No. S076999

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

MATTHEW A. SOUZA,

Defendant and Appellant.

Alameda County
Superior Court
No. C122159B

APPELLANT'S REPLY BRIEF

Appeal from the Judgment of the Superior Court
of the State of California for the County of Alameda

HONORABLE JOSEPH HURLEY

MICHAEL J. HERSEK
California State Public Defender

C. DELAINE RENARD
Deputy State Public Defender
California Bar No. 169893

221 Main Street, 10th Floor
San Francisco, CA 94105
Telephone: (415) 904-5600

Attorneys for Appellant

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INTRODUCTION

In his opening brief, Matthew Souza challenged the trial court's refusal to give factually supported instructions on the lesser-included offenses of voluntary manslaughter and attempted voluntary manslaughter, as well as several other federal constitutional violations that demand reversal under the *Chapman* standard. (*Chapman v. California* (1967) 386 U.S. 18, 24.) While acknowledging the evidence that supported the judgment, he also cited substantial evidence in support of his arguments under well settled principles of appellate review. (See, e.g., *People v. Breverman* (1998) 19 Cal.4th 142, 177 ["substantial evidence" supporting instructions on lesser included offenses is "evidence from which a jury composed of reasonable persons could conclude that the lesser offense, but not the greater, was committed," a determination based on the "bare legal sufficiency" of the evidence, "not its weight"]; *Satterwhite v. Texas* (1988) 486 U.S. 249, 258-259 [in determining whether federal constitutional violation requires reversal under the *Chapman* standard, the question "is *not* whether the legally admitted evidence was sufficient to support" the verdict, but rather "whether the State has 'proved beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained'"].)

In this regard, respondent's brief is perhaps most remarkable for what it omits. Throughout its brief, respondent cites only those portions of the record that support its arguments while ignoring all evidence supporting a contrary view. While this would be an appropriate response to a challenge to the legal sufficiency of the evidence to sustain the judgment (see, e.g., *People v. Cuevas* (1995) 12 Cal.4th 252, 260-261), it is not an appropriate response to the challenges raised on this appeal. Hence, the state's response that substantial evidence did not support instructions, and

that the various federal constitutional violations were harmless, by citing *only* those pieces of evidence that support the judgment and ignoring all others, amounts to what is essentially a non-response. As the Supreme Court recently observed, "by evaluating the strength of only one party's evidence, no logical conclusion can be reached regarding the strength of contrary evidence offered by the other side to rebut or cast doubt." (*Holmes v. South Carolina* (2006) ___ U.S. ___, 126 S.Ct. 1727, 1735.)

Similarly, and as discussed in detail in the arguments below, throughout its brief, respondent simply ignores the decisions of this and the United States Supreme Court, which were discussed extensively in the opening brief, but which undermine the State's arguments. In addition, throughout its responses to the penalty phase arguments, respondent insists that all of the penalty phase errors were harmless under the "reasonable probability" test of *People v. Watson* (1956) 46 Cal.2d 818, thus ignoring this Court's well settled line of authority that state law violations at the penalty phase are reviewed under the far more stringent "reasonable possibility" standard announced in *People v. Brown* (1988) 46 Cal.3d 432.

The State's ostrich-like response is telling. It simply ignores what it cannot dispute: the facts and the law demand reversal of the judgment.

ARGUMENT[1]

I

THE JOINDER OF THE SOUZA BROTHERS' TRIALS VIOLATED MATTHEW SOUZA'S SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS TO A FAIR TRIAL, PROOF BEYOND A REASONABLE DOUBT ON THE TRUTH OF THE SPECIAL CIRCUMSTANCE ALLEGATION, AND A RELIABLE JURY DETERMINATION ON THE ELEMENTS RENDERING HIM DEATH ELIGIBLE

A. Introduction

As set forth in the opening brief, while Matthew and Michael Souza's inconsistent defenses to the underlying murder and attempted murder charges were blame-shifting, they were not necessarily irreconcilable. However, their defenses to the charge of *capital* murder went beyond the mere inconsistent or blame-shifting to the irreconcilable or mutually antagonistic. (Appellant's Opening Brief ["AOB"] 31-46.) That is, the special circumstance converting the murder charges to capital murder was conclusively established for the actual shooter; each brother's defense to the allegation was that he was not the actual shooter. (AOB 31-46.) Given the evidence, once the jurors determined that both brothers were

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[1] In this brief, Matthew addresses specific contentions made by respondent, that necessitate and answer in order to present the issues fully to this Court. Matthew does not address every claim raised in the opening brief, nor does he reply to every contention made by respondent with regard to the claims he does discuss. Rather Matthew focuses only on the most salient points not already covered in the opening brief. The absence of a reply to any particular argument or allegation made by respondent does not constitute a concession, abandonment, waiver of forfeiture of the point by Matthew (see *People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3), but rather reflects Matthew's view that the issue has been adequately presented and the positions of the parties fully joined.

guilty of the underlying murders, they had to reject one brother's defense to the capital murder charge in order to accept the other's. (AOB 31-46.) The jurors ultimately accepted Michael's defense that Matthew was the actual shooter, found the special circumstance not true as to him and therefore determined that he was not even *eligible* for the death penalty, which required them to reject Matthew's defense, find that he was the actual shooter, and therefore find the special circumstance to be true as to him. This result was not due to the weight of the evidence – which was extraordinarily close – but rather to the presentation of the irreconcilable defenses, the tandem accusations of Michael's counsel and the prosecutor, and their exploitation of the risk of prejudice in joining the brothers' trials throughout their cross-examinations and closing arguments. (AOB 46-53.) The effect of joining the trials over Matthew's objection, therefore, compromised Matthew's rights to a reliable jury verdict and a fair trial on the capital murder charge, as guaranteed by the Sixth, Eighth, and Fourteenth Amendments. (AOB 31-53.)

Respondent contends that "this was a 'classic case' for joint trial," because the brothers were charged with having committed the same crimes in the same episode. (Respondent's Brief ["RB"] 45.) Respondent further contends that the brothers did not have irreconcilable defenses and therefore Matthew was not entitled to severance. (RB 45-46.) Finally, respondent contends that the failure to sever was harmless under the *Watson* standard of prejudice applicable to violations of state law. (RB 44-48.) Respondent completely ignores the thrust of Matthew's argument that, regardless of whether the motion to sever was properly denied at the time it was made, the effect of the joinder deprived Matthew of his state and federal constitutional rights to a fair trial and a reliable verdict that he was guilty of

a capital offense based not only on the brothers' presentation of irreconcilable defenses, but also on the manner in which the joined cases were tried. In any event, respondent's argument is without merit.

B. The Souza Brothers' Defenses To The Capital Murder Charge Went Beyond The Mere Blame Shifting To The Irreconcilable And Therefore Matthew Was Entitled To Severance

Respondent acknowledges that this Court has turned to federal law in resolving whether joinder compromises a defendant's rights to a fair trial and reliable verdicts when he and his codefendant present irreconcilable defenses. (RB 44, citing *People v. Coffman* (2004) 34 Cal.4th 1, 41-42.) Curiously, however, respondent does not cite any federal authority, or address the federal authorities on which this Court has relied and which Matthew cited in the opening brief. (AOB 38-47.) Instead, respondent relies on an isolated quotation from this Court's decision in *People v. Coffman*, *supra*, as setting forth a "test" for irreconcilable defenses:

> ". . . . [T]o 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].) When, however, there exists sufficient independent evidence against the moving defendant, it is not the conflict alone that demonstrates his or her guilt, and antagonistic defenses do not compel severance. (Citation.)

(*People v. Coffman*, *supra*, 34 Cal.4th at p. 42.)

Applying this "test," respondent concludes that the brothers "did not have irreconcilable defenses as defined in *People v. Coffman* . . . [because] it was not the case that any conflicting defense would *alone* compel the jury to return guilty verdicts against both appellant and codefendant." (RB 45,

italics in original.) This is so, respondent reasons, because there was evidence "independent" of the conflicting defenses to prove that the brothers were the perpetrators – namely, "several eyewitnesses to the shooting and . . . conclusive forensic evidence." (RB 46.) Because the brothers did not present irreconcilable defenses, respondent concludes, there was no error in, and no harm from, the court's refusal to sever. (RB 45-48.)

Respondent's analysis is flawed. It is true that this Court has recognized that in order "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*." (*People v. Hardy* (1992) 2 Cal.4th 86, 168, italics added, quoted in *People v. Coffman, supra*, 34 Cal.4th at p. 42.) However, the Court has *also* recognized that irreconcilable defenses mandating severance "'exists where the acceptance of *one party's* defense will preclude acquittal of *the other*.'" (*People v. Hardy, supra*, at p. 168, italics added, quoting *United States v. Zipperstein* (7th Cir. 1979) 601 F.2d 281, 285.) Federal courts are in accord with this latter principle. (See, e.g., *United States v. Mayfield* (9th Cir. 1999) 189 F.3d 895, 899-900, quoting *United States v. Throckmorton* (9th Cir. 1996) 87 F.3d 1069, 1072 [irreconcilable defenses exist when "'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'"]; *United States v. Tootick* (9th Cir. 1991) 952 F.2d 1078, 1086 [irreconcilable defenses "exist when acquittal of a codefendant would necessarily call for conviction of the other"]; *United States v. Rose* (1st Cir. 1997) 104 F.3d 1408, 1415 [irreconcilable defenses

exist "if the tensions between the defenses are so great that the finder of fact would have to believe one defendant at the expense of another"]; *United States v. Romanello* (5th Cir. 1984) 726 F.2d 173, 178-181.)

People v. Coffman, supra, involved motions for severance filed by *both* defendants on the ground, *inter alia*, that their defenses would be "antagonistic" in the sense that they were simply hostile to each other. (*People v. Coffman, supra*, 34 Cal.4th at p. 40.) The female defendant relied on a battered woman's defense to the intent to kill element of the charged murder wherein she presented extensive evidence of her male co-defendant's past assaults on her and otherwise violent character. (*Id.* at pp. 20-25.) The male codefendant presented evidence to rebut her defense. (*Id.* at pp. 27-30.) There was no factual basis on which only one defendant could be guilty; to the contrary, there was ample evidence that *both* defendants were equally guilty of the murder charge *and* special circumstances. (*Id.* at pp. 42.) Indeed, *both* defendants were convicted of the charged murder *and* special circumstances and sentenced to death. (*Id.* at p. 16.) Hence, the case did not involve a situation wherein the defenses were irreconcilable, or alleged to be irreconcilable, in the sense that "'the acceptance of one party's defense [would] preclude acquittal of the other.' [Citation]" (*People v. Hardy, supra*, 2 Cal.4th at p. 168.) Therefore, this Court examined whether the joinder and antagonistic defenses alone would have led the jurors to conclude that "*both defendants* were guilty." (*People v. Coffman, supra*, at p. 42, italics added.)

Here, as discussed in the opening brief, based on the ballistics evidence, only one of the brothers could be the actual killer to whom the special circumstance was automatically true once he was convicted of the underlying murders. As further discussed in the opening brief, the jury's

acceptance of Michael's defense to the special circumstance/capital murder charge – i.e., that Matthew was the actual killer – required rejection of Matthew's defense that Michael was the killer and thereby precluded his acquittal on that charge. (AOB 45-46.) These are classic examples of irreconcilable defenses. Matthew showed that the "'the core of the codefendant's defense [wa]s so irreconcilable with the core of his own defense that the acceptance of the codefendant's theory by the jury [would] preclude[] acquittal of the defendant.'" (*United States v. Mayfield*, *supra*, at pp. 899-900, quoting *United States v. Throckmorton*, *supra*, 87 F.3d at p. 1072; accord *People v. Hardy*, *supra*, 2 Cal.4th 86, 168.)[2] Hence, he showed that "there was a serious risk that a joint trial would compromise a specific trial right . . . [and] prevent the jury from making a reliable judgment about guilt or innocence." (*Zafiro v. United States* (1993) 506 U.S. 534, 539.) The court abused its discretion in denying the motion to sever.

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[2] As mentioned in the opening brief, it is true that the brothers's defenses, on their face, still left room for the theoretical possibility that the jurors would have had reasonable doubt that either brother's identity as the actual shooter had been proved and thus acquitted them both of the capital murder charge. (AOB 35-36.) However, given the manner in which the case was tried, this possibility was entirely unrealistic. From opening statements through closing arguments, Michael's defense hinged affirmatively persuading the jurors that Matthew was the actual shooter, a defense that proved to be hugely successful for him, saving his life at the cost of his brother's. At bottom, in order to accept Michael's defense, the jury had to accept that Matthew was the actual shooter and, hence, had to find the special circumstance – or capital murder charge – to be true. (See, e.g., *United States v. Romanello*, *supra*, 726 F.2d at p. 179 [mere "theoretical possibility" that jury can acquit both defenses does not negate nature of defenses as irreconcilable when core of one defendant's defense directly implicates codefendant].)

C. Even If The Existence Of Irreconcilable Defenses Do Not Alone Compel Severance And The Court's Ruling Was Therefore Correct At The Time It Was Made, The Effect Of The Joinder Violated Matthew's State And Federal Constitutional Rights To A Fair Trial And Reliable Verdict On The Capital Murder Charge

Even if the existence of irreconcilable defenses to the capital murder charge did not alone demand severance, however, that does not end the inquiry. The essential question remains whether the presentation of irreconcilable defenses, along with other factors, deprived Matthew of his state and federal constitutional rights to a fair trial and reliable capital murder verdicts. (See AOB 37-43, citing, *inter alia*, *People v. Mendoza* (2000) 24 Cal.4th 130, 162 [even if refusal to sever was not abuse of discretion at time of motion, if effect of joinder deprived defendant of due process right to fair trial, reversal is required], *Zafiro v. United States* (1993) 506 U.S. 534, 539 [essential consideration in determining whether cases should be severed is whether "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"], and *United States v. Tootick* (9th Cir. 1991) 952 F.2d 1078, 1082 ["The touchstone of the court's analysis is the effect of joinder on the ability of the jury to render a fair and honest verdict"].) It is this critical question that respondent ignores.

Certainly, the Souza brothers' presentation of irreconcilable defenses is a potent indication that Matthew – whose defense the jurors had to reject when they accepted Michael's defense – was deprived of his constitutional rights to a fair trial and a reliable capital murder verdict by the joinder. (See AOB 43-47, citing, *inter alia*, *United States v. Mayfield*, *supra*, 189 F.3d

895, 906 [presentation of irreconcilable defenses, along with the manner in which the cases were tried, deprived losing codefendant of right to fair trial], *United States v. Tootick*, *supra*, 952 F.2d 1078, 1081-1082, *United States v. Sherlock* (9th Cir. 1989) 962 F.2d 1349, 1362, and *United States v. Romanello*, *supra*, 726 F.2d at pp. 178-181.) Equally important to an assessment of whether the presentation of irreconcilable defenses deprived Matthew of his rights to a fair trial and reliable verdict on the capital murder charge (*Zafiro v. United States*, *supra*, 506 U.S. at p. 539) are the facts that:

> (1) The danger of unfair prejudice and confusion from joining the cases of codefendants with irreconcilable defenses was increased in this case because the codefendants were *brothers* with identical last names and similar sounding first names, who were nearly the same age and bore a striking resemblance to each other. That this danger was realized at trial is amply demonstrated by Raymond Douglas's testimony in which he repeatedly confused one brother with the other in identifying the actual shooter (AOB 46-47, citing, *inter alia*, *United States v. Rucker* (11th Cir. 1990) 915 F.2d 1511, 1512-1513 [reviewing court considered fact that codefendants with inconsistent defenses were related in concluding trial court committed prejudicial error in denying motion for severance], *United States v. Sampol* (D.C. Cir. 1980) 636 F.2d 621, 647 [refusal to sever was prejudicial in light of danger that jury would confuse evidence admissible against two codefendant brothers and where at least one witness misidentified the brothers], and *People v. Wilson* (Ill. App. Ct. 1987) 515

N.E.2d 812, 819 [recognizing "the devastating effects of a fraternal accusation" in holding that court erred in refusing to sever trials of codefendant brothers with antagonistic defenses]);

(2) Unlike Michael, Matthew faced two prosecutors whose trial theories were that Matthew was the shooter – the deputy district attorney and Michael's counsel (see AOB 47-48, citing, *inter alia*, *United States v. Tootick*, *supra*, 952 F.2d at p. 1082 ["[j]oinder is problematic in cases involving mutually antagonistic defenses because it may operate to reduce the burden on the prosecutor . . . (and) introduce what is in effect a second prosecutor into a case, by turning each codefendant into the other's most forceful adversary"], *Zafiro v. United States*, *supra*, 506 U.S. at pp. 543-544, conc. opn. of Stevens J. [same – quoting *Tootick* with approval], *United States v. Mayfield*, *supra*, 189 F.3d at pp. 899-900, and *United States v. Romanello*, *supra*, 726 F.2d at p. 179);

(3) Michael's counsel not only "took every opportunity" to implicate Matthew as the actual shooter, he also exploited the potential for confusion and prejudice throughout the trial by, for instance, grossly misstating the evidence going to the identity of the actual shooter and presenting false argument on the same critical issue (AOB 48-50, citing, *inter alia*, *United States v. Mayfield*, *supra*, 189 F.3d at pp. 900-902 [joinder of trials of codefendants with antagonistic defense deprived defendant of right to fair trial where codefendant's counsel used "every opportunity" to

implicate defendant]; *United States v. Tootick*, *supra*, 952 Fd.2d at pp. 1082-1084 [same – where codefendant's counsel repeatedly accused defendant and misstated the evidence in argument]);

(4) The prosecutor exploited "the devastating effects of a fraternal accusation" (*People v. Wilson*, *supra*, 515 N.E.2d 812, 819) by urging the jurors to convict Matthew of capital murder *because* his defense was to blame his brother for the actual shooting (AOB 50-52, citing *United States v. Tootick*, *supra*, 952 F.2d at p. 1085 [joinder of trials of codefendants with antagonistic defenses deprived defendant of fair trial where, *inter alia*, prosecutor's closing argument mocked defendants for placing the blame on each other and the logical impossibility of accepting both defenses]);

(5) The evidence going to the identity of the actual shooter was astonishingly close, a fact respondent People clearly appreciated below (AOB 52-53, citing, *inter alia*, *United States v. Mayfield*, *supra*, 189 F.3d at p. 907 [joinder deprived defendant of right to fair trial where, *inter alia*, the evidence pointing to defendant as the perpetrator rather than his codefendant was not overwhelming]).

Under the rubric of harmless error under the *Watson* standard, respondent focuses solely on the last factor and disputes that any prejudice resulted from the joinder because the evidence that Matthew was the actual shooter was "overwhelming." (RB 46-47; *People v. Watson* (1956) 46 Cal.2d 818, 836 [violations of state law require reversal if it is reasonably

probable that the verdict would have been different in the absence of the error].) In making this argument, respondent acknowledges that the evidence regarding the identity of the shooter was in direct conflict. (RB 46-47.) However, respondent contends, the testimony of Raymond Douglas and Martin Jones, who described Michael's gun as a shotgun, is entitled to more weight than the conflicting eyewitness testimony that Michael fired his weapon.

As to Hillary Leonesio's testimony that she actually saw Michael fire his weapon about three times and shoot Dewayne Arnold, respondent contends that her observations were made during the stress of the shooting, which was made them less reliable than Douglas and Martin's observations of Michael's gun, which were made before the shooting, "during the relative calm before the storm." (RB 47.) However, Leonesio also observed Michael's gun *before the shooting* and described it as an "Uzi" (19 RT 3116-3118, 3152, 3157) and a machine gun, *not* a shotgun (19 RT 3164-3166), which further bolstered her eyewitness testimony that it was *Michael* who shot the victims.

Respondent further contends that Jones's testimony was more persuasive than the other evidence because he had "no doubt that [Michael] carried a shotgun." (RB 47.) However, respondent ignores that Jones testified at the preliminary hearing – when his memory was admittedly better – that he was not certain that Michael's gun was a shotgun; rather, he testified only that Michael's gun was "something that looked like a shotgun[,] . . . something sawed off" or short barreled. (16 RT 2475-2477, 2481-2482, 2500.) Respondent also ignores that Jones also had "no doubt" at trial that a shotgun was actually fired, when in truth a shotgun was never fired in that room. (13 RT 2044, 2046-2047, 2049; 16 2477-2478, 2500,

2508.)[3] Hence, Jones's expressions of certainty hardly demonstrated that his testimony was more persuasive than that of the other witnesses.

As to Lea Coss and Raymond Douglas's testimony that they saw muzzle flashes and heard gunfire from Michael's position in the center of the room, respondent contends that it is consistent with Matthew being the shooter because Jones testified that Matthew started moving toward the center of the room before the shooting started. (RB 47.) However, both Coss and Douglas testified that they saw the flashes and heard the shots from Michael's position in the center of the room *while Matthew was still standing several feet away*, in front of the laundry nook. (15 RT 2266, 2362-2366; 18 RT 2811-2812.) Indeed, Coss even testified at the preliminary hearing that Michael had shot Dewayne Arnold. (18 RT 2809-2810.)

Moreover, in stark contrast to the testimony against Michael in which he was actually identified as the shooter, *none* of the witnesses identified Matthew as the shooter or even testified that they saw him fire his weapon. Thus, not only was the evidence suggesting that Matthew was the actual shooter no more "compelling" than that pointing to Michael as the shooter (RB 46), it was far *less* "compelling."

At bottom, either the two witnesses who described Michael's gun as a shotgun – which meant that he was not the actual killer – were correct, or the three witnesses who directly or indirectly testified that they actually saw Michael fire his weapon and shoot Arnold – which meant that Michael did *not* carry the shotgun and *was* the actual killer – were correct. This

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[3] One possible, reasonable explanation for Jones's mistaken "certainty" that a shotgun was fired is that he actually saw Michael fire his weapon, which he mistakenly believed was a shotgun.

testimony could not be reconciled any more than the brothers' defenses could be reconciled. As not a scintilla of other evidence tended to prove the identity of the actual shooter, this was a classic example of an extremely close case.

In arguing to the contrary, it is telling that respondent People simply ignore their own actions before trial, which undeniably reflected their appreciation of the extreme closeness of the evidence going to prove the identity of the shooter beyond a reasonable doubt. As discussed in the opening brief, the People's original theory – as reflected by the allegations in the original complaint, the preliminary hearing, and the original information – was that *Michael* was the actual shooter. (AOB 52-53.) Although the evidence at trial was essentially the same as that offered pre-trial, the prosecutor inexplicably shifted gears and proceeded on the primary trial theory that Matthew was the actual shooter. (12 RT 1876-1877; 20 RT 3292-3293, 3298, 3436-3437, 3444-3445, 3454, 3457.) At the same time, in patent recognition of the irreconcilable conflicts in the evidence and the closeness of the question, the prosecutor repeatedly emphasized that the jurors did not have to determine the identity of the actual shooter because both brothers intended to kill and therefore the special circumstance allegation was true as to both of them, regardless of who was the actual shooter. (20 RT 3290-3291, 3298, 3308-3309, 3312-3313.) Obviously, the People recognized that the identity of the actual shooter was a close and difficult question. Their inconsistent and illogical position on appeal should be taken for what is it is worth.

Otherwise, respondent completely ignores all of the other factors going to an assessment of the fairness of Matthew's trial, outlined above and in the opening brief. (See RB 45-48.) Respondent ignores too much.

The People's failure to dispute that the evidence posed a danger of confusion that was realized at trial, that Matthew (unlike Michael) faced two prosecutors with respect to capital murder charge, that Michael's counsel misstated the evidence pointing to Matthew as the actual shooter, or that Michael's counsel and the prosecutor otherwise exploited the danger of prejudice inherent in joining the trials through their cross-examinations and arguments to the jurors, should be treated as concessions, which are fatal to respondent's position that Matthew's trial on the capital murder charge was a fair one and the jury's verdict a reliable one. The Eighth and Fourteenth Amendments, as well as state law, demand that the special circumstance be set aside and the death judgment reversed.

II

THE TRIAL COURT'S REFUSAL TO INSTRUCT THE JURY ON THE LESSER-INCLUDED OFFENSES OF VOLUNTARY MANSLAUGHTER AND ATTEMPTED VOLUNTARY MANSLAUGHTER IN A REASONABLE HEAT OF PASSION VIOLATED MATTHEW'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO DUE PROCESS, TRIAL BY JURY, AND TO PRESENT A DEFENSE AS GUARANTEED BY THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS

A. Introduction

As discussed in the opening brief, the trial court refused Matthew's requested instructions on voluntary manslaughter and attempted voluntary manslaughter in a reasonable heat of passion upon an incorrect legal determination that a reasonable heat of passion requires actual provocation from the victim killed. (AOB 54, 68-88.) Penal Code section 192, subdivision (a), does not impose such a requirement. Rather, California law requires only findings that like circumstances would "provoke" a reasonable person to a passionate, rash act against the victim and that the defendant in fact acted out of such passion. (AOB 68-88.) There was substantial evidence supporting such findings as to all of the victims in this case. (AOB 88-103.) Hence, the court violated state law, as well as Matthew's Sixth, Eighth, and Fourteenth Amendment rights to instructions and a jury determination on every element of the charged offenses, to due process and to present a full and meaningful defense, and to reliable guilt phase verdicts by refusing the instructions. (AOB 56-62, 106-107.) Finally, because respondent cannot prove the errors harmless beyond a reasonable doubt, the entire judgment must be reversed. (AOB 106-122.)

Respondent disagrees. (RB at pp. 49-65.) Respondent is wrong.

B. Respondent's Failure To Dispute That Penal Code Section 192, Subdivision (a) Does Not Require Actual Provocation From The Victim Killed, And Therefore That The Trial Court's Basis For Refusing The Instructions Was Legally Incorrect, Should Be Treated As A Concession

Appellant's opening brief acknowledged that the appellate court in *People v. Spurlin* (1984) 156 Cal.App.3d 119 announced a general "rule" – subject to exceptions – that Penal Code section 190.2, subdivision (a), requires that provocation must come from the victim killed, and that several other published decisions, relying on *Spurlin*, have cited the same general rule without independent analysis. (AOB 78-88.) Matthew argued at length, however, that *People v. Spurlin* was wrongly decided. (AOB 78-88.) Section 190.2, subdivision (a) imposes no such requirement. (AOB 68-88.)

With respect to the objective prong of the reasonable heat of passion that will mitigate a killing to voluntary manslaughter, "no specific type of provocation [is] required under section 192 . . . ." (*People v. Berry* (1976) 18 Cal.3d 509, 515; accord, *People v. Lasko* (2000) 23 Cal.4th 101, 108; *People v. Breverman* (1998) 19 Cal.4th 142, 162-163; *People v. Valentine* (1946) 28 Cal.2d 121, 141-144; AOB 68-88.) The only requirement is that like circumstances "would cause an ordinary person of average disposition to act rashly or without due deliberation or reflection" against the victim. (AOB 68-88, citing, *inter alia*, *People v. Lee* (1999) 20 Cal.4th 47, 59, *People v. Wickersham* (1982) 32 Cal.3d 307, 326, *People v. Valentine*, *supra*, 28 Cal.2d at pp. 136-144, and *People v. Logan* (1917) 175 Cal. 45, 48.) Such circumstances include those wherein: a) the defendant reasonably, but mistakenly, believes that the victim engaged in passion-provoking conduct; b) the defendant unintentionally kills the victim in an

assault upon a person who has engaged in, or a person the defendant reasonably believes has engaged in, passion-provoking conduct; and c) the defendant "reasonably associates" the victim with the passion-provoking conduct of a third party, even if he or she did not explicitly adopt that conduct. (AOB 68-88, citing, *inter alia*, *People v. Breverman*, *supra*, 19 Cal.4th at pp. 149, 151, 163, *People v. Minifie* (1996) 13 Cal.4th 1055, 1063-1068, *People v. Lee*, *supra*, 20 Cal.4th at p. 59.)

Curiously, respondent does no more than cite *People v. Spurlin*, *supra*, 156 Cal.App.3d 119, and cases that directly or indirectly rely on that decision, as standing for the proposition that voluntary manslaughter in the heat of passion generally requires actual provocation from the victim killed. (RB 57-58.) Of course, Matthew has no quarrel with respondent's description of *Spurlin*'s holding. Matthew's quarrel is with the *soundness* of *Spurlin* and its progeny. Respondent does not even address Matthew's argument in this regard, much less make any effort to dispute it. Respondent's failure to dispute the correctness of Matthew's legal position should be deemed a concession. Hence, respondent should be deemed to concede that the trial court erred in relying on *Spurlin* to refuse the jury instructions on voluntary manslaughter in the heat of passion as to any victim other than Regina Watchman – the only victim who *actually* engaged in passion-provoking conduct.

C. The Objective Prong Of A Reasonable Heat Of Passion Requires That A Reasonable Person Would Be Provoked To Act Rashly, Not To Kill, Under Like Circumstances

Respondent discusses at length what it perceives to be conflicting lines of authority with regard to whether the objective prong of reasonable heat of passion requires that a reasonable person would be provoked *to kill*

under like circumstances or whether it requires that a reasonable person would be provoked to "*act rashly*" under like circumstances. (RB 55-56.) While the point appears to be an academic one, since respondent contends that the evidence of heat of passion was insufficient to support the instructions under either standard (RB 60), it nevertheless warrants a brief reply.

It has long and well been settled that the objective prong of reasonable heat of passion requires that the circumstances be such as to "to render ordinary men of average disposition liable to act rashly or without due deliberation and reflection, and from this passion rather than from judgment." (*People v. Logan*, *supra*, 175 Cal. at p. 49; accord, e.g., *People v. Koontz* (2002) 27 Cal.4th 1041, 1086; *People v. Lasko*, *supra*, 23 Cal.4th at p. 108; *People v. Breverman*, *supra*, 19 Cal.4th at p. 163; *People v. Berry*, *supra*, 18 Cal.3d at p. 515; *People v. Valentine*, *supra*, 28 Cal.2d 121, 139.) Indeed, given that a reasonable heat of passion may mitigate both intentional *and* unintentional killings (*People v. Lasko*, *supra*, 23 Cal.4th at pp. 107-110), it necessarily follows that it does not require that a reasonable person would be incited to kill under like circumstances. The reason for this rule is one that respondent otherwise recognizes: a reasonable man, no matter how provoked, simply does not kill without legal justification. (RB 55; see, e.g., LaFave, *Substantive Criminal Law* (4th ed. 2003), § 15.2(b) at p. 705 [test is whether there is adequate "provocation which causes a reasonable man to lose his normal self-control; and although a reasonable man who has thus lost control of himself would not kill, yet his homicidal response to the provocation is at least understandable"]; Hobson, C., *Reforming California's Homicide Law* (1996) 23 Pepp. L. Rev. 495, 550; Moreland, R. *The Law of Homicide* (1952) at p. 68 [law mitigates

murder to voluntary manslaughter "because, while it is believed that all men should do as a reasonable man would do under any and all circumstances, it is also recognized that human nature is frail, often when strongly provoked, failing to measure up to the standard of the reasonable man"].)

D. The Court's Error In Refusing The Requested Instructions As To All Of The Victims Was Not Invited

As predicted in the opening brief (AOB 103-106), respondent argues that, although the trial court has an independent duty to instruct on factually supported lesser-included offenses and defense counsel in fact requested instructions on voluntary manslaughter and attempted voluntary manslaughter in the heat of passion, Matthew's counsel invited the court's erroneous refusal to so instruct because: 1) he "conceded that the trial court should give the instructions only as to the count relating to Ms. Watchman" (RB 49); and 2) following the court's ruling limiting the instruction to Watchman only, he cited a tactical basis for withdrawing his request for the instructions as to the Watchman murder charge alone (RB 58). As respondent's argument is made in a perfunctory fashion and certainly raises no point or authority that was not predicted and refuted in the opening brief, an extended reply is unnecessary here.

It is certainly true that, after requesting the instructions as to all of the victims, Matthew's counsel acquiesced that, under *People v. Spurlin*, *supra*, 156 Cal.App.3d 119, the instruction would only apply to the Watchman charge. (19 RT 2947.) Nevertheless, counsel did *not* express a tactical basis for his acquiescence or "concession." (19 RT 2947.) Hence, under black letter law in this state, the invited error doctrine is inapplicable. (AOB 103-106, and authorities cited therein.) Indeed, in decisions issued

after the opening brief (but before respondent's brief) was filed in this case, this Court has yet again confirmed that "the invited error doctrine is inapplicable [when] it does not appear that counsel *both* '"intentionally caused the court to err' and clearly did so for tactical reasons." (*People v. Dunkle* (2005) 36 Cal.4th 861, 923; see also *People v. Moon* (2005) 37 Cal.4th 1, 27 ["[t]he invited error doctrine will not preclude appellate review if the record fails to show that counsel had a tactical reason for requesting or acquiescing" in an instructional error].)

Respondent is also correct that counsel expressed a tactical basis for withdrawing his request for the instruction *as to the Watchman charge alone*. (RB 58.) Were Matthew's challenge to the court's failure to provide the instructions as to that charge *only*, then the invited error doctrine might arguably apply.

However, Matthew's challenge is to the court's original error in refusing to provide the instructions as to *all* of the victims. In this regard, respondent elsewhere recognizes that counsel only withdrew his request for the instruction as to Watchman "[*b*]*ecause* the trial court limited any voluntary manslaughter instructions to the killing of Watchman" (RB 62, italics added) and "in light of" the court's "rulings" limiting the instruction as to Watchman, which only left defense counsel the option of "relying on a second degree murder theory" as to the other victims, because he "did not want to confuse the jury with multiple standards of provocation." (RB 67; see also AOB 105-106 and 20 RT 3230-3231.) Respondent's recognition that counsel's request was made to mitigate the harm from the court's original erroneous ruling is fatal to its argument that counsel invited the court's original error. (See AOB 106, citing, *inter alia*, *People v. Turner* (1990) 50 Cal.3d 708, 744, and fn. 18 ["defensive acts" to mitigate effect of

adverse ruling do not amount to waiver] and *People v. Watts* (1976) 59 Cal.App.3d 80, 85-86, and fn. 2, cited with approval in *People v. Wickersham*, *supra*, 32 Cal.3d at p. 332 [counsel's request for inappropriate instruction, made only out of deference to court's error, did not invite the error]; see also Witkin, *Cal. Procedure* (4th ed.), Ch. XIII, § 387 [invited error doctrine does not apply to defensive acts].)

E. Respondent Misapprehends The Substantial Evidence Rule In The Lesser-Included Instructional Context; Substantial Evidence Supported The Requested Instructions As To All Of The Victims

As discussed in the opening brief, there was substantial evidence from which the jurors could find that: Matthew and Michael reasonably believed that a group of people at the Watchman apartment had committed an extremely brutal assault on their mother and stolen her belongings, which provoked in them a reasonable heat of passion; that, in the rapid escalation of violence that ensued after they entered the apartment, they reasonably believed that Regina Watchman and Dewayne Arnold were at least two of the people responsible for that assault and that Dewayne Arnold was about to (or already had) assault or shot Michael; and that the perpetrator began shooting Arnold and Watchman as an immediate and reasonably impassioned response to this culmination of events. (AOB 88-99.) Further, there was substantial evidence from which the jurors could find that the shooter intentionally shot Leslie Trudell, Rodney James, and Beulah John because he "reasonably associated" all of the apartment's occupants with the series of passion-provoking events that preceded the shooting or that he shot them unintentionally during the course of his impassioned shooting of Watchman and Arnold. (AOB 99-102.) Thus, substantial evidence supported instructions on voluntary manslaughter, and

attempted voluntary manslaughter, in the heat of passion. (AOB 62-102, and authorities cited therein.)

As points of law, respondent does not dispute that the mitigating effect of a reasonable heat of passion applies to the killing of victims whom the defendant reasonably, even if mistakenly, believes have engaged in passion-provoking conduct, to victims who are unintentionally killed in the course of a reasonably impassioned assault on another, and to victims whom the defendant "reasonably associates" with the passion-provoking conduct of third parties, even if they did not explicitly adopt that conduct. (AOB 68-88, citing, *inter alia*, *People v. Breverman*, *supra*, 19 Cal.4th at pp. 149, 151, 163, *People v. Minifie*, *supra*, 13 Cal.4th at pp. 1063-1068, and *People v. Lee*, *supra*, 20 Cal.4th at p. 59; see RB 53-57.) Respondent's only quarrel appears to be with the facts.

But it is with the facts that respondent's argument falters. As fully discussed below, citing only those facts that support the judgment on the greater offenses, while completely ignoring other evidence that supported findings on the lesser-included offenses, respondent contends that the evidence was insufficient to support the requested instructions as to any of the victims. (RB 59-61.) Utilizing the same approach, respondent contends in the alternative that the evidence was sufficient to support the instruction only as to Watchman – as the trial court ruled – because there was evidence suggesting that the boys knew that it was only Watchman who had participated in the assault on their mother. (RB 61-62.) Respondent apparently concludes that because the evidence was legally sufficient to support the verdicts on the charged offenses, the evidence did not support instructions on the lesser-included offenses. Respondent misapprehends the appropriate application of the substantial evidence rule in the lesser-

included offense context.

1. A Trial Court's Failure to Instruct on Lesser-included Offenses That Are Supported by Substantial – Even If Contradicted – Evidence Amounts to Error, Even If the Evidence Is Legally Sufficient to Support Verdicts on the Charged Offenses

Where a defendant challenges the legal sufficiency of the evidence to support the verdicts, the issue is whether "substantial evidence" supported the verdicts. (See, e.g., *People v. Cuevas* (1995) 12 Cal.4th 252, 260-261.) Where, as here, however, the defendant challenges the omission of a lesser-included offense instruction, the issue is whether "substantial evidence" would have supported verdicts on *the lesser-included offense*. (See, e.g., *People v. Breverman*, *supra*, 19 Cal.4th at pp. 162-163.)

Just as "substantial evidence" sufficient to support a judgment is evidence from which "'a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt'" (*People v. Cuevas*, *supra*, 12 Cal.4th at p. 260, and authorities cited therein), so too is substantial evidence in the lesser-included instruction context "evidence from which a jury composed of reasonable persons *could* conclude that the lesser offense, but not the greater, was committed" or "evidence that a reasonable jury could find persuasive." (*People v. Breverman*, *supra*, 19 Cal.4th at pp. 162, 177, italics in original, internal quotations, citations, ellipses, and parenthesis excluded; accord, *People v. Flannel* (1979) 25 Cal.3d 668, 684-685.) In both contexts, "the focus of the substantial evidence test is on the *whole record* of evidence presented to the trier of fact, rather than on 'isolated bits of evidence.'" (*People v. Cuevas*, *supra*, 12 Cal.4th at p. 260, italics added [sufficiency of the evidence to support the judgment]; *People v. Breverman*,

supra, 19 Cal.4th at pp. 162-163 [sufficiency of the evidence to support instructions]; *People v. Barton* (1995) 12 Cal.4th 186, 202-203; *People v. Elize* (1999) 71 Cal.App.4th 605, 613.)

"In deciding whether evidence is 'substantial' . . . in [either] context, a court determines only its bare legal sufficiency, not its weight." (*People v. Breverman*, *supra*, 19 Cal.4th at p. 177 [lesser-included offense instructions]; *People v. Ochoa* (1993) 6 Cal.4th 1199, 1206 [sufficiency of the evidence to support the judgment].) In both contexts, "courts should not evaluate the credibility of witnesses, a task for the jury." (*People v. Breverman*, *supra*, at p. 162 [to support lesser-included offense instructions]; *People v. Ochoa*, *supra*, at p. 1206 [to support the judgment].) Hence, in both contexts, "[t]he testimony of a single witness," even if it conflicts with other evidence, "can constitute substantial evidence . . . ." (*People v. Lewis* (2001) 25 Cal.4th 610, 646 [lesser-included offense instructions]; *People v. Barton*, *supra*, 12 Cal.4th at p. 202 [same]; *People v. Wickersham*, *supra*, at p. 324 [same]; see also *People v. Chavez* (1985) 39 Cal.3d 823, 831 [sufficiency of evidence to support judgment].) And, just as doubts regarding the sufficiency of the evidence to support a judgment will be resolved on appeal in favor of the judgment (see, e.g., *People v. Ochoa*, *supra*, at p. 1206), so too will "[d]oubts as to the sufficiency of the evidence to warrant instructions . . . be resolved *in favor of the accused.*" (See, e.g., *People v. Ratliff* (1986) 41 Cal.3d 675, 694, italics added; accord, *People v. Flannel*, *supra*, 25 Cal.3d. at p. 685; *People v. Wilson* (1967) 66 Cal.2d 749, 763.)

Here, in arguing that the evidence was insufficient for the jurors to conclude that the boys were reasonably provoked to a state of reason-obscuring passion, respondent cites only those portions of the record

supporting the judgment while ignoring those portions supporting the lesser-included offense. Since Matthew's challenge is not to the sufficiency of the evidence to support the judgment, but rather to the failure to instruct on evidentiary supported lesser-included offenses, respondent's position is utterly without merit.

2. There Was Substantial Evidence from Which the Jurors Could Reasonably Find That 18-Year-Old Matthew and 19-Year-Old Michael Were Awakened in the Dead of Night by Their Bloodied and Beaten Mother, Who "Hysterically" Told Them She Had Been Beaten and Robbed by a Group of People at Watchman's Apartment and Insisted That They Retrieve Her Belongings, Which Reasonably Incited Their Intense, Passionate Emotions

Respondent first contends that "[t]he assault on Ms. Souza was simply not enough to provoke a reasonable person to a heat of passion" against all of the victims. (RB 59.) This is so, respondent reasons, because there was evidence suggesting that the boys *knew* that only a single woman – Watchman – had assaulted their mother. As to Watchman, respondent appears to contend, her assault on their mother was insufficient to provoke a reasonable person's passion because the boys did not believe the assault was particularly brutal or significant. (RB 59-60.)

In support of its contention that the boys knew that it was only Watchman who had assaulted their mother, respondent points to an isolated segment of Ms. Souza's testimony that she "probably" told the boys that she had been beaten by one woman. (RB at p. 59, citing 14 RT 2211-2212.) However, respondent ignores other portions of her testimony in which she stated that she could not recall exactly what she had told her sons because

she was drunk (14 RT 2097-2098, 2211), in which she was specifically asked if she had told them that she was by assaulted by "one woman" and she replied that she could not recall (14 RT 2211), in which she stated that she simply did not "*think*" that she had told the boys she'd been beaten by "a whole bunch of people" (14 RT 2211), in which she was asked if she had told them she was beaten by "a woman who told [her] to leave her place" and replied that she was "not sure of [her] exact words" but she thought she had told them "something along that lines" (14 RT 2211-2212), and in which she testified that she "probably told them that [she] got beat up" without specifying by whom (14 RT 2098; see also 14 RT 2214, 2153, 2192). In other words, Ms. Souza's testimony fell far short of conclusively establishing that she told her sons that only Watchman had beaten her. To the contrary, her testimony about what she told her sons was vague and inexact. This is precisely why the *other* circumstantial evidence regarding what she had told the boys, and what they *believed* had happened to her, was so critical.

In this regard, respondent *completely* ignores what was perhaps the most compelling evidence of what Ms. Souza *told* her young sons had happened to her – the testimony of Ed Arnold, whom respondent People represented at trial to be the most reliable witness because he was the only witness who was sober that night. (20 RT 3303.) According to Ed Arnold's unequivocal testimony, Ms. Sousa *repeatedly* and furiously referred to the "beating" she had suffered at the hands of "*those people*" in Watchman's apartment all the way home to her sons – a refrain Arnold testified made no sense because *he* knew that a group of people had not beaten her. (19 RT 2921–2922.)

Respondent recognizes that what Ms. Souza told her sons had

happened, and what the boys believed had happened, could be gleaned in part from Michael's remarks upon entering the apartment. (RB 61.) Again, however, respondent insists that this evidence established that the boys knew that it was Watchman alone who beat their mother by focusing on isolated bits of testimony that Michael furiously demanded to know, "*who's the bitch* who beat up my mom," and "*who's the one* that beat up my mom." (RB 61, citing 15 RT 2322-2323, 2345; 17 RT 2733-2734; 19 RT 3105, 3132, italics in original.) Once again, in making this argument, respondent ignores the other testimony describing Michael's furious statements as demanding to know which of the "motherfuckers," and which of the "fucking *guys*," had beaten their mother (15 RT 2322-2326), "who jumped my mother" (13 RT 2044-2045; 15 RT 2454), and "who kicked my mother's ass, just show me who did it" (17 RT 2733-2734; 18 RT 2778). Indeed, although the People insist on appeal that the boys knew that their mother's sole assailant was the female resident of the apartment – Watchman – it is significant that *none* of the witnesses testified that Michael demanded to know which woman lived at the apartment.

In addition, based on the testimony that Ms. Souza told her sons to retrieve her purse and other belongings from the apartment (14 RT 2097, 2101, 2108, 2150, 2156, 2214, 2219), and that Michael also angrily demanded that to know who had "stole[n]" his mother's purse and repeatedly ordered the apartment's occupants to return it to him (13 RT 2778, 2054, 2056; 15 RT 2454-2455; 17 RT 2778), the jurors could further find that they believed that more than one person had participated in an assault *and* robbery of their mother.

"Substantial evidence" is not uncontradicted evidence. Although there were some conflicts in the evidence, it was clearly substantial enough

for the jurors to reasonably find that Ms. Souza told her sons that a group of people at the apartment had beaten and robbed her and that the boys believed her story.

In an apparent attempt to neutralize the emotional intensity of the circumstances under which Ms. Souza recounted the assault to her sons, respondent points to an isolated segment of Esther Dale's testimony that Ms. Souza only "cried 'a little bit'" after the assault and on the drive home to her sons. (RB 59.) But respondent ignores other portions of Esther Dale's testimony that Ms. Souza complained of being in pain and was so upset on the way home that she and Ed Arnold had to repeatedly tell her to calm down (17 RT 2630, 2655), as well as other portions of Ms. Souza's own testimony that she was crying and "hysterical" all the way home and when she awakened her young sons (14 RT 2154, 2156).

Similarly, respondent cites to Esther Dale's testimony that she did not recall seeing any blood on Ms. Souza when they drove her home. (17 RT 2634.) However, respondent ignores Dale's testimony that she might simply have been *unable* to see the blood because it was dark and Ms. Souza was sitting in the back seat. (17 RT 2634.) Respondent further ignores Ms. Souza's own testimony that she was not only bloody when she awakened her sons, but that she was *certain* that they saw it as she "hysterical[ly]" recounted the attack to them. (14 RT 2098, 2188, 2193.)

At bottom, respondent "attempts to parse the evidence as narrowly as possible, resisting all reasonable inferences that could be drawn from the testimony of [the witnesses], and [only citing such portions of their testimony that support his argument. In so doing, [respondent] simply ignores the substantial evidence rule." (*People v. Panah* (2005) 35 Cal.4th 395, 488.) Properly applying the substantial evidence rule and viewing the

record as a whole, there was compelling circumstantial evidence from which the jurors could reasonably conclude that Ms. Souza was bloodied and "hysterical" when she awakened her very young sons in the dead of night and recounted a horrific story of having been beaten and robbed by a group of people at the apartment, that the boys reasonably believed her story (see, e.g., *People v. Brooks* (1986) 185 Cal.App.3d 687, 693-694 [evidence that defendant reasonably but mistakenly believed that victim had killed brother, based on information communicated to him, was sufficient evidence to support finding that reasonable person would have been provoked to state of passion under like circumstances]; accord, *People v. Lee*, *supra*, 20 Cal.4th at p. 59; *People v. Logan*, *supra*, 175 Cal. at p. 49), that the sight of their mother and the details of her story made them "very upset" and reasonably inflamed their passion (14 RT 2203-2204; see, e.g., 2 Wharton's *Criminal Law* (15th ed. 1994) § 163 at p. 63 [harm or threat to family member well recognized as adequate to engender passion in reasonable person]; accord, *People v. Barton*, *supra*, 12 Cal.4th at p. 202 [evidence that victim and defendant's daughter were involved in an upsetting traffic accident during which the victim spat on the daughter's car, that the daughter was "extremely upset" when she later relayed the altercation to the defendant, and that the defendant armed himself and confronted the victim, at which point a heated argument ensued between the two men before the defendant shot the victim, was sufficient to warrant instructions on voluntary manslaughter in the heat of passion]; *People v. Brooks*, *supra*, 185 Cal.App.3d at pp. 693-694; LaFave, *supra*, § 15.2(b) at pp. 777, 782), and that it was in this impassioned state that the boys armed themselves and – at their "hysterical" mother's insistence – went to the apartment.

3. There Was Substantial Evidence from Which the Jurors Could Reasonably Find That the Boys' Emotions Were Still Reasonably Intense When They Arrived at the Apartment

As predicted (AOB 93-94), respondent next contends that even if the boys' passion had reasonably been provoked by the sight of their hysterical and bloodied mother and the horrific story she told, their passion had sufficient time to cool as a matter of law by the time they arrived at the apartment. (RB 60.) Although it is not entirely clear, respondent appears to contend that the bare passage of time between the boys' learning of the assault and the commission of the shooting was, *as a matter of law*, sufficient time for a reasonable person's passions to have cooled and reason return. (RB 60.) Respondent's contention is flawed for several reasons.

First, respondent makes no more than passing reference to the fact that the judge – who sat through the trial and had the opportunity to observe the demeanor of the witnesses – determined that there was substantial evidence that the boys arrived at the apartment and shot *all* of the victims in a subjective state of passion and, at least as to Watchman, that there was substantial evidence from which the jurors could conclude that their passion was reasonable – i.e., that it had *not* "cooled" as a matter of law or fact when the shooting occurred. (RB 52.) The court's factual determination that the evidence supports a particular instruction is entitled to great weight on appeal. (See, e.g., *People v. McKelvy* (1987) 194 Cal.App.3d 694, 705; *People v. Page* (1980) 104 Cal.App.3d 569, 575.)

Furthermore, the boys' discovery of the assault on their mother did not mark the *end* of the passion-provoking events that night, but just the *beginning*. (See, e.g., *People v. Wharton* (1991) 53 Cal.3d 522, 569

[provocation "need not occur instantaneously, but may occur over a period of time"]; Perkins & Boyce, *Criminal Law* (3d ed. 1982) at p. 100 [where series of events are provocative, cooling time should be measured "from 'the last straw'"]; accord, LaFave, *Substantive Criminal Law*, *supra*, § 15.2(d) at p. 787 and fn. 96, citing *People v. Berry*, *supra*, 18 Cal.3d 509.) Although respondent contends that Ms. Souza testified that she had "calmed" down after telling her sons about the assault and while they drove around looking for the apartment (RB 59, citing 14 RT 2161), in truth she testified that she had "probably" "calmed down *a bit*" as they drove around and simply was not "*as* hysterical" as she had been earlier. (14 RT 2162.) Furthermore, she was insistent that the boys find the apartment and retrieve her belongings, including her purse and medication. (14 RT 2096-2097, 2099, 2101, 2107-2108, 2150, 2155-2156, 2193-2194, 2203-2204, 2214, 2219.) In other words, although not "*as* hysterical," her hysteria – and thus the passion-provoking circumstances – continued after she told her sons about the assault and while they drove around looking for the apartment.

Moreover, as discussed in the opening brief, the evidence was susceptible of a more than reasonable inference that no more than a few minutes had passed between the boys dropping their still "hysterical" mother back at home and entering the Watchman apartment. (AOB 93-94.) Cooling time is ordinarily a question for the jury. (See, e.g., *People v. Berry*, *supra*, 18 Cal.3d at p. 515.) Certainly, given the intensity of the event triggering their passion – the boys seeing their hysterical and bloodied mother and hearing her story – and the continuing nature of the passion-provoking circumstances that night, the evidence precluded a determination that the boys' passion had cooled by the time they entered the apartment as a matter of law.

Respondent further contends that the evidence established that the boys' passion had in fact cooled before the shooting. In support of this contention, respondent points to Hillary Leonesio's testimony that the boys pulled up in their car, repositioned the car, and watched her enter before they ran into the apartment. (RB 60-61.) Even assuming for the sake of argument that Leonesio's testimony conclusively established the truth of those facts, however, the fact that the boys waited a few seconds before entering the apartment simply was not necessarily inconsistent with a state of passion.

Respondent similarly contends that the evidence that the brothers and their companion stood in front of "exits from the living room" established a carefully orchestrated plan, which was inconsistent with passion. (RB 60.) The problem with respondent's argument is that the room was extremely small and virtually *any* position a person took in that room would have "blocked" an "exit" – the front door in one corner, the laundry nook on another wall, the kitchen area, and the patio door on yet another. (13 RT 2035; 15 2235, 2304-2305; People's Trial Exhibits 31 and 33 A-L; A Deft's Ex. A; B Deft.'s Ex. L.) To be sure, *one* view of the evidence as a whole might have been consistent with a plan; again, however, it was by no means the *only* view.

Furthermore, even assuming for argument's sake that the boys' passion might have smoldered before the shooting, that does not end the matter. As discussed in the opening brief (but ignored by respondent), passion which is actually and reasonably aroused by one provocative event can smolder, during which time the defendant's reason returns, only to be suddenly, violently, and reasonably re-ignited by a later provocative event. (See, e.g., *People v. Berry*, *supra*, 18 Cal.3d at pp. 513-516; *People v.*

Bridgehouse (1946) 47 Cal.2d 406, 408-414; *People v. Spurlin*, *supra*, 156 Cal.App.3d at p. 126; Perkins & Boyce, *supra*, at p. 100 ["passion may be suddenly revived by circumstances that bring the provocation vividly to mind"]; LaFave, *supra*, § 15.2(d) at p. 787.) As one commentator has explained regarding "cooling" measured under such circumstances:

> Not infrequently, there is a considerable time interval between the victim's act of provocation and the defendant's fatal conduct – time enough for passion to subside. In the meantime, however, some event occurs which rekindles the defendant's passion. If this new occurrence is such as to trigger the passion of a reasonable man, the cooling-off period should start with the new occurrence . . . .

(LaFave, *supra*, § 15.2(d) at p. 787 and fn. 96, citing *People v. Berry*, *supra*, 18 Cal.3d 509; accord, Perkins & Boyce, *supra*, at p. 100 [where series of events are provocative, cooling time should be measured "from 'the last straw'"].)

4. There Was Substantial Evidence from Which the Jurors Could Reasonably Conclude That the Boys' Passionate Emotions Reasonably Intensified in the Confusing, Chaotic, and Suddenly Developing Violent Situation They Encountered at the Apartment and That the Shooter Acted from That Passion and Not Reason

As discussed at length in the opening brief, even if the boys' passion had cooled to some extent before entering the apartment, the jurors could certainly find that their passion was reignited and intensified by the rapid escalation of violence they encountered after entering. (AOB 66-68, 92-98.) When Michael repeatedly and furiously demanded to know the identity of his mother's attackers and the return of her belongings, both Watchman and Dewayne Arnold responded with aggression – responses that the boys

could reasonably take as admissions, particularly given that their judgment was already reasonably clouded by the passion engendered by their mother's horrific story, bloodied appearance, and "hysterical" demeanor. (AOB 94-97, citing *People v. Edelbacher* (1989) 47 Cal.3d 983, 1010-1011 [admission is reasonable inference from failure to deny accusation], *People v. Miranda* (1987) 44 Cal.3d 57, 84 [person's conduct may be relevant to show consciousness of guilt], and *People v. James* (1976) 56 Cal.App.3d 876, 889.)

And, when Arnold – a very large man who was *extremely* intoxicated on methamphetamine and alcohol – angrily got up and grabbed Michael's gun, some witnesses described hearing and seeing a gunshot go off in their struggle and others described a scuffle and the sound of a lamp loudly crashing to the floor. (15 RT 2266, 2362-2366, 2379, 2405, 2424, 2430, 2433; 16 RT 2478; 18 RT 2809-2812.) From this evidence, the jurors could find that the shooter reasonably believed that Arnold had harmed, or was about to harm, Michael – just as he had already harmed their mother – a belief that further stoked the flames of his passion, which exploded in an immediate burst of gunfire aimed at Arnold and Watchman. (AOB 96-98.)

Apart from its position – refuted above – that the evidence conclusively established that the boys knew that only Watchman had assaulted their mother, and therefore that all of the other victims were completely innocent, respondent does not address Matthew's argument that the jury could find that the intensity of emotion directed at Arnold was reasonable under the circumstances. (See RB 59-62.) However, in another section of its brief, respondent does contend that the jurors could not consider Arnold's conduct as "provocation" in even the *un*reasonable heat of passion context – i.e., as sufficient to cite the boys' passion as a

subjective matter only. (RB 72, Argument III.) Respondent relegates to a footnote its legal argument supporting this contention – Arnold's conduct could not "provoke" passion as a matter of law because it amounted to a predictable response from someone resisting a felony. (RB 72, fn. 18, citing *People v. Rich* (1988) 45 Cal.3d 1036.) As a preliminary matter, the Court should decline to consider a legal "argument" made in a footnote. (See, e.g., *People v. Griffin* (2004) 33 Cal.4th 536, 589, fn. 25 [perfunctory arguments not properly briefed should be rejected on that basis]; *Placer Ranch Partners v. County of Placer* (2001) 91 Cal.App.4th 1336, 1342, fn. 9 [arguments raised in footnotes not properly briefed].) In any event, the "argument" is without merit.

The authority on which respondent relies is inapposite. In *People v. Rich*, *supra*, the defendant killed the victim in the course of raping her. Amicus curie argued that the victim's resistence to the rape could have provoked the defendant's passion and that the trial court should have instructed the jurors on provocation sufficient to incite the passion of a reasonable person. (45 Cal.3d at p. 1112.) Relying on its previous decision in *People v. Jackson* (1980) 28 Cal.3d 264, 306, in which it had held that a victim's screams upon being awakened by the defendant burglarizing her home did not satisfy the objective, "provocation" prong of the reasonable heat of passion test, this Court rejected the argument on the ground that no reasonable person would be provoked to a state of passion by his victim's resistance to rape. (*Id.* at p. 1112.) In both cases, the Court quite correctly held as a matter of law that a reasonable person who initiates an *unprovoked* act of violence – such as rape – against victims whom they know to be innocent would not be provoked into a state of passion by his victims' resistence.

Of course, this case is entirely different. Unlike the defendants in *Rich* and *Jackson*, there was substantial evidence from which the jurors could conclude that the Souza brothers act of violence was *not* unprovoked because they reasonably believed that it was *the victims* who had initiated the violent events preceding the shooting. The distinction is dispositive.

In *People v. Berry*, *supra*, 18 Cal.3d 509, for instance, after being provoked to a state of passion by a series of events his wife had initiated, the defendant told his wife that he intended to kill her. In response, she began screaming. This Court held that her screams in response to the defendant's threat to kill her could be considered the final act in a cumulative series of "provocative" events that resulted in the defendant's *reasonable* heat of passion. (*Id.* at pp. 513-516; accord, *People v. Barton*, *supra*, 12 Cal.4th at p. 202 [evidence that victim and defendant's daughter were involved in an upsetting traffic accident during which the victim spat on the daughter's car, that the daughter was "extremely upset" when she later relayed the altercation to the defendant, and that the defendant armed himself and confronted the victim, at which point a heated argument ensued between the two men before the defendant shot the victim, was sufficient to warrant instructions on voluntary manslaughter in the heat of passion].)

Here, as in *Berry* and unlike *Rich* and *Jackson*, the boys had already been provoked to a state of passion before entering the apartment with guns and demanding to know the identity of their mothers' assailants and the return of her property. As in *Berry*, Arnold's violent response could be considered the final act in a cumulative series of "provocative" events resulting in the shooter's *reasonable* heat of passion.

Finally, respondent contends that the manner in which the shooting was committed conclusively established that it was premeditated and

deliberate, not impulsive and impassioned, because Page Nelson and Hillary Leonesio testified that "there were several bursts of fire, each followed by a pause before the next burst," every shot hit human beings, who were "spread throughout the apartment in nearly every direction," and, after the shooting, the boys "slowly drove away." (RB 60-61.) Respondent is incorrect.

As a preliminary matter, even accepting for argument's sake respondent's view of the evidence, its implicit position that the ability to kill one's intended target or targets, the killing of more than one victim, or one's cautious post-crime conduct, is somehow inconsistent with passion, or conclusively proves premeditation, is without support in law or logic. (See, e.g., *People v. Alcala* (1984) 36 Cal.3d 604, 626 [multiple acts of violence consistent with impassioned "explosion" of violence]; *People v. Anderson* (1968) 70 Cal.2d 15, 32 [post-crime conduct irrelevant to prove killings premeditated or committed in "explosive" state of passion].) In any event, respondent's characterization of the facts distorts them and violates the substantial evidence rule.

Respondent is correct that Page Nelson – who lived about 80 yards from the Watchman apartment – testified that he heard a single shot, followed by a series of shots fired in rapid succession, followed by *one* pause of two to five seconds, followed by several more shots fired in rapid succession. (15 RT 2405-2408, 2420-2423.)

As to Hillary Leonesio's testimony, the three distinct shots she described were the three shots she saw *Michael fire at Arnold* before she ran outside. (19 RT 3109-3110, 3136-3137, 3139-3140, 3160-3161.) As to the remaining the shots, when repeatedly asked how many were fired, Leonesio described them as making a "real repetitive sound. At least ten - "

(19 RT 3110-3111; see also 18 RT 3136), as making "like army machine guns sound . . . very rapid," like "pbtpbtpbtpbtpt" (19 RT 3112-3113; see also 19 RT 3136), and "just continuous sound" until the shots stopped completely (19 RT 3113).

Furthermore, respondent ignores that other witnesses testified that, after hearing a single shot, the remaining shots – which sounded as if they came from a different gun – were all fired in rapid succession, without any pauses between them. (13 RT 2060-2061; 15 RT 2430, 2432-2433; 17 RT 2603-2604.) Indeed, the duration of the entire shooting was described by one witness as no more than four seconds. (16 RT 2481-2482.) As discussed in part E, above, "[t]he testimony of a single witness," even if it conflicts with other evidence, "can constitute substantial evidence . . . ." (*People v. Lewis*, *supra*, 25 Cal.4th at p. 646.) Thus, while one view of the evidence was that there were pauses between shots, which could lend support to an inference that the shooter used a semi-automatic weapon and deliberately aimed at each victim with an intent to kill them, that was by no means the *only* view. The evidence as a whole was susceptible of a more than reasonable inference that the victims were shot in a single burst of automatic weapon fire.

Moreover, it is simply untrue that the victims "were spread throughout the apartment," as respondent contends. (RB 61.) Tellingly, respondent fails to support this assertion with any citation to the record. (RB 61.) This is undoubtedly so because the trial testimony, photographs, and diagrams of the apartment all established that Arnold and Watchman were immediately next to each other when they were shot and that Trudell, James, and John, were all sitting or standing directly behind them when they were shot. (AOB 99-101, 119-120.)

In sum, contrary to respondent's argument and properly applying the substantial evidence rule, the physical evidence in no way conclusively established that "the shootings were planned and deliberate," as respondent insists. (RB 60-61.) There was substantial evidence from which the jurors could have harbored reasonable doubts that the shooting was premeditated and deliberate rather than impulsive and reasonably impassioned. The court erred in refusing the requested voluntary manslaughter instructions.

5. Whether Intentional or Unintentional, There Was Substantial Evidence from Which the Jurors Could Reasonably Find That the Shootings of Leslie Trudell, Rodney James, and Beulah John Were Committed Out of Passion and Not Reason

As discussed above and in the opening brief, instructions on voluntary manslaughter and attempted voluntary manslaughter in the heat of passion as to Leslie Trudell, Rodney James, and Beulah John were supported by evidence reasonably susceptible of the interpretation that they were shot intentionally (as the prosecutor contended) because the boys reasonably associated them with the passion-provoking assault on their mother and subsequent events. (AOB 191-102, citing, *inter alia*, *People v. Breverman*, *supra*, 19 Cal.4th at pp. 149-152, 163 [evidence supported instructions on reasonable heat of passion where some members of group were armed, vandalized defendant's car, and challenged him to fight, and defendant fired several shots at the group, hitting and killing the victim, even though no evidence affirmatively showed that the victim actually participated in the others' provocative conduct] and *People v. Minifie*, *supra*, 13 Cal.4th at pp. 1067-1068 [evidence that defendant "reasonably associated" victim with threats by third parties, even if victim did not

threaten or adopt the third parties' threats, admissible to support claim of self-defense].) As further discussed above, respondent does not dispute as a point of law that the mitigating effect of a reasonable heat of passion applies to the killing of victims whom the defendant "reasonably associates" with the passion-provoking conduct of third parties. (See RB 55-61.)

Respondent's only dispute is a factual one: according to respondent, the evidence established that the boys knew that only Watchman was involved in the assault, and therefore knew that all of the other victims were innocent and did not reasonably associate any of them with the assault. (RB 61-62.) This factual dispute has been addressed and refuted in parts E-1 and E-3, above. Consequently, no further discussion of this aspect of the issue is necessary. Both the law and the facts supported instructions on voluntary manslaughter and attempted voluntary manslaughter in a reasonable heat of passion as to Trudell, James, and John.

As further discussed in the opening brief, the evidence also supported a reasonable inference that Trudell, James, and John were not shot intentionally, but rather were shot inadvertently during the impassioned shootings of Arnold and Watchman. (AOB 99-101.) This evidence supported instructions on voluntary manslaughter as to Trudell, either under a transferred intent theory (see, e.g., *People v. Bland* (2002) 28 Cal.4th 313, 317, 322; *People v. Carlson* (1974) 37 Cal.App.3d 349; *see also People v. Minifie*, *supra*, 13 Cal.4th at p. 1065), or under a theory that shooting Arnold and Watchman in a small, crowded room was a highly dangerous act done with conscious disregard for human life, but without implied malice due to heat of passion (*People v. Lasko*, *supra*, 23 Cal.4th at p. 109 [reasonable heat of passion legally negates implied malice]).

Once again, as a point of law, respondent does not dispute that reasonable heat of passion will mitigate the unintentional killing of a victim who dies as a result of an assault upon a person who engaged in, or a person the defendant reasonably believes engaged in, passion-provoking conduct. Again, respondent's only quarrel is with the facts: according to respondent, the only reasonable interpretation of the evidence was that the shooter intentionally killed, or attempted to kill, each specific victim. (RB 62.)

Without supporting citations to the record, respondent bases its position on "the locations of the victims in various parts of the apartment," the evidence that every shot hit a human being, Martin Jones's testimony that the gun did not sound like an automatic, and Mr. Nelson and Ms. Leonesio's testimony "that they heard several brief bursts and pauses of gunfire." (RB 62.) Once again, however, respondent recites only those portions of the record supporting its view of the evidence while ignoring all others. Because the issue here is whether "substantial evidence" supported the instructions, which requires an examination of the *whole record* and not isolated segments, respondent's argument is without merit.

In this regard, Matthew has addressed and refuted respondent's characterization of Mr. Nelson and Ms. Leonesio's testimony as conclusively establishing that there were "several bursts and pauses of gunfire" in part E-3, above. (RB 60-61.) Respondent is certainly correct that Martin Jones testified that the gun sounded like a semi-automatic, as acknowledged in the opening brief. (RB 62; AOB 13-14.) Again, however, respondent ignores that several of the witnesses testified that they heard one burst of gunfire, in which the shots were fired in rapid succession and without any pauses between them, which would be consistent with an automatic weapon (13 RT 2060; 15 RT 2432; 17 RT 2603-2604; 19 RT

3110-3113, 3136, 3138), that Ms. Leonesio herself testified that the shots sounded as if they came from an "army machine gun" (19 RT 3112), that the prosecution's ballistics expert testified that the expended bullets could have been fired by an automatic or a semi-automatic weapon (18 RT 2851-2852), and that the reliability of Martin Jones's lay opinion that the gun sounded as if it were a semi-automatic was severely undermined by his testimony that he was just as "certain" that a shotgun was fired, which – as respondent elsewhere recognizes – was conclusively refuted by the ballistics evidence (13 RT 2044, 2046-2047, 2049; 16 RT 2477-2478, 2500, 2508). Properly applying the substantial evidence rule, respondent's argument that the only reasonable interpretation of the evidence was that the gun was *not* an automatic is clearly without merit.

Similarly, in part E-3, above and in the opening brief, Matthew has addressed and refuted respondent's contention, unsupported by record citation, that the victims were spread throughout the apartment. (AOB 99-101, 119-120.) Elsewhere in its brief, respondent makes much of the fact that casings were scattered throughout the room when the criminalist arrived and noted their locations as proof that the shooter fired his weapon as he moved around the room, taking aim at each victim. (RB 84, Argument IV.) However, respondent ignores the evidence that witnesses, emergency personnel, and police officers all ran and walked through that room – some even moving furniture (15 RT 2273; 16 2555-2556; compare People's Trial Exhibit 31 to Deft. A's Exhibit A) – before the criminalist arrived on the scene and noted the locations of the casings. (15 RT 2273; 16 RT 2553-2557, 2589, 2591-2592.) As the criminalist herself acknowledged, under the circumstances, the casings could easily have been kicked or moved before her arrival. (16 RT 2556-2557; 19 RT 3001-3002.)

Respondent also insists that the location of the bullet holes, one of which was to the lower half of the north wall near the northeast corner and one of which was to a southeast wall, conclusively proves that the shooter moved about the room taking deliberate aim at each victim. (RB 83-84.) While *one* view of this evidence certainly could be that the shooter intentionally aimed where those bullets struck, it was by no means the *only* view. To the contrary, there are any number of explanations for the location of those holes that are entirely consistent with the theory that the targets of the shooting were Arnold and Watchman and that Trudell, John, and James were shot unintentionally.

Significantly, the location of those holes are entirely consistent with the evidence that *Michael* was the shooter and that his rifle went off during his struggle with Arnold in the center of the room. (15 RT 2266, 2362-2366; 18 RT 2809-2812; 19 RT 3109-3110, 3139-3140, 3160-3161.) Even based on the theory that Matthew was the shooter, according to the prosecution, he moved *northward*, from his original location in front of the laundry nook to the center of the living room where Arnold was struggling with his brother, as he began firing at Arnold, which easily accounts for the bullet hole on the north wall near the northeast corner. (13 RT 2059; 15 RT 2341; 20 RT 3454; People's Trial Exhibit 31.) And, once he moved forward to the center of the room, he would have turned in an easterly direction to shoot Arnold and a southeasterly direction to shoot Watchman, who was sitting on the couch to Arnold's left. (People's Trial Exhibit 31; Deft. A's Exhibits A, D, 1; Deft. B's Exhibits G and F; 15 RT 2255, 2262, 2268, 2344.) Given the extremely small size of the room, it is entirely is possible that the shooter's weapon moved no more than a few inches – while he was moving and firing a very powerful weapon at Watchman and

Arnold – which would account for the bullet holes in those locations.

It is just as reasonably possible that either or both of those holes were caused by *ricocheting* bullets that struck something else – even bone – first or by bullet *fragments*. Arnold, Watchman and Trudell were struck with some bullets that did not lodge inside of their bodies, but rather exited their bodies and landed or lodged elsewhere. (13 RT 1925-1926, 1941, 1956.) Some of those bullets struck and shattered bone before exiting, or breaking apart and exiting as fragments. (13 1933-1938, 1955-1959, 1969.)

It is also possible that either one of the holes was caused by the .25 caliber handgun firing a second round. The projectiles that made those holes were never recovered; the projectile in the southeast wall was imbedded and could not be retrieved and police were never able to locate the projectile that passed through the north wall. (16 RT 2574-2576; 19 RT 2988.) And the state's firearm expert testified that they could have been caused by .25 caliber bullets. (18 RT 2575-2576.) True, only one .25 caliber *shell casing* was found at the scene (18 RT 2882-2983), but the second casing could have been lost in the chaos that followed the shooting. For instance, it could have been kicked outside or even caught in a victim's clothing and lost at any point before examination. Indeed, other ballistics evidence was lost in this case. Despite a thorough search of the area, police were never able to locate the bullet that went through the north wall to the parking lot outside. (16 RT 2574-2576.)

At bottom, while there might have been *legally sufficient* evidence to support findings that the shooter deliberately took aim at and shot each victim, that was by no means a foregone conclusion. Although respondent chooses to ignore or disregard it, there was substantial other evidence from

which the jurors could reasonably conclude that the gun was an automatic, that the bullets from that gun were fired in a single spray of gunfire for no more than four seconds, an eighteen year-old-boy with no experience with such a powerful weapon had great difficulty controlling it, and that Trudell, James, and John were all struck with stray bullets and without the specific intent to kill.

Regardless of whether they were shot unintentionally in the course of the impassioned shootings of Watchman and Arnold, or intentionally because the shooter reasonably associated every member of the group in the apartment with the series of passion-provoking events that culminated in the shooting (as in *People v. Breverman, supra*), the evidence supported the requested instructions on voluntary manslaughter and attempted voluntary manslaughter as to Trudell, James, and John. (AOB 99-102.) The court erred in refusing to provide them.

F. The Judgment Must Be Reversed

1. The Court's Error Violated Matthew's Fifth, Sixth, Eighth, and Fourteenth Amendment Rights

Respondent contends that because the jurors were "provided with the noncapital option of second degree murder," the court's erroneous refusal to instruct on voluntary manslaughter in the heat of passion did not violate the Eighth or Fourteenth Amendments under *Beck v. Alabama* (1980) 447 U.S. 625, 637-638. (RB 63.) From that premise, respondent leaps to the conclusion that "this leaves the possibility of only state law error" under *People v. Breverman, supra*, 19 Cal.4th at p. 167, in which this Court held that the erroneous omission of lesser-included offense instructions is

ordinarily state law error. (RB 63-64.)[4]

In making this argument, respondent ignores that after it issued its decision in *Breverman*, this Court explicitly recognized that voluntary manslaughter has a "unique legal function" under California law and thus is unlike other lesser-included offenses. (*People v. Rios* (2000) 23 Cal.4th 450, 459.) As extensively discussed in the opening brief, when "the issue of heat of passion . . . is 'properly presented' in a murder case (*Mullaney v. Wilbur* (1975) 421 U.S. 684, 704), *the People* must prove beyond a reasonable doubt that these circumstances [reasonable heat of passion] were lacking in order to establish the murder element of malice." (*People v. Rios*, *supra*, 23 Cal.4th 450, 462; see also *Mullaney v. Wilbur*, *supra*, 421 U.S. at pp. 698-699 ["the Due Process Clause requires the prosecution to prove beyond a reasonable doubt the absence of the heat of passion upon sudden provocation when the issue is properly presented in a homicide case"]; AOB 59-60, 99, 102, 106-107, and fn. 16.) In other words, where there is substantial evidence of reasonable heat of passion, the *absence* of heat of passion is an *element* of murder the prosecution must prove beyond a reasonable doubt. (*People v. Rios*, *supra*, at pp. 454, 462; see also *People v. Breverman*, *supra*, 19 Cal.4th at p. 189.) Consequently, where supported by the evidence, the federal constitutional due process and jury trial

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[4] Of course, as discussed in the opening brief but ignored by respondent, because this Court found that the appellant had not argued that the erroneous omission of instructions on voluntary manslaughter violated the Sixth or Fourteenth Amendments, the Court specifically declined to consider that issue. (*People v. Breverman*, *supra*, 19 Cal.4th at p. 170, fn. 19; AOB 60, fn. 16.) "It is axiomatic that cases are not authority for propositions not considered." (*People v. Gilbert* (1969) 1 Cal.3d 475, 482, fn. 7.)

guarantees to instructions on every element of the charge mandate complete and accurate instructions on voluntary manslaughter in the heat of passion. (*Id.* at pp. 189-191; *see also Mullaney v. Wilbur*, *supra*, at pp. 698-699; *Osborne v. Ohio* (1990) 495 U.S. 103, 122-124 and fn. 17.)

Although *Rios* and *Mullaney*, *supra*, thus conclusively establish that the court's error violated Matthew's federal constitutional rights, and although they were cited for this proposition in the opening brief, respondent plays ostrich to them. Respondent does not even cite either case in its brief, much less make any effort to persuade the Court that they do not control here.

Similarly, as argued in the opening brief, because defense counsel actually *requested* instructions on voluntary manslaughter in the heat of passion, and was clearly attempting to rely on a reasonable heat of passion defense theory, the court's error also violated his Fifth, Sixth and Fourteenth Amendment rights to due process and to present a full and meaningful defense. (AOB 60-61, 98-99, 102, citing, *inter alia*, *Conde v. Henry* (9th Cir. 2000) 198 F.3d 734, 734-739-740 [trial court's refusal to instruct on factually supported lesser-included offense violated Sixth and Fourteenth Amendment rights to instructions on defense theory of case], *Bradley v. Duncan* (9th Cir. 2002) 315 F.3d 1091, 1098-1099 [refusal to instruct on entrapment defense violated defendant's right to due process], cert. denied 540 U.S. 963 (2003), *United States v. Sayetsitty* (9th Cir. 1997) 107 F.3d 1405, 1414 ["a defendant has a constitutional right to have the jury consider defenses permitted under applicable law to negate an element of the offense"]; see also *People v. Rogers* (2006) 39 Cal.4th 826, 871 [drawing distinction between refusal to provide *requested* instructions on lesser-included offenses that encompass defense theory, which implicates

federal constitutional right to present complete defense, and failure to provide such instructions *sua sponte*, which does not].) Respondent also ignores this claim. (See RB 63-65.)

Respondent ignores too much. The error was one of federal constitutional dimension. Hence, respondent bears the burden of proving it harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) Respondent has failed to do so.

2. Respondent Has Failed to Carry its Burden of Proving the Error Harmless Beyond a Reasonable Doubt

As predicted in the opening brief (AOB 106-112), respondent contends that by rejecting the second-degree, unpremeditated murder and unpremeditated attempted murder options in the face of CALJIC No. 8.20 [premeditated first-degree murder] and the court's modified version of CALJIC No. 8.73 [provocation], the jurors necessarily resolved the factual questions posed by the omitted instructions against Matthew, thus proving the error harmless. (RB 64-65.) Respondent ignores that this Court rejected essentially the same argument in *People v. Berry*, *supra*, 18 Cal.3d 509.

As discussed in the opening brief, in *People v. Berry*, 18 Cal.3d 509, this Court held that the jury did not resolve the factual issues posed by erroneously omitted voluntary manslaughter instructions by convicting the defendant of first-degree premeditated murder and rejecting the unpremeditated second degree murder option in the face of instructions that were analytically indistinguishable from those provided in this case. (*People v. Berry*, *supra*, 18 Cal.3d at p. 518.) Thus, the first-degree murder verdicts in the face of those instructions no more proves the error harmless

in this case than the same verdict in the face of essentially the same instructions proved the same error harmless in *Berry*. (AOB 109-111.) Respondent's decision to ignore *Berry* does not make it go away.

Nor, in this argument, does respondent address Matthew's argument that the jury's rejection of the second-degree murder option does not prove the error harmless since the instructions on that option were incomplete and the arguments misleading. (AOB 111-112; see RB 63-65.) In Argument III of its brief, however, respondent contends that the instructions were entirely adequate and the arguments entirely appropriate. (RB 66-75.) Matthew likewise replies to that contention in Argument III, below.

Finally, respondent omits from its brief any discussion of the jury's verdicts, which provide virtually undeniable proof that the instructional error was prejudicial under any standard. (AOB 117; see RB 63-65.) By acquitting Michael of the multiple-murder special circumstance allegation, it is clear that the jurors concluded that the aider and abettor did *not* intend to kill and therefore convicted him on the underlying murder and attempted murder charges as "natural and probable consequences" of the assault with a firearm that he aided and abetted. (Pen. Code § 190.2, subd. (c); 3 CT 697 [jurors instructed on liability for natural and probable consequences of aiding and abetting assault with a firearm]; 20 RT 3300-3302 [prosecutor explaining natural and probable consequences liability for first degree murder based on aiding and abetting assault with a firearm even if aider and abettor harbors no intent to kill]; 3 CT 659 [jurors inquiring into requirement that aider and abettor must intend to kill in order to find special circumstance true as to him]; 3 CT 739-751 [verdicts convicting Michael of underlying offenses but acquitting him on special circumstance allegation].) Particularly since Michael was characterized as the "leader" and the "one in

command" (20 RT 3292, 3298) – a characterization with compelling evidentiary support – it follows from the jurors' verdicts that that the jurors rejected the prosecutor's theory that the boys went to the apartment with a plan to kill, even one "conditioned" on encountering resistence from the apartment's occupants. (20 RT 3290-3291, 3298, 3308-3309, 3312-3313.) It further follows that the jurors determined that Matthew only formed the intent to kill in response to the suddenly developing situation the brothers encountered at the apartment. True, it is *possible* that the jurors could still find premeditation, since (under California law) premeditation can be achieved in a matter of seconds. However, given the evidence as a whole, the jurors' finding that the shooter did not plan to kill is a compelling indication that they found that the shooting was a rash and impulsive response to the suddenly developing violence the boys encountered at the apartment.

Of course, under the law, any such conclusion would be inconsistent with a conclusion that the shooting was premeditated and deliberate. Unfortunately, under the instructions provided and arguments given, those conclusions were not necessarily inconsistent. Had the jurors received complete and accurate instructions on voluntary manslaughter in a reasonable heat of passion and on second-degree murder in an unreasonable heat of passion and heard appropriate argument on the law, there is little doubt that their verdicts would have been different.

As respondent has raised no other point or authority here that has not thoroughly been addressed in the opening brief, no further discussion of this issue is necessary. The trial court's refusal to provide the requested instructions violated Matthew's state and federal constitutional rights and demands reversal of the judgment.

III

THE CUMULATIVE EFFECT OF THE OMISSION OF INSTRUCTIONS ON HEAT OF PASSION AND PROVOCATION AND THEIR RELATIONSHIP TO PREMEDITATION ALONG WITH THE PROSECUTOR'S REPEATED MISSTATEMENTS OF THE APPLICABLE LEGAL PRINCIPLES VIOLATED STATE LAW AND MATTHEW'S FEDERAL CONSTITUTIONAL RIGHTS TO DUE PROCESS, TO PRESENT A DEFENSE, AND TO A RELIABLE GUILT PHASE DETERMINATION AS GUARANTEED BY THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS

A. Introduction

As discussed in the opening brief, the instructions on the defense theory that Matthew was guilty of no more than second-degree murder in an unreasonable, or subjective, heat of passion were incomplete, inadequate and – at the very least – potentially misleading. (AOB 122-141.) That potential was realized through the prosecutor's repeated misstatements of the applicable law in his guilt phase closing argument. His argument not only obviated the distinction between second-degree murder in an unreasonable heat of passion and voluntary manslaughter in a reasonable heat of passion by insisting that adequate "provocation" was *necessary* to "reduce" the charged crimes to second-degree murder and that the lethal response to such provocation must be "reasonable." His argument also advanced a legal standard of adequate provocation even greater than that required in the voluntary manslaughter context. (AOB 141-152.) It is reasonably likely that the jurors in this capital case were misled regarding the law applicable to the critical premeditation element of the charges, to the only lesser-included offense option available to them, to Matthew's primary defense theory, and to the scope of constitutionally relevant

evidence that they could consider in determining Matthew's guilt and death-eligibility, in violation of state law as well as his Sixth, Eighth, and Fourteenth Amendment rights. (AOB 122-152.) Finally, the judgment must be reversed because respondent cannot prove the violation harmless beyond a reasonable doubt. (AOB 152-155.)

Respondent contends that the instructions were correct and adequate to guide the jury's consideration of Matthew's defense. (RB 69.) Respondent further contends that the prosecutor's legal arguments were entirely correct. (RB 69-74.) Finally, respondent contends that any error violated state law only and was harmless under the *Watson* "reasonable probability" standard applicable to such violations. (RB 75.) Respondent is wrong on all counts.

B. Neither *People v. Cole* (2004) 33 Cal.4th 1158, Nor *People v. Mayfield* (1997) 14 Cal.4th 668, Disposes Of Matthew's Claim Of Instructional Error Nor Are The Legal Definitions Of "Heat of Passion" And "Provocation" Or Their Relationship To Each Other And The Element Of Premeditation Commonly Understood

According to respondent, this Court's decisions in *People v. Cole* (2004) 33 Cal.4th 1158 and *People v. Mayfield* (1997) 14 Cal.4th 668, in which it held that the terms "heat of passion" and "provocation" bear a common meaning and therefore need not be defined in the absence of a request, dispose of Matthew's claim of instructional error. (RB 69.) Respondent is incorrect both as to the essential holdings of *Cole* and *Mayfield* and as to their application here.

The decisions in *Cole* and *Mayfield* are readily distinguished from this case. In *People v. Mayfield, supra*, 14 Cal.4th 668, the defendant challenged the adequacy of CALJIC No. 8.73 alone, although he had

requested no other instructions at trial. Characterizing the instruction as a pinpoint one for which the defendant must request amplification, the Court held that the defendant had forfeited the claim. (*Id.* at pp. 778-779.)

Here, however, and as explained in the opening brief, even assuming that CALJIC No. 8.73 is a pinpoint instruction (but see *People v. Johnson* (1993) 6 Cal.4th 1, 43), that does not dispose of the issue in this case. Matthew's argument is not that the court was under a *sua sponte* duty to provide a pinpoint instruction on provocation and failed to do so. Instead, his argument is that the court failed to completely and accurately instruct on the lesser-included offense/defense theory that the killings were second-degree murder committed in an unreasonable heat of passion by defining "heat of passion" and "provocation" and their relationship to each other and the element of premeditation. (AOB 129-141, citing, *inter alia*, *People v. Breverman*, *supra*, 19 Cal.4th at p. 154; *People v. Wickersham*, *supra*, 32 Cal.3d at p. 329; *Conde v. Henry*, *supra*, 198 F.3d at pp. 739-740.)

Moreover, unlike the defendant in *Mayfield*, defense counsel *did* request instructions that would adequately have encompassed the legal principles applicable to Matthew's defense by requesting instructions on both second-degree murder in an unreasonable heat of passion and voluntary manslaughter in a reasonable heat of passion. (AOB 122-123, 135-138, citing 19 RT 2947, 2954-2957, 2959-2962; 20 RT 3184-3185; CT 587-591.) While the court determined that the instructions on voluntary manslaughter in a reasonable heat of passion were not supported by the evidence and therefore denied them outright, it did agree that instructions on second-degree murder in an unreasonable heat of passion were supported by the evidence and accordingly agreed to instruct the jury on that lesser-included offense/defense theory. (AOB 123, 135-138, citing 20 RT 3185-

3186, 3263-3264, 3268; CT 705.) As explained in the opening brief but ignored by respondent, pursuant to well settled lines of authority, even if a trial court has no *sua sponte* duty to instruct on a particular principle, once it agrees to so instruct, it must do so completely and accurately (*People v. Castillo* (1997) 16 Cal.4th 1009, 1015; *People v. Montiel* (1993) 5 Cal.4th 877, 942; *People v. Cummings*, *supra*, 4 Cal.4th at p. 1337; *People v. Malone* (1988) 47 Cal.3d 1, 49; *People v. Baker* (1954) 42 Cal.2d 550, 575-576) – a rule that applies with particular force to requested defense theory instructions on the only lesser-included offense option given the jurors in a capital case. (See, e.g., *Beck v. Alabama*, *supra*, 447 U.S. at pp. 637-638; *People v. Breverman*, *supra*, 19 Cal.4th at pp. 160, 162; *People v. Castillo*, *supra*, 16 Cal.4th at p. 1015, *People v. Wickersham*, *supra*, 32 Cal.3d at p. 329; *Conde v. Henry*, *supra*, F.3d at pp. 739-740; *United States v. Sayetsitty*, *supra*, 107 F.3d at p. 1414.) (AOB 127-128, 137-138.) And where – as here – the defendant requests instructions on a defense theory, but the trial court perceives them to be partially inaccurate, the court is obligated to tailor them to the theory rather than deny them outright. (AOB 127-129, 137-138, citing *People v. Falsetta* (1999) 21 Cal.4th 903, 924; *People v. Fudge* (1994) 7 Cal.4th 1075, 1110; *People v. Malone*, *supra*, 47 Cal.3d at p. 49; *People v. Jeffers* (1996) 41 Cal.App.4th 917, 924-925; *People v. Brady* (1987) 190 Cal.App.3d 124, 136; *United States v. Newcomb* (6th Cir 1993) 6 F.3d 1129, 1132.) Pursuant to these authorities, the court was obligated to tailor the requested instructions on voluntary manslaughter in a reasonable heat of passion to the lesser-included offense/defense theory of second-degree murder in an unreasonable heat of passion, rather than deny the instructions outright.

Finally, in contrast to *Mayfield*, the court's duty to instruct further

was triggered by the dispute over whether relevant "provocation" evidence in the second-degree murder context must come from the victim. As discussed in the opening brief, the prosecutor vigorously argued to the court that "provocation" must come from the victim killed in order to be relevant in the second-degree murder context and thus moved to modify CALJIC No. 8.73 to limit the jurors' consideration of "provocation" evidence to the Regina Watchman murder count. (19 RT 2958, 3138; CT 12733-12734.) The court correctly ruled that the prosecution's position was legally incorrect and therefore refused the instruction. (19 RT 3185-3186.) Nevertheless, the prosecutor thereafter argued that incorrect legal principle to the jurors. (20 RT 3448-3449.) When Michael's counsel objected that the prosecutor was misstating the law, the court overruled the objection. (20 RT 3449.) Clearly, the court erred by overruling the objection. In addition, because the prosecutor's argument and the instructional void created a reasonable likelihood that the jurors would be misled regarding a point of law critical to the defense, the court had a duty at that point to provide an accurate and complete instruction. (*People v. Livaditis* (1992) 2 Cal.4th 759, 784 [even if court is ordinarily not required to instruct on particular legal principle, where "the court or the parties make an improper contrary suggestion" and thus a reasonable likelihood that the jurors will be misled without instruction, the court is obligated to do so]; accord, *People v. Stanley* (2006) 39 Cal.4th 913, 962; *People v. Johnson* (1992) 3 Cal.4th 1183, 1261, conc. opns. of Mosk, J., joined by Kennard, J. [even if court not ordinarily required to give particular instruction, "the court is obligated to give an express instruction on the matter if there is a reasonable likelihood that, in the absence of such an advisement, the jury will labor under a misconception . . . ."]; see also *People v. Wickersham* (1982) 32 Cal.3d 307,

323 [court has *sua sponte* duty to instruct on the "'general principles of law' that are closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case"].)

Similarly, in *People v. Cole*, *supra*, the defendant argued that the trial court erred in failing to define the terms "heat of passion" and "provocation" in the second-degree murder context with the *same* definitions used in the voluntary manslaughter context. (*People v. Cole*, *supra*, 33 Cal.4th at pp. 1217-1218.) Of course, the definition of those terms are not the same in both contexts, and therefore this Court rejected the defendant's claim. (*Ibid.*) Furthermore, defense counsel did not request any other instructions regarding heat of passion or provocation. (*Id.* at pp. 1214-1215, 1217-1218.) Finally, the facts in *Cole* involved a classic heat of passion claim – i.e., that the killing resulted from the defendant's jealousy over his paramour's acts of infidelity. (*Id.* at p. 1214.) It was in this *classic* heat of passion context that this Court observed, "provocation and heat of passion as used in the instructions here bore their common meaning, which required no further explanation in the absence of a specific request." (*Id.* at pp. 1217-1218.)

Here, in contrast to *Cole*, Matthew does not claim that the court should have defined "heat of passion" and "provocation" in the second-degree murder context with the definitions used in the voluntary manslaughter context. To the contrary, as he argued at length in the opening brief, the definitions are not identical and therefore should have been modified accordingly rather than denied outright. (AOB 135-140.) Also in contrast to *Cole*, defense counsel *did* request additional instructions on heat of passion and provocation and the court concluded they were only *partially* incorrect or inapplicable. Finally, in contrast to *Cole*, the jurors

were not presented with a set of facts involving a classic, and commonly understood, example of heat of passion. In such cases, as in *Cole*, it may be true that the commonly understood meaning of the terms is sufficient for the jurors' understanding of the "law relevant to the issues *raised by the evidence* . . . or closely and openly connected with *the facts before the court* . . . '" (*People v. Wickersham*, *supra*, 32 Cal.3d at p. 323, italics added.) However, in a case such as this, which does *not* involve the classic example of heat of passion, the common understanding of the terms is of no assistance to lay jurors.

To the contrary, the legal definition of "heat of passion" is not obvious, nor is it even uniform. Some states narrowly define it as rage or anger (see LaFave, *supra*, *Substantive Criminal Law* § 15.2 [collecting cases]), while others – like California – define it more expansively as "anger or rage . . . [or] any other "'violent, intense, high-wrought, or enthusiastic emotion' [Citation], other than revenge. [Citation]." (*People v. Breverman*, *supra*, 19 Cal.4th at p. 163.)

Nor is the meaning of the term "provocation" in the second-degree murder context obvious or susceptible of only one, commonly understood and legally correct meaning. This Court need look no further than the prosecutor's arguments in this very case for proof of that fact. As discussed above and in the opening brief, the prosecutor emphatically, but incorrectly, argued to both the trial court and the jurors that the "provocation" to which CALJIC No. 8.73 refers must actually come from the victim killed or injured in order to be legally relevant to the issue of premeditation. (AOB 143-149.) Similarly, the prosecutor incorrectly argued that in order to be relevant and "reduce" a killing to second-degree murder, the "provocation" must be sufficient to cause a "reasonable" person to kill. (AOB 143-149.)

As this Court has recognized, "if the legally trained prosecutor was unable to" understand the correct legal meaning of the term "provocation" in the context of this case, then a reviewing court "safely can infer that this was true of the lay jurors as well." (*People v. Fletcher* (1996) 13 Cal.4th 451, 471.)

Even if the terms "heat of passion" and "provocation" were commonly understood ones that do not need definition, their *relationship* to each other and to the element of premeditation (provocation being relevant to the question of passion, which in turn is inconsistent with the element of premeditation and deliberation) are certainly *not* concepts commonly understood to lay jurors. (See AOB 136-142.) Certainly, the distinction between a premeditated and deliberate act and an impassioned, impulsive act is "famously difficult" (*United States v. Jackson* (S.D.N.Y. 2004) 351 F.Supp.2d 108, 114) and even more so when (as the jurors here determined) premeditation is alleged to have been achieved in a matter of seconds (see, e.g., *United States v. Curtis* (1996) 44 M.J. 106, 147 ["One of the most difficult situations is distinguishing between the two when there is only a short period of time that has elapsed. . . . For years, courts have struggled with the difference between first and second-degree murder"]; accord, *United States v. Chagra* (W.D. Tex. 1986) 638 F.Supp. 1389, 1399-1400). As discussed in the opening brief, the distinction between premeditation and an impulsive act of passion in such a situation is so "obscure and mystifying" that no less a jurist than Benjamin Cardozo pronounced himself unable to understand it. (*What Medicine Can Do for Law*, quoted in *Austin v. United States* (1967 D.C. App. Ct.) 382 F.2d 129, 135.)

Indeed, jurors have expressed their perplexity regarding the relationship between the "sudden heat of passion" to which CALJIC No.

8.20 refers and the element of premeditation. (See, e.g., *People v. Thompkins* (1987) 195 Cal.App.3d 244.) In *Thompkins*, jurors submitted notes seeking "clarification of CALJIC 8.20, how does premeditation and sudden heat of passion interrelate in this law, CALJIC 8.20" and asking, "can sudden heat of passion nullify premeditation, also in the law?" (*Id.* at p. 250.) As further proof that the relationships between the terms and concepts are not self-evident, the highly trained judge in that case responded to the jurors' questions by incorrectly explaining that *there is no relationship* between the concepts and that sudden heat of passion does *not* nullify premeditation. (*Id.* at pp. 250-251.)

In sum, courts have defined "heat of passion" differently, the prosecutor in this case was unable to grasp the correct meaning of "provocation" in the second-degree murder context, and the relationship between heat of passion/provocation and premeditation has confounded lawyers, judges and juries. In the face of such evidence, it is simply unreasonable to say that lay jurors would understand the correct legal meaning of the terms or, even more importantly, their relationship to each other and the mental state elements of murder in the absence of instructions from the court. As the appellate court in *People v. Thompkins* eloquently observed of lay jurors' inability to grasp the relationship between "sudden heat of passion" and premeditation, as stated in CALJIC No. 8.20, on their own:

> Jurors are not first year law students with some independent motive for legal study. At best, they are well-meaning but temporary visitors in a foreign country attempting to comprehend a foreign language. To perform their job properly and fairly, jurors must *understand* legal principles they are charged with applying. It is the trial judge's function to facilitate such an understanding by any available means.

> The mere recitation of technically correct, but arcane legal precepts does precious little to insure that jurors can apply the law to a given set of facts.

(*People v. Thompkins*, *supra*, 195 Cal.App.3d at p. 250.)

In any event, as discussed in the opening brief and further below, even if the instructions were "not crucially erroneous, deficient or misleading on their face," they "became so" in light of the arguments. (*People v. Brown* (1988) 45 Cal.3d 1247, 1255; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1035-1040 [combination of potentially ambiguous instruction and potentially misleading but not necessarily incorrect argument by the prosecutor created a reasonable likelihood jurors were misled]; *People v. Crandell* (1988) 46 Cal.3d 833, 882-885 [same]; *People v. Brady*, *supra*, 190 Cal.App.3d at p. 137; *Taylor v. Kentucky* (1978) 436 U.S. 478, 486-490 and fn. 14 [despite provision of generally adequate and correct instructions on prosecution's burden of proof, refusal to provide amplifying instructions along with prosecutor's misleading argument created a genuine danger that jurors would be misled and convict on improper basis, in violation of defendant's right to fair trial]; *Hitchcock v. Dugger* (1987) 481 U.S. 393, 397-399 [combination of instructional void and prosecutor's argument erroneously conveyed to jurors that they were not to consider mitigation that was not specified in instructions].)

C. The Prosecutor's Misstatements Filled The Instructional Void To Create A Reasonable Likelihood That The Jurors Were Misled On The Law Applicable To Matthew's Defense And The Evidence They Could Consider In Evaluating His Defense

As discussed in the opening brief, the prosecutor's misstatements of the law filled the instructional void to create a reasonable likelihood that the

jurors were misled regarding the law applicable to Matthew's defense. (AOB 141-152.) At the outset, respondent builds, then knocks down, a straw man. As respondent characterizes it, "the error, according to appellant, is that the instructions did not explain how provocation can be inconsistent with premeditation and deliberation and that the prosecutor's argument emphasized the inadequacy of the instructions." (RB 71.) However, this is not Matthew's contention.

As discussed in the opening brief, under the law, the critical issue for the jurors to determine was Matthew's subjective *state of mind* at the moment of the shooting – i.e., whether he killed with premeditation or in a state of passion – an issue to which evidence of "provocation" was *relevant* ut not necessary, and the jurors could consider virtually *anything* that could have "provoked" his impassioned mental state, including the conduct of *any* ictim, real *or* perceived, and even if the same event would not provoke passion in a reasonable person. (AOB 131-134, 142-143, citing, *inter alia*, *People v. Wickersham*, *supra*, 32 Cal.3d. at p. 327, 329-330, *People v. Valentine*, *supra*, 28 Cal.2d at pp. 131-135, *People v. Bender* (1945) 27 Cal.2d 164, 178-179, 184-186, *People v. Padilla* (2002) 103 Cal.App.4th 675, 677-680, *In re Thomas C.* (1986) 183 Cal.App.3d 786, 794, and *People v. Webb* (1956) 143 Cal.App.2d 402, 423.)

The prosecutor's summation, however, turned the law on its head. The arguments of all counsel failed to fill the instructional void by conveying that the determinative issue was whether Matthew committed the shooting in a state of unreasonable, or subjective passion. The prosecutor's argument as a whole instead incorrectly conveyed that the determinative issue was the existence of adequate *provocation*, which was *required* to support Matthew's defense and reduce the crimes to second-degree murder.

And with respect to the adequacy of the provocation, the prosecutor further incorrectly argued that it must be conduct in which the victim killed or injured *actually* engaged; that no victim other than Watchman was actually involved in the assault on the boys' mother and therefore "this idea that somehow the provocation applies to everyone . . . there is no issue and no provocation as to them" (20 RT 3448); and that "the only issue of provocation in this case . . . would be as to the killing of Regina Watchman" (20 RT 3446) because the "only possible provocation . . . would be what happened to their mother" (20 RT 3447; see also 20 RT 3448-3449). (See, e.g., *People v. Wickersham*, *supra*, 32 Cal.3d at pp. 329-330 [because focus of whether killing was impassioned and impulsive second-degree murder is on defendant's subjective mental state, provocation – while relevant – is not necessary]; *People v. Padilla*, *supra*, 103 Cal.App.4th at pp. 677-680 [same]; see also *People v. Lee*, *supra*, 20 Cal.4th at p. 59 [even under objective standard of adequate provocation in voluntary manslaughter context, mistaken belief as to provocative conduct is sufficient].) When defense counsel correctly argued that the critical issue was what the brothers *believed* had happened to their mother, and that there was compelling evidence that they believed she had been beaten and robbed by a group at the apartment, the prosecutor made a speaking objection that counsel's argument was a "misstate[ment]" and nothing more than "wishful thinking." (22 RT 3421.) Hence, the prosecutor argued, Matthew's defense was inapplicable to any victim other than Watchman as a matter of law because the provocation necessary to negate premeditation as to their shootings was lacking.

Finally, the prosecutor argued, while the defense *could* theoretically apply to Watchman, her act of "provocation" was not adequate to "reduce"

(20 RT 3450) her murder to second-degree murder because it was a trivial "dispute between women over hair pulling" (20 RT 3308, 3446, 3449), it was "not provocation given directly at these guys" (20 RT 3446), and the boys' lethal response was not "reasonable" or "responsible and mature" (20 RT 3452) or "natural" (20 RT 3311). (See AOB 144-145, citing, *inter alia*, *People v. Wickersham*, *supra*, 32 Cal.3d at p. 329 [killing second degree murder if committed in subjective, but *un*reasonable, heat of passion], accord *People v. Padilla*, *supra*, 103 Cal.App4th at pp. 677-680, *People v. Fitzpatrick* (1992) 2 Cal.App.4th 1285, 1295.) Having so framed the issue, the heart of the prosecutor's closing argument focused on the victims' conduct and whether or not they *deserved* what they got – a legally irrelevant, but emotionally charged argument that obviously swayed the jurors.

Respondent first contends that whatever inaccurate statements of law the prosecutor made were cured or harmless as a matter of law because the jurors were instructed that "if anything concerning the law said by the attorneys in their arguments or at any other time during the trial conflicts with [the court's] instructions on the law, you must follow my instructions." (RB 70 and fn. 15.) Of course, the flaw in respondent's argument is that *nothing in the court's instructions conflicted with the prosecutor's misstatements of the law*. Indeed, that is the heart of the matter: due to the instructional void regarding the legal principles applicable to Matthew's defense and the only possible non-capital murder option for the perpetrator, the jurors were forced to take their guidance from the arguments of counsel. Given the heightened regard juries have for prosecutors, and given the record evidence in this case that these jurors did not accept the law as stated by Matthew's counsel, it is more than reasonably likely that the jurors took

their legal cue from the prosecutor, not defense counsel. (See AOB 149, citing, *inter alia*, *United States v. LaPage* (9th Cir. 2001) 231 F.3d 488, 492 [in contrast to the prosecutor, "the jury understands defense counsel's duty of advocacy and frequently listens to defense counsel with skepticism"], and *People v. Edelbacher*, *supra*, 47 Cal.3d at p. 1040 [combination of potentially ambiguous instruction and potentially misleading but not necessarily incorrect argument by the prosecutor created a reasonable likelihood jurors were misled; "the prosecutor and defense counsel, through their arguments" presented two inconsistent versions of the applicable law, and the Court had "no way of knowing which [version] the jurors adopted"]; see also *Mills v. Maryland* (1988) 486 U.S. 367, 376, quoting from *Andres v. United States* (1948) 333 U.S. 740, 752 [where "reasonable men might derive a meaning from the instructions given other than the proper meaning" of the statute, "in death cases doubts such as those presented here should be *resolved in favor of the accused*"].)

Next, respondent contends that "provocation and heat of passion bore their common meanings at appellant's trial [and a] common sense application of the terms informed the jury that provocation may, but will not necessarily, cause heat of passion." (RB 71.) In other words, respondent appears to reason, because the instructions were adequate, the arguments focusing exclusively on provocation were not misleading but rather got to the heart of the matter: whether the perpetrator committed the shooting in a subjective state of passion, a question to which the existence or non-existence of provocation was relevant circumstantial evidence.

Matthew agrees that this was, indeed, the heart of the matter and that the existence or non-existence of "provocation" is circumstantial evidence highly relevant to the show passion rather than premeditation. But

respondent does not point to any argument in which this critical issue was explained or presented to the jurors. Respondent does point to an instruction informing the jurors that the defendant's mental state may be shown through circumstantial evidence (RB 71, citing CALJIC No. 8.31 at 3 CT 717), but fails to explain how the lay jurors would have made the connection between that instruction, the evidence of provocation, and its relevance as circumstantial evidence to the ultimate issue of whether Matthew committed the shooting with premeditation or in the heat of passion. (See RB 71-72.)

Respondent agrees that the jurors should have considered not only what had *actually* occurred, but also what the brothers *believed* had occurred, in assessing whether the Matthew committed the shooting in a state of passion. (RB 72-73.) However, respondent contends, the prosecutor correctly argued that legal principle to the jurors. In support of this contention, however, respondent quotes from *defense counsel's* closing argument that the key issue was the boys' belief – an argument respondent mistakenly attributes to the prosecutor. (RB 72, quoting from defense counsel's argument at 20 RT 3421; see also AOB 144 [addressing defense counsel's argument at 20 RT 3421.)

Curiously, in the next subsection of its brief, respondent correctly attributes the argument regarding the brothers' subjective belief to defense counsel, but contends that the prosecutor's speaking objection to that argument was an appropriate one that counsel had misstated the testimony of Ms. Souza. (RB 73-74, section 3.) Not so. In fact, as respondent otherwise recognizes (RB 72, section 2), defense counsel was not misstating the evidence. He correctly argued that it was unclear from Ms. Souza's testimony what she had told her sons, but from the evidence as a whole the

jurors could find that she had told them that she was "beaten up" by people at the apartment and, regardless of whether that was true, it was relevant if the boys believed it. (20 RT 3420-3421.) It was in this context that the prosecutor objected that defense counsel "misstate[d] testimony not 'some people.' [Ms. Souza is] very clear. It was only the woman that kicked her out. I object to Mr. Costain's misstates [*sic*], repeated misstates. Of the evidence, your honor, is his wishful thinking." (20 RT 3421.) Thus, in context, it seems clear that the prosecutor was objecting that the factual and legal issue for the jurors to resolve was what had actually occurred – based on Ms. Souza's trial testimony about what actually occurred – and not what the boys believed had occurred. As discussed in the opening brief (AOB 144-145), by overruling the objection on the ground that "each side can argue the evidence as they see it" (20 RT 3421), the trial court "'could well have left the jury with the (wrong) impression.'" (*People v. Edelbacher*, *supra*, 47 Cal.3d at pp. 1039-1040 [in finding reasonable likelihood jurors misunderstood law, this Court emphasized that while defense counsel correctly argued the law, the prosecutor objected to his argument, and, although the trial "court overruled the objection, it did so with remarks that counsel was given latitude in argument and the jury was instructed on the law, which 'could well have left the jury with the (wrong) impression'"].)

Respondent does not dispute that relevant "provocation" evidence in the second-degree murder context is *not* limited to the conduct of the victim killed. Instead, respondent contends that while the prosecutor did "'suggest' that only Watchman's provocative acts were relevant," what he really meant was that Dewayne Arnold's conduct could not lawfully be considered as provocation evidence, which was a legally correct argument. (RB 72.) Matthew agrees that the prosecutor vehemently argued that

defense counsel's position that the jurors could consider Arnold's conduct as provocation was "ridiculous"; Arnold's conduct was "not provocation" within the meaning of the instruction, the prosecutor argued, because his conduct was "reasonable." (20 RT 3446-3447; AOB 147.) Matthew adamantly disagrees, however, that this argument was legally correct.

As discussed in Argument II, above, respondent relegates to a footnote its legal argument that the jury could not consider Dewayne Arnold's conduct in assessing whether the boys acted in a responsive state of passion because Arnold's conduct was a predictable response from someone resisting a felony. (RB 72, and fn. 18, citing *People v. Rich* (1988) 45 Cal.3d 1036, and attempting to distinguish *People v. Wickersham*, *supra*, 32 Cal.3d at p. 329.)[5] For the reasons discussed in Argument II, above, this argument is without merit.

In addition to those reasons, in *People v. Rich*, *supra*, 45 Cal.3d at p. 112, as well as in *People v. Jackson* (1980) 28 Cal.3d 264, 306 (on which the *Rich* Court relied), this Court held that a *reasonable* person who initiates the events leading to a killing by committing a felony such as rape or robbery would not be provoked into a state of *reasonable* passion by their victims' resistance. Here, of course, the issue was whether the brothers were acting in a *subjective* state of passion, even if *un*reasonable.

In assessing the defendant's *subjective* mental state, this Court has held that the jury is entitled to consider any relevant evidence, including the victim's response to the defendant's initiation of the confrontation. (See, e.g., *People v. Wickersham*, *supra*, 32 Cal.3d at p. 329; see also *People v.*

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[5] Appellant's counsel incorrectly cited the relevant portion of *People v. Wickersham*, *supra*, as at page 322. (AOB 147.) The correct pinpoint citation is to page 329.

Smith (1907) 151 Cal. 619, 628 [in assessing mental state, "a defendant is entitled to have the jury take into consideration all the elements in the case which might be expected to operate on his mind"]; accord, *People v. Minifie*, *supra*, 13 Cal.4th at p. 1064; *People v. Bridgehouse*, *supra*, 47 Cal.2d at p. 410.) Respondent attempts to distinguish *Wickersham* on the ground that, unlike the boys' conduct in this case, the defendant's conduct prior to the fatal shooting in that case was "lawful." (RB 72, fn. 18.) Respondent misreads *Wickersham*.

In *Wickersham*, *supra*, there was evidence that the victim pointed a gun at her husband, he grabbed it, and she shot him as they struggled over it. This Court held that the evidence was insufficient to support instructions on voluntary manslaughter in a reasonable heat of passion in part because "there was virtually no evidence of provocation . . . The only possible source of provocation was the victim's grabbing of the gun." (*People v. Wickersham*, *supra*, 32 Cal.3d at p. 327.) The evidence was, however, sufficient to warrant instructions on second-degree murder in an *unreasonable* heat of passion. This Court reasoned that even if the jury found that the defendant was *not* in fear for her life when she pointed the gun at the victim – in other words, even if the defendant's act of pointing a gun was *not* lawful – the jurors could consider the victim's grabbing of the gun in assessing whether the defendant's passion was provoked and, thus, whether the killing was impulsive and impassioned rather than premeditated and deliberated. (*People v. Wickersham*, *supra*, 32 Cal.3d at p. 329.)

Just as in *Wickersham*, the jurors here could consider the evidence that Arnold grabbed the gun, struggled with Michael, and that a shot was fired during the struggle, in assessing whether Matthew's *immediate* response in firing his weapon was premeditated or impassioned. Hence, as

discussed in the opening brief, the prosecutor's remarks that Matthew's defense did not apply to Dewayne Arnold because his conduct was "reasonable" and therefore could not be considered as "provocation" was legally incorrect. (AOB 147.)

Furthermore, the prosecutor did not merely argue that Arnold's conduct was not "provocation" within the meaning of the instruction. He explicitly argued that "there was no provocation given by" Trudell, James and John, "and so this idea that somehow the provocation applies to everyone . . . there is no issue and there is no provocation as to them." (20 RT 3448.) Hence, according to the prosecutor, Matthew's defense did not apply to any victim other than Watchman because the adequate provocation *necessary* to prevent premeditation as to their shootings was lacking. Respondent does not address the propriety of these remarks. (See RB 69-75.) Nor does respondent dispute that the jurors were likely misled to believe that the prosecutor's argument was legally correct when the trial court overruled defense counsel's objection to it. (20 RT 3449; AOB 146, citing *Caldwell v. Mississippi* (1985) 472 U.S. 320, 339 [by overruling defense counsel's objection to prosecutor's misstatement of law in front of jury with remarks that prosecutor's argument was appropriate, court "strongly impl(ied) that the prosecutor's" argument legally "was correct"].) "The court's failure to sustain" the defense objection "effectively informed the jury that the law . . . and reasoning processes [the prosecutor] urged upon them were valid an acceptable." (*People v. Woods* (2006) 146 Cal.App.4th 106, 53 Cal.Rptr.3d 7, 15.)

Similarly, respondent does not address the propriety or effect of the prosecutor's argument that Matthew's defense was unsupported because the brothers' response to their mother's assault and the events that followed it

was not "*reasonable*," (20 RT 3452) "responsible and mature" (20 RT 3452-3453) or "natural" (20 RT 3311) or dispute that this argument was legally incorrect and grossly misleading (AOB 148, citing, *inter alia*, *People v. Wickersham*, 32 Cal.3d at pp. 327, 329, *People v. Valentine*, *supra*, 28 Cal.2d at p. 132, *People v. Bender*, *supra*, 27 Cal.2d at pp. 178-179, 184-186, and *People v. Fitzpatrick*, *supra*, 2 Cal.App.4th at p. 1295.)

At bottom, the essence of respondent's position as a whole seems to be that the prosecutor's remarks focusing on the adequacy of *provocation* to reduce the crime to second-degree murder was perfectly legitimate argument going to the *weight* of the evidence to show that Matthew committed the shooting in a state of passion and to negate premeditation. Had the jurors received accurate and complete instructions on Matthew's defense and the prosecutor actually limited his argument to the *weight* of all of the evidence relevant to that defense, Matthew would have no quarrel with his argument.

The flaw in respondent's position, however, is that the instructional avoid ensured that the jurors's understanding of the law applicable to Matthew's defense was incomplete. And the prosecutor's *legal* argument regarding the adequacy of provocation *necessary* to support Matthew's defense ensured that it was incorrect. Given the instructional void, the prosecutor's remarks took on far greater meaning than the ordinary words of an advocate spoken in an attempt to persuade jurors who have received complete and accurate instructions on the law. Coming, as they did, from the mouth of the sovereign's representative, they served to fill that instructional gap. This is precisely why this Court and the United States Supreme Court examine the *combined* effect that an instructional void *and* a prosecutor's arguments can have on a jury's understanding of the law,

notwithstanding whether the instructions alone are "crucially erroneous, deficient or misleading on their face" (*People v. Brown* (1988) 45 Cal.3d 1247, 1255; accord, *People v. Edelbacher*, *supra*, 47 Cal.3d at pp. 1035-1040) and notwithstanding whether the prosecutor's arguments are patently incorrect or improper (see, e.g., *Taylor v. Kentucky* (1978) 436 U.S. 478, 486-490, and fn. 14 [despite provision of generally adequate and correct instructions on prosecution's burden of proof, refusal to provide requested amplifying instructions was error in combination with prosecutor's argument, regardless of whether the "prosecutorial comments, standing alone, would rise to the level of reversible error . . . [because] they are relevant to the need for carefully framed instructions . . . ."]; *People v. Lucero* (1988) 44 Cal.3d 1006, 1031, and fn. 15 [in examining combined effect of instruction, or lack thereof, and prosecutor's argument, "our concern is not with the ethics of the prosecutor or the performance of the defense, but with the impact of the erroneous interpretation of the law on the jury"]; *People v. Edelbacher*, *supra*, 47 Cal.3d at p. 1035 and fn.16 [because prosecutor's argument exacerbated instructional error, unnecessary to resolve whether argument amounted to misconduct]).

This was a capital trial and the outcome of the guilt phase hinged on whether the shooter killed in an impulsive and subjective state of passion brought about by a series of violent events and misunderstandings, or whether he killed with calm reflection and cool deliberation. The instructions did not frame this critical issue for the jurors and the prosecutor's argument distorted it. As the Supreme Court has emphasized, in a capital case such as this, "the Eighth Amendment requires a greater degree of accuracy and factfinding than would be true in a noncapital case." (*Gilmore v. Taylor* (1993) 508 U.S. 333, 342.) Matthew's trial fell far short

of the mark.

D. Reversal Is Required

1. The Reasonable Likelihood That the Jurors Misunderstood the Law Applicable to Matthew's Defense, and the Scope of the Evidence They Could Consider in Resolving Whether the State Had Proved the Element of Premeditation Beyond a Reasonable Doubt, Violated Matthew's Sixth, Eighth, and Fourteenth Amendment Rights

Respondent briefly argues that the error violated state law only because the jurors were given a noncapital "third option" – first-degree murder *without* special circumstances – and hence the flawed second-degree murder option did not violate the constitutional mandate announced in *Beck v. Alabama* (1980) 447 U.S. 625, 637-638. (RB 75; see also RB 63.) Respondent is incorrect.

First, once the jury determined that the killings were first-degree murder and Matthew was the actual shooter (see Argument I, above), there *was no valid, legal option* of rejecting the special circumstance and thus no valid noncapital "third option." The only special circumstance was "multiple murder," which required no element for a true finding for the actual shooter above and beyond his liability for the underlying murders. Indeed, *all* counsel explicitly told the jurors as much. (20 RT 3342-3343, 3403, 3437.) In other words, the jurors could *only* return a verdict of first-degree murder without special circumstances for the actual shooter – whom they determined to be Matthew – if they disregarded the law and violate their oaths as jurors. Obviously, any "third option" of returning first-degree murder verdicts without special circumstances for the actual killer was illusory. Respondent's argument exalts form over substance, which should

not be the basis for sending a man to his death.

In any event, even if it could be said that the theoretical but actually unavailable "option" of first-degree murder without special circumstances for Matthew as the actual shooter avoided the mandate of *Beck v. Alabama*, *supra*, respondent once again ignores Matthew's additional claims that the error violated his Sixth and Fourteenth Amendments rights to complete and accurate instructions on his defense theory. (AOB 122-152, citing, *inter alia*, *Conde v. Henry*, *supra*, 198 F.3d 734, 739-740, and *Bashor v. Riley* (9th Cir. 1984) 730 F.2d 1228, 1240; see also *Clark v. Brown* (9th Cir. 2006) 442 F.3d 708, 713-718.) Furthermore, because it is reasonably likely that the jurors misunderstood the law in such a way as to preclude their consideration of a legally valid defense and evidence raising reasonable doubt as to the element of premeditation, Matthew was deprived of his Sixth, Eighth and Fourteenth Amendment rights to due process, to present a meaningful defense, and to a fair and reliable jury determination on each element of the offenses. (AOB 122-152, citing, *inter alia*, *Estelle v. McGuire* (1991) 502 U.S. 62, 71-72 [where it is reasonably likely that jurors misapplied law in a manner that violates the federal constitution, federal constitutional error has occurred], *People v. Roder* (1983) 33 Cal.3d 491, 503-504, and fn. 13 [combination of potentially ambiguous instruction on presumption and prosecutor's argument misstating the legal principles addressed therein created reasonable likelihood of misunderstanding and amounted to constitutional error], and *Crane v. Kentucky* (1986) 476 U.S. 683, 690 [criminal defendants have constitutional right to present and have jury consider highly relevant evidence in their defense].) Respondent's failure to address or dispute these claims of federal constitutional error should be deemed a concession.

2. Neither "Overwhelming Evidence" of Intent to Kill Nor the Jury's First-Degree Murder Verdict Prove That the Constitutional Violation Going To the Element of Premeditation Was Harmless Beyond a Reasonable Doubt

Next, respondent perfunctorily asserts that, regardless of the standard of prejudice applied, the error was harmless "because the evidence of intent to kill was overwhelming and the jury's findings that appellant acted wilfully, with premeditation, and with deliberation necessarily precluded heat of passion." (RB 75.) Respondent's argument is a *non sequitur*.

Of course, Matthew does not dispute that, at least with respect to Arnold and Watchman, the shooter intended to kill. But that fact does not answer the critical question of whether the intention to kill was formed impulsively and in a state of passion or with cold, calculated premeditation.

Similarly, the "jury's findings that appellant acted wilfully, with premeditation, and with deliberation" begs the question of prejudice. (RB 75.) Because those findings were reasonably likely to have been based upon a misunderstanding of the law going to the element of premeditation, they are meaningless to the harmless error inquiry.

Otherwise, respondent simply incorporates its argument that the erroneous omission of instructions on *voluntary manslaughter* in a *reasonable* heat of passion was harmless to support its position that the jurors' misunderstanding of the law regarding *second-degree murder* in an *unreasonable* heat of passion was harmless. (RB 75 [incorporating and referring to "our Argument II, Harmless Error, at pp. 63-65, *ante*"].) But respondent's harmless error argument in the voluntary manslaughter context has no application here.

That is, in arguing harmless error from the omission of voluntary manslaughter instructions at pages 63 to 65 of its brief, respondent simply (and incorrectly – see Argument II-E, above) contends that the omission of voluntary manslaughter instructions was harmless because the jurors rejected the second-degree murder option in favor of premeditated first-degree murder. (RB 64-65.) That argument does not assist respondent here, who bears the burden of proving the jurors' erroneous misunderstanding of the law relating to the *second-degree murder* option was harmless beyond a reasonable doubt.

Otherwise, at pages 63 to 65 of its brief, respondent summarily asserts that there was "overwhelming evidence that [Matthew] committed deliberate and premeditated murder," supported by nothing more than a reference to its Statement of Facts. (RB 64.) This contention is made in a perfunctory fashion, without supporting argument or citation to the record. This Court should pass it without consideration. (See, e.g., *People v. Williams* (1997) 16 Cal.4th 153, 315, and authorities cited therein ["points 'perfunctorily asserted without argument in support' are not properly raised"]; *People v. Stanley* (1995) 10 Cal.4th 764, 793 [it is improper to simply refer to the Statement of Facts in support of argument in appellate brief; court may treat is as waived and pass it without consideration]; 9 Witkin Cal. Proc. (4th ed. 1997) Appeal, § 594, p. 627, and authorities cited therein ["A reviewing court is not required to make an independent, unassisted study of the record in search of error *or* grounds to support the judgment"].) In any event, for all of the reasons discussed in the opening brief, but ignored by respondent, respondent's "argument" is without merit.

Based on the record as a whole, the evidence that the shooter formed the intent to kill with premeditation and deliberation, rather than in an

impulsive state of passion, was extremely close. (AOB 116-121, 162; see also *People v. Guiton* (1993) 4 Cal.4th 1116, 1130 [assessment of prejudice under state law requires examination of entire record]; *Rose v. Clark* (1986) 478 U.S. 570, 583 [whether constitutional error harmless under federal standard requires assessment of entire record]; *Satterwhite v. Texas* (1988) 486 U.S. 249, 258-259, quoting from *Chapman v. California*, *supra*, at p. 24 [in determining whether a federal constitutional violation requires reversal under the *Chapman* standard, the question "is not whether the legally admitted evidence was sufficient to support" the verdict, but rather is "whether the State has 'proved beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained"].) Indeed, although respondent ignores them, the verdicts – which reveal that the jurors rejected the prosecution's theory of a premeditated plan to kill and instead found that the shooter only formed the intent to kill in response to the suddenly developing situation the boys encountered at the apartment – provide objective, compelling evidence that the jurors agreed.

Respondent has failed to carry its burden of proving beyond a reasonable doubt that the error did not contribute to the verdicts. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.) The entire judgment must be reversed.

IV

REVERSAL OF THE ATTEMPTED MURDER CONVICTIONS IS REQUIRED DUE TO AN AMBIGUOUS INSTRUCTION RESULTING IN A REASONABLE LIKELIHOOD THAT THE JURORS MISUNDERSTOOD THAT THEY COULD RETURN GUILTY VERDICTS WITHOUT FINDING THAT THE PERPETRATOR SPECIFICALLY INTENDED TO KILL THE VICTIMS AND NOT MERELY THE TARGETS, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS

A. Introduction

In his opening brief, Matthew argued that it is reasonably likely that the jurors understood the prosecutor's special pinpoint instruction that it is "not necessary that premeditation and deliberation be directed at a specific individual, it may be directed at a group" as permitting guilt verdicts on the premeditated attempted murder charges under the doctrine of "transferred intent," and thus without findings beyond a reasonable doubt that the shooter specifically and with premeditation intended to kill both James and John. (AOB 156-163.) This theory was legally incorrect under state law and violated Matthew's federal constitutional rights to due process, trial by jury, and reliable guilt phase verdicts as guaranteed by the Sixth, Eighth, and Fourteenth Amendments. (AOB 156-163.) Because respondent cannot prove the error harmless beyond a reasonable doubt, the attempted murder convictions must be reversed. (AOB 162-163.)

Respondent disagrees. (RB 76-85.) Respondent is incorrect.

B. Because The Erroneous Instruction Violated Matthew's Substantial Rights, His Defense Counsel's Failure To Object To It Did Not Waive Matthew's Right To Challenge It On Appeal

As predicted (AOB 161-162), respondent briefly contends at the

outset that defense counsel's failure to object to the instruction as it applied to attempted murder waived his claim of error on appeal (RB 81). Of course, as explained in the opening brief, because the erroneous instruction violated Matthew's substantial rights, it is reviewable notwithstanding the absence of an objection below. (AOB 161, 162, citing, *inter alia*, Pen. Code § 1259; *People v. Smithey* (1999) 20 Cal.4th 936, 976, fn. 7.) As respondent does not address, much less dispute, Matthew's position in this regard, no further discussion of this issue is necessary. (See RB 81.)

C. Respondent Concedes That The Challenged Instruction Was A Transferred Intent Instruction; It Is Reasonably Likely That The Jurors Erroneously Applied That Instruction To All Charges Requiring A Premeditated Intent To Kill, Including The Attempted Murder Charges

Respondent concedes that the instruction was "a pinpoint instruction on transferred intent," that the jurors would have understood it as such, that the transferred intent doctrine was inapplicable to the attempted murder charges, and therefore that it would have been error for the jurors to apply the instruction to the attempted murder charges. (RB 76-81.) However, respondent contends that the jurors would not have applied the transferred intent instruction to the attempted murder charges because it was incorporated in the definition of premeditation and deliberation as it applied to murder. (RB 76-78, 81.) Because "the attempted murder instruction was supplied separately," respondent reasons that the jurors necessarily limited it to the murder charges and did not misapply it the attempted murder charges. (RB 81.)

If the instruction on the premeditated intent to kill required for attempted murder conflicted with that required for murder, respondent

might have a point. However, it did not. The attempted murder instruction was silent with regard to whether the defendant must intend to kill the specific target or whether it is sufficient that he intend to kill *anyone*, so long as he intends to kill "a human being." (3 CT 707.) The jurors were, of course, specifically instructed to "consider the instructions as a whole and each in light of all others," and it must be presumed that they followed this instruction. (CALJIC No. 1.01; CT 669; see, e.g., *People v. Davenport* (1995) 11 Cal.4th 1171, 1210, and authorities cited therein.) Indeed, this Court and others have consistently held that jurors presumably fill in gaps in one instruction from definitions in others. (See, e.g., *People v. Castillo* (1997) 16 Cal.4th 1009, 1016, and authorities cited therein ["the absence of an essential element in one instruction may be supplied or cured in light of the instructions as a whole"]; *People v. Van Winkle* (1999) 75 Cal.App.4th 133, 147 [same]; *People v. Galloway* (1979) 100 Cal.App.3d 551, 567-568.) Given the language of the instructions as a whole, they were certainly susceptible of the reading that the challenged instruction applied to the premeditated intent to kill required for all, not just some, of the charges incorporating that element.

Furthermore, as discussed in the opening brief, because neither the prosecutor nor Matthew's counsel addressed the boys' liability if any of the shootings were unintentional, their arguments did not correct the misleading impression left by the instruction. (AOB 159-160.) The only attorney who did address the question of liability for unintentional shootings was Michael's counsel, and his argument not only failed to correct the misleading impression left by the instruction, it fortified it. Respondent disagrees, contending that it was clear from Michael's counsel's argument that he was only referring to the murder charges, not the attempted murder

charges. (RB 78, 81.) Not so.

Michael's counsel's argument focused on a significant issue presented by the facts: whether all of the victims were shot intentionally or whether some were shot unintentionally in the course of the intentional shootings of others and, in the latter case, whether liability attached. (20 RT 3324-3328, 3363.) In this regard, Michael's counsel argued "whether [the shooter]'s actually firing at everybody or he's firing at one and can't control it and he's firing at the others, *legally it doesn't matter*" because even if he did not intend to kill all of the victims, "when he's firing, he has an intent to kill" and therefore was still liable. (20 RT 3363-3364, italics added.) Neither he nor Matthew's counsel even differentiated between the murder and attempted murder charges, much less between the intent to kill required for the murder charges and that required for the attempted murder charges. (Compare *People v. Bland*, *supra*, 28 Cal.4th at pp. 332-333 [where trial court's instruction on transferred intent specifically stated that it applied to victims "killed," and not to victims injured, and where court properly responded to juror's inquiries regarding application of transferred intent to attempted murder charge, no reasonable likelihood that the jurors applied instruction to attempted murder charges].)

For all of these reasons, as well as those set forth in the opening brief, based on the record as a whole it is reasonably likely that the jurors misapplied the transferred intent instruction to the attempted murder charges, concluding that it was not necessary for the shooter to harbor a premeditated intent to kill "a specific individual" (3 CT 704), so long as he intended to kill *a* human being" (3 CT 703, 705) or "another human being" or "another person" (3 CT 707). Application of the transferred intent instruction to the attempted murder charges violated state law and allowed

the jurors to convict Matthew of premeditated attempted murder without finding all of the essential elements of that crime beyond a reasonable doubt, in violation of Matthew's federal constitutional rights to due process, trial by jury, and reliability in the guilt phase verdicts in this capital case. (See, e.g., *Estelle v. McGuire* (1992) 502 U.S. 62, 71-72; *Boyde v. California* (1990) 494 U.S. 370, 380; *Beck v. Alabama, supra*, 447 U.S. at pp. 637-638; .)

D. Respondent Has Failed To Carry Its Burden Of Proving That The Attempted Murder Verdicts Were Unattributable To The Error

Respondent acknowledges that any error in this regard must be reviewed under the *Chapman* standard of prejudice, which places the burden on the state to prove federal constitutional violations harmless beyond a reasonable doubt. (RB 82, citing *Chapman v. California* (1967) 386 U.S. 18, 24.) While respondent cites the correct standard of review, respondent misapplies it.

Respondent contends that the only reasonable interpretation of the evidence was that each victim was shot deliberately, with an intent to kill each individual person. (RB 82-85.) However, as respondent People do throughout their brief, they support that proposition by citing only to selected portions of the record while ignoring substantial other portions supporting a contrary view. (RB 82-85.) While respondent's analysis might be an appropriate response to a challenge to the sufficiency of the evidence to support a particular verdict, it is an inappropriate analysis here. As the United States Supreme Court has unequivocally stated, in determining whether a federal constitutional violation is harmless beyond a reasonable doubt under the *Chapman* standard, the question "is not whether

the legally admitted evidence was sufficient to support" the verdict, but rather is "whether the State has 'proved beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" (*Satterwhite v. Texas* (1988) 486 U.S. 249, 258-259, quoting from *Chapman v. California*, *supra*, at p. 24; see also *Rose v. Clark* (1986) 478 U.S. 570, 583 [whether constitutional error is harmless beyond a reasonable doubt requires consideration of entire record].) As discussed at length in Argument II-D-4, above, while respondent's record citations certainly support *one view* of the evidence as showing an intent to kill each victim, the evidence *as a whole* was susceptible of a reasonable interpretation that the perpetrator shot Trudell, James, and John inadvertently in the shootings of Arnold and Watchman.

Finally, respondent contends, even under a factual scenario in which James and John were shot unintentionally, during the shootings of Arnold and Watchman, they were in the same "kill zone." (RB 84.) "Thus, the shooting would fall squarely within the ambit of concurrent intent." (RB 84-85.) Consequently, respondent concludes, the instructional error was harmless. (RB 85.) Respondent's argument misapprehends both the nature of the error that occurred here and the law on "concurrent intent."

The error here was that the jurors were permitted to convict Matthew of the attempted murders of James and John without finding beyond a reasonable doubt that he harbored the specific intent to kill *them*. Resorting to the law on "concurrent intent" does not avoid this problem. It is true that when the defendant intends not only to kill his primary target but also specifically intends to kill any other persons within the "kill zone" of that target, he is liable for the attempted murder of the people within the "kill zone." (*People v. Bland*, *supra*, 28 Cal.4th at p. 328.) This is so because he

specifically, and concurrently, intends to kill those people. (*Id.* at pp. 329-331.) In other words, this "concurrent intent" principle still requires the specific intent to kill each victim; it is still insufficient to intend to kill "someone else." (*Id.* at pp. 328-329, and fn. 6.) Once again, the evidence as a whole was susceptible of the reasonable inference that the shooter only intended to kill Arnold and Watchman and that the shootings of the other victims were unintentional. If so, Matthew was not guilty of attempted murder, either under a "transferred intent" theory *or* by resorting to the concurrent intent principle. (*Id.* at pp. 323, 328-329.)

Respondent has failed to carry its burden of proving that the jury's verdicts were surely unattributable to the instructional error. The verdicts finding Matthew's guilty of attempting to kill James and John with premeditation must be reversed.

V

THE PROVISION OF CALJIC NO. 17.41.1 VIOLATED MATTHEW'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS AND TRIAL BY A FAIR AND IMPARTIAL JURY AND REQUIRES REVERSAL

In the opening brief, Matthew challenged the court's provision of CALJIC No. 17.41.1 as violating his Sixth and Fourteenth Amendment rights to due process and trial by a fair and impartial jury. (AOB 163-166.) Respondent disputes the contention, but cites no relevant point or authority that has not adequately been addressed in the opening brief. (RB 86-87.) Accordingly, Matthew considers this issue to be fully joined by the briefs on file with the Court.

VI

FOR PURPOSES OF THIS APPEAL ONLY, MATTHEW WITHDRAWS HIS CLAIM THAT THE PROSECUTOR COMMITTED MISCONDUCT BY ARGUING FALSE EVIDENCE

The opening brief challenged the prosecutor's references to false evidence in his guilt and penalty phase summations as a violation of state law, as well as Matthew's federal constitutional right to due process. (AOB 166-187.) Respondent contends that Matthew has waived his right to challenge the remarks as prosecutorial misconduct because his counsel failed to object them below. (RB 90-91.) In light of respondent's contention, Matthew respectfully withdraws the claim of prosecutorial misconduct for purposes of this appeal only.[6]

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[6] Although Matthew withdraws his claim of prosecutorial misconduct, he still contends that the prosecutor's various misrepresentations of the evidence in his arguments to the jurors must be considered in assessing prejudice from other errors. (AOB Arguments VIII and IX and Arguments VIII and IX, below; see, e.g., *People v. Edelbacher*, *supra*, 47 Cal.3d at p. 1035 and fn.16 [prosecutor's statements in argument appropriately considered in assessing prejudice from other error, regardless of whether independent claim of prosecutorial misconduct would be meritorious or was preserved by objection].)

VII

THE TRIAL COURT'S EXCLUSION OF QUALIFIED JURORS AND REFUSAL TO EXCLUDE DISQUALIFIED JURORS UNDER THE *WAINWRIGHT v. WITT* STANDARD VIOLATED MATTHEW'S RIGHTS TO A FAIR AND IMPARTIAL JURY, TO DUE PROCESS OF LAW, AND TO A RELIABLE PENALTY DETERMINATION AS GUARANTEED BY THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS

A. Introduction

As discussed in the opening brief, the trial court's exclusion of two life-inclined venierpersons who were not disqualified under the *Wainwright v. Witt* (1985) 469 U.S. 412 standard violated Matthew Souza's rights to a fair and impartial jury a reliable penalty determination under the Fifth, Sixth, Eighth, and Fourteenth Amendments. (AOB 178-200.) Similarly, the court's refusal to exclude a juror who was actually biased in favor of the death penalty, and who actually sat on the jury that fixed Matthew's punishment at death, violated his rights under the Sixth, Eighth, and Fourteenth Amendments. (AOB 200-215.) For any or all of these reasons, the death judgment must be reversed.

In addition, the trial court applied its standard for exclusion arbitrarily and capriciously, unfairly favoring the prosecution and the exclusion of life-inclined jurors, in violation of state law and Matthew's rights under the Sixth, Eighth, and Fourteenth Amendments. (AOB 218-228.) With peremptory challenges, the prosecutor removed the few life-inclined venirepersons who escaped the trial court's unfair application of *Witt*. (AOB 228-231.) Through the tandem actions of the court and the prosecutor, the state excluded all of the prospective jurors who had expressed opposition to, or conscientious scruples against, the death

penalty, in violation of the Sixth, Eighth, and Fourteenth Amendments. (AOB 215-231.) For this reason as well, the death judgment cannot stand.

Respondent disagrees. (RB 98-115.) As will be demonstrated, respondent is incorrect.

B. Because Prospective Juror Madali's "Extreme Discomfort" At The Thought Of Voting To Execute Another Human Being Was Not The Equivalent To Being Disqualified To Serve Under *Wainwright v. Witt*, The Court's Erroneous Dismissal Of Ms. Madali For Cause Demands Reversal Of The Death Judgment

In the opening brief, Matthew argued that the evidence before the trial judge was insufficient to support his ruling that prospective juror Madali's personal feelings about imposing the death penalty would prevent or substantially impair her ability to serve as a juror under *Wainwright v. Witt*, *supra*, 469 U.S. 412. Hence, the judge erred in dismissing Ms. Madali for cause, which demands reversal of the death judgment. (AOB 179-186, citing, *inter alia*, *Gray v. Mississippi* (1987) 481 U.S. 648, 666-668; *Davis v. Georgia* (1976) 429 U.S. 122.)

The state's response is nothing more than a brief summary of Ms. Madali's voir dire answers and her dismissal for cause (RB 99-101), followed by a perfunctory conclusion that the judge properly determined that she was disqualified because "[s]he expressed extreme discomfort at the very thought of determining sentence in a case involving the death penalty . . . [and] admitted that she might not be able to even consider death as a punishment" (RB 101).

As a preliminary matter, respondent's characterization of Ms. Madali's responses as indicating that "she might not be able to even consider death as a punishment" is more than a little misleading. (RB 101.)

While she did initially answer yes when the judge put that question to her, her answers to the follow-up questions clarified that she would not consider death as a punishment *in anything other than aggravated cases* and that, without knowing anything about the facts of this particular case other than the number of people killed, she could not say whether this was the kind of aggravated case that warranted the death penalty. (6 RT 897-899.) There was absolutely nothing inappropriate about these responses. To the contrary, they mirrored the law. (See, e.g., *People v. Prieto* (2003) 30 Cal.4th 226, 263 [death penalty may only be imposed if aggravating circumstances "substantially outweigh" mitigating circumstances]; Pen. Code, § 190.3 [aggravating and mitigating circumstances relating to offense and offender jurors must consider in determining appropriate penalty]; *Skipper v. South Carolina* (1986) 476 U.S. 1, 4-5 [jurors must consider all relevant circumstances relating to the offense and the offender in selecting appropriate penalty]; *People v. Zapien* (1993) 4 Cal.4th 929, 990.)

As to respondent's remaining premise that Ms. Madali's "extreme discomfort" over the notion of voting to kill another human being was the equivalent to being unable to perform, or substantially impaired in performing, her duties as a juror, under *Wainwright v. Witt*, respondent makes it in a perfunctory fashion and without citation to any supporting authority. (See, e.g., *People v. Stanley*, *supra*, 10 Cal.4th at p. 793 [court may pass without consideration "argument" made without citation to supporting authority]; *People v. Clair* (1992) 2 Cal.4th 629, 653, fn. 2 [point made in perfunctory fashion is not properly raised].) This is no doubt because the authorities are to the contrary.

As discussed at length in the opening brief, this Court and others have made abundantly clear that:

> In light of the gravity of [the death penalty], for many members of society their personal and conscientious views concerning the death penalty would make it "very difficult" *ever* to vote to impose the death penalty. . . . [That] is not equivalent to a determination that such beliefs will "substantially impair the performance of his [or her] duties as a juror" under *Witt*, *supra*, 469 U.S. 412. . . .

(*People v. Stewart* (2004) 33 Cal.4th 425, 446;[7] accord, *People v. Avila* (2006) 38 Cal.4th 491, 530 ["mere *difficulty* in imposing the death penalty does not, per se, prevent or substantially impair the performance of a juror's duties. The prospective juror might nonetheless be able to put aside his or her personal views and deliberate fairly under the death penalty law"]; *People v. Bradford* (1969) 70 Cal.2d 333, 346-347 [prospective juror improperly dismissed for cause where she "expressed little more than a deep uneasiness about participating in a death verdict . . . [,] complained that a death vote would make her 'very nervous' and agreed with the trial court's suggestion that such a vote might have a 'great physical effect' on her. . . . The decision that a man should die is difficult and painful, and veniremen cannot be excluded simply because they express a strong distaste at the prospect of imposing that penalty"]; *Witherspoon v. Illinois* (1968) 391 U.S. 510, 515, fn. 8 ["'[e]very right-thinking man would regard it as a painful duty to pronounce a verdict of death upon his fellow man;'" that does not mean that he is unable to perform his duties as a juror]; *Adams v. Texas* (1980) 448 U.S. 38, 50 [in applying the "prevent or substantially impair" standard, "neither nervousness, emotional involvement, nor

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[7] Remarkably, although this Court's decision in *Stewart*, *supra*, figured prominently in the opening brief (AOB 180-182, 187-192, 198), respondent does not even cite, much less address, *Stewart* in its brief. (See RB 98-115).

inability to deny or confirm any effect whatsoever is equivalent to an unwillingness on the part of the jurors to follow the court's instructions and obey their oaths, regardless of their feelings about the death penalty"]; *Mann v. Scott* (5th Cir. 1994) 41 F.3d 968, 981 ["emotional opposition to capital punishment alone is insufficient cause for juror exclusion"].)

Although the thought of voting to kill another human being would make her "sick" at "heart," Ms. Madali's answers as a whole made it clear that she could set aside her personal feelings and deliberate fairly under the law. As she stated in her questionnaire that, while "I myself really don't know how I feel about the death penalty," "*I believe the law is the law, you must abide by the law of the land* and if that means the person/s fall under that category, so be it." (19 CT 5181, italics added.) As she further stated on voir dire, it would take a "whole lot" for her to decide death was appropriate, meaning that it would depend on "basically the whole circumstance [*sic*]. . . . everything that's taken and accounted for. The evidence, the person, what – the circumstance, what happened, all of that." (6 RT 897.) Although it would be a painful decision, she would indeed vote for the death penalty if these "circumstance[s]" warranted it. (6 RT 897-901.) Once again, far from demonstrating that she was disqualified, in essence, Ms. Madali's views on the death penalty mirrored California's death penalty law itself. The trial judge's improper exclusion of Ms. Madali demands reversal of the death judgment. (*Gray v. Mississippi*, *supra*, 481 U.S. at pp. 666-668; *Davis v. Georgia*, *supra*, 429 U.S. 122; *People v. Heard* (2003) 31 Cal.4th 946, 965-966.)

C. Because The Court's Determination That Prospective Juror Froyland Was Disqualified Under *Witt* Was Unsupported By Substantial Evidence, The Court Erroneous Dismissal Of Mr. Froyland For Cause Also Demands Reversal Of The Death Judgment

The state's response to the court's exclusion of prospective juror Froyland is similarly perfunctory. (RB 102-103.) Once again, the state's response is nothing more than a brief summary of Mr. Froyland's voir dire and dismissal for cause (RB 102-103), followed by a perfunctory conclusion that the trial judge properly determined that he was disqualified because, when "asked if he had 'prejudged' the penalty issue, he answered that he had strong convictions that would cause him to choose the more lenient punishment" (RB 103, citing 1 RT 5-c and 6 RT 748).

Respondent's characterization of Mr. Froyland's voir dire answer is grossly misleading. When the court asked Mr. Froyland if, "to some extent," he had "prejudged," Mr. Froyland replied, "*not having heard one fact whatsoever*," he would be "more likely to sway or fall on the side of lenient punishment." (6 RT 748, italics added.) This is precisely what any rational and right-thinking human being should feel: having heard no facts whatsoever regarding the offense or the offender, he would not be inclined toward killing the offender. And this is the law. (See, e.g., *People v. Smith* (2005) 35 Cal.4th 334, 370 [approving instruction as properly "convey[ing] that a life sentence is mandatory if aggravation does not outweigh mitigation"]; Pen. Code, § 190.3 [death penalty may only be imposed if aggravating factors outweigh mitigating]; *Skipper v. South Carolina*, *supra*, 476 U.S. at pp. 4-5 [jurors must consider all relevant aggravating and mitigating circumstances relating to the offense and the offender before

voting to impose death].) Mr. Froyland's statement that his "decision would likely depend on the facts he was face[d] with . . . suggested that his selection would comport with the trial court's 'quest' to find jurors who 'conscientiously apply the law and find the facts.' *Witt*, *supra*, 469 U.S. at 423." (*Gall v. Parker* (6th Cir. 2000) 231 F.3d 265, 331.) Respondent's contention that this statement amounts to disqualification turns *Witt* on its head.

Mr. Froyland expressed his moderate support for the death penalty (16 CT 4521), emphasized that the finality of the penalty precluded its light consideration (6 RT 745-746), and indicated that although he was more inclined toward life, he *would vote for death* if "persuaded . . . by the evidence" (6 RT 747). As this Court has unambiguously recognized (but respondent ignores), "a prospective juror may not be excluded for cause simply because his or her conscientious views relating to the death penalty would lead the juror to impose a higher threshold before concluding that the death penalty is appropriate or because such views would make it *very difficult* for the juror ever to impose the death penalty." (*People v. Stewart*, *supra*, 33 Cal.4th at p. 447; accord, *People v. Heard*, *supra*, 31 Cal.4th at pp. 959-965; *People v. Kaurish* (1990) 52 Cal.3d 648, 699; *Wainwright v. Witt*, *supra*, 469 U.S. 412, 423; *Adams v. Texas*, *supra*, 448 U.S. at p. 40; *Witherspoon v. Illinois*, *supra*, 391 U.S. at pp. 518, 520-523.) As in the case of Ms. Madali, far from demonstrating that his views would prevent or substantially impair his ability to follow his oath and serve as a juror, Mr. Froyland's answers as a whole clearly demonstrated that he would be an ideal juror. The trial judge's improper exclusion of Mr. Froyland demands reversal of the death judgment. (*Gray v. Mississippi*, *supra*,481 U.S. at pp. 666-668; *Davis v. Georgia*, *supra*, 429 U.S. 122; *People v. Heard*, *supra*,

31 Cal.4th at pp. 965-966.)

D. The Court's Refusal To Exclude Juror No. 5, Who Was Actually Biased In Favor Of Execution And Was Impaneled On The Jury That Voted To Execute Matthew, Demands Reversal Of The Death Judgment

1. The Court Erred in Refusing to Dismiss Juror No. 5 for Cause

In his opening brief, Matthew argued that the trial judge erred in denying his challenge for cause to Juror No. 5, whose voir dire answers clearly established that he was actually biased under the *Witt* standard. (AOB 200-205, citing, *inter alia*, *People v. Boyette* (2002) 29 Cal.4th 381, 416.) Because this biased juror was "empaneled and the death sentence [was] imposed, the State is disentitled to execute the sentence." (*Morgan v. Illinois* (1992) 504 U.S. 719, 729; accord, *People v. Boyette*, *supra*, 29 Cal.4th at p. 416; *People v. Weaver* (2001) 26 Cal.4th 876, 910; AOB 205.)

Respondent asserts that "Juror No. 5 repeatedly testified that he could keep an open mind and would consider all of the evidence before deciding an appropriate punishment." (RB 112.) Although this assertion is made without supporting record citation, Matthew assumes from respondent's summary of the voir dire (RB 108-110) that respondent refers to Juror No. 5's answers at pages 411 and 416-417 of the Reporter's Transcript. (See RB 108.) Those answers do not support respondent's characterization of Juror No. 5's responses.

When the judge opened its voir dire by asking Juror No. 5 a single death-qualification question which emphasized that he had "not heard any evidence" and generally inquired whether he could be "keep an open mind and fairly evaluate all of the evidence and keep open the option of either

penalty in this case," Juror No. 5 initially and simply replied, "I *believe* so." (4 RT 411, italics added.) And, asked if he could be "fair and impartial to each side concerning the penalty in this case," he replied, "I *think* so." (4 RT 411, italics added.) Much later, and in response to the judge's vigorous and patent efforts to rehabilitate Juror No. 5 after his disastrous and disqualifying responses to defense counsel's questions and the judge's own hypothetical, the judge pressed him about keeping an "open mind" at the penalty phase and he replied, "I'd *try* to keep an open mind." (4 RT 416-417, emphasis added.) These equivocal responses are taken out of the context of Juror No. 5's voir dire as a whole and are thereby given a distorting effect. Upon actual probing, these equivocal responses gave way to an unequivocal and unambiguous bias. (See, e.g., *People v. Holt* (1997) 15 Cal.4th 619, 652 [despite juror's initial equivocal responses, subsequent unequivocal statements established disqualification under *Witt*].)

Following the court's perfunctory voir dire in which Juror No. 5 initially stated that he "believe[d]" he could keep an open mind at the penalty phase (4 RT 411), Juror No. 5 stated that the death penalty (or an "eye for an eye") was warranted in all cases in which someone was killed, other than accidents and acts of war – in other words, in all cases of criminal homicide (4 RT 412-413). Michael's counsel specifically asked him if he would vote for death (or an "eye for an eye") based on the defendants' bare convictions on the underlying murder charges, "without other considerations." Juror No. 5 replied that he would. (4 RT 415.) Of course, while Mr. Froyland and Ms. Madali's similar responses that they would be more inclined toward life in the absence of any evidence apart from the convictions themselves mirrored the law (see parts B and C, above), Juror No. 5's response that he would vote for death in the absence

of any other evidence was contrary to law. (See *People v. Boyette*, *supra*, 29 Cal.4th at p. 419 [juror's statements "that an offender (such as defendant) who killed more than one victim should automatically receive the death penalty" demonstrated that "this juror's views would have 'prevent(ed) or substantially impair(ed) the performance of his duties as a juror in accordance with his instructions and his oath,'" under *Witt*].)

When the judge further inquired into these responses with a hypothetical "scenario" obviously meant to rehabilitate Juror No. 5, Juror No. 5 held fast to his bias: he would vote for the death penalty as the only appropriate punishment for a getaway driver convicted of felony-murder, who was not actively involved in the felony or the killing, who was not present when the killing occurred, who did not intend for anyone to be killed, and who did not even necessarily know that his accomplice had committed a killing. (4 RT 416-417.) Such a "scenario" is not even sufficient to show the "reckless indifference" necessary to make the felon *eligible* for the death penalty (Pen. Code, § 190.2, subd. (d)), much less to suggest that the ultimate punishment of death is the only possible option. Juror No. 5's response "was a statement indicating he could not follow the law" under *Witt*. (*People v. Holt* (1997) 15 Cal.4th 619, 652 [prospective juror's statement that he would not vote for death in cases of unintentional killings "was a statement indicating he could not follow the law" and therefore demonstrated disqualification under *Witt*].) Obviously appreciating this truth, the judge pressed Juror No. 5 about keeping an "open mind" at the penalty phase, to which he finally responded that he would "*try*." (4 RT 417, italics added.) Particularly given his other answers, this "tentative statement[] that [Juror No. 5] would *try* to decide the case based on the evidence" simply was not sufficient to rehabilitate

him. (*Wolfe v. Brigano* (6th Cir. 2000) 232 F.3d 499, 503 [jurors' "tentative statements that they would try to decide the case based on the evidence" insufficient to support finding of impartiality]; accord, *White v. Mitchell* (6th Cir. 2005) 431 F.3d 517, 540 [same]; *United States v.* Sithongtham (8th Cir. 1999) 192 F.3d 1119, 1121 [trial court erred in refusing to excuse juror for cause who stated only that he could "probably" be fair and impartial; "'probably' is not good enough".)

Even after making this tentative promise to "try" to keep an open mind, Juror No. 5 made further statements unequivocally demonstrating his bias and inability to perform his duties as a juror. When Matthew's counsel questioned him, he was reluctant to use the word "automatic" in describing his opinion that the death penalty was warranted based on the underlying murders alone; however he could not conceive of anything that would "change" his "mind" and convince him *not* to vote for death and indeed he would place the burden on the defendants to persuade him not to do so. (4 RT 418-419.) Yet again, this statement revealed that Juror No. 5 was unequivocally biased and was substantially impaired in performing his duties as a juror. (*People v. Boyette*, *supra*, 29 Cal.4th at pp. 417-419 [juror's statement that he would "probably have to be convinced" to vote for life and "would be more inclined to go with the death penalty . . . . indicated he would apply a higher standard . . . to a life sentence than to one of death," and unequivocally demonstrated his disqualification under *Witt*].)

Respondent acknowledges that some of Juror No. 5's answers were "similar" to the disqualified juror's answers in *People v. Boyette*, *supra*, 29 Cal.4th 381. (RB 112.) However, respondent contends that *Boyette* is inapplicable based upon what respondent apparently perceives to be important distinctions between that case and the one at bar. (RB 112-113.)

First, according to respondent, "the juror in *Boyette* indicated that he was 'strongly in favor' of the death penalty; Juror No. 5 did not." (RB 113.) Juror No. 5 did, however, identify himself on the questionnaire as "moderately in favor" of the death penalty. (13 CT 3608.) And his voir dire statements as a whole – discussed above and in the opening brief – clearly revealed a man "strongly" in favor of the death penalty, notwithstanding the "moderate" label with which he chose to identify himself. Thus, the distinction respondent draws is one without a difference.

Second, according to respondent, "[t]he juror in *Boyette* indicated the death penalty should automatically be imposed on those defendants convicted of committing a multiple murder [citation]; Juror No. 5 did not." (RB at p. 113.) This is simply untrue. Although *he* did not use the word "automatic," his statements that the death penalty was warranted in all cases of criminal homicide and specifically in cases of multiple murder, regardless of "other considerations," were the same in substance and effect as stating that the death penalty should "automatically" be imposed on those defendants convicted of multiple murder, as in *Boyette*. While Juror No. 5 later attempted to backpedal from this position by expressing his reluctance over using the word "automatic," he also stated that he would be inclined to vote for the death penalty in a case of multiple murder, would place the burden on the defense to change his mind, just as in *Boyette*, and – worse than in *Boyette* – could not conceive of or articulate anything that could change his mind. (4 RT 418-419.) Thus, the distinction respondent draws does not exist. And to the extent there is a distinction, Juror No. 5's answers were even more indicative of bias than the disqualified juror's answers in *Boyette*.

Third, according to respondent, "the juror in *Boyette* equivocated

when asked if he would exclude consideration of a life term [citation]; Juror No. 5 did not." (RB at p. 113.) Once again, respondent does not support this assertion with a citation to the record nor can Matthew's counsel find any portion of the record that could even conceivably support respondent's assertion. While Juror No. 5 may not have been directly asked if he would "exclude consideration of a life term," his answers as a whole clearly and unequivocally indicated that he would.

Finally, respondent contends that the heart of *Boyette*'s holding was that the juror was disqualified due to his "serious doubts" that life without parole meant what it said, not due to his other answers. (RB 113.) Even the narrowest reading of *Boyette* does not support respondent's characterization.

At bottom, respondent essentially contends not only that a prospective juror who believes that the death penalty is warranted in *all* cases of criminal homicide and that the death penalty would be warranted in this case based on the bare fact of conviction, who would place the burden on the defense to change his mind, and who could not conceive of or articulate anything that *could* change his mind, is qualified to serve as a juror in a capital case. (RB 108-109, 112-113.) Respondent further contends that *only* those jurors who would find it painless and easy to vote to execute another human being (RB 99-101), and who would be inclined to vote to execute death-eligible defendants regardless of mitigating considerations (RB 103) are qualified to serve on capital juries. Respondent's premise is not only contrary to the law; it is anathema to any process by which a civilized society puts a man to his death.

The trial court erred in refusing to dismiss Juror No. 5 and in excluding potential jurors Madali and Froyland. For all or any one of those

erroneous rulings, the death judgment must be reversed.

2. Matthew Did Not Waive the Violation of His Right to an Impartial Jury That Resulted from the Court's Refusal to Dismiss Juror No. 5 for Cause

a. The "Exhaustion Requirement" Was Effectively Satisfied as to the Reconstituted Jury Which Fixed Matthew's Punishment at Death and Counsel's Failure to Express Dissatisfaction with the Reconstituted Jury Did Not Amount to Waiver

As predicted (AOB 205-215), respondent contends that Matthew's trial counsel waived his right to challenge the violation of his right to a fair and impartial jury that resulted from the seating of a biased juror, Juror No. 5. (RB 111-112.) Respondent is wrong.

First, respondent contends that defense counsel's failure to express dissatisfaction with the jury waived his right to challenge the erroneous refusal to excuse Juror No. 5. (RB 111.) However, as discussed in the opening brief but ignored by respondent, at the time voir dire in this case took place in 1998, counsel was not required to express dissatisfaction with the jury in order to preserve the claim for appeal. (AOB 207.) In *People v. Weaver* (2001) 26 Cal.4th 876, this Court resolved a conflict in its prior decisions and clarified that an expression of dissatisfaction is necessary to preserve the erroneous denial of a challenge for cause. However, because the Court recognized that prior to its decision, the "law was in a state of flux on this point," and thus held that the failure to express dissatisfaction in cases tried before 2001 will not be treated as waiver. (*People v. Weaver*, *supra*, at pp. 910-911; accord, *People v. Blair* (2005) 36 Cal.4th 686, 741-742; *People v. Boyette*, *supra*, 29 Cal.4th at p. 416; AOB 207.)

Second, respondent contends that counsel's failure to remove Juror No. 5 with one of his unexhausted peremptory challenge waived his right to challenge the inclusion of a biased juror who sentenced him to death. (RB 111.) Respondent disputes Matthew's contention that his counsel effectively satisfied the exhaustion requirement by using all of his peremptory challenges in the selection of the alternate jurors, one of whom replaced a seated juror before deliberations. (RB 111; see AOB 205-207.)

Although it is not entirely clear, respondent seems to argue that Matthew's position is without merit because the selection of the alternates was conducted in a separate proceeding with "a new set of peremptory challenges." (RB 111.) But respondent does not explain how that procedure undermines Matthew's argument. As discussed in the opening brief, the "exhaustion requirement" is grounded on the notion that the failure to exhaust an available peremptory challenge implies counsel's "relative" satisfaction with the constituted jury *as a whole*, which may be based on some "nuanced and tactical" reason. (AOB 205-207, citing, *inter alia*, *People v. Ayala* (2000) 23 Cal.4th 225, 261.) When the composition of that particular jury *changes* with the seating of an alternate juror, and when counsel *did* exhaust his peremptory challenges to the alternate jurors thus implying that he was *not* satisfied with that pool of jurors, the implication of "relative satisfaction" with that reconstituted jury no longer applies. (AOB 205-206, citing *In re Mendes* (1979) 23 Cal.3d 847, 855.)

Respondent counters that counsel for both Michael and Matthew did "express[] satisfaction" with the selected alternates. (RB 111, citing 12 RT 1853-1856.) Respondent misreads or misstates the record.

The judge initially ruled that five alternate jurors would be selected. (12 RT 1836.) When the first five potential alternates were called, both

sides accepted the pool without exercising any peremptory challenges and those jurors were sworn. (12 RT 1840-1841.) However, immediately after they were sworn, alternate juror No. 16 expressed a hardship. (12 RT 1842.) After an unreported bench conference, both sides were permitted to rescind their passes and alternate juror selection was reopened. (12 RT 1842.) When selection was reopened, Matthew's counsel exhausted all of his peremptory challenges to the alternates. (12 RT 1842-1850.) After the alternate jurors were sworn and excused for the day, the judge described the bench conference for the record, stating that on Matthew's counsel's motion, he had reopened alternate selection and allowed for the selection of six alternates jurors, and six peremptory challenges, after Juror No. 16 expressed a hardship. (12 RT 1851-1852.) It was in discussing this *procedure* that the discussion of "satisfaction" occurred. The court noted that the prosecutor "seemed satisfied with the *procedure* the court outlined." (12 RT 1853, italics added.) The court then inquired, "is there anybody who wants to object to *the procedure* as it finally unfolded?" (12 RT 1853.) It was to *this question – not* to the sworn group of alternates – that Michael's counsel replied, "we're satisfied." (12 RT 1853.)

Finally, respondent insists that – despite having exhausted his peremptory challenges in the selection of alternate jurors – it should be presumed that defense counsel was satisfied with the reconstituted jury because "there was no objection or request to reopen when the ultimate [reconstituted] jury was impaneled" in the middle of trial. (RB 111.) Respondent's argument is more than a little curious. There simply was nothing procedurally inappropriate about replacing a duly sworn alternate with a regular juror and hence no ground for reopening jury selection *in the middle of trial* or for a mistrial, which reopening jury selection would have

required. Certainly, this Court has never imposed such a convoluted and illogical preservation requirement or held that the failure to move to reopen jury selection under such circumstances rebuts the implication of dissatisfaction that arises from the exhaustion of peremptory challenges.

At bottom, the principal rationale for applying the exhaustion requirement simply does not apply in this case. Because counsel *did* exhaust his peremptory challenges in the selection of alternates and one of those alternates sat on the reconstituted jury that selected the punishment of death, counsel cannot be presumed to have been "relative[ly] satisf[ied]" with that jury. To the contrary, given that counsel did express his concern about Juror No. 5's bias by moving to dismiss him for cause, and given that counsel did exhaust his peremptory challenges to the alternates, it should be presumed that he was not satisfied with the reconstituted jury.

b. Even If the Exhaustion Requirement Were Not Satisfied, Defense Counsel's Inaction Did Not Waive Matthew's Right to an Impartial Jury, a Fundamental, Personal Right That Requires the Defendant's Personal and Express Waiver

Next, respondent builds another straw man by characterizing Matthew's alternative argument as a contention that "his right to challenge a violation of his right to a fair and impartial jury could not be waived." (RB 111.) As the opening brief makes abundantly clear, Matthew's argument is not necessarily that the right to a fair and impartial jury is not waivable. Rather, his argument is that the Sixth Amendment right to a fair and impartial jury is inseparable from the Sixth Amendment right to a jury and, thus, a fundamental personal right that requires the defendant's *personal and express waiver* and hence cannot and will not be implied from

his counsel's action or inaction. (AOB 207-215, citing, *inter alia*, *Hughes v. United States* (6th Cir. 2001) 258 F.3d 453, 463, *Johnson v. Armontrout* (8th Cir. 1992) 961 F.2d 748, 754, *Patton v. United States* (1930) 281 U.S. 276, 308-312, *People v. Collins* (2001) 26 Cal.4th 297, 304-305 and fn. 2, *In re Hitchings* (1993) 6 Cal.4th 97, 110, and *In re Carpenter* (1995) 9 Cal.4th 634, 654 [violation of right to impartial jury is structural error]; see also *United States v. Wiles* (9th Cir. 1996) 102 F.2d 1043, 1057 ["Due to the nature of a structural defect error, whether a defendant objects . . . is simply irrelevant"].)

Indeed, since the filing of appellant's opening brief, another appellate court held that a fair and impartial jury violation arising from the seating of a biased juror was cognizable on appeal, and demanded reversal of the judgment, despite the fact that trial counsel made no attempt to remove that juror in the proceedings below. (*Franklin v. Anderson* (6th Cir. 2006) 434 F.3d 412, 427-428.) In so holding, the court rejected any argument that trial counsel's failure to remove the biased juror waived his client's right to challenge violation of impartial jury on appeal, or that counsel's inaction could have been strategical: "There is no situation under which the impaneling of a biased juror can be excused. . . . To permit this would be to allow trial counsel to waive the defendant's right to an impartial jury." (*Id.* at pp. 427-428.)[8]

As Matthew further argued in the opening brief, even if the right to

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[8] Lending further support to the essential proposition that the seating of a biased juror is constitutionally intolerable regardless of counsel's action or inaction, some courts have even held that trial courts have a *sua sponte* duty to dismiss a biased juror for cause even in the absence of a defense motion to remove the juror. (See, e.g., *Miller v. Webb* (6th Cir. 2001) 385 F.3d 666, 675; *United States v. Torres* (2nd Cir. 1997) 128 F.3d 38, 43.)

trial by an impartial jury does not require the defendant's personal and express waiver, "because the presence of even a single juror compromising the impartiality of the jury requires reversal, counsel would be constitutionally ineffective if he had failed to" remove that juror when he had the power to do so. (*People v. Weaver*, *supra*, 26 Cal.4th at p. 911; accord, e.g., *Hughes v. United States*, *supra*, at pp. 463-464; *Johnson v. Armontrout*, *supra*, 961 F.2d at pp. 754-755; see also *Franklin v. Anderson*, *supra*, 434 F.3d at p. 428 [counsel allowing seating of biased juror can never be excused as "strategic"]; *Miller v. Webb* (6th Cir. 2004) 385 F.3d 666, 675-676 ["whether to seat a biased juror cannot be a discretionary or strategic decision. . . . [T]here is no sound trial strategy that could support what is essentially a waiver of defendant's basic Sixth Amendment right to trial by impartial jury"].) Regardless of the analytical approach, the end result is that the seating of a biased juror taints the jury and demands reversal of its verdict. (AOB 208-215.)

Respondent does not address either of these arguments or their supporting authorities. (See RB 111-112.) Rather, respondent merely notes that "waiver of dissatisfication with a juror has repeatedly been recognized by this Court." (RB 111, citing *People v. Seaton* (2001) 26 Cal.4th 598, 637 and *People v. Williams* (1997) 16 Cal.4th 635, 667.) Neither *Seaton* nor *Williams* assists respondent in rebutting Matthew's arguments.

In both *Seaton* and *Williams*, *supra*, this Court simply cited and applied the general "exhaustion requirement." In neither case did this Court find that a biased juror was actually seated over a challenge for cause, but that defense counsel waived his client's right to challenge the resulting Sixth and Fourteenth Amendment violations by failing to exercise an unexhausted peremptory challenge to remove that juror. Indeed, as

mentioned in the opening brief, counsel's research has failed to uncover a single case in which *any* court has held that a seated juror was biased, but also that counsel either waived his client's right to challenge the constitutional violation by failing to exhaust his peremptory challenges or that counsel was not ineffective in failing to remove that juror with a peremptory challenge. (AOB 209.) Nor, obviously, has respondent's research uncovered such a case. As discussed in the opening brief, this is undoubtedly because such a holding would be unconstitutional. (AOB 207-215).

Finally, respondent contends that this case "perfectly illustrates" the justification for the waiver doctrine. (RB 111-112.) First, according to respondent, "appellant chose" to have a biased juror sit on his jury by failing to remove that juror with a peremptory challenge. (RB 1121.) Of course, this argument begs the essential premise of Matthew's position – because the right to a fair and impartial jury is a fundamental personal one, *the defendant* must personally and expressly waive that right, thus precluding an implied waiver from the actions or inactions of his trial counsel. In other words, *Matthew* did not "choose" to have a biased juror sit on his jury, *his counsel* simply failed to "cure" the trial court's erroneous denial of his challenge for cause by removing that juror with a peremptory challenge. Or, under the alternative analysis, and as this Court recognized in *People v. Weaver*, *supra*, 26 Cal.4th at p. 911, if juror No. 5 were biased and his counsel "chose" to have a biased juror sit on the jury, then that "choice" deprived Matthew of his right to the effective assistance of counsel. (See also, *Franklin v. Anderson*, *supra*, 434 F.3d at p. 428; *Miller v. Webb*, *supra*, 385 F.3d at pp. 675-676.)

Second, according to respondent, application of the waiver doctrine

is particularly apt in this case because, if counsel had "alerted" the trial court to Juror No. 5's bias by, for instance, expressing his dissatisfaction with the jury, the constitutional violation could have been avoided. (RB 112.) But counsel *did* alert the trial court to the juror's bias by bringing an amply supported challenge for cause. The trial court, however, refused to avoid the error by improperly denying the challenge. Hence, as numerous other courts have recognized, a defendant is not "obliged to use a peremptory challenge to cure a judge's error" in denying a challenge for cause; if the court's ruling "result[s] in the seating of any juror who should have been dismissed for cause . . . that circumstance . . . require[s] reversal." (*United States v. Martinez-Salazar* (2000) 528 U.S. 304, 316; *Johnson v. Armontrout*, *supra*, 961 F.2d at p. 754; *Morrison v. Colorado* (Colo. 2000) 19 P.2d 668, 671 ["regardless of whether the defendant chose to use a peremptory challenge on the allegedly objectionable juror, because he challenged [her] for cause and she served on the jury, his right to an impartial trial was violated if his challenge for cause was improperly denied"]; *State v. Gesch* (Wis. 1992) 482 N.W.2d 99, 100 [rejecting state's argument that defense counsel can waive defendant's right to impartial jury by failing to strike biased juror with peremptory challenge].)

For all of these reasons, as well as those discussed in the opening brief, but ignored by respondent, defense counsel's inaction did not – and constitutionally cannot – be deemed to have waived Matthew's right to challenge the court's erroneous denial of his challenge for cause and the impanelment of a biased juror in violation of his Sixth and Fourteenth Amendment rights to trial by a fair and impartial jury. (AOB 204-215.) The death judgment must be reversed.

E. The Actions Of The Trial Court And The Prosecutor Produced A Jury Culled Of All Those Who Revealed During Voir Dire That They Had Conscientious Scruples Against Or Were Otherwise Opposed To Capital Punishment, Which Violated Matthew's Rights to A Fair And Impartial Jury And Requires Reversal

In the opening brief, Matthew argued as an additional basis for reversal that the trial judge's application of *his* interpretation of the *Witt* standard for disqualification was arbitrary and capricious, unfairly favoring the prosecution and the exclusion of life-inclined jurors and the inclusion of death-inclined jurors. (AOB 215-228.) That is, based on the judge's rulings dismissing life-inclined jurors, he apparently determined that prospective jurors were disqualified if they: 1) would be more inclined to vote for one penalty over the other; 2) would find it very difficult to vote for the other penalty; and 3) would need substantial evidence to be persuaded to vote for the other penalty. (AOB 215-228.) However, the judge only applied that standard to dismiss life-inclined jurors; he refused to dismiss death-inclined jurors who met the same standard. Indeed, the judge was quick to dismiss jurors life-inclined jurors who appeared to meet this standard without further probing or efforts at rehabilitation while he took great pains to attempt to rehabilitate death-inclined jurors who also appeared to meet this standard. (AOB 215-228.) The judge's rulings were thus arbitrary, capricious, and fundamentally unfair; at the very least, his rulings granting the prosecution's challenges for cause to Ms. Madali and Mr. Froyland and denying the defense challenge for cause to Juror No. 5 are not entitled to deference. (AOB 215-228, citing, *inter alia*, *People v. Champion* (1995) 9 Cal.4th 879, 908 [*Witt* must be applied in evenhanded manner]; *Morgan v. Illinois*, *supra*, 504 U.S. at pp. 729-730 [court's

exercise of discretion in conduct of death-qualifying voir dire "is subject to the essential demands of fairness"]; *People v. Welch* (1993) 5 Cal.4th 228, 234 [arbitrary or capricious exercise of discretion is abuse of discretion].) Furthermore, the prosecution used peremptory challenges to exclude the few life-inclined jurors who survived the court's unfair rulings. (AOB 228-230.) In this manner, the tandem actions of these state actors culled the jury "of all those who revealed during voir dire examination that they had conscientious scruples against or were otherwise opposed to capital punishment" (*Adams v. Texas*, *supra*, 448 U.S. at p. 43), in violation of Matthew's Sixth and Fourteenth Amendment rights (*ibid*; accord, *Witherspoon v. Illinois*, *supra*, 391 U.S. at pp. 520-521).

Respondent builds yet another straw man. According to respondent, Matthew contends that the trial court's rulings excluding life-inclined jurors Rutland and Leong were not supported by substantial evidence that they were disqualified under the *Wainwright v. Witt* standard, and its rulings refusing to exclude death-inclined jurors Labuda, Illige, and Wesson were not supported by substantial evidence that they were qualified to serve under the *Wainwright v. Witt* standard. (RB 99, 103-108.) Similarly, according to respondent, Matthew contends that the prosecutor's use of peremptory challenges to excuse life-inclined jurors was, in and of itself, improper and requires reversal. (RB 113-114.) Having built up these straw men, respondent knocks them down by analyzing the court's rulings as to each individual juror under the *Witt* standard and the prosecutor's exercise of peremptory challenges under the familiar rule that a prosecutor is free to utilize peremptory challenges to exclude life-inclined jurors. (RB 99, 103-108, 113-114.)

But these are not the issues before the Court. Once again, the

challenges raised here are that: 1) the trial judged applied his interpretation of the *Witt* standard in an arbitrary and capricious manner, which violated Matthew's rights to a fair penalty trial and, at the very least, precludes application of a deferential standard of review to the judge's rulings regarding prospective jurors Madali and Froyland and Juror No. 5; and 2) the *tandem* actions of the trial judge's unfair voir dire procedure and the prosecutor's use of peremptory challenges resulted in unfairly stacking the jury in favor of execution, in violation of the Sixth and Fourteenth Amendments. (AOB 215-230.)

As respondent's discussion of the judge's rulings consists of nothing more than isolated quotations from the prospective jurors' questionnaires and voir dire answers, followed by perfunctory conclusions that the rulings were appropriate without supporting argument or authority (RB 103-108), and does not address the essence of Matthew's claim that the only consistency in the judge's rulings is that they favored the exclusion of life-inclined jurors and the inclusion of death-inclined jurors (AOB 215-228), no further discussion of this aspect of the issue is necessary. (See, e.g., *People v. Williams*, *supra*, 16 Cal.4th at p. 315, and authorities cited therein ["points 'perfunctorily asserted without argument in support' are not properly raised"]; *People v. Stanley*, *supra*, 10 Cal.4th at p. 793 [reviewing court may pass without consideration point made in appellate brief without supporting argument or authority].) Similarly, as respondent simply cites decisions of this Court (also cited and discussed in the opening brief) which hold that a prosecutor may use peremptory challenges to exclude life-inclined jurors (RB 113-114), without addressing Matthew's argument that

those holdings do not apply to this particular case (AOB 228-230), no further discussion of this aspect of the issue is necessary, either.

The death judgment must be reversed.

VIII

THE DEATH JUDGMENT MUST BE REVERSED BECAUSE IT IS REASONABLY LIKELY THAT THE JURORS READ THE COURT'S MODIFIED LINGERING DOUBT INSTRUCTION TO PRECLUDE CONSIDERATION OF THEIR LINGERING DOUBTS REGARDING MATTHEW'S ROLE IN THE CRIMES, AND THUS CONSTITUTIONALLY RELEVANT GUILT PHASE EVIDENCE, IN VIOLATION OF STATE LAW AND THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS

A. Introduction

As discussed in the opening brief, the trial court's modification of defense counsel's requested lingering doubt instruction was, at the very least, potentially misleading. It indicated that the jurors' consideration of lingering doubt was limited to the question of "guilt" and *not* to the critical question of Matthew's role in the underlying crimes of which he was "guilty," and therefore also precluded consideration of constitutionally relevant guilt phase evidence pointing to Michael as the actual killer and Matthew as the aider and abettor, whom the jurors determined had no intent to kill. (AOB 231-249.) It is reasonably likely that the potentially misleading nature of the instruction was realized through the prosecutor's penalty phase closing argument, in which he repeatedly and emphatically argued that it would be inappropriate for the jurors to "even consider" their lingering doubts and that it was grossly inappropriate for Matthew to continue to "blame his brother" for being the actual killer and to ask them to "second-guess" their guilt phase verdict to the contrary. (AOB 249-255.) Thus, on the record as a whole, it is reasonably likely that the jurors were misled to believe that they could not consider or give effect to their lingering doubts that Matthew was the actual killer, along with the

substantial, constitutionally relevant guilt phase evidence that he was the far less culpable aider and abettor, in violation of state law and the Sixth, Eighth and Fourteenth Amendments. (AOB 231-255, citing, *inter alia*, *Estelle v. McGuire* (1991) 502 U.S. 62, 71-72; *Boyde v. California* (1990) 494 U.S. 370, 380; *Skipper v. South Carolina* (1986) 476 U.S. 1, 4, *Green v. Georgia* (1979) 442 U.S. 95, 97, *Lockett v. Ohio* (1978) 438 U.S. 586, 694, 608, *Hitchcock v. Dugger* (1987) 481 U.S. 393, 397, and *People v. Jones* (2003) 30 Cal.4th 1084, 1125.) Finally, given the enormous importance of the brothers' respective roles in the crimes to the outcome of both the guilt and penalty determinations, together with the exceptional closeness of the penalty phase case, the error was prejudicial under any standard and the death judgment must be reversed. (AOB 255-265.)

Respondent disagrees. (RB 116-125.) Respondent is wrong.

B. The Instructional Error Was Not Waived

As predicted in the opening brief, despite defense counsel's reiteration that he wanted his originally requested lingering doubt instruction (which encompassed the issue of Matthew's role in the crimes) when the court proposed its erroneous modification, respondent contends the error was waived. (RB 119; see AOB 248, and fn. 33.) As respondent essentially concedes that the error is reviewable under Penal Code section 1259 if – as Matthew argues – it violated his substantial rights, and as respondent does not otherwise address the other reasons cited in the opening brief that preclude a finding of waiver or invited error, no further discussion of this issue is necessary. (RB 119; see AOB 248, and fn. 3, citing, *inter alia*, Pen. Code, § 1259 ["an instruction given, refused, or modified" is reviewable notwithstanding absence of trial court objection if "the substantial rights of the defendant were affected thereby"], *People v.*

Johnson (1992) 3 Cal.4th 1183, 1261, conc. opns. of Mosk, J., joined by Kennard, J. [if there is a reasonable likelihood that jurors will not understand that they may entertain and act upon their lingering doubts in penalty phase, court must provide lingering doubt instruction so as to avoid or correct the error].) The error was neither waived nor invited.

C. It Is Reasonably Likely That The Jurors Understood That They Were Precluded From Considering Their Lingering Doubts Over Matthew's Role In The Crimes, And The Constitutionally Relevant Guilt Phase Evidence That He Was Not The Actual Killer, In Deciding Whether He Should Live or Die

Turning to the merits, respondent again misstates the essence of Matthew's claim as a challenge to the court's failure to instruct the jurors that they could consider their lingering doubts over "the truth of the special circumstance." (RB 116, 120.) The heart of the claim, however, is that the instruction as modified was misleading because it indicated that the jurors could not consider their lingering doubts that Matthew, although "guilty" of the underlying murders, was the actual killer. True, an instruction that the jurors could consider their lingering doubts regarding the truth of the special circumstance would have avoided the error given the unique facts of this case, in which the jurors' guilt phase verdicts as a whole reveal that that the true finding on the special circumstance allegation reflect their determination (beyond a reasonable doubt) that Matthew was the actual killer. (See AOB 242.) However, it is important to emphasize that this is not the essence of the claim. The fundamental flaw underlying the penalty phase was that the identity of the actual killer was obviously of paramount importance to these jurors and it is reasonably likely that these jurors were misled to believe that they could not consider their lingering doubts over

that critical and extraordinarily close question (and, thus, the constitutionally relevant guilt phase evidence that Matthew was not the actual killer) in deciding whether to execute Matthew or spare his life.

Respondent insists that the jurors would have understood that the modified lingering doubt instruction's reference to "guilt" encompassed the special circumstance determination (or, more precisely, Matthew's actual role in the crimes). (RB 120.) Respondent bases this contention on provision of the "factor (a)" instruction to consider "[t]he circumstances of the crimes of which the defendant was convicted in the present proceeding and the existence of any special circumstance found to be true." (3CT 782; RB 120.) This instruction not only fails to support respondent's position, it undermines it.

The instruction under factor (a) told the jurors to consider their *true finding* on the special circumstance, *not* to consider any lingering doubts regarding that finding. Moreover, the instruction clearly differentiated between the "*crimes*" on which the jurors had returned "*guilt*" verdicts (to which the modified lingering doubt instruction referred) and the "special circumstance," on which they were not asked to determine "guilt," but rather to determine "*truth*." This is not lawyerly parsing; throughout *this* trial, *these* jurors were repeatedly told that the question of "*guilt*" – to which the lingering doubt instruction referred – was separate and distinct from the question of the brothers' relative *roles* in the crime and the truth of the special circumstance allegation. (AOB 241-242; 20 RT 3290-3291, 3298, 3308-3309, 3312-3313, 3338, 3342-3343, 3345-3347, 3402-3404, 3457, 3470-3474; 3 CT 694, 696; see also *People v. Riel* (2000) 22 Cal.4th 1153, 1209-1210 [distinction between lingering doubt as to guilt and lingering doubt as to role, or relative culpability]; *People v. Davenport* (1995) 11

Cal.4th 1171, 1215 [distinction between lingering doubt as to guilt and lingering doubt as to truth of special circumstance].) And, of course, it was through the use of this language – to consider lingering doubt over Matthew's "*guilt*"– that the court's modification was flawed and terribly misleading. (AOB 241-247.)

And respondent cannot dispute (as evidenced by its decision to ignore) that this jury not only appreciated the distinction between Matthew's "guilt" of the underlying murders as opposed to his relative culpability or role in the crimes of which both participants were guilty, but they also attached tremendous significance to it. While they found both brothers equally "*guilty*" of the murders and attempted murders, they further found that the "guilty" aider and abettor did not intend to kill and therefore was not even *eligible* for the death penalty, while they found that the actual killer's role in the crimes was so important that it outweighed the compelling and substantial mitigating evidence to demand his death. (AOB 242-243, 256-263; see also Sundby, *The Capital Jury and Absolution: The Intersection of Trial Strategy, Remorse, and the Death Penalty* (1998) 83 Cornell L. Rev. 1557, 1577-1583 [results of empirical study revealed that "[w]hile lingering doubt concerning the defendant's actual innocence appeared to play a very infrequent role in influencing the jury's penalty decision, lingering doubt seemed to play a far more significant role when the doubt involved the defendant's level of participation in the murder"; jurors did not consider whether there were lingering doubts as to guilt in penalty phase and expressed antipathy toward defendants who ask them to do so; in contrast, jurors were very receptive to considering lingering doubts as to the defendant's actual role in the crimes and such cases frequently resulted in life sentences].)

As predicted in the opening brief (AOB 245-247), respondent summarily contends that the *general* instructions on factor (j) and catch-all factor (k) – neither of which addressed lingering doubt at all – was sufficient to correct or overcome the misleading nature of the *specific* lingering doubt instruction. (RB 120.) In urging this point, however, respondent simply ignores the argument and supporting authorities in the opening brief that undermine it. (See AOB 244-248, citing, *inter alia*, *LeMons v. Regents of University of California* (1978) 21 Cal.3d 869, 878, and fn. 8 [citing well-settled rule that "the more specific charge controls over the general charge" in assessing how lay jurors would understand series of instructions], *Francis v. Franklin* (1985) 471 U.S. 307, 316-320 [viewing instructions as a whole, potentially misleading nature of *specific* instruction was not cured by provision of other correct but *general* instructions], and *People v. Easley* (1983) 34 Cal.3d 858, 877-879 [where one instruction erroneously and specifically told jurors not to consider sympathy, provision of former, general factor (k) instruction to consider "any other circumstance that extenuates the gravity of the crime" did not cure error].) Accordingly, no further discussion of this aspect of the issue is necessary.

Next, respondent very briefly contends that the arguments of counsel made it clear that the jurors could consider and give effect to their lingering doubts over Matthew's actual role in the crimes, and the guilt phase evidence pointing to Michael as the actual killer and Matthew as the less culpable aider and abettor. (RB 120-121.) In support of this assertion, respondent insists that the prosecutor did *not* argue that lingering doubt was an inappropriate consideration, but rather "simply suggested that, in this case, the jurors should have no lingering doubt because of the strength of

the evidence." (RB 121.) Matthew agrees that if the prosecutor did acknowledge that the jury could consider lingering doubt, but argued that there was no room for lingering doubt or that lingering doubt should be given little weight in the sentencing calculus, that argument would not have been inappropriate. (See AOB 249-250, and fn. 34.) However, that simply is not what the prosecutor argued.

To illustrate, it is helpful to compare the prosecutor's remarks when he *did* acknowledge the validity of certain mitigating considerations, but appropriately limited his argument to the *weight* of the evidence supporting those considerations. For instance, the prosecutor acknowledged that it was appropriate for the jurors to consider the evidence that Matthew had been a motivated and well-behaved student as a child, but argued that the evidence should be given little weight. He argued, "I mean, the law has to allow you to consider that sort of thing, but again, don't forget the instruction, you assign whatever moral, sympathetic weight you feel the proof is entitled to, if you accept it." (22 RT 3926.) Similarly, the prosecutor recognized that "[f]actors A through K are the things that you can and should consider." (22 RT 3879.)

In stark contrast, the prosecutor did not acknowledge that lingering doubt was an appropriate consideration in deciding penalty, but that the evidence did not support such doubt or that such doubt should be given little weight in the sentencing calculus. (Indeed, as discussed in Argument I, above and in the opening brief, such an argument would have been disingenuous given the clear evidence that the District Attorney's Office had troubling doubts over the identity of the actual killer.) Instead, he opened his summation by emphasizing, "[t]here's no longer a question about who did what to who[m], it is not about that. That's behind us" (22

RT 3871; see, e.g., *Riley v. Taylor* (3rd Cir. 2001) 277 F.3d 261, 298 [prosecutor's misleading remarks comments "were the first comments the jury heard at sentencing, making them more likely to have made an impression"]), and went on to vehemently argue that for the jurors to "*to even consider*" any "lingering doubts" was an "insult" and "an affront the decision [they] made" (22 RT 3889-3890, italics added). In this regard, the prosecutor's argument was analytically identical to the prosecutor's improper and "seriously misleading" argument in *People v. Robertson* (1982) 33 Cal.3d 21, wherein he "did not limit his argument to factually unsupported sympathy, but repeatedly told the jurors that it should not consider . . . 'sympathy factors'" because they were inappropriate to their penalty phase decision. (*Id.* at pp. 57-58; compare *Ayers v. Belmontes* (2006) ___ U.S. ___ , 127 S.Ct. 469, 476-477 [prosecutor properly told jurors that "religion was 'a proper subject of consideration.'" but argued the "shaky" "*weight*" of the defense "evidence" offered in support of that consideration].)

Nevertheless, respondent briefly insists – as predicted in the opening brief – that defense counsel's argument "urg[ing] the jury to consider any lingering doubts concerning appellant's role" nullified or corrected the misleading nature of the instruction and the prosecutor's argument. (RB 121; AOB 252-255.) In this regard, respondent disputes Matthew's argument that the prosecutor anticipated and responded to defense counsel's argument by insisting that it was not only inappropriate to consider lingering doubt, but also that Matthew's request to do so was itself another factor warranting his death. (RB 121; AOB 252-253, citing, *inter alia*, 22 RT 3926-3928, and *People v. Edelbacher* (1989) 47 Cal.3d 983, 1039 [despite defense counsel's "thorough and forceful explication" of the

correct law, prosecutor's contrary argument and potentially misleading instruction created reasonable likelihood jurors misunderstood the law, particularly since "the prosecutor did not adopt or endorse the view expressed by defense counsel," but rather criticized it].) To the contrary, according to respondent, the prosecutor "reinforced the legal validity of the concept" of lingering doubt by "invit[ing] the jury to use lingering doubt to reach a life sentence if it wanted an easy way out. (22 RT 2926.)" (RB 121.)

Respondent's contention would be laughable if the stakes of this case – the execution of a young man with no prior criminal history who was only 18 years old when the crimes were committed – were not so high. The prosecutor's actual remarks – which respondent carefully avoids – were a scathing indictment against Matthew for having the temerity to ask the jurors to "even consider" their lingering doubts that he was the actual killer and a compelling example of his lack of remorse:

> Finally, if you want the easy way out, look no further than lingering doubt. All you have to do is second guess the decision you've already been put through and use that as a reason not to go forward and finish the job. . . . The defense in this case, again, blaming the brother; that failing, I wasn't there; that failing, blaming the mother. Now they want to put a guilt trip on you and making you fear that ten years from now you will second guess the decision you made and you will feel horrible . . . . Does he deserve your mercy? This picture that's been painted of him as a caring, loving, quiet, never ever fought with any of his brothers or sisters . . . . But does he deserve your mercy because that's the way he's been portrayed when he was young? Well, someone that was really that way, they would show remorse. Remorse would be apparent. They would feel bad about what they had done. . . . If time goes by and they apologize, you believe them, they are not just saying it, you believe he is sorry, you know, that's the

> way for you to exercise a little mercy of forgiveness on your own. Do you have an inkling of that here? Has any hint of that been extended here? He's still claiming he wasn't there and asking you to second guess your decision, deciding that he was. Is that remorse? There's not a shred of remorse, and without remorse, you're supposed to extend mercy, forgiveness in the face of that? Mercy should be extended out of strength, not weakness. If it is extended out of weakness, it is not mercy at all, by definition. So before you take that way out, think about why you're doing it.

(22 RT 3926-3928.)

Otherwise, in urging that defense counsel's request to the jurors to consider their lingering doubts corrected the misleading nature of the instruction and prosecutor's argument, respondent ignores the compelling evidence that *this* jury just did not believe Matthew's counsel. (AOB 253-255.) That is, respondent ignores that the prosecutor explicitly and repeatedly told the jurors that Matthew's defense counsel had lied to them in the guilt phase (by inaccurately attributing to him arguments that were in fact made by Michael's counsel) (22 RT 3887-3889) and that he was "manufactur[ing]" "phony mitigation" in the penalty phase (22 RT 3291), and pointedly told them to "remember" defense counsel's so-called lies "when he gets up and argues lingering doubt as a reason to impose the life without possibility of parole instead of the death penalty (22 RT 3889). (See also, 22 RT 3880-3881, 3886-3887, 3916-3918; AOB 253-254.) Respondent ignores the jury's mid-deliberations query, which clearly indicated that it did not accept defense counsel's representations of the law and that the prosecutor's unfounded attacks on his honesty thus had their desired effect. (AOB 254.) And respondent ignores that the trial judge himself refused to consider the indisputable lingering doubts over whether Matthew was the actual killer, thus providing further compelling proof that

the jury also failed to take that critical mitigating factor and evidence into account. (AOB 254-255.) Once again, respondent ignores too much.[9] (See, e.g., *Hitchcock v. Dugger*, *supra*, 481 U.S. at pp. 397-398 [from combination of instruction and prosecutor's arguments, jurors likely understood that their consideration of mitigating factors was limited to those listed in instruction and no others].)

For all of these reasons, as well as those set forth in the opening brief, it is a reasonable possibility that the jurors were misled to believe that they could not consider constitutionally relevant evidence regarding Matthew's role in the crimes by considering their lingering doubts that, although "'*guilty*" of the crimes, he was not the actual killer. Because state law entitled Matthew to have the jury consider those doubts in determining the appropriate penalty, because this was a significant component to his penalty phase defense, and because his actual role in the shooting was constitutionally relevant to the penalty determination, the error violated both state law and Matthew's rights under the Sixth, Eighth, and Fourteenth

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[9] Nor was this a case in which defense counsel presented the jurors with extensive evidence that Michael was the actual killer *at the penalty phase*, such that the jurors could only conclude that they could *not* consider and give effect to their lingering doubts over Matthew's role in the crimes by drawing "the unlikely inference 'that the court's instructions transformed "all of this favorable testimony into a virtual charade."' (Citations)" (*Ayers v. Belmontes* (2006) ___ U.S. ___ , 127 S.Ct. 469, 474.) All such evidence was presented *at the guilt phase* and resolved by the jurors' guilt phase verdicts under the beyond a reasonable doubt standard. Thus, the only way that jurors would understand that they could consider and give effect to that evidence in their penalty phase determination would be through understanding that they could consider their lingering doubts over their guilt phase determinations that Matthew was the actual killer and Michael the aider and abettor.

Amendments.

D. The Error Requires Reversal

1. The Error Violated Matthew's Federal Constitutional Rights

Finally, respondent argues that even if the jurors were misled to believe that they could not consider and give effect to their lingering doubts over Matthew's role in the crimes, and the constitutionally relevant guilt phase evidence that he was the far less culpable aider and abettor, it was harmless under the test for state law violations in the penalty phase. (RB 121.) According to respondent, the governing test is whether it is "reasonably probable" that the verdict would have been different in the absence of the error under *People v. Brown* (1988) 46 Cal.3d 432, 447-448 and *People v. Watson* (1956) 46 Cal.2d 818, 836. (RB 121.) Of course, respondent's understanding of the law is incorrect.

"The test for state law error in the penalty phase of a capital trial is whether there is a reasonable *possibility* the error affected the verdict." (*People v. Gonzalez* (2006) 38 Cal.4th 932, 961, citing *People v. Brown*, *supra*, 46 Cal.3d at pp. 447-448, italics in original.) This test is not only "more exacting" than the *Watson* "reasonable probability" standard (*People v. Brown*, *supra*, at p. 447); it is "the same in substance and effect" as the harmless beyond a reasonable doubt standard applied to violations of the federal constitution. (*People v. Gonzalez*, *supra*, at p. 961, quoting from *People v. Ashmus* (1991) 54 Cal.3d 932, 990.)

In any event, the violation was not merely one of state law. As extensively discussed in the opening brief, the error also violated Matthew's rights under the Sixth, Eighth, and Fourteenth Amendments. (AOB 232-239, 255). Apart from a brief contention that capital defendants enjoy no

state or federal constitutional right to an instruction on "residual lingering doubt about his or her *guilt*" (RB 118, italics added), respondent does not even address, much less dispute, Matthew's argument in this regard.

Even if a defendant is not entitled under either state or federal law to an instruction on lingering doubt about his guilt, he is entitled under state law to have the jury consider lingering doubt over his role in the crimes in mitigation (see, e.g., *People v. Jones* (2003) 30 Cal.4th 1084, 1125), and under the federal constitution to be protected from the arbitrary deprivation of that state-created right (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346), to have the jury consider constitutionally relevant evidence – particularly as it relates to relative culpability (*Lockett v. Ohio* (1978) 438 U.S. 586, 694, 608), to rebut the prosecution's case for death (*Skipper v. South Carolina*, *supra*, 476 U.S. at p. 5, fn. 1) – particularly when it rests, as respondent elsewhere recognizes, "almost entirely on the *manner* in which appellant committed his crimes" (RB 136) (*Green v. Georgia* (1979) 442 U.S. 95, 97), and to a meaningful opportunity to present a defense and enjoy the effective assistance of counsel at the penalty phase (*Crane v. Kentucky* (1986) 476 U.S. 683, 690; *Wiggins v. Smith* (2003) 539 U.S. 510, 521-523). Hence, the error here violated Matthew's rights under the Sixth, Eighth and Fourteenth Amendments. (AOB 232-239, 248, 255, citing, *inter alia*, *Estelle v. McGuire*, *supra*, 502 U.S. at pp. 71-72; *Boyde v. California*, *supra*, 494 U.S. at p. 380; *People v. Claire*, *supra*, 2 Cal.4th at p. 663; *People v. Brown*, *supra*, 45 Cal.3d at pp. 1255-1256.) This Court should therefore treat respondent's failure to address or dispute these essential points as concessions.

Furthermore, the high court's recent decision in *Oregon v. Guzek* (2006) ___ U.S. ___, 126 S.Ct. 1226, cited by respondent without any

discussion (RB 118), supports Matthew's essential position and undermines respondent's contention that no constitutional violation occurred. In *Guzek*, the Supreme Court reiterated the constitutional relevance of evidence regarding *how* – as opposed to *whether* – the defendant committed the charged crime, to the question of penalty in a capital case. The "narrow" question presented in that case was whether the defendant was entitled to present "new" evidence that he was *innocent*, or not "guilty," of the basic underlying crime at his penalty phase retrial under the Eighth and Fourteenth Amendments as construed in *Lockett v. Ohio* (1978) 438 U.S. 586. (*Oregon v. Guzek*, *supra*, 126 S.Ct. at p. 1230.) The Supreme Court answered this question in the negative. (*Id.* at pp. 1231-1233.)

In so doing, the Court emphasized that the defendant sought to admit new evidence regarding "*whether*, not *how*" he committed the "basic crime of conviction." (*Oregon v. Guzek*, *supra*, 126 S.Ct. at p. 1232.) In contrast, the high court observed that the evidence at issue in *Lockett* and other decisions involved "traditional sentence-related evidence" of "*how*, not *whether*, a defendant committed the crime." (*Id.* at p. 1231, italics in original; see also *id.* at p. 1232.)

Hence, evidence regarding *how* the crime was committed, including the role the defendant played in the crime, is constitutionally relevant mitigating evidence. (*Lockett v. Ohio*, *supra*, 438 U.S. at pp. 604, 608.) If it is reasonably likely that the jurors believe they are precluded from considering such evidence, the error violates the federal Constitution.

Here, of course, Matthew did not seek to present new evidence regarding his guilt of the basic underlying crimes or to relitigate the jury's determination beyond a reasonable doubt that he was guilty of those crimes. Rather, he sought to ensure that the jurors understood that they could give

effect to the guilt phase evidence that they already heard regarding *how* the crimes were committed – i.e., the evidence pointing to Michael, and not Matthew, as the actual killer. But the modified lingering doubt instruction, coupled with the prosecutor's argument, led the jurors to believe that they were precluded from considering their lingering doubts over their guilt phase determination that Matthew was the actual shooter. In so doing, "relevant mitigating evidence" that Matthew was *not* the actual shooter "was placed beyond the effective reach of the sentencer." (*Graham v. Collins* (1993) 506 U.S. 461, 475.) The error, therefore, violated the Eighth and Fourteenth Amendments (*ibid.*), as well as the Sixth Amendment, as discussed above. Hence, respondent bears the burden of proving it harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

2. Respondent Has Failed to Carry its Burden of Proving the Error Harmless Beyond a Reasonable Doubt

Finally, respondent insists that any error was harmless because there "virtually no evidence" that Matthew was not the actual killer and, hence, no room for lingering doubt that he was. (RB 121.) Respondent's contention is astonishing.

Not only was there evidence that Michael, not Matthew, was the actual killer; there was actually *more* evidence putting Michael in the role of actual killer than there was putting Matthew in that role. *Three witnesses* testified directly or indirectly that they *saw* Michael fire his weapon and shoot Arnold (15 RT 2266, 2362-2366; 18 RT 2809-2812; 19 RT 3109-3110, 3139-3140, 3160-3161), while only *two* witnesses – one of whom had essentially testified that Michael fired his weapon – described Michael's

weapon as a shotgun (13 RT 2043; 15 RT 2285, 2318). *Not a single witness testified that they saw Matthew fire his weapon.* Thus, to say that there was "virtually no evidence" that Michael, not Matthew, was the actual shooter is simply and patently untrue.

Otherwise, respondent does not dispute that if a juror did have lingering doubt that Matthew was the actual killer, the error would demand reversal given the importance of the brothers' respective roles in the crimes to the outcome of case and the extreme closeness of the penalty phase evidence. (See AOB 257-265.) Indeed, throughout its brief and discussion of harmless penalty phase error, including its argument that the cumulative effect of the errors was harmless, respondent carefully avoids *any* discussion of the actual penalty phase evidence or the objective indicia that the jurors found their penalty decision to be a close and difficult one. (See RB 124-125, 131, 135-136, 138.) Accordingly, no further discussion of this issue is necessary. The death judgment must be reversed.

IX

THE DEATH JUDGMENT MUST BE REVERSED BECAUSE RESPONDENT HAS FAILED TO CARRY ITS BURDEN OF PROVING THE ERRONEOUS OMISSION OF, AND AFFIRMATIVE DIRECTION TO DISREGARD, PREVIOUSLY GIVEN EVIDENTIARY INSTRUCTIONS IN THE PENALTY PHASE WAS HARMLESS BEYOND A REASONABLE DOUBT

In his opening brief, Matthew argued that the court's omission of evidentiary instructions from the penalty phase, along with its affirmative admonition to disregard all guilt phase instructions omitted from the penalty phase, violated state law, as well as his rights to a fair sentencing hearing and a reliable penalty phase determination, as guaranteed by the Eighth and Fourteenth Amendments. (AOB 265-280, citing, *inter alia*, *People v. Carter* (2003) 30 Cal.4th 1166, 1219-1220, 1231; see also *People v. Moon* (2005) 37 Cal.4th 1, 37 [error to omit applicable evidentiary instructions after providing jurors with CALJIC No. 8.84.1].) Given the admonition to disregard the guilt phase instruction that the arguments of counsel are not to be considered as evidence, for instance, along with the prosecutor's repeated references to putative facts not in evidence, the error cannot be deemed harmless under either the standard for violations of state law or that for violations of the federal Constitution. (AOB 265-280.) The death judgment must be reversed.

Respondent concedes that the court committed instructional error. (RB 123-124.) However, respondent insists that the error was harmless under the *Watson* "reasonable probability" standard for violations of state law. (RB 124.)

Once again, it must be emphasized at the outset that respondent has misstated the test for harmless state law error in the penalty phase of a

capital trial. Reversal is required if it is "reasonably *possible*" that the verdict would have been different in the absence of the error, a test that is "'the same in substance and effect'" as the *Chapman* harmless beyond a reasonable doubt standard. (*People v. Gonzalez* (2006) 38 Cal.4th 932, 961; accord, *People v. Brown* (1988) 46 Cal.3d 432, 447-448; *People v. Ashmus* (1991) 54 Cal.3d 932, 990.)

Respondent does not address, much less dispute, Matthew's argument that the error and its impact also violated the federal Constitution. (AOB 266-269; see RB 123-125.) Hence, Matthew considers this issue to be conceded and makes no further discussion of it here.

With respect to Matthew's argument that the harm from the error is amply demonstrated by the prosecutor's summation in which he repeatedly referred to putative facts not in evidence – many of which were false – respondent contends, "[m]ost of appellant's claim addresses guilt phase evidence and argument. It is not probable that a jury would believe arguments of counsel it evaluated as such in the guilt phase could change character and be treated as penalty phase evidence." (RB 124; see AOB 272-280, citing, *inter alia*, *Taylor v. Kentucky* (1978) 436 U.S. 478, 486-490 [instructional omission was prejudicial and violated defendant's right to fair trial in light of prosecutor's argument]; see also *People v. Davenport* (1985) 41 Cal.3d 247, 280-281 [instructional omission prejudicial in light of prosecutor's argument]; *People v. Valentine* (2001) 93 Cal.App.4th 1241, 1253 [same].) Respondent's disingenuous contention to the contrary, Matthew has never suggested that the prosecutor's guilt phase arguments demonstrate penalty phase prejudice from the instructional error.

As the opening brief makes abundantly clear, Matthew's position is that the instructional error was prejudicial in the penalty phase in light of

the prosecutor's following *penalty phase* arguments and remarks:

1) that Rodney James had turned to heroin use as a direct result of the shooting and had died of an overdose, a death for which the jurors should hold Matthew responsible and which the jurors should consider as victim impact evidence – a factual assertion and argument with absolutely no evidentiary support (AOB 273-274, citing 22 RT 3885-3886);

2) that Matthew only stopped shooting people because he ran out of ammunition – a factual assertion and argument also without any evidentiary support (AOB 275, citing 22 RT 3921);

3) that Matthew placed his gun directly against the bodies of the victims and fired into them multiple times – a false factual assertion contrary to the evidence (AOB at p. 276, citing 22 RT 3921);

4) "rebutting" the mitigating evidence that Matthew had no criminal record by insinuating that Matthew had a juvenile criminal history to which the prosecutor was privy – an assertion which not only implied facts not in evidence, but one which also was absolutely false (AOB 277, citing 22 RT 3920);

5) that Matthew would enjoy conjugal visits if sentenced to life without parole – an assertion which again not only referred to facts not in evidence, but was also absolutely false (AOB 277-278, citing 22 RT 3922);

6) that the victims' family members desired that Matthew be put to death, but the prosecutor was "not allowed" to present their

wishes through the witnesses – an assertion of facts not in evidence and inadmissible under the law (AOB 278, citing 22 RT 3919);

7) that "most" death row inmates had the artistic talent that Matthew possessed, and therefore his talent did not make his life unique or worth saving – an argument based on extrajudicial "evidence" of the prosecutor's own observations at the San Quentin gift shop (AOB 278, citing 22 RT 3921-3922);

8) that academic process while in jail awaiting trial is a typical capital mitigation ruse, and therefore that mitigating evidence was worthless – an assertion of putative "facts" not in evidence (AOB 279, citing 22 RT 3805-3807, 3922-3923); and

9) invoking biblical doctrine calling for "an eye for an eye three times" – an argument which again injected extraneous matters not in evidence (AOB 279, citing 22 RT 3884).

In this argument, respondent does not directly address these penalty phase remarks other than by perfunctorily concluding that they were "straightforward and not reasonably likely to be the subject of confusion." (RB 125.) However, in another section of its brief, respondent does address most of the remarks identified above and it is to those points that Matthew now turns. (RB 93-96, Argument IV.)

Respondent concedes that the prosecutor's penalty phase argument that Rodney James was driven to heroin use by the shooting and died of an overdose for which Matthew was responsible referred to putative "evidence" that did not exist. (RB 95.) However, respondent dismisses

these remarks as harmless given the insignificance of this "evidence" as "compared to appellant's three first degree murders and two attempted murders." (RB 95.) Of course, respondents' position on appeal is at odds with their position at trial. The prosecutor made use of this "evidence" not once, but twice – in both his opening guilt phase statement and his penalty phase summation. (12 RT 1871; 22 RT 3885-3886.) The Court has "seen how important [the 'evidence' was] to the People's case, and 'There is no reason why [it] should treat this evidence as any less "crucial" than the prosecutor – and so presumably the jury – treated it.' [Citation.]" (*People v. Powell* (1967) 67 Cal.2d 32, 56-57.)

Respondent next contends that the prosecutor's penalty phase argument that Matthew only stopped shooting people because he ran out of ammunition was a "reasonable inference" from the evidence that assault magazine rifles can carry anywhere from 5 to 50 or more rounds. (RB 93.)[10] Not so. There was absolutely no evidence regarding the amount of ammunition in the gun used in this case nor did the circumstantial evidence support an inference that it carried only 14 rounds. Not a single witness testified that the shooter ever made an unsuccessful attempt to fire the gun, nor did a single witness testify to any matter that would support such an inference, such as hearing the sound of a clicking trigger. The prosecutor's argument "went far beyond the question of the inferences which could reasonably be drawn" from the evidence and amounted to "'mere conjecture, surmise, or suspicion . . . .'" (*People v. Velasquez* (1980) 26 Cal.3d 425, 436 [argument that defendant must have had a preconceived

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[10] Respondent again misattributes these penalty phase remarks to the prosecutor's guilt phase argument. (RB at pp. 91-92.)

plan to kill robbery witnesses based on evidence that they wore no masks, disguises, and made no attempt to conceal license number was not reasonable inference, but rather conjecture]; accord, *People v. Hillhouse* (2002) 27 Cal.4th 469, 498-499 [medical examiner's testimony that it was merely *possible* that victim was alive at certain point amounted to nothing more than speculation and was not the equivalent of substantial evidence or a reasonable inference]; *People v. Hill* (1993) 17 Cal.4th 800, 823-825 [prosecutor's argument overstating and misrepresenting the significance of serological evidence and the inferences to be drawn therefrom was misleading and improper].)

Respondent similarly contends that the prosecutor's argument referring to the "powder burns on the victim[s]. Placing the gun up to their body, sending a piece of lead going thousands of feet per second through their body again and again" was entirely appropriate. (22 RT 3921.) What the prosecutor *really* meant, according to respondent, was that there was stippling to Regina Watchman's *clothing*, which proved that she had been shot at close range, or a distance of two feet. (RB 93.) Respondent is incorrect. "Powder burns" were specifically described as gunpowder that burns into *the skin*, not fabric, which was consistent with the prosecutor's reference to "placing the gun up to their body." (13 RT 1948-1950.) And with respect to Watchman specifically, the medical examiner simply testified there was a black area on her clothing "consistent with smoke and other materials depositing on the fabric," not stippling or power burns, which refers to the skin. (13 RT 1950.) Viewing the prosecutor's remarks in context, he was clearly attempting to portray the shooting as far more deliberate and sadistic than it actually was based on the falsity that Matthew placed the muzzle of the gun directly against the victims' bodies and

repeatedly fired it. (See, e.g., *People v. Young* (2005) 34 Cal.4th 1149, 1219-1222 [prosecutor's remarks must be viewed in context.])

Respondent simply disagrees that the prosecutor's italics that the evidence showed *only* the absence of an "*adult* felony conviction record" and an "*adult* criminal history" (22 RT 3920, italics added) falsely implied that Matthew had a juvenile record. (RB 94.) Although it is not entirely clear, respondent seems further to contend that any implication that Matthew had a juvenile record to which the prosecutor was privy but the jurors were not was harmless because the fact that the current offenses were Matthew's first criminal convictions "was damning enough." (RB 94.) Respondent is wrong. (See, e.g., *People v. Sturm* (2006) 37 Cal.4th 1218, 1244 [penalty phase errors required reversal of death judgment arising from three first-degree murder convictions; "although the crime committed was undeniably heinous, a death sentence in this case was by no means a foregone conclusion. Defendant was quite young at the time of the murders and had no criminal history"]; *People v. Gonzalez*, *supra*, 38 Cal.4th at p. 962 [penalty phase error required reversal of death judgment arising from double murder; despite "egregious" nature of double murder, along with defendant's prior assaults on inmates, possession of assault weapon, and possession of shank in jail, "a death verdict was not a foregone conclusion"]; *People v. Lucero*, *supra*, 44 Cal.3d at p. 1032 [penalty phase error required reversal in light of substantial mitigating evidence that, *inter alia*, defendant had no history of criminal violence or felony convictions]; see also *People v. Horton* (1995) 11 Cal.4th 1068, 1140 [erroneous admission of prior conviction in penalty phase required reversal where defendant had no other criminal history and only other aggravation was circumstances of the crimes].)

Respondent concedes that the prosecutor's assertion that Matthew would enjoy conjugal visits if his life were spared was both false and improperly referred to putative "facts" not in evidence. (RB 94.) Nevertheless, respondent contends that the remarks were harmless because the court instructed the jurors with CALJIC No. 1.00 that they were to accept and follow the law as stated by the court even if the attorneys' statements of the law conflicted with the court's instructions. (RB 94.) CALJIC No. 1.00, however, was given in the *guilt phase, not* the penalty phase. In any event, it is not reasonably likely that the jurors would have understood the prosecutor's improper remarks to be statements of the "law" and certainly not statements of the "law" that conflicted with the court's instructions, which they were therefore to disregard.

Respondent does not address the prosecutor's remaining remarks (numbered six through nine, above). (See RB 91-97, 124-125.) Respondent's failure to dispute the impropriety of these remarks and the prejudice they demonstrate from the instructional error should be deemed a concession.

Finally, respondent contends that any harm flowing from the instructional error is, as in *People v. Moon*, *supra*, 37 Cal.4th at p. 39, "'pure speculation.'" (RB 124.) Respondent misreads *Moon*.

In that case, this Court held that the provision of CALJIC No. 8.84.1, along with the omission of evidentiary instructions that had been provided in the guilt phase, was (as here) error. (*Id.* at p. 37.) However, this Court further held that the defendant's arguments regarding prejudice were "pure speculation [because] *defendant identifies no specific harm that could plausibly have resulted from a missing guilt phase instruction.*" (*Id.* at p. 39, italics added.)

Here, of course, Matthew *has* "identified" and extensively discussed the "specific harm" that resulted from the instructional error based upon the prosecutor's repeated and false references to matters that were not in evidence and misstatements of the evidence that was presented – evidence on which reviewing courts have long relied in assessing the impact of instructional error on jurors. (See, e.g., *Taylor v. Kentucky*, *supra*, 436 U.S. at pp. 486-490 [prosecutor's arguments critical in assessing impact of instructional error on jurors]; *People v. Wims* (1995) 10 Cal.4th 293, 315 [same]; *People v. Davenport* (1985) 41 Cal.3d 247, 280-281 [same]; *Coleman v. Calderon* (9th Cir. 1999) 210 F.3d 1047, 1051 [same]; see also *People v. Bolton* (1979) 23 Cal.3d 208, 213 [prosecutor's references to facts not in evidence, "'although worthless as a matter of law, can be "dynamite" to the jury because of the special regard the jury has for the prosecutor, thereby effectively circumventing the rules of evidence.'"]; *People v. Wagner* (1975) 13 Cal.3d 612, 619-620 [where prosecutor suggests he is privy to evidence that jury never heard, "it is reasonable to assume that . . . the jurors were led to believe that, in fact," the "evidence" was true]; *United States v. Kojayan* (9th Cir. 1993) 8 F.3d 1315, 1323 ["[e]vidence matters; closing argument matters; statements from the prosecutor matter a great deal"].)

In addition, and as argued in the opening brief, Matthew has shown how the prosecutor's false assertions of fact apparently affected and misled the trial judge regarding the penalty phase evidence. (AOB 275-276.) Respondent counters that the trial judge's misstatements of the evidence in ruling on the motion to modify the verdict – statements that mirrored the prosecutor's misstatements – have "nothing to do with the instructions." (RB 125.) Respondent misses the point. The issue is not whether the trial

judge was impacted by the instructional error. The issue is whether the instructional error was prejudicial in light of the prosecutor's remarks. And, if the *prosecutor's remarks* misled the trial judge – who *knows* the difference between prosecutorial argument and evidence – about the evidence, then it is more than reasonably possible that the prosecutor's remarks similarly misled the lay jurors – who were instructed *once* on the distinction between argument and evidence during the guilt phase *and then told to disregard that distinction in the penalty phase*. (See, e.g., *People v. Gonzalez*, *supra*, 38 Cal.4th at p. 961 and fn. 6.)

On this record, the trial court's *affirmative direction to disregard* its previous instruction that the "statement made by the attorneys during trial are not evidence" cannot be deemed harmless under either the state law or federal constitutional standard. The death judgment must be reversed.

X

THE COURT'S EXCLUSION OF CONSTITUTIONALLY RELEVANT MITIGATING EVIDENCE VIOLATED MATTHEW'S RIGHTS UNDER STATE LAW, AS WELL AS THE EIGHTH AND FOURTEENTH AMENDMENTS, AND REQUIRES REVERSAL OF THE DEATH JUDGMENT

A. Introduction

In the opening brief, Matthew argued that the trial court's exclusion of his father's testimony regarding a prior incident in which Michael got into a fist fight in order to protect Matthew, along with a school essay in which Matthew described his deep love for Michael, as irrelevant and "self-serving" violated state law and his Eighth and Fourteenth Amendment rights to present, and have the jury consider, relevant mitigating evidence. (AOB 280-290.) The evidence was constitutionally relevant to show Matthew's loving relationship with his brother and to rebut the prosecution's case for death premised on Matthew's role as the actual killer and to support the defense theory that Michael assumed the role of leader and protector of his family on the night of the crimes, while Matthew's role was a passive one. (AOB 280-290, citing, *inter alia*, *Parker v. Dugger* (1991) 498 U.S. 308 [defendant's positive relationships with friends and family appropriate mitigating factor]; *Mayfield v. Woodford* (9th Cir. 2001) 270 F.3d 915, 918-919, 929-932; *Jackson v. Herring* (11th Cir. 1995) 42 F.3d 1350, 1368; *People v. Harris* (1984) 36 Cal.3d 36, 68-70 [poems defendant wrote while in jail tended to show he was a sensitive person and were relevant mitigating evidence]; *Green v. Georgia* (1975) 442 U.S. 95, 97 [trial court violated due process by excluding from penalty phase evidence tending to show that co-participant was actual killer, particularly

since prosecutor argued defendant was actual killer]; *Rupe v. Wood* (9th Cir. 1996) 93 F.3d 1434, 1440-1441; *Mak v. Blodgett* (9th Cir. 1992) 970 F.2d 614, 622-623; and Pen. Code, § 190.3, subds. (a), (g), (j), (k).) Because respondent cannot prove the error harmless beyond a reasonable doubt, the death judgment must be reversed. (AOB 290.)

Respondent counters that the evidence was irrelevant, unreliable hearsay, and that any theories of relevance Matthew's counsel did not raise in the trial court cannot be considered for the first time on appeal. (RB 126-131.) Respondent is wrong on all counts.

B. The Evidence Was Constitutionally Relevant And Admissible And Its Erroneous Exclusion Was Adequately Preserved Below

As to the fight incident, respondent contends that the trial court's ruling that the evidence was irrelevant and "far afield" did not amount to an abuse of discretion because it did not exceed the bounds of reason. (RB 127.) Respondent is incorrect.

A trial judge simply has no power or discretion to exclude relevant mitigating evidence. (See, e.g., *Tennard v. Dretke* (2004) 542 U.S. 274, 288; *Payne v. Tennessee* (1991) 501 U.S. 808, 822; *Boyde v. California*, *supra*, 494 U.S. at pp. 377-378.) There is no question that a defendant's close relationship with his family members is constitutionally relevant mitigating evidence. (See, e.g., *Parker v. Dugger*, *supra*, 498 U.S. at p. 314; *Mayfield v. Woodford*, *supra*, 270 F.3d at pp. 929-932; *Smith v. Stewart* (9th Cir. 1998) 140 F.3d 1263, 1270; *Jackson v. Herring*, *supra*, 42 F.3d at p. 1368.) Thus, the court's exclusion of this evidence was error and its ruling is entitled to no deference here.

As to Matthew's argument that the evidence was relevant to explain

the crimes because it tended to show that Michael assumed the leadership and protective role in their commission (a role he had assumed in the past, as illustrated by the offered evidence), which also made it more likely than not that Michael was the actual killer and thus undermined the prosecution's case for death, respondent contends that he has waived his right to argue that theory of relevancy because his counsel failed to specifically articulate it below. (RB 127.) Respondent's only supporting authority for this argument is Evidence Code section 354 and *People v. Livaditis* (1992) 2 Cal.4th 759, 778, wherein this Court recognized the general rule that a party's failure to assert exceptions to the *hearsay* rule in response to a hearsay objection waives the party's right to argue that exception on appeal. (RB 128.) Of course, *Livaditis* is inapposite to the issue here. As to section 354, it undermines, rather than supports, respondent's position.

Evidence Code section 354 provides in relevant part:

> A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous exclusion of evidence unless the court which passes on the effect of the error or errors is of the opinion that the error or errors complained of resulted in a miscarriage of justice and it appears on record that:
>
> (a) The substance, purpose, and relevance of the excluded evidence was made known to the court by the questions asked, the offer of proof, or by other means; [or]
>
> (b) The rulings of the court made compliance with subdivision (a) futile . . . .

Here, Matthew's trial counsel specifically sought to elicit evidence that "Michael got into a fight to *protect* Matthew." (20 RT 3619, italics added.) Thus, the value of the evidence to show that Michael assumed a

"protective" role in their relationship was manifest in the "question[] asked," as required under section 354, subdivision (a). And the trial court was certainly aware "by other means" throughout the penalty phase that Matthew's counsel attempted to portray Michael as the "leader" in their relationship and Matthew as his "shadow," and the obvious relevance of such evidence to show "how" the crimes were committed and lay "a basis for a sentence less than death." (*Lockett v. Ohio* (1978) 438 U.S. 586, 604.) Thus, the court was aware of the "substance" of the offered evidence (the fistfight), its "purpose" (to illustrate the brothers' relationship and Michael's leadership and protective role), and its "relevance" (to show that Michael assumed the same role in the crimes, which served as a basis for a sentence less than death), in compliance with Evidence Code section 354, subdivision (a). (See, e.g., *People v. McGee* (1947) 31 Cal.2d 229, 242 [offer sufficient where "the questions themselves, together with colloquies with the trial judge, in light of the previously introduced testimony, clearly disclose their purpose" and expected answers].)

In any event, because the evidence was relevant and admissible to illustrate the brothers' "closeness," just as Matthew's trial counsel argued below, it was error for the court to exclude it for this reason alone. And, in assessing the *effect* of that error, it is entirely appropriate for this Court to consider the many ways in which the jurors might have found that evidence to be relevant, whether counsel articulated them or not. (See *People v. Partida* (2005) 37 Cal.4th 428, 436-437 [court may consider additional consequences of error in assessing whether it was prejudicial, even if counsel did not articulate all of the consequences below].)

Finally, for the first time on appeal, respondent contends in a footnote that the fight incident was "inadmissible as unreliable hearsay,"

since the brothers' father presumably did not witness the fight himself. (RB 127, fn. 29.) Because the People did not make a hearsay objection at trial, defense counsel was given no opportunity to show that the evidence was non-hearsay or fell within a hearsay exception. This is precisely why the People cannot claim on appeal that the excluded evidence was inadmissible hearsay without having made that objection, thus giving the proponent of the evidence an opportunity to overcome it. (*People v. Kennedy* (2005) 36 Cal.4th 595, 612 [rule that claim is forfeited if no objection is made ensures that the opposing party is given an opportunity to address the objection]; *People v. Partida, supra*, 37 Cal.4th 428, 433-435; *People v. Mullens* (2004) 119 Cal.App.4th 648, 669 and fn. 9 [prosecution waived hearsay objection by failing to make it at trial].)

As to the school essay, respondent does not dispute that it was relevant in the particulars argued in the opening brief. (See RB 130; AOB 284-289.) Instead, respondent contends that because Matthew's counsel *only* argued that it was relevant to show his academic progress in school, any other theories of relevancy cannot be considered on appeal. (RB 130.) Once again, respondent is incorrect.

According to the judge's own words, he understood that the issue presented was whether Matthew's essay was just as relevant as the family member's poem, offered by the prosecution, was relevant victim impact testimony. (22 RT 3810.) Of course, this Court has held that victim impact evidence is relevant and admissible under factor (a) as a circumstance of the crime. (*People v. Edwards* (1991) 54 Cal.3d 787, 833.) Thus, the court was aware that Matthew's trial counsel was offering the evidence as relevant to the circumstances of the crime under factor (a). The court understood the issue and specifically ruled that while the poem was relevant

and admissible victim impact evidence as a circumstance of the crime under factor (a), Matthew's essay was inadmissible because it did not "carry that same relevance, but would be self-serving." (22 RT 3810.)

Furthermore, the judge himself recognized that the essay illustrated Matthew's "*relationship*" with his brother and thus understood its evidentiary value in that regard. (22 RT 3810.) It simply ruled that the evidence was "self-serving" and inadmissible. (22 RT 3810.) Moreover, the court had already ruled that specific examples of "family closeness" were irrelevant and "far afield." (21 RT 3619.) Hence, any further argument that the essay, like the fight evidence, was relevant to illustrate Matthew's close and loving relationship with his brother would have fallen on deaf ears. (See, e.g., *People v. Hamilton* (1989) 48 Cal.3d 1142, 1189 and fn. 27 [counsel not obligated to engage in futile acts].)

Similarly, respondent contends that the court correctly found that the essay was "self-serving" hearsay. (RB 130-131.) Respondent's assertion is made in a perfunctory fashion, and without any supporting argument explaining how or why the essay was "self-serving." (RB 130.) Respondent does cite *People v. Edwards* (1991) 54 Cal.3d 787, but makes no effort at all to apply that case to the facts of this case or explain why *it* – and not *People v. Harris* (1984) 36 Cal.3d 36, cited in the opening brief – controls this case. (RB 130; compare AOB 286-289 [arguing application of *Harris*].) This Court should reject respondent's contention in a similarly perfunctory fashion.

In any event, respondent's contention is meritless. From the dearth of argument and discussion of how *Edwards* applies to this case, one can only assume that respondent's essential premise is that the mere fact that Matthew wrote the school essay after the commission of the crimes

established that it was "self-serving," and therefore inadmissible under both California's hearsay rule and the Due Process Clause. (See RB 130.) Of course, that premise is incorrect. (*People v. Harris*, *supra*, 36 Cal.3d 36, 69-70 [poems defendant wrote after commission of crime and while in jail were relevant mitigating evidence and not self-serving or inherently untrustworthy].)

As this Court made clear in *Harris*, *supra*, in evaluating the trustworthiness of a defendant's extrajudicial writings, "the question is whether the defendant wrote [the material] for the purpose of communicating a statement to a jury" or "to manufacture self-serving evidence." (*People v. Harris*, *supra*, 36 Cal.3d at pp. 70-71.) In this regard, *People v. Edwards*, *supra*, 54 Cal.3d 787, does not aid respondent.

In *Edwards*, the defendant was charged with the first-degree premeditated murder of one young girl and the premeditated attempted murder of another. His guilt phase defense rested on minimizing his responsibility for the crimes by showing that they were not premeditated but rather a sudden act of violence resulting from his depression. (54 Cal.3d at pp. 803, 806.) In the guilt phase, the defendant sought to admit a notebook in which he made entries after the crimes referring to himself in the third person and to having headaches and feeling sick, along with a lengthy taped interview after his arrest in which he cried several times, claimed not to recall the shootings or surrounding events, complained of headaches, and mentioned the notebook. (*Id.* at pp. 818-819.) The trial court ruled that the evidence was inadmissible hearsay that did not fall within the state of mind exception to the hearsay rule because it was untrustworthy. (*Id.* at p. 819.)

This Court agreed, holding that when the defendant made the hearsay statements, "he had compelling motive to . . . at least *minimize his*

responsibility for, the shootings" and that is precisely what the defendant's hearsay statements attempted to do. (*Id.* at pp. 819-820, italics added.) The defendant's references to having headaches and feeling ill, his strange references to himself in the third person, and his claimed lack of recollection regarding the *crimes themselves* and the surrounding events, all tended to support his defense strategy of minimizing his responsibility for the crimes. Indeed, the fact that he referred to the notebook in his post-arrest interview clearly indicated that he appreciated the value of its contents to minimize his responsibility for the crimes. Thus, the nature of the evidence was manifestly of value to his defense. In other words, there was substantial evidence from which to conclude that the defendant's written and oral statements were made "for the purpose of communicating a statement to a jury." (See *People v. Harris*, *supra*, 36 Cal.3d at pp. 70-71.)

Here, in sharp contrast, Matthew's essay neither explicitly nor implicitly mentioned the crimes nor did it explicitly or implicitly tend to exonerate him or minimize his responsibility for the crimes. It was simply a short school essay describing his extremely close and loving relationship with his brother. It strains credulity to assume that an inexperienced 18-year-old with absolutely no criminal history or experience with the judicial system would have the slightest inkling that a school essay describing his close relationship with his brother would have *any* evidentiary value or any bearing on the outcome of his case. In other words, there was absolutely no basis on which to conclude that Matthew wrote the essay to "for the purpose of communicating a statement to a jury" or to "manufacture evidence" for use in court. (*People v. Harris*, *supra*, 36 Cal.3d at pp. 70-71.)

C. Respondent Has Failed To Carry Its Burden Of Proving That The Erroneous Exclusion Of The Evidence Was Harmless Beyond A Reasonable Doubt

Finally, respondent contends that any error in excluding the evidence was harmless under the *Watson* "reasonable probability" standard because there was already "ample" evidence of appellant's close relationship with his brother, his "gentleness . . . loving nature . . . peacefulness" and of "codefendant's leadership role." (RB 128, 131.) In a single sentence unsupported by any argument or discussion of the evidence, respondent similarly asserts that any error was harmless under "the stricter *Chapman* standard." (RB 128, 131.) Respondent is wrong.

Respondent cites *People v. Weaver* (2001) 26 Cal.4th 876, 981 to support its proposition that the "*Watson* standard" applies to "the exclusion of hearsay evidence at [the] penalty phase in a capital case." (RB 128, 131.) As a preliminary matter, the evidence was not hearsay. In any event, respondent misreads *Weaver*. In *Weaver*, this Court applied the *Brown* "reasonable *possibility*" standard to the exclusion of mitigating evidence at the penalty phase, *not* the *Watson* "reasonable probability" standard which applies only state law violations in the guilt phase. (*People v. Weaver*, *supra*, at p. 981; see also *People v. Gonzalez*, *supra*, 38 Cal.4th at p. 961; *People v. Brown*, *supra*, 46 Cal.3d at pp. 447-448.)

Furthermore, exclusion of the evidence did not violate only state law. "The exclusion of mitigating evidence 'violates the [federal] constitutional requirement that a capital defendant must be allowed to present all relevant evidence to demonstrate he deserves a sentence of life rather than death. [Citation]. Exclusion of such evidence . . . is . . . subject to the standard of review announced in *Chapman v. California* (1967) 386 U.S. 18, 24.'

(*People v. Fudge* [1994] 7 Cal.4th [1074.] 1117; see *Skipper v. South Carolina* (1986) 476 U.S.1.)" (*People v. Roldan* (2005) 35 Cal.4th 646, 739.)

Respondent does not dispute that the penalty phase evidence – which consisted of no aggravation apart from the bare facts of the underlying convictions and their impact on the victims' families as compared to a wealth of compelling mitigating evidence – was extremely close or that the record of the jurors' deliberations reveals that they agreed. (See RB 128, 131; compare AOB 255-265, 290-291.) On such a record, it is no answer to say that because the jurors heard such otherwise compelling mitigating evidence, any additional mitigating evidence would have made no difference. To the contrary, given the closely balanced nature of the case, it more than reasonably possible that even the slightest additional evidence placed on either side of the scales tipped them. (*People v. Brown*, *supra*, 46 Cal.3d at pp. 447-448; cf. *United States v. Agurs* (1976) 427 U.S. 92, 112-113 ["where the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt"]; *Kotteakos v. United States* (1946) 328 U.S. 750, 763 [under federal "harmless error statute," errors "that may be altogether harmless in the face of other clear evidence" may nevertheless require reversal when they "might turn scales otherwise level"].) This is particularly so given that the trial court *sustained* the prosecutor's relevance objection *in front of the jurors* and agreed that evidence of "family closeness" was irrelevant and "far afield." (21 RT 3619.) In so doing, the court not only erroneously excluded constitutionally relevant mitigating evidence; it clearly implied to the jurors that the other evidence regarding Matthew's close and loving relationship with his family was irrelevant to

their penalty decision. (Cf. *People v. Edelbacher*, *supra*, 47 Cal.3d at pp. 1039-1040; *People v. Woods* (2006) 146 Cal.App.4th 106, 53 Cal.Rptr.3d 7, 15.)

Certainly, this Court cannot be confident that the erroneous exclusion of highly relevant mitigating evidence did not contribute to the jurors' close and difficult penalty decision. *(Chapman v. California*, *supra*, 386 U.S. at p. 24.) The death judgment must be reversed.

XI

THE TRIAL COURT'S PROVISION OF AN IMPROPER PINPOINT INSTRUCTION ON VICTIM IMPACT EVIDENCE VIOLATED STATE LAW AND MATTHEW'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS TO A FAIR PENALTY TRIAL AND A RELIABLE PENALTY JUDGMENT AND REQUIRES REVERSAL

In his opening brief, Matthew argued that the trial court erred by giving an improper, argumentative pinpoint instruction on victim impact evidence, which had been requested by the prosecutor. (AOB 291-297.) The court should not have given the instruction at all or, alternatively, it should have provided a complete and accurate instruction on the limitations on, and appropriate use of, victim impact evidence. (AOB 291-297.) Given the enormous importance the victim impact evidence played in bolstering the prosecution's anemic case for death and the impact of the court's instructional error, the error deprived Matthew of his state and federal constitutional rights to a fair penalty trial and a reliable penalty judgment. (AOB 291-297.) The death judgment must be reversed.

Respondent first contends that Matthew has forfeited his right to challenge the instruction on appeal because his counsel did not request that it be amended. (RB 134.) Respondent is incorrect.

The error raised here is that the instruction was an improper, argumentative pinpoint instruction. (AOB 291-297, citing, *inter alia*, *People v. Fauber* (1992) 2 Cal.4th 792, 865.) Matthew's counsel *twice* objected to the prosecutor's requested instruction as an improper pinpoint instruction. (21 RT 3563-3565; 22 RT 3698-3699.) The court overruled that objection and gave the instruction as requested. (21 RT 3563-3565.) Counsel's objection was clearly sufficient to preserve Matthew's challenge

to the instruction.

Furthermore, the instructional error violated Matthew's "substantial rights" to a fair penalty trial and a reliable penalty verdict. Under these circumstances, Matthew's counsel was not required to request amplification of the instruction in order to challenge its erroneous provision on appeal. (See, e.g., Pen. Code, § 1259; *People v. Smithey* (1999) 20 Cal.4th 936, 976, fn. 7 [rejecting Attorney General's argument that failure to request amplification of instruction amounted to waiver because the defendant's challenge was that the instruction itself was flawed, and that the error violated his right to due process, which was reviewable under section 1259].)

Next, respondent contends that because the instruction provided did not "'improperly impl[y] certain conclusions from specified evidence,'" it was "not argumentative." (RB 133, quoting from *People v. Wright* (1988) 45 Cal.3d 1126, 1135.) But respondent ignores that this is not the only definition of an improper argumentative instruction.

As discussed in the opening brief, but ignored by respondent, this Court has repeatedly and consistently held that a pinpoint instruction should be refused as "flawed" and "argumentative" when "it merely highlight[s] certain aspects of the evidence without further illuminating the legal standards at issue." (*People v. Fauber*, *supra*, 2 Cal.4th at p. 865, and authorities cited therein; accord, *People v. Yeoman* (2003) 31 Cal.4th 93, 152; *People v. Musslewhite* (1998) 17 Cal.4th 1216, 1269; *People v. Noguera* (1992) 4 Cal.4th 59, 648; AOB 293.) And, using this definition of an improper argumentative instruction, this Court – at the behest of respondent People – has repeatedly and consistently held that a trial court should refuse instructions highlighting specified *mitigating* evidence that

the jurors can consider under the section 190.3 factors. (See, e.g., *People v. Yeoman*, *supra*, at pp. 151-152 [court properly refused defense instruction that jury could consider specified evidence under factor (k)]; *People v. Musselwhite*, *supra*, at p. 1269 [same].) This was just such an instruction – it highlighted specified *aggravating* evidence (victim impact evidence) that the jury could consider under factor (a). "What is sauce for the People's goose is sauce for the defendant's gander." (*Nienhouse v. Superior Court* (1996) 42 Cal.App.4th 83, 92.) The instruction was improper and argumentative and thus error was committed.

Nevertheless, respondent contends that it is not "reasonably likely" that the jurors would have understood the instruction in a manner that was inconsistent with the law and therefore the court did not err by giving it. (RB 134, citing *People v. Barnett* (1998) 17 Cal.4th 1044, 1161 and *People v. Holt* (1997) 15 Cal.4th 619, 677.) As a preliminary matter, respondent relies on an inapplicable standard of review.

The "reasonable likelihood" standard applies to a claim that an instruction is "*ambiguous* and therefore subject to an erroneous interpretation." (*Boyde v. California* (1990) 494 U.S. 370, 380, italics added; accord, *People v. Clair* (1992) 2 Cal.4th 629, 662-663; *Estelle v. McGuire*, *supra*, 502 U.S. 62, 72.) *People v. Barnett*, *supra*, 17 Cal.4th 1044, cited by respondent, involved such a claim. (*Id.* at pp. 1161-1162, citing *People v. Raley* (1992) 2 Cal.4th 870, 899 [rejecting claim that instruction was vague and susceptible of reading inconsistent with the law].) In *People v. Holt*, *supra*, 15 Cal.4th 619, the only other case cited by respondent, the Court did not apply the reasonable likelihood standard at all. Instead, this Court simply applied the well-settled principle that jury instructions must be read as a whole and concluded that the instructions as a

whole were adequate to apprise the jurors of the relevant legal principles. (*Id.* at p. 677.)

The instruction given here was not ambiguous; it was erroneous and therefore should not have been given at all. Hence, error occurred. (See, e.g., *Wade v. Calderon* (9th Cir. 1994) 29 F.3d 1312, 1321 [reasonable likelihood standard only applies to ambiguous instructions, not to instructions that are erroneous on their face].)

In any event, and to the extent respondent's contention is taken to mean that further illumination of the legal principles applicable to victim impact evidence were unnecessary, or that the trial court's reading of the instruction was harmless, it is without merit. As discussed in the opening brief, a complete instruction on the legal principles applicable to the victim impact evidence presented in this case (see *People v. Wickersham* (1982) 32 Cal.3d 307, 323 [court must instruct on "general principles of law relevant to the issues *raised by the evidence*. . . . [and] closely and openly connected with the *facts before the court*"]) would have explained that the jurors could only consider harm logically caused by Matthew, that they could not consider what they perceived to be the opinions of the victims' survivors regarding the appropriate punishment, and admonished them that the penalty decision should not be an emotional response to victim impact evidence. (AOB 296, and authorities cited therein.)

In this regard, respondent contends that it is not "reasonably likely" that the jurors would have considered the victim impact evidence for purposes inconsistent with the above-described legal principles because: the requirement that the jury only consider harm logically caused by Matthew was "self-evident [since] no reasonable jury would have held appellant responsible for injuries he did not cause directly or indirectly;" the jurors

would not have considered the victim impact witnesses' opinions concerning the appropriate punishment since no such evidence was presented; and the evidence would not have impelled the jurors to vote with emotion or vengeance since emotion and vengeance were not aggravating factors on which they received instructions. (RB 134-135.) In making this argument, respondent simply ignores the prosecutor's arguments inviting the jurors to do just that, a point discussed in the opening brief. (AOB 296.)

That is, the prosecutor *did* ask the jurors to consider harm to a victim that had no causal link to the shooting – Rodney James's death by unknown causes over two years later. (22 RT 3885-3886.)[11] And although respondent is absolutely correct that there was no evidence of the survivors' wishes regarding execution, the prosecutor essentially told the jury that the survivors desired Matthew's execution – emphasizing that although the prosecutor was "not allowed to ask them that," the jury "can imagine what some of the witnesses would have said were I able" – and thereby invited the jury to consider those desires in its penalty determination. (22 RT 3919.) As further discussed in the opening brief, much of the prosecutor's argument was a call for vengeance and for emotion to control over reason. (AOB 296, citing 22 RT 3884-3887, 3892.) As respondent's decision to ignore the prosecutor's remarks makes clear, it is beyond dispute that they

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[11] As discussed in Argument IX, above, the prosecutor actually argued that James "didn't die right away, he died a slow death over a couple of years due to intravenous heroin use and eventual overdose. But you can consider that, what he went through because of what someone else did." (22 RT 3885-3886.) As further discussed, there was no evidence that James used heroin at all after the shooting, much less that he died of a heroin overdose. The only evidence regarding James's death was a death certificate indicating that he had died two years after the shooting of undetermined causes. (People's Trial Exibit 35.)

demonstrate prejudice from the instructional error. (See, e.g., *Taylor v. Kentucky* (1978) 436 U.S. 478, 486-490 [instructional omission was prejudicial and violated defendant's right to fair trial in light of prosecutor's argument]; accord, *People v. Davenport* (1985) 41 Cal.3d 247, 280-281; *People v. Valentine* (2001) 93 Cal.App.4th 1241, 1253 [same]; *People v. Barnes* (1997) 57 Cal.App.4th 552, 557, and fn. 3.)

Finally, respondent contends that even if the jurors' consideration of the victim impact evidence exceeded its legal limits, it was harmless under the *Watson* standard[12] because "[t]he victim impact evidence was negligible [while e]vidence in aggravation consisted almost entirely of the manner in which appellant committed his crimes." (RB 135.) Respondent makes this startling assertion without any supporting argument or discussion of the penalty phase evidence.

Victim impact evidence is "perhaps the most compelling evidence available to prosecutors – highly emotional, frequently tearful testimony coming directly from the hearts and mouths of the survivors . . . . [which] arrives at the precise time when the balance is at its most delicate and the stakes are highest." (Logan, *Through the Past Darkly: The Uses and Abuses of Victim Impact Evidence in Capital Trials* (1995) 41 Ariz. L. Rev. 178.) Here, the victim impact evidence – presented through the highly emotional testimony of four witnesses – was the *only* aggravating evidence offered at the penalty phase above and beyond the guilt phase evidence regarding the commission of the crimes themselves. (See, e.g., *People v. Horton* (1995) 11 Cal.4th 1068, 1140 [reversal required where only

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[12] See Arguments VIII, IX, and X, above, addressing respondent's incorrect position that state law violations at the penalty phase are reviewed under the *Watson* standard.

aggravating evidence offered apart from circumstances of the crimes was tainted by error].) The impact of the crimes on the victims and their families – including victim impact considerations that exceeded the permissible scope of such evidence – was a recurring theme throughout the prosecutor's opening and closing arguments. (22 RT 3885-3887, 3890-3892, 3919; see also Platania & Moran, *Due Process and the Death Penalty: The Role of Prosecutorial Misconduct in Closing Argument in Capital Trials* (1999) 23 Law & Human Behavior 471, 478-479, 481 [mock jurors exposed to straightforward prosecutorial arguments based on victim impact found them more persuasive than even highly inflammatory arguments on other aspects of the prosecution's case in aggravation]; Eisberg, et al., *Victim Characteristics and Victim Impact Evidence in South Carolina Capital Cases* (2003) 88 Cornell L. Rev. 306, 317 [mock jurors shown a written victim impact statement were two and one-half times more likely to vote for death]; Nadler & Rose, *Victim Impact Testimony and the Psychology of Punishment* (2003) 88 Cornell L.Rev. 419, 430-431 [studies reviewed are "consistent with the general principle that victim impact statements which communicate greater harm produce more severe punishment judgments].) Indeed, the evidence was important enough to the state's case that the prosecutor sought, and received, a special instruction highlighting the evidence. Once again, this Court has "seen how important [the 'evidence' was] to the People's case, and 'There is no reason why [it] should treat this evidence as any less "crucial" than the prosecutor – and so presumably the jury – treated it.' [Citation.]" (*People v. Powell* (1967) 67 Cal.2d 32, 56-57; see also *United States v. Kojayan* (9th Cir. 1993) 8 F.3d 1315, 1323 ["[e]vidence matters; closing argument matters; statements from the prosecutor matter a great deal"].)

Given the importance of the evidence to the state's case, the dearth of other aggravating evidence, the wealth of mitigating evidence, and the length of the jury deliberations, during which it inquired about deadlock, as discussed in Argument VIII, above and in the opening brief (AOB 255-265), this Court cannot be confident that the instructional error, compounded by the prosecutor's argument, was surely unattributable to the jurors' close and difficult penalty decision. The death judgment must be reversed.

XII

THE CUMULATIVE EFFECT OF THE GUILT AND PENALTY PHASE ERRORS REQUIRE REVERSAL OF THE DEATH JUDGMENT

In his opening brief, Matthew argued that the cumulative effect of the guilt and penalty phase errors was prejudicial and violated his state and federal constitutional rights to a fair penalty trial and a reliable penalty verdict, and reversal of the death judgment is required. (AOB 279-301, citing, *inter alia*, *Arizona v. Fulminante* (1991) 491 U.S. 279, 301-302, *Johnson v. Mississippi* (1988) 486 U.S. 578, 585, *Chambers v. Mississippi* (1973) 410 U.S. 284, *People v. Hill* (1993) 17 Cal.4th 800, 844-847, and *Alcala v. Woodford* (9th Cir. 2003) 334 F.3d 862, 877-879, cert. denied *Alcala v. California* (1993) 510 U.S. 877; see also *People v. Sturm* (2006) 37 Cal.4th 1218, 1243-1244 [cumulative effect of penalty phase errors was prejudicial and required reversal of death judgment]; *People v. Hernandez* (2003) 30 Cal.4th 835, 877-878 [same]; *United States v. McCullough* (10th Cir. 1996) 76 F.3d 1087, 1101-1102 [error that was harmless in guilt phase was prejudicial in penalty phase].)

Respondent initially contends that there were no errors (apart from the erroneous reading of CALJIC No. 8.84.1 along with the failure to reinstruct with evidentiary instructions during the penalty phase) to accumulate. (RB 136.) Of course, for all of the reasons set forth above and in the opening brief, respondent is wrong.

Respondent next asserts that even if there were errors, they "were harmless whether considered individually or collectively under any standard of review." (RB 136.) Respondent makes this assertion in a single sentence, without any supporting argument or any discussion of the specific

errors, the evidence, or their potential effect on the death verdict. Nor has respondent made *any* such argument or discussion *anywhere* in its brief. The Court should reject respondent's claim in a similarly perfunctory fashion. (See, e.g., *People v. Williams* (1997) 16 Cal.4th 153, 315, and authorities cited therein [assertion made in a "single sentence" was "perfunctorily asserted without argument in support'" and thus "not properly raised"].)

For all of the reasons discussed in the opening brief, given the astonishing closeness of the penalty phase case and the nature and number of the errors that permeated the trial, the death judgment must be reversed.

XIII

FOR PURPOSES OF THIS APPEAL ONLY, MATTHEW WITHDRAWS HIS CLAIM THAT HIS DEATH SENTENCE IS CRUEL AND/OR UNUSUAL IN VIOLATION OF THE STATE AND FEDERAL CONSTITUTIONS

In his opening brief, Matthew argued that his death sentence is disproportionate to his individual culpability and cruel and/or unusual in violation of the state and federal Constitutions. (AOB 301-314.) For purposes of this appeal only, he withdraws that claim.

XIV

THE TRIAL COURT'S REFUSAL TO PROVIDE AN INSTRUCTION CLEARLY GUIDING THE JURY'S CONSIDERATION OF THE SCOPE AND PROOF OF MITIGATING CIRCUMSTANCES VIOLATED MATTHEW'S RIGHTS UNDER STATE LAW, AS WELL AS THE EIGHTH AND FOURTEENTH AMENDMENTS, AND REQUIRES THAT HIS DEATH SENTENCE BE REVERSED

In his opening brief, Matthew argued that the trial court's refusal to give his requested instruction guiding the jurors' consideration of the scope and proof of mitigating circumstances violates his rights under state law, as well as the Eighth and Fourteenth Amendments. (AOB 314-321.) He acknowledged that this Court has rejected similar arguments, but urged the Court to reconsider those decisions for several reasons. (*Ibid.*)

Respondent simply cites those decisions and asserts without argument that they need not be reconsidered. (RB 140.) Accordingly, no further discussion of this issue is necessary.

XV

READING CALJIC NO. 8.85, WHICH INCLUDED INAPPLICABLE FACTORS AND FAILED TO SPECIFY WHICH FACTORS COULD BE MITIGATING ONLY, VIOLATED MATTHEW'S RIGHTS UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS AND REQUIRES REVERSAL OF THE PENALTY JUDGMENT

In his opening brief, Matthew argued that the court's reading of CALJIC No. 8.85 violated his rights under the Sixth, Eighth, and Fourteenth Amendments and requires reversal. (AOB 321-326.) He acknowledged that the Court has rejected similar arguments, but urged the Court to reconsider those decisions. (*Ibid.*)

Respondent simply cites one of those decisions and asserts without argument that it need not be reconsidered. (RB 141.) Accordingly, no further discussion of this issue is necessary.

XVI

READING CALJIC NO. 8.88 DEFINING THE NATURE AND SCOPE OF THE JURY'S SENTENCING DECISION, VIOLATED MATTHEW'S RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE FEDERAL CONSTITUTION AND REQUIRES REVERSAL OF THE PENALTY JUDGMENT

In his opening brief, Matthew argued that the provision of CALJIC No. 8.88 violated his rights under the Eighth and Fourteenth Amendments to the United States Constitution. (AOB 326-336.) He acknowledged that this Court has rejected these claims in other cases, but asked the Court to those decisions. (*Ibid.*)

Respondent simply cites one of those decisions and asserts in a single sentence that it is correct and should not be reconsidered. (RB 142.) Hence, no further discussion of this issue is necessary.

XVII

THE SPECIAL CIRCUMSTANCE OF MULTIPLE-MURDER FAILS TO NARROW THE CLASS OF PERSONS ELIGIBLE FOR THE DEATH PENALTY AND THUS VIOLATES THE EIGHTH AMENDMENT

In his opening brief, Matthew argued that the multiple murder special circumstance is unconstitutional. (AOB 336-340.) Again, he acknowledged that this Court has rejected similar claims, but asked that it reconsider those decisions. (*Ibid.*)

Again, respondent simply cites one of those decisions and asserts without argument that it should not be reconsidered. (RB 143.) Accordingly, no further discussion of this issue is necessary.

XVIII

CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED BY THIS COURT AND APPLIED AT MATTHEW'S TRIAL, VIOLATES THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE FEDERAL CONSTITUTION AND ITS APPLICATION TO MATTHEW'S TRIAL REQUIRES REVERSAL OF THE PENALTY JUDGMENT

In his opening brief, Matthew challenged California's death penalty statute under various provisions of the federal Constitution, as well as international law. (AOB 340-395.) Once again, he acknowledged that this Court has rejected similar challenges, but urged it to reconsider those decisions. (*Ibid.*)

Once again, respondent simply cites some of those decisions and asserts without argument that they are correct and need not be reconsidered. (RB 144-150.) Accordingly, no further discussion of this issue is necessary

XIX

FOR PURPOSES OF THIS APPEAL ONLY, MATTHEW WITHDRAWS HIS CLAIM THAT THE METHOD OF EXECUTION EMPLOYED IN CALIFORNIA VIOLATES THE FOURTEENTH AMENDMENT'S GUARANTEE OF PROCEDURAL DUE PROCESS AND THE EIGHTH AMENDMENT'S PROHIBITION ON CRUEL AND UNUSUAL PUNISHMENT

In his opening brief, Matthew challenged California's method of execution as a violation of the Eighth and Fourteenth Amendments. (AOB 395-407.) He withdraws that claim for purposes of this appeal only.

XX

THE TRIAL COURT'S RESTITUTION ORDERS WERE UNAUTHORIZED AND MUST BE STRICKEN

In the opening brief, Matthew argued that the trial court's restitution orders were erroneously calculated and imposed under the law that existed at the time of his 1999 sentencing, rather than under the law that existed at the time of the 1993 crimes, and that they were therefore unauthorized and must be stricken. (AOB 407-414.)[13] Respondent concedes that the trial court's restitution orders were unauthorized must be stricken. (RB 154.) Accordingly, no further discussion of this issue is necessary. The case must be remanded for recalculation of the restitution orders.

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[13] In addition to the points raised in the opening brief, the 1993 restitution provisions – which respondent concedes should have been applied in this case – also required the trial court to find, based upon substantial evidence, that Matthew has the ability to pay the ordered restitution. (See, e.g., Former Gov't. Code, § 13967 (1992); *People v. Frye* (1994) 21 Cal.App.4th 1483, 1484-1486.) Because the trial court erroneously applied the 1999 restitution provisions, and not the 1993 provisions, the court made no such finding nor was there any evidence that Matthew had the ability to pay the ordered restitution. Therefore, if a remand is ordered for recalculation of the restitution orders, the orders must be supported by substantial evidence and findings that Matthew has the ability to pay them.

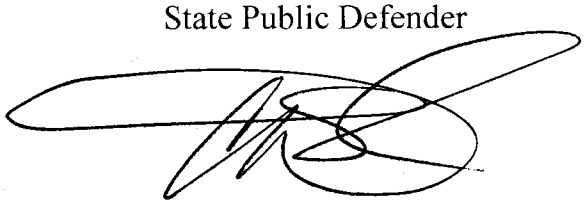
CONCLUSION

For the foregoing reasons, as well as those stated in appellant's opening brief, the entire judgment and sentence of death must be reversed.

DATED: March 7, 2007

Respectfully submitted,

MICHAEL J. HERSEK
State Public Defender

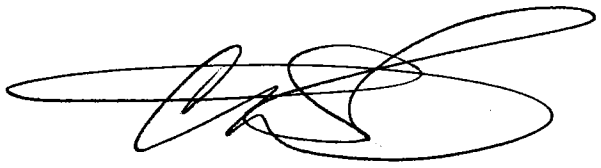


C. DELAINE RENARD
Deputy State Public Defender

Attorneys for Appellant

CERTIFICATE OF COUNSEL
(Cal. Rules of Court, rule 36(b)(2))

I, C. Delaine Renard, am the Deputy State Public Defender assigned to represent appellant Matthew A. Souza in this automatic appeal. I directed a member of our staff to conduct a word count of this brief using our office's computer software. On the basis of that computer-generated word count, I certify that this reply brief is 45,537 words in length.



C. DELAINE RENARD
Attorney for Appellant

DECLARATION OF SERVICE

Re: *People v. Souza* No. S076999

I, Jeffrey McPherson, declare that I am over 18 years of age, and not a party to the within cause; my business address is 221 Main Street, 10th Floor, San Francisco, California 94105; that I served a true copy of the attached:

APPELLANT'S REPLY BRIEF

on each of the following, by placing same in an envelope (or envelopes) addressed (respectively) as follows:

Office of the Attorney General
Attn: William Kuimelis, D.A.G.
455 Golden Gate Ave., Ste. 11000
San Francisco, CA 94102-3664

Matthew A. Souza
(Appellant)

Each said envelope was then, on March 7, 2007, sealed and deposited in the United States Mail at San Francisco, California, the county in which I am employed, with the postage thereon fully prepaid.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 7, 2007, at San Francisco, California.

_____
DECLARANT