulation from the prosecutor that they were not notified that Detective Deckard had interviewed Starn until after the jury rendered its guilt verdicts. (45 RT 8404–8406.) The prosecutor offered to submit the matter on his pleadings, but noted that he had four witnesses, including Starn, who were ready to testify if the trial court believed it was necessary. (45 RT 8406.)

Cruz argued that appellants' constitutional rights trumped any confidentiality agreement and the prosecutor should have disclosed Starn's testimony. He argued that the prosecutor could not show beyond a reasonable doubt that the verdicts would have been the same if appellants had received the suppressed evidence.. Cruz argued that Starn's statement that Raper threatened Cruz would have justified an instruction on conspiracy to commit manslaughter.[85] He argued that Starn's statement that LaMarsh blamed everything on Cruz would have been relevant to prove bias. Finally, Cruz argued that Starn's statement about what happened when Cruz came back to the motel would have corroborated Cruz's testimony. (45 RT 8406–8408.)

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85. Cruz apparently forgot that the trial court did instruct the jury on the lesser included offense of "conspiracy to commit voluntary manslaughter." (36 RT 6504; but see *People v. Cortez* (1998) 18 Cal.4th 1223, 1230–1238 [holding that "all conspiracy to commit murder is necessarily conspiracy to commit premeditated and deliberated first degree murder" and repudiating the prior rule that conspiracy to murder could consist of conspiracy to commit first degree murder, conspiracy to commit second degree murder, or conspiracy to commit manslaughter].)

Beck did not make any argument. (45 RT 8409.)

The prosecutor argued:

> Everything that Mr. Amster has said that Miss Starn could have testified to was cumulative to testimony of Michelle Evans, Mr. Cruz, Mr. Beck, Mr. LaMarsh, I believe Kevin Brasuell. All of those people testified that threats had been made by Mr. Raper towards Mr. Cruz and his friends. There was ample evidence of that.
>
> There was evidence that Jason LaMarsh blamed things on Cruz. He testified to that. And the things that occurred at the motel room were also testified to by other people, Mr. Cruz for one. Anything that she could have testified to at that point was cumulative, even if her testimony were admissible.
>
> The–I think the crux of the motion is that or the defense to the motion, objection to the motion, is that the prosecution was under no obligation to disclose this information at that time. There was nothing exculpative. Anything that was there was–was merely cumulative to testimony already admitted.
>
> Miss Starn[] had information that was damaging to the defendants. I chose not to put that on in the guilt phase. I chose not to call her as a witness. And I don't think I had any obligation to disclose the fact that we had even talked to her at that point. In fact, I think I was precluded from doing so under the *Tanner* case and the applicable Penal Code and the Code of Civil Procedure sections.

(45 RT 8409.)

The trial court denied the new trial motions based on Starn's statements:

> It's the Court's opinion that under the case of *People versus Tanner*, 1975, 45 Cal.App.3d 345, that statements made during a plea negotiation process are inadmissible in any case, any proceeding, any action at all imaginable, period. Under–that's under also Penal Code Section 1192.4 and Evidence Code 1153 . . . . [¶] [B]ecause those statements are so totally inadmissible . . . they were also not discoverable until long after the guilt phase of Mr. Cruz and Mr. Beck's trial was concluded.

> The Court in earlier proceedings has had an opportunity to listen to those tapes. And even if they were admissible, the Court does not feel that they were subject of such that would exonerate either Mr. Cruz or Mr. Beck of the charges for which they've been convicted.
>
> I'll make–it's not a reasonable probability that there would have been a different result had their counsel known of those statements before trial.
>
> The Court further concludes that if it is wrong in its interpretation that since they're inadmissible they're also not discoverable, in view of the contents of the tape and the evidence presented during the trial that if there was error because of the prosecution's failure to disclose that evidence, it was harmless beyond a reasonable doubt.
>
> So, accordingly, the motion for new trial based on the failure to disclose the statements of Miss Starn, that motion is denied.

(45 RT 8411–8412.)

B. The Standard Of Review

The trial court's denial of a motion for new trial is reviewed for an abuse of discretion. (*People v. Hovarter* (2008) 44 Cal.4th 983, 999, fn. 4; *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1252; *People v. Williams* (1997) 16 Cal.4th 635, 686; *People v. Staten* (2000) 24 Cal.4th 434, 466; *People v. Davis* (1995) 10 Cal.4th 463, 524; *People v. Delgado* (1993) 5 Cal.4th 312, 328.)

Beck's brief does not mention the standard of review. But it does repeatedly assert that the trial court erred, i.e., not that it abused its discretion. (See, e.g., BOB 316, 320.) Beck's brief correctly evaluates prejudice for both claims by examining whether there was a reasonable probability of a more favorable result absent the errors. (BOB 317, 322, 325; see *People v. Ruthford* (1975) 14 Cal.3d 399, 408 [even though erroneous suppression of evidence is a federal constitutional error, it is reviewed for a reasonable probability of prejudice],

overruled on another ground in *In re Sassounian* (2005) 9 Cal.4th 535, 545, fn. 7.)

In a letter to this Court, Cruz moved to join fifteen of Beck's arguments. He included one paragraph in support of the current argument. According to Cruz's motion, "A trial court's denial of a motion for new trial is reviewed de novo on appeal. (*People v. Ault* (2004) 33 Cal.4th 1250, 1262; *People v. Albarran* (2007) 149 Cal.App.4th 214, 224–225, fn. 7.)" However, Cruz's authority is not persuasive. In *Ault*, this Court opined that independent review might be appropriate when the trial court denies a new trial motion that is based on "juror bias." (33 Cal.4th at p. 1262.) However, *Ault* acknowledged, "A number of our own recent criminal decisions have recited that [the denial of new trial motion] is reviewed under a 'deferential abuse-of-discretion standard.' [Citation.] and will not be disturbed "'unless a manifest and unmistakable abuse of discretion clearly appears."' [Citation.]" (*Id.* at p. 1262, fn. 7.)

While *Albarran* squarely held that the denial of new trial motion is reviewed de novo, it based that determination on a misreading of *Ault* and *People v. Nesler* (1997) 16 Cal.4th 561. According to *Albarran*, this Court applied independent review because the rights affected by the new trial motion implicated the federal constitution. (149 Cal.App.4th at p. 225, fn. 7.) However, the actual reason was more specific: the claim involved jury bias or misconduct. (*People v. Ault*, *supra*, 33 Cal.4th at p. 1262 ["Courts have stressed the particular need for independent review of the trial court's reasons for denying a new trial motion in juror bias cases."]; *People v. Nesler*, *supra*, 16 Cal.4th at pp. 578–583 & fn. 5 ["Juror misconduct, such as the receipt of information about a party or the case that was not part of the evidence received at trial, leads to a presumption that the defendant was prejudiced thereby and may establish juror bias."].) As discussed in *Ault*, juror bias is the one area where this Court is inclined to review the denial of a new trial motions de novo.

(33 Cal.4th at p. 1262.) Therefore, properly read, neither *Ault* nor *Nesler* stand for the general proposition that any new trial motion that purports to implicate the federal constitution is reviewed de novo. (Such a rule would merely guarantee that every new trial motion would include a federal constitutional claim.) Because the current claim does not involve juror bias or misconduct, this Court should follow its own well established precedent and review the trial court's denial of appellants' new trial motions for an abuse of discretion. (See, e.g., *People v. Hovarter*, *supra*, 44 Cal.4th at p. 999, fn. 4; *People v. Williams*, *supra*, 16 Cal.4th at p. 686.)

C. Legal Principles

"'"The determination of a motion for a new trial rests so completely within the court's discretion that its action will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears."'" (*People v. Delgado* (1993) 5 Cal.4th 312, 328.) "In ruling on a motion for new trial based on newly discovered evidence, the trial court considers the following factors: '"1. That the evidence, and not merely its materiality, be newly discovered; 2. That the evidence be not cumulative merely; 3. That it be such as to render a different result probable on a retrial of the cause; 4. That the party could not with reasonable diligence have discovered and produced it at the trial; and 5. That these facts be shown by the best evidence of which the case admits."'" (*Ibid.*)

> When a verdict has been rendered or a finding made against the defendant, the court may, upon his application, grant a new trial, in the following cases only . . . . [¶]
>
> 8. When new evidence is discovered material to the defendant, and which he could not, with reasonable diligence, have discovered and produced at the trial. When a motion for a new trial is made upon the ground of newly discovered evidence, the defendant must produce at the hearing, in support thereof, the affidavits of the witnesses by whom such evidence is expected to be given, and if time is required by the defendant to procure such

> affidavits, the court may postpone the hearing of the motion for such length of time as, under all circumstances of the case, may seem reasonable.

(§ 1181, subd. (8).)

In *Pic'l*, the court held that a defendant who brings a new trial motion based on new evidence was not entitled to a hearing on the motion:

> The language of Penal Code section 1181, subdivision 8, is also mandatory in nature and very similar to the language of Code of Civil Procedure section 658 in providing that, when a motion for a new trial is made upon the ground of newly discovered evidence, "the defendant must produce at the hearing, in support thereof, the affidavits of the witnesses by whom such evidence is expected to be given, ..." (Italics added.) We consider *Linhart* [*v. Nelson* (1976) 18 Cal.3d 641] to be dispositive of the contention made by defendant Pic'l. Accordingly, we hold that a motion for a new trial in a criminal case, made upon the ground of newly discovered evidence, must be decided solely upon affidavits because of the mandatory language of Penal Code section 1181, subdivision 8, and that the trial court is prohibited from conducting an evidentiary hearing at which witnesses would be permitted to testify.

(*Pic'l, supra*, 114 Cal.App.3d at pp. 878–879.)

Prosecutors have a duty to disclose favorable evidence to defendants. (*Brady v. Maryland, supra*, 373 U.S. at p. 87.) To find a violation of *Brady*: "The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." (*Strickler v. Greene* (1999) 527 U.S. 263, 281-282.)

When a prosecutor suppresses evidence bearing on the credibility of a key witness, the accused is entitled to a new trial if the suppressed evidence is "material" and it is "reasonably probable" the defense could have obtained a different verdict had it been aware of the evidence. (*People v. Ruthford, supra*, 14 Cal.3d at p. 408; *United States v. Bagley* (1985) 473 U.S. 667, 682 ["A 'reasonable probability' is a probability sufficient to undermine confidence in

the outcome."]; *Giglio v. United States* (1972) 405 U.S. 150, 154; *In re Ferguson* (1971) 5 Cal.3d 525, 535; *Napue v. Illinois* (1959) 360 U.S. 264, 271.)

A defendant must show the undisclosed information was material, in the sense that its nondisclosure undermines confidence in the trial outcome, because "not every nondisclosure of favorable evidence denies due process. '[S]uch suppression of evidence amounts to a constitutional violation only if it deprives the defendant of a fair trial. Consistent with "our overriding concern with the justice of the finding of guilt," [citation] a constitutional error occurs, and the conviction must be reversed, only if the evidence is material in the sense that its suppression undermines confidence in the outcome of the trial.' [Citation.]" (*In re Brown* (1998) 17 Cal.4th 873, 884.)

Because a defendant must show that he was prejudiced by the suppression of evidence, the determination that a trial court erroneously denied a new trial motion based on the suppression of evidence should not be subjected to further analysis to determine harmlessness. (*In re Sassounian, supra*, 9 Cal.4th at p. 545, fn. 7.)

D. The Trial Court Properly Exercised Its Broad Discretion By Rejecting The Newly Discovered Evidence As An Unreliable And Insufficient Basis For A New Trial

The trial court denied the new trial motions on the basis of newly discovered evidence because (1) appellants failed to produce a sworn affidavit as required by section 1181, subdivision 8, and (2) because McDonnell's letter did not make it reasonably probable that appellants would receive a better result in a new trial. (45 RT 8402.) Both bases were supported by the record and, therefore, the trial court did not abuse its broad discretion.

1. Appellants Failed To Produce Any Credible Evidence

Relying on *Pic'l*, the trial court ruled that appellants' new trial motion based on newly discovered evidence had to be supported by an affidavit. Since McDonnell's letter was not sworn under penalty of perjury, appellant's motion was not supported by any cognizable evidence. Therefore, the trial court properly denied the motion. (45 RT 8409.) Appellants complain that the trial court applied the rule of evidence set forth in section 1181, subdivision 8, "mechanistically," and it should have set aside the statutory hearsay rules to preserve their rights to present a defense. (BOB 315–316; Cruz Joinder.) Appellants are wrong. An enormous amount of time and energy went into their trials, and it would be ludicrous to set it all aside on the basis of evidence that not only bore no indicia of credibility, but was reasonably likely to be fabricated.

Appellants offer no authority which contradicts *Pic'l's* holding that affidavits are a prerequisite under section 1181, subdivision 8, for a new trial motion based on newly discovered evidence. Accordingly, appellants have not shown that the trial court erred by applying the plain language of that statute. (See *Pic'l, supra*, 114 Cal.App.3d at pp. 878–879; *People v. Trujillo* (1977) 67 Cal.App.3d 547, 557; *People v. House* (1969) 268 Cal.App.2d 922, 924; cf. *Linhart v. Nelson* (1976) 18 Cal.3d 641, 644–645 [stating rule in civil cases that new trial motion must be based only on affidavits].)

Appellants acknowledge that they did not obtain an affidavit from McDonnell. But, amazingly, they do not admit that they *tried* to get one and McDonnell not only refused, but said if he was called to testify he would exercise his right to remain silent. (45 RT 8399–8400.) Of course, this situation is different than one in which technical or logistical reasons prevent a defendant from obtaining an affidavit. Section 1181, subdivision (8), specifically provides for a reasonable continuance when a defendant has

difficulty obtaining an affidavit. However, McDonnell's refusal to stand behind his letter was affirmative evidence that the content of that letter was not credible. Moreover, his advisement that he would invoke his right to remain silent suggested that McDonnell was concerned that his fabricated letter could be evidence of criminal activity, i.e., obstructing justice.

Similarly, appellants contend that the trial court should have accepted McDonnell's letter even though it was hearsay because "McDonnell was unavailable to testify at [the hearing]." (BOB 316; Cruz Joinder.) Again, appellants neglect to mention that McDonnell was "unavailable" because he refused to validate the contents of his letter under oath. No sensible judge would "*create* a new exception to the hearsay rule" (BOB 316, italics added; Cruz Joinder) to admit evidence which was manifestly unreliable. Moreover, appellants fail to acknowledge that they failed to support their argument with """the best evidence of which the case admits,""" i.e., McDonnell's sworn affidavit. (*People v. Delgado*, *supra*, 5 Cal.4th at p. 328.) Appellants not only complain that the trial court should not have followed section 1181, subdivision 8, because doing so was "mechanistic," they also contend that the trial court's reliance on *Pic'l* was misplaced because it was "dicta." However, it is difficult to conceive of how it could be dictum when it was based on the plain language of section 1181, subdivision 8, and appellants' own quote of the relevant passage begins: "'Accordingly, *we hold* that a motion for a new trial in a criminal case, made upon the ground of newly discovered evidence, must be decided solely upon affidavits . . . .'" (BOB 315, quoting *Pic'l*, *supra*, 114 Cal.App.3d at pp. 878–879, italics added by Respondent; Cruz Joinder.) Appellants, of course, offer no explanation why the court's holding was dictum.

Accordingly, the trial court relied on a proper legal basis and used its broad discretion to discount the letter and deny the new trial motions. (See *People v. Hovarter*, *supra*, 44 Cal.4th at p. 999, fn. 4 [denial of new trial motion will not

be reversed absent "manifest and unmistakable abuse of discretion"]; *People v. Delgado*, *supra*, 5 Cal.4th at p. 328 [same].)

2. McDonnell's Letter Did Not Show That There Was A Reasonable Probability That Appellants Would Have Received A Better Result

The trial court ruled that even if it treated McDonnell's letter as an affidavit; and even if it overlooked the fact that McDonnell said he would invoke his Fifth Amendment right not to testify; there was not a reasonable probability that appellants would have received a better result if McDonnell had testified at the trial. (45 RT 8402.) Appellants contend, however, that if "the McDonnell evidence [had] been given to the jury, there is a reasonable likelihood that the jury would have doubted Evans and would have been more inclined to return convictions of lesser included second degree murder, voluntary manslaughter, or assault with a deadly weapon." (BOB 317, footnote omitted; Cruz Joinder.)

As a preliminary matter, appellants fail to explain *how* the McDonnell evidence could have been given to a jury. McDonnell said he would refuse to testify. And even if appellants somehow convinced McDonnell to change his mind, LaMarsh's statements were still hearsay. (See *People v. Radz* (1931) 119 Cal.App. 435, 436 [hearsay statements in an affidavit supporting a motion for new trial for newly discovered evidence must be disregarded.].) Even though they were admissions, they were inadmissible under *Aranda-Bruton*. Similarly, if McDonnell refused to testify, the letter, itself, would have to be admitted through another witness such as Cruz. But the letter would have been inadmissible because it would have been double hearsay, i.e., Cruz would testify that McDonnell said that LaMarsh said he planned the whole thing with Evans. Again, LaMarsh's purported statement would have been inadmissible under *Aranda-Bruton*. Moreover, there was certainly no hearsay exception regarding McDonnell.

Further, McDonnell was a convicted and incarcerated murderer who essentially recanted his story when asked to verify it under oath. (10 CT 2636–2637; 45 RT 8399.) Therefore, the only thing the "evidence" proved was that Cruz was able to convince McDonnell to fabricate the letter. Implicit in the trial court's ruling was that McDonnell's assertions were not credible enough to undermine the other substantial evidence of appellants' guilt. The trial court, therefore, reasonably refused to set aside the two-month and four-defendant trial on the basis of a worthless letter that would have not been taken seriously by any reasonable trier of fact.

It is well established that when supported by substantial evidence, a trial court's determination of credibility is given great deference on appeal. (*People v. Majors* (1998) 18 Cal.4th 385, 417; *People v. Nesler, supra*, 16 Cal.4th at p. 582; *People v. Danks* (2004) 32 Cal.4th 269, 303-305; *People v. Delgado, supra*, 5 Cal.4th at p. 328.) Even Cruz–who incorrectly argues in his joinder motion that the trial court's ruling should be reviewed de novo–concedes that this Court owes the trial courts' credibility determinations deference. Moreover, absent express findings of credibility by the trial court, this Court has the inherent authority to make its own determinations of credibility. In the current matter, neither the trial court nor this Court can possibly ascribe any credibility to McDonnell's letter.

In sum, McDonnell's letter was inadmissible, incredible, and unworthy of serious consideration. But as discussed in other arguments, the evidence against appellants was overwhelming. Thus, there was not a reasonable probability that McDonnell's letter or testimony would have persuaded the jury to return more favorable verdicts. (See *People v. Delgado, supra*, 5 Cal.4th at p. 328.) Moreover, as discussed above, the letter was rank hearsay and only an affidavit or McDonnell's actual testimony could have raised a prima facie case for a new trial. Therefore, the trial court could have also denied the new trial

motion solely on the ground that appellants failed to produce the "best evidence" available. (*Ibid.*) Accordingly, the trial court acted within its broad discretion to deny appellants' new trial motion. (See *People v. Hovarter*, *supra*, 44 Cal.4th at p. 999, fn. 4 [denial of new trial motion will not be reversed absent "manifest and unmistakable abuse of discretion"]; *People v. Delgado*, *supra*, 5 Cal.4th at p. 328 [same].)

E. The Trial Court Properly Exercised Its Discretion By Finding That Appellants Would Not Have Received A More Favorable Result If The Prosecutor Had Disclosed Starn's Statements

The trial court denied the new trial motion based on Starn's undisclosed statements, in part, because it found that the prosecutor had no duty to disclose statements that were made during Starn's plea negotiations. (45 RT 8411, citing *People v. Tanner*, *supra*, 45Cal.App.3d 345, § 1192.4, and Evidence Code section 1153.) Appellants argue that the trial court erred because statements made in plea negotiations are inadmissible only in actions against the defendant who made the statements–not in actions against third parties. (BOB 319–320; Cruz Joinder.) Respondent agrees. Nevertheless, this Court should affirm the denial of the new trial motion because the trial court's alternative ground–that there was not a reasonable probability that the suppressed evidence would have resulted in a more favorable verdict (45 RT 8412)–was a reasonable exercise of the trial court's broad discretion.

In order for appellants to prevail on their claim that the trial court erroneously denied their new trial motion based on Starn's suppressed statements, they must show that the evidence was "material" and it is "reasonably probable" the defense could have obtained a different verdict had it been aware of the evidence. (*People v. Ruthford*, *supra*, 14 Cal.3d at p. 408.)

Appellants claim, "The trial court's denial of this claim was based on a finding that the statements were not material and therefore no prejudice

resulted. (RT 8412.)" (BOB 323; Cruz Joinder.) Appellants misread the record. The trial court made no finding on the materiality of the statements. It based its ruling on there not being a reasonable probability that disclosure of the evidence would have resulted in a more favorable result for appellants:

> The Court in earlier proceedings has had an opportunity to listen to those tapes. And even if they were admissible, the Court does not feel that they were subject of such that would exonerate either Mr. Cruz or Mr. Beck of the charges for which they've been convicted.
>
> I'll make–it's not a reasonable probability that there would have been a different result had their counsel known of those statements before trial.

(45 RT 8412.)

Appellants claim that Starn's statements would have helped undermine the evidence that they masterminded the conspiracy to murder everyone at the Elm Street house. (BOB 323–324; Cruz Joinder.) As discussed below, it is doubtful that appellants would have had any way to enter Starn's statements into evidence even if they had known about them. But even if they could, it is not reasonably probable that it would have led to more favorable verdicts for them.

According to appellants, Starn's statement that Cruz told her that things did not go well and things got out of hand undermined the evidence that the attacks were planned. (BOB 323; Cruz Joinder.) However, that evidence did not prove the violence was spontaneous and unplanned. It was obvious from the evidence at trial that the assault on the residents of the Elm Street house did not go as planned. According to Evans, the plan was to kill everyone there, including witnesses. However, by the time Cruz arrived at the motel and spoke to Starn, he already knew that one victim had escaped; a neighbor had witnessed him cut Ritchey's throat; and several weapons and masks had been left behind. Therefore, contrary to the carefully planned military-style operation which Cruz hoped would be untraceable, he was confronting the reality that

they had left behind ample evidence that could result in their apprehension and conviction.

Evidence that Cruz expressed disappointment with the events at the Elm Street house did not prove the attack was unplanned; it simply proved that the attack did not go as planned. Similarly, Cruz's statement that things got out of hand could easily refer to the fact that they could not kill everyone and a resident and a witness got away. Furthermore, the statement was cumulative of various witnesses' testimony that Cruz and Beck both expressed disappointment on the drive home that they left behind evidence and did not kill more people. (24 RT 4249–4250; 32 RT 5663; 34 RT 6005.) It was also cumulative of Willey's testimony that when they got to his house, he told his girlfriend, "'Nothing went right.'" (34 RT 6012 .)

According to appellants, "Starn's other statements about LaMarsh's motive to lie and Raper's threat to kill Cruz are not only independently material but also bolster the materiality of Cruz's statement about things going wrong." (BOB 324; Cruz Joinder.) However, there was abundant evidence that Raper was obnoxious, annoying, and had threatened Cruz and others, and the prosecutor conceded as much. (See, e.g., 29 RT 5063 [Cruz testified that Evans was upset because Raper threatened to kill her]; 29 RT 5163 [Cruz testified that Raper threatened him with a knife in front of Starn and their children]; 29 RT 5165 [Cruz testified that Raper threatened him after his car was burned]; 29 RT 5170 [Cruz testified that sometimes Colwell was with Raper when threatened him]; 30 RT 5342 [Beck testified he thought Raper would come to the Camp with his motorcycle friends and kill everyone]; 32 RT 5639 [LaMarsh testified that Raper threatened to kill him]; 35 RT 6542–6543 [prosecutor argued, "Mr. Raper was crotchety, he was a druggie, and he wasn't the mayor of Salida by any means . . . ."].) Several witnesses also testified that Raper was so vexing that Cruz and Beck's group towed away his trailer and burned his car. So

Starn's statement that she overheard Raper threaten to kill Cruz was merely cumulative and not helpful to appellants. On the contrary, it bolstered the prosecution's theory that the conspiracy to commit murder was motivated by the group's antipathy for Raper.

As discussed in Argument XXVII-F, all of the bad character evidence about Raper involved threats–not violence. Starn's statement also fit that pattern. Raper said, "'Hey, maybe *if you don't leave me alone* I'm going to kill you.'" (10 CT 2607, italics added.) Contrary to appellants' claim that this evidence would have bolstered their claim that Raper was likely to have started a fight at the Elm Street house, it again showed that it was *appellants* who harassed *Raper.*

Similarly, Starn's statement that LaMarsh told her that the whole situation was Cruz's fault did not help appellants. It corroborated the prosecution's theory that Cruz planned the murders. Moreover, it would not have changed the jury's evaluation of LaMarsh's credibility. According to the prosecution's theory of the crime, LaMarsh beat Raper's head until it "looked like an Easter egg after you banged it on the table for 20 or 30 times." The prosecutor also argued that LaMarsh lied when he said he only broke Raper's arm and Cruz did the majority of the beating with his baton. (37 RT 6747–6748; 45 RT 8313.) LaMarsh clearly tried to pin the blame on Cruz by testifying that his only act of violence was breaking Raper's arm in self-defense. According to LaMarsh, Raper was in shock and backing up when Cruz approached him and beat his head with his baton. (32 RT 5656–5657, 5874.) Therefore, evidence that LaMarsh told Starn that Cruz was to blame for everything would not have changed the jury's perception of LaMarsh. It already knew that his life literally depended on convincing the jury that everything was Cruz's fault.

Starn also told Detective Deckard that Cruz's shoes were cleaned at the motel–purportedly contradicting Evans' testimony that Vieira cleaned Cruz's

shoes at Willey's house. But that evidence hardly undermined Evans' testimony. Evans' testimony was corroborated by McLaughlin and LaMarsh, who also testified that Vieira cleaned Cruz's shoes at Willey's house. (31 RT 5549–5550 [McLaughlin testified that Beck told her that Vieira cleaned everyone's shoes at Willey's house]; 32 RT 5721 [LaMarsh testified that Vieira cleaned blood from Cruz's shoes and the car].) Moreover, it would not be surprising if it were hard to remove all the blood the first time Cruz's shoes were cleaned. According to McLaughlin, Beck told her that he had to buy new shoes because he could not get the blood out. (31 RT 5550, 5553.) Similarly, Willey testified that after he washed his shoes, he decided to burn them. (34 RT 6136.) Therefore, since Evans testified that Cruz was covered in blood and Vieira had to get down on his knees and scrub Cruz's shoes at Willey's house (24 RT 4245, 4254), it would be reasonable to infer that Cruz's shoes were very bloody, and Vieira tried to clean them while Cruz was still wearing them. It would make sense that later, Cruz had to take off his shoes and scrub them again. Also, to the extent Evans, McLaughlin, and LaMarsh's testimony that Cruz's shoes were bloody established that Cruz participated in the murders, Starn's statement would have confirmed exactly the same thing. Therefore, Starn's statement that Cruz's shoes were cleaned at the motel was certainly more detrimental than helpful to appellants.

Appellants argue that Cruz's statements to Starn had enhanced credibility because "he made these statements to his wife, whom he believed to be his partner and confidant." (BOB 324; Cruz Joinder.) It is true that Starn had been Cruz's girlfriend for three or four years and had three children with Cruz. However, she was not his wife. More importantly, Starn did not testify on Cruz's behalf; she testified as the *prosecutor's* sole witness in Cruz's penalty trial, as well as one of five witnesses in Beck's penalty trial. Therefore, appellants' unexamined assumption that they would have been able to actually

use Starn's statements is doubtful. Her statements were hearsay, and appellants offer no rationale for entering them under a hearsay exception. Moreover, even if they could be admitted as admissions, it is doubtful Starn would have testified on appellants' behalf. If Cruz's statements had been admitted through another witness, most likely Detective Deckard, that would have raised the evidence to double hearsay, i.e., Deckard would testify that Starn told him that Cruz told her . . . .

Appellants could argue that even if they could not admit Starn's statements, they still could have used them to change their defense strategy and possibly call Starn as a witness. However, it is not plausible that appellants were otherwise unaware of what Starn could say if she were called to testify. As the prosecutor argued, "Most of the information contained in the statement of Starn was already known to the defense by way of a statement given by Starn to Cruz's defense investigator, Alan Peacock, on July 27, 1991." (10 CT 2638.) Moreover, Cruz should have had some idea about what he had said to Starn and what she might have seen at the motel after the murders. Nor is it plausible that appellants would have decided to call Starn as a witness if they had been aware of her statements to Detective Deckard. Appellants were well aware of most–if not all–of what Starn could have testified to. They must have had good reasons not to call her. The suppressed statements would not have changed that calculation.

As discussed in Argument XXIX, Starn had stopped communicating with Cruz by January 1992–i.e., before the commencement of jury selection. In Perkins' phone message to Starn on January 26, 1992, he threatened that things would get "messy" if she did not contact Cruz. (Exh. 245.) According to Beck, that threat originated with Cruz. (45 RT 8271–8273.) Starn also recorded three threatening phone calls from Cruz from March 17, March 24, and April 4, 1992–i.e., before appellants presented their defenses in the guilt phase. (45 RT

8275; Exh. 245.) On cross-examination by Beck, Starn testified in Beck's penalty trial that she received many threatening phone calls from Cruz while he was in jail. The calls stopped only when Cruz found out that Starn would be testifying in his trial. (45 RT 8282–8284; Exh. 245; see 10 CT 2445.) Finally, sometime before the conclusion of trial, Starn met and became engaged to Larry Cortinez–which, of course, infuriated Cruz. (39 RT 7013; 45 RT 8273–8274; Exh. 245.) Therefore, any implication by appellants that Starn would have testified on their behalf if they had only known that she possessed exculpatory information is dubious. (See 41 RT 7359–7364 [in Cruz's penalty trial Cruz acknowledged that Starn had turned against him.) Notwithstanding Starn's undisclosed statements to Detective Deckard, appellants had all the information they needed to decide not to call Starn. Moreover, if they did not call Starn because she would have invoked her Fifth Amendment privilege, Starn's statements to Detective Deckard would not have changed that. Finally, Starn's willingness to testify against appellants at their penalty trials shows that she would not have been a helpful witness during the guilt trials. As the prosecutor noted, "Miss Starn[] had information that was damaging to the defendants. I chose not to put that on in the guilt phase." (45 RT 8409.)

For all the reasons given above, plus the weight of the evidence against appellants, it is not reasonably probable that appellants would have received more favorable verdicts if they had known about Starn's statements to Detective Deckard. (See *People v. Ruthford, supra*, 14 Cal.3d at p. 408.) Therefore, appellants cannot show that the trial court's denial of their new trial motions was a manifest abuse of discretion. (See *People v. Hovarter, supra*, 44 Cal.4th at p. 999, fn. 4.) For the same reasons, appellants cannot show that the suppression of Starn's statements resulted in any prejudice; therefore, it could not have violated their federal constitutional rights to due process, a fair trial, or a reliable guilt verdict. (*People v. Partida* (2005) 37 Cal.4th 428, 438–439

[even when exclusion of evidence is erroneous under state law, it violates due process only when it makes the trial fundamentally unfair]; see *Chia v. Cambra* (9th Cir.2004) 360 F.3d 997, 1003 [exclusion of evidence does not violate due process if the evidence is not particularly probative of a central issue or is merely cumulative of other evidence].)

XXXIII.

CALIFORNIA'S DEATH PENALTY DOES NOT VIOLATE THE FEDERAL CONSTITUTION

Appellants have joined each other's argument raising standard objections to California's death penalty statute. As both appellants concede, this Court has repeatedly rejected their claims. They present their arguments to afford this Court an opportunity to reconsider prior rulings and to preserve the issue for collateral review. (COB 377; BOB 326; Cruz Joinder.)

Because all of the arguments in appellants' opening briefs overlap, Respondent asks that this Court refer to Argument XIV for responses to both appellants' arguments. To aid this Court, Respondent notes each subargument in Beck's opening brief, and provides the corresponding subargument in Respondent's Argument XIV:

Argument XVIII in BOB	Respondent's Argument XIV
A (BOB 329)	A
B (BOB 332)	B
B-1 (BOB 334)	B-1
B-1-a (BOB 338)	B-8
B-1-b (BOB 347)	B-2, 4
B-2-a (BOB 350)	B-1, 2
B-2-b (BOB 351)	B-5, 6
B-3 (BOB 355)	C
B-4 (BOB 359)	E

B-5 (BOB 362) B-5

B-6 (BOB 363) D-1

B-7 (BOB 364) D-3

C (BOB 368) . . . . . F

D (BOB 373) . . . . . G

XXXIV.

THERE WAS NEITHER CUMULATIVE ERROR NOR CUMULATIVE PREJUDICE

Appellants claim that numerous errors flowed from the trial court's failure to sever the trial, as well as from errors in jury selection and jury instructions. They claim these errors "undermined the reliability of the guilt and penalty verdicts in this case and denied [appellants their] rights guaranteed by the Fifth, Sixth, Eight[h] and Fourteenth Amendments and the California constitutional analogs." (BOB 377; Cruz Joinder.) Further, they argue, "Given the numerous errors at guilt and penalty phases, the cumulative impact of these errors requires reversal of the convictions and sentence[s] of death." (BOB 378; Cruz Joinder.) Respondent disagrees.

For the reasons set forth in Respondent's Arguments I–V, VII–XI, XIV, and XVI–XXXIV, there was one error in the guilt phase and there were two errors in the penalty phase. As acknowledged in Arguments VII and XXVII, the trial court erroneously instructed the jury that conspiracy could be based on malice even though it actually required express malice or intent to kill. However, that error was necessarily harmless because the jury made numerous other findings that demonstrated it had found appellants harbored the intent to kill. Respondent conceded in Argument XXX that the prosecutor may have improperly argued in Beck's penalty trial that the death penalty was sanctioned by the Bible. However, this Court has repeatedly found similar arguments harmless. Moreover, any minor misconduct would not have cumulated with

any other errors. Finally, in Arguments XII and XXVI, Respondent conceded that the trial court erred by allowing the jury to return a verdict of death on the conspiracy charges, and also by imposing that sentence. However, that was not the type of error that could infect other parts of the jury's penalty deliberations, nor could it cumulate with other errors. Moreover, this Court can easily correct that error by ordering the trial court to amend the abstract of judgment.

In sum, there was no cumulative error or prejudice because there were only three errors. The misinstruction on malice prior to guilt deliberations and the prosecutor's reference to the Bible in Beck's penalty trial were harmless and could not have caused cumulative error because they occurred in different phases of the trial. The erroneous death verdicts and sentences for conspiracy to commit murder could not have cumulated with any other errors because they came at the end of the trial. Further, even if there were other minor errors, the verdicts would have been the same absent those errors because the evidence against appellants was overwhelming.

Appellants argue, "The inconsistent and unreliable testimony of Michelle Evans was the sole basis for the conspiracy charge . . . ." (BOB 377–378; Cruz Joinder.) However, as discussed in Argument XXV, Evans' testimony was not unreliable. She admitted that she initially lied to police. But criminal suspects often lie to police and then agree to testify truthfully in exchange for reduced charges. Indeed appellants both acknowledged in their testimony that they also lied to police when they were arrested. Moreover, contrary to appellants' arguments, Evans' testimony was not inconsistent; there was no proof that any of her testimony was false; and her testimony was corroborated in numerous ways. Furthermore, all of the defendants admitted that they were at the crime scene, and each defendant was blamed for at least one murder by another defendant. Several witnesses testified that the assailants wore masks and two masks were found at the crime scene. Cruz admitted he had bought four masks

just a few weeks before the murders, but he could not explain why they were not in his house. Finally, appellants' defense theory that around midnight they suddenly armed themselves and went to the Elm Street house to retrieve some clothes was not plausible. Thus, there was overwhelming evidence of the conspiracy.

Appellants argue, "At most, Beck was directly connected to one of the killings for which he would not have been death eligible." (BOB 377; Cruz Joinder.) It is true that the prosecutor argued that Beck personally killed only Colwell, and Beck's other murder convictions were probably based on vicarious liability. (But see 34 RT 5996–5998 [Willey testified that Beck cut Ritchey's throat].) However, as discussed above, the evidence of Beck's participation in the conspiracy was quite strong.

Appellants argue that "the jury deliberated for at least four days before returning verdicts against [appellants]." (BOB 378; Cruz Joinder.) However, that was not a particularly long time for the jury to consider evidence from a two-month trial with four defendants, twenty serious charges, twenty-five enhancements, twenty overt act allegations, four special circumstance allegations, and lengthy instructions. Moreover, it is quite possible that most of the jury's deliberations were focused on LaMarsh and Willey, and that it had a relatively easy time reaching consensus on appellants' verdicts. (See 38 RT 6882.)

In sum, even if there were minor improprieties, the errors were harmless whether considered individually or collectively. (See, e.g., *People v. Box, supra,* 23 Cal.4th at p. 1214 ["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, supra,* 20 Cal.4th at p. 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*, *supra*, 13 Cal.4th at p. 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"]; see *Vieira*, *supra*, 35 Cal.4th at p. 305 [because there was only one error, and it was harmless, the claim of cumulative error was meritless]; *People v. Wallace*, *supra*, ___ Cal.4th ___ [2008 WL 3482895] [having found no prejudicial errors in either the guilt or penalty phase, court rejected defendant's claim that his death sentence should be reversed].) Accordingly, this Court should reject appellants' claim of cumulative error.

XXXV.

EXCEPT FOR THE MODIFICATION OF APPELLANTS' DEATH SENTENCES FOR CONSPIRACY TO COMMIT MURDER, THIS COURT SHOULD REJECT ALL THE JOINED ARGUMENTS

Pursuant to California Rules of Court, rule 8.200(a)(5), Beck has joined eleven of Cruz's arguments and Cruz has joined fifteen of Beck's arguments. (BOB 379; Cruz Joinder.) As a result, Respondent has addressed the following arguments to both appellants: I–V, VII–XI, XIV, XVI-A, XVII–XXVII, XXXII–XXXIV.

In Arguments XII and XXVI, Respondent conceded that the trial court improperly imposed death sentences for appellants' convictions for conspiracy to commit murder. Those sentences should be converted to a term of 25 years to life. However, this Court should reject all of the other joined claims for the reasons given in those arguments.

CONCLUSION

This Court should order the trial court to amend the abstract of judgment to reflect that the sentence for appellants' conspiracy convictions are 25 years to life in prison. In all other respects, Respondent respectfully requests that this Court affirm the judgments.

Dated: October 3, 2008

Respectfully submitted,

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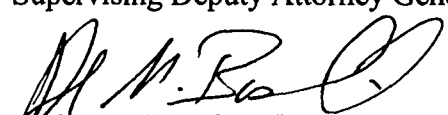

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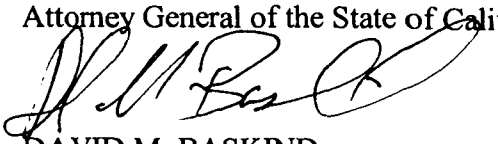
CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S BRIEF** uses a 13 point Times New Roman font and contains 211,229 words.

Dated: October 3, 2008

Respectfully submitted,

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



DAVID M. BASKIND
Deputy Attorney General

Attorneys for Respondent

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. James David Beck and Gerald Dean Cruz**

No.: **S029843**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004.

On October 3, 2008, I served the attached

RESPONDENT'S BRIEF

by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Mail at San Francisco, California, addressed as follows:

William T. Lowe
Deputy State Public Defender
221 Main Street, 10th Floor
San Francisco, CA 94105
(2 copies)

Adrienne Toomey
Attorney at Law
Habeas Corpus Resource Center
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San Francisco, CA 94107

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P.O. Box 5988
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Ketchum, ID 88340
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The Honorable Thomas Orloff
District Attorney
Alameda County District Attorney's Office
1225 Fallon Street, Room 900
Oakland, CA 94612-4203

The Honorable Birgit Fladager
District Attorney
Stanislaus County
832 12th Street, Ste. 300
Modesto, CA 95353

County of Alameda
Superior Court of California
Rene C. Davidson Courthouse
1225 Fallon Street
Oakland, CA 94612-4293

California Appellate Project
101 Second Street, Suite 600
San Francisco, CA 94105-3672

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on October 3, 2008, at San Francisco, California.

S. Agustin	S. Agustin
Declarant	Signature