SUPREME COURT COPY

In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **IRVING ALEXANDER RAMIREZ,** **Defendant and Appellant.**	**CAPITAL CASE** Case No. S155160

Alameda County Superior Court Case No. 151080
The Honorable Jon Rolefson, Judge

RESPONDENT'S BRIEF

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DEATH PENALTY

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INTRODUCTION

Irving Alexander Ramirez was convicted of premeditated and deliberate murder and sentenced to death for the killing of Officer Nels "Dan" Niemi. On July 25, 2005, Ramirez shot Niemi in the head when the officer's back was to him. As Niemi lay supine on the ground, Ramirez shot him five more times, striking him in the chest, abdomen, and thigh.

Shortly before the murder, Ramirez and some acquaintances were drinking alcohol outside of an apartment complex. Niemi, responding to a call for service, approached the men and requested their IDs. Ramirez confessed that he murdered Niemi because he was on searchable probation, and "if the police officer called in his name, he would be arrested, because he had two guns and drugs on him."

On appeal, Ramirez alleges several errors in both the guilt and penalty phases of his trial. In the guilt phase, he challenges the trial court's modification of the standard instruction on the degrees of murder, its denial of his request for an instruction on reasonable doubt and the degrees of murder, and its failure to limit the number of uniformed police officers that attended closing arguments. In the penalty phase, he contends the court erroneously admitted certain victim impact evidence, improperly denied his request for an instruction on lingering doubt, and incorrectly answered several questions from the jury during deliberations. Ramirez also makes routine claims challenging the death penalty. All of his claims fail.

STATEMENT OF THE CASE

On November 1, 2005, the Alameda County District Attorney filed an information charging Ramirez in count 1 with murder (Pen. Code, § 187, subd. (a))[1] and alleging the special circumstances of murder to avoid arrest

[1] Further undesignated statutory references are to the Penal Code.

(§ 190.2, subd. (a)(5)), murder of a peace officer engaged in the lawful performance of his duties (§ 190.2, subd. (a)(7)), and murder by lying in wait (§ 190.2, subd. (a)(15)). (2 CT 473-475.) The district attorney also alleged enhancements for discharge of a firearm causing death (§§ 12022.7, subd. (a), 12022.53, subd. (d)), personal and intentional discharge of a firearm (§ 12022.53, subd. (c)), and personal use of a firearm (§§ 12022.5, subd. (a)(1), 12022.53, subd. (b)). (2 CT 474.) On November 2, 2005, the district attorney filed notice to seek the death penalty against Ramirez. (2 CT 480.)

On March 5, 2007, the trial court granted the district attorney's motion to dismiss the lying in wait special circumstance. (2 RT 103; 3 CT 724.) On May 3, 2007, the district attorney amended the information to include an allegation of second degree murder of a peace officer (§ 190, subd. (c)). (4 RT 890-892.)

On May 10, 2007, the jury convicted Ramirez of murder in the first degree and found true the special circumstances and firearm enhancements.[2] (13 RT 2647-2648; 4 CT 906-908.) On June 11, 2007, the jury imposed a sentence of death. (14 RT 2976; 4 CT 1041.)

On August 3, 2007, the trial court denied Ramirez's automatic motion for modification of his death sentence. The court imposed the death penalty for the special circumstances murder and a consecutive term of 25 years-to-life for the enhancement of discharging a firearm causing death. The court struck punishment for the remaining firearm enhancements and entered an order of commitment pending execution of Ramirez's death sentence. (14 RT 2996-2997, 3004; 4 CT 1085-1087.)

The matter is before this Court on automatic appeal. (§ 1239.)

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[2] Because the jury convicted Ramirez of first degree murder, it did not make a finding on the section 190, subdivision (c), allegation.

STATEMENT OF FACTS

I. GUILT PHASE

A. Prosecution Evidence

1. Ramirez's 2004 arrest in Pleasanton

The People introduced evidence of Ramirez's prior arrest in Pleasanton to show his knowledge and motive for the murder. (9 RT 1795.)

On the evening of December 10, 2004, Detective Mark Sheldon of the Pleasanton Police Department arrested Ramirez for a probation violation. (9 RT 1837, 1843-1844.) Sheldon noticed Ramirez driving a vehicle with false registration tags. He approached Ramirez in a gas station parking lot and asked for his identification. (9 RT 1839, 1841-1842.) When Ramirez handed him an identification card rather than a driver's license, Sheldon asked him if his driver's license was suspended and if he was on probation. (9 RT 1842-1843.) Ramirez answered yes to both questions. (9 RT 1843.) Sheldon conducted a records check and confirmed that Ramirez was on probation with a four-way search clause, which meant Ramirez's person, property, vehicle, and residence were subject to search by law enforcement officers. (9 RT 1843.)

Sheldon asked Ramirez if he had "anything illegal on him." (9 RT 1843.) Ramirez admitted he had some methamphetamine in his front pocket. Sheldon searched Ramirez and found two plastic baggies containing suspected methamphetamine and cocaine. He arrested Ramirez and searched his vehicle, where he found a pipe used for smoking methamphetamine. (9 RT 1844.) Sheldon found no guns during the search. (9 RT 1848.)

Sheldon brought Ramirez to the Santa Rita jail. (9 RT 1844.) Ramirez served 45 days in jail in connection with the arrest. (9 RT 1845.)

2. Events leading up to Officer Niemi's murder

Around noon on July 25, 2005, Vicente Heredia's younger brother, Daniel,[3] called him to tell him that a group of people who had "jumped" him three days earlier were in front of their mother's apartment complex on Doolittle Drive in San Leandro. (9 RT 1903, 1935, 1937; 10 RT 1958.) Heredia went to his mother's residence. On the way, he called several people looking for a gun to borrow. He spoke to Ramirez, who agreed to loan him a gun. (10 RT 1959, 1961.) Heredia gave Ramirez directions to his mother's apartment complex where they arranged to transfer the weapon. (10 RT 1961-1962.)

Heredia found Daniel in front of their mother's residence with a swollen face, a chipped tooth, and a black eye. (10 RT 1962.) Ramirez arrived about an hour later and asked Heredia if he still needed the gun. (10 RT 1962, 1993.) Heredia responded, "'No, I don't need it anymore, it's all right.'" (10 RT 1962.) Ramirez insisted Heredia take the gun, stating, "Look at your little brother's face." (10 RT 1962-1963.) Ramirez showed Heredia how to use the gun, which resembled People's Exhibit 32. (10 RT 1963; 10 RT 2051.) Heredia stashed the gun in some bushes close to the apartment complex. (10 RT 1963.)

A group of people, consisting mostly of Daniel's friends, played football in front of the apartment complex. (10 RT 1962-1964.) They discussed finding the people who "jumped" Daniel. (10 RT 1964.) Around 7:47 p.m., Officer Niemi arrived and told the group they needed to leave the area. (9 RT 1854; 10 RT 1964.) The group moved to Cherry Grove Park, where they drank alcohol and listened to music. Heredia drove his Jeep Cherokee to the park, which was about a 5 to 10 minute drive from his

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[3] Because Vicente and Daniel have the same surname, we refer to Daniel by his first name for clarity.

mother's residence. He did not bring Ramirez's gun with him. (10 RT 1964-1965.)

At the park, Heredia learned that the individuals who had beaten Daniel earlier were on their way. Heredia went back to his mother's residence and retrieved Ramirez's gun from the bushes. When he returned to the park, multiple people were beating Daniel on the ground. (10 RT 1966.) Heredia ran towards the crowd and fired Ramirez's gun into the air. The crowd dispersed and Heredia saw Daniel. (10 RT 1966-1967.) He was bleeding from the eye and "looked worse" than earlier. (10 RT 1967.) Heredia tried to fire the gun again, but it jammed. (10 RT 1967.) He gave the gun to someone at the park and left in his Jeep with Daniel. On the way back to his mother's residence, he was stopped by police, who contacted an ambulance upon seeing Daniel's condition. (10 RT 1967-1968.) The police searched the Jeep and, finding nothing incriminating, permitted Heredia to leave. (10 RT 1968.)

3. The murder

When Heredia returned to Doolittle Drive, Ramirez's gun was already at his mother's apartment. Heredia called Ramirez, told him the gun had jammed, and asked him to come pick it up. (10 RT 1968-1969.) Ramirez borrowed his roommate's white Thunderbird and drove to the apartment complex with his friend "Louie" Arteaga. (10 RT 1971, 2043-2044; 12 RT 2373.)

Ramirez had been drinking since earlier in the day and was driving fast and "out of control." (10 RT 2044, 2076.) He had a bottle of Hennessy cognac with him that was half full. (10 RT 2056, 2078.) Arteaga could tell he was drunk. Fearing they would get into an accident, Arteaga asked Ramirez to pull the car over so he could drive instead. (10 RT 2044, 2075-2077.) Arteaga drove the rest of the way to the apartment complex, following Ramirez's directions. (10 RT 2044-2045.) On the way, Ramirez

said he wanted to find the people that had beaten "his brother" and "[s]hoot'em." (10 RT 2074.) Arteaga noticed a shotgun, a box of shotgun shells, and a dark colored handgun resembling People's Exhibit 33 in the car. Although Arteaga had previously stated that Ramirez was loading the shotgun in the car, at trial he could not recall him doing so. (10 RT 2045-2048.)

Heredia's older brother, Frank Gonzales, went to the apartment complex after receiving a hysterical phone call from his mother. (9 RT 1901-1902; 10 RT 1958.) When he arrived, a large group of people, including Heredia, were in front of the apartment. Heredia told Gonzales that their younger brother Daniel "had got jumped." (9 RT 1903; 10 RT 1958.) Gonzales left to pick up his cousin and "right-hand man," Miguel Rangel. (9 RT 1905-1906.) Anticipating a possible confrontation, he and Rangel returned to the apartment complex with two baseball bats. (9 RT 1906, 1935.)

Ramirez and Arteaga arrived at the apartment complex shortly after Gonzales and Rangel. (9 RT 1936-1937, 1939-1940; 10 RT 1971.) By then, most of the people who were there earlier had left. (9 RT 1906.) Ramirez, Arteaga, and Heredia went inside the apartment, where Ramirez took apart his gun, examined it, and explained to Heredia why it had jammed. Ramirez put the gun in his pocket. The three men returned outside and joined Gonzales and Rangel. (9 RT 1937-1938; 10 RT 1972-1973, 2051-2053.)

Gonzales, Rangel, Heredia, Arteaga, and Ramirez stood in front of the apartment complex talking. (9 RT 1909, 1939; 10 RT 1973-1974, 2054.) Ramirez mentioned that it was his birthday. (9 RT 1954.) Ramirez and Heredia discussed "going after" the people who had beaten Daniel. (10 RT 2054.) The men passed around the bottle of Hennessy that Ramirez brought. (9 RT 1925, 1939; 10 RT 1975-1976, 2056.) Gonzales described

the bottle as about one-third of the way full, or "pretty empty." (9 RT 1922.) Heredia, Rangel, and Ramirez each took a drink from the bottle. (9 RT 1925, 1939; 10 RT 1978, 2079.)

Ramirez seemed drunk to Gonzales, but coherent. (9 RT 1923, 1927.) Rangel noted that Ramirez stumbled when he walked. (9 RT 1948.) Neither Gonzales nor Rangel had met Ramirez before that day. Both of them believed Ramirez was slurring his words. (9 RT 1919, 1923, 1939, 1948.) Heredia, who had known Ramirez for "about a year and a half," noted nothing unusual about Ramirez's speech. (10 RT 1960, 1978.) In Heredia's opinion, Ramirez was "[n]ot really" acting as if he had been drinking. (10 RT 1978, 2003.)

Gonzales went to his car to retrieve his cell phone so he could call his mother. At 10:57 p.m., Niemi arrived in his patrol car. (9 RT 1858, 1910; 10 RT 1974, 2055.) He was responding to a complaint about a group of juveniles loitering in the area. (9 RT 1858.) He stopped his patrol car next to Ramirez and the other men, rolled down the passenger side window, and asked if they were part of the group that he told to leave earlier. (9 RT 1910-1911, 1940; 10 RT 1974, 2055-2056.) Heredia answered the officer's question in the negative. Niemi said, "'I don't think you guys understand me,'" and got out of his patrol car. (9 RT 1911, 1941; 10 RT 2056.) He approached the men and asked if any of them had been drinking. When they admitted they had, Niemi asked for their identification. Heredia handed his identification card to the officer first, followed by Ramirez, who fumbled with his wallet. (9 RT 1911-1912, 1941-1942, 1952; 10 RT 1974, 1981, 2010, 2057.) Niemi commented that Ramirez seemed to be having trouble retrieving his ID. Ramirez explained that his wallet was new. (9 RT 1912.) At trial, Rangel recalled that Niemi had asked Ramirez why he was slurring his words. (9 RT 1951.)

Once Niemi had Ramirez's identification card, he turned to Rangel and collected his ID. Niemi looked over the IDs. Rangel took a couple of steps back and turned away from the officer. (9 RT 1912, 1942; 10 RT 1981.) Niemi faced toward the street with his back to Ramirez, who stood right behind him. (9 RT 1913-1915.) Niemi wore a microphone on his left shoulder that was connected to his radio. (9 RT 1856; 10 RT 2058.) According to a computer assisted dispatching (CAD) report, Niemi requested a nonurgent backup unit, or "Code 8," at 11:00 p.m. (9 RT 1851-1852, 1858-1859.) Arteaga saw Niemi place his hand on his shoulder microphone and speak into it. (10 RT 2058.) As he did so, Ramirez pulled a handgun from his waist, leaned forward, and shot Niemi in the head. (9 RT 1915; 10 RT 2058.)

The bullet struck Niemi by his lower jaw and exited his body through the left side of his neck. (9 RT 1869-1871.) Heredia, Gonzales and Rangel took off running. (9 RT 1916-1917, 1945; 10 RT 1983.) Arteaga ran "back and forth, not knowing what to do." (10 RT 2061.) He saw Niemi—who was still alive—kicking at Ramirez from the ground. (10 RT 2061, 2091.) As Niemi lay helpless on his back, Ramirez shot him five more times, emptying his gun. The bullets struck Niemi in his chest, abdomen, and thigh. (9 RT 1871-1876, 1896, 1917, 1945; 10 RT 2037, 2062.)

At the sound of the first gunshot, Heredia "freaked out," ran to his car, and got inside. (10 RT 1983-1984.) As Heredia's Jeep was moving, Arteaga and Ramirez jumped in the front seat. (10 RT 1984, 2063, 2089.) Heredia told them to "get out," but they did not. (10 RT 1985.) Ramirez crawled into the back seat. Not knowing "what else to do except go," Heredia fled the scene. (10 RT 1985, 2063, 2090.)

Gonzales and Rangel ran to Gonzales's car and got in. Gonzales drove to the corner, turned right, then made a U-turn and returned to the scene. He parked the car across the street from Niemi and he and Rangel

got out. (9 RT 1916-1918, 1945-1946.) Rangel ran over to Niemi, saw that he was hurt, and panicked. Ramirez's ID was next to the officer's body. Hysterical, Rangel grabbed the ID and the bottle of Hennessy and tossed them aside. (9 RT 1918, 1946-1947; 11 RT 2139.)

Shortly thereafter, Officer Jason Fredriksson arrived on scene. (10 RT 2107.) He was responding to Niemi's request for a "Code 8" and was en route to their location when a report of shots fired and an officer down was broadcast over the radio. (10 RT 2104-2105.)

At the scene, Fredriksson saw several people "frantically" waving their hands, calling him over to Niemi's body. He went over to Niemi and "dropped to [his] knees" beside him. (10 RT 2107.) Niemi's face was swelling and his eyes were open, but "nonreactive." (10 RT 2107.) Blood pooled around his body and inside his mouth. Fredriksson called Niemi's name several times, but he gave no response. His chest did not rise and fall. Believing the blood in Niemi's mouth might be obstructing his airway, Fredriksson rolled him onto his side. (10 RT 2107-2108.)

Additional police officers arrived on scene. (11 RT 2169-2170.) Medical personnel assumed care of Niemi, but were unable to save him. (10 RT 2110.) He died from multiple gunshot wounds. (9 RT 1867.)

4. Ramirez's statements and conduct following the murder

As Heredia, Arteaga, and Ramirez drove away from the scene, Heredia and Arteaga repeatedly asked Ramirez why he had shot Niemi. (10 RT 1986-1987, 2065.) According to Heredia, Ramirez responded, "I was gone. I was gone. I was gonna go," meaning he thought he was "going to go to jail or was going to be gone for a while." (10 RT 1986, 1988.) Arteaga heard Ramirez say, "'I was done,'" which meant "he was caught." (10 RT 2065, 2087-2088.)

Heredia was "shaken up" and kept repeating, "I [have] a daughter." (10 RT 1987.) Arteaga, too, expressed concern for his daughter. Heredia drove south on the freeway and exited onto Highway 84. Ramirez directed him to go to the Dumbarton Bridge, but Heredia wanted to go home and refused to drive to the bridge. Instead, he exited onto Thornton Avenue and drove toward Newark. (10 RT 1986-1989, 2064-2065.)

When they got to a marshy area off of Thornton Avenue, Ramirez told Heredia to "'[s]top the car.'" (10 RT 1989-1990, 2021, 2025, 2064; 12 RT 2352.) Heredia complied and Ramirez got out. (10 RT 1989.) Outside, Ramirez removed his clothes and "everything else that was on him." (10 RT 2064, 2066.) He threw the items—including the murder weapon—into the marsh. He got back into the car wearing only his boxers. (10 RT 1990, 2067.)

Heredia drove Ramirez to his house on Wells Avenue in Newark. (10 RT 1991, 2067.) Ashley Ewert, who had been dating Ramirez for about a week, was waiting there for him. (12 RT 2334, 2338.) Ewert and Ramirez were supposed to meet at Ewert's house earlier that evening. (12 RT 2335-2336.) When Ramirez did not arrive at the scheduled time, Ewert drove over to Ramirez's house to wait for him. (12 RT 2338.)

Ramirez burst through his bedroom door smelling of alcohol and wearing only his boxers. (12 RT 2339, 2374.) He was "frantic and flustered." (12 RT 2340.) Ewert was certain Ramirez was drunk (12 RT 2386), but he was nonetheless coherent (12 RT 2375). Ramirez shouted at Ewert and his roommate Chris to "get everything out." (12 RT 2340.) He grabbed a container of "Comet" from next to the sink and ran to the shower. (12 RT 2340.) Ramirez stumbled trying to remove his boxers. (12 RT 2376.) After he showered and dressed, he repeated to Ewert and Chris "to get everything out." (12 RT 2340.)

Ewert and Ramirez got into Ewert's black Volkswagen Jetta and left Ramirez's house. In the car, Ramirez wiped his hands and arms with alcohol swabs. (12 RT 2341.) He said multiple times, "'We have to go. They're after me. We have to go.'" (12 RT 2341.) When Ewert asked him who was after him, Ramirez responded, "'I can't tell you. You don't want to know.'" (12 RT 2341.) Ewert insisted that Ramirez tell her what he was talking about and warned him she would stop driving unless he did. (12 RT 2341.) Ramirez told her, "'I just shot a cop. I just killed a cop.'" (12 RT 2342.)

Ramirez directed Ewert to Arteaga's house. (12 RT 2342.) When they arrived, Ramirez went to the door and asked Arteaga for money. Arteaga gave him $20. The two men discussed "getting [their] story straight." (10 RT 2068-2069; 12 RT 2344.) Ewert approached Arteaga and asked him, "'Is it true?'" (10 RT 2070; 12 RT 2343.) According to Ewert, Arteaga answered that it was not true. (12 RT 2343.) Arteaga denied responding to the question. (10 RT 2070.)

When Ewert and Ramirez got back into the car, Ramirez disclosed more details about the murder. He told Ewert that he and the other men had been in front of Heredia's house when Niemi drove up and asked for their identification. (12 RT 2344-2345.) After Ramirez gave his ID to Niemi, the officer "went to reach for his radio, and . . . he shot him once in the face, and then four more times." (12 RT 2345.) He told Ewert he "rolled over" Niemi's body to retrieve what he thought was his ID, then pointed the gun at Heredia and told him to drive. (12 RT 2345.) He confessed that he shot Niemi because he was on probation with a search and seizure clause, and "if the police officer called in his name, he would be arrested, because he had two guns and drugs on him." (12 RT 2345.)

Ewert drove Ramirez to a Safeway in Newark where Ramirez, who was asthmatic, stole an inhaler. (12 RT 2345-2346; 13 RT 2707 [penalty

phase testimony].) The theft was captured on video by store surveillance cameras (People's Exh. 73). (12 RT 2346-2348.) When Ewert and Ramirez left the Safeway, Ramirez told Ewert he needed to return to his house to retrieve a gun and bullets that were still there. (12 RT 2349.) He explained that the bullets were the same kind he had used to kill Niemi. (12 RT 2349.) They returned to Ramirez's house and Ramirez went inside. He reemerged with a "shaving kit bag" containing a Ziplock bag full of bullets and washers and a box containing a gun. (12 RT 2349-2351.)

Ramirez instructed Ewert to drive to the Dumbarton Bridge and she complied. As they crossed over the bridge, Ramirez told Ewert to slow down in the far right lane. As Ewert slowed the car, Ramirez threw the bag and box out of the car window, over the side of the bridge and into the bay below. (12 RT 2351.)

They exited the bridge onto Thornton Avenue and drove toward Newark. Ramirez pointed to a location in the marshy area where he had discarded his gun, cell phone, and clothes earlier that night. (12 RT 2351-2352.) He told Ewert he had thrown the items into the marsh "because the salt water would get rid of the forensics." (12 RT 2352.)

Ramirez told Ewert he needed to find a phone so he could call someone "to take Louie and Vicente out." (12 RT 2352.) They drove to a pay phone next to a Taco Bell. Ramirez dialed several numbers, but did not complete a call. (12 RT 2353.) According to Ewert, Ramirez was so drunk she could not imagine how he was able to remember anyone's phone number. (12 RT 2384.)

Ewert next drove them to the home of their mutual friends, Frank and Alina Vallejo. Alina's younger brother let them inside the residence; however, before either of them spoke to Frank and Alina, Ramirez decided they needed to go elsewhere. (12 RT 2353-2354.) They went to a "E-Z 8" Motel where Ewert rented a room using her "ATM card." (12 RT 2354-

2355, 2390.) Inside the motel room, Ramirez washed his hands, arms, and face in the sink. He spoke to himself aloud about the steps he had taken to eliminate the evidence against him. (12 RT 2355-2356.) He recalled that he had fired a gun during an argument with his ex-girlfriend and the bullet—the same kind used to kill Niemi—was still lodged in his bedroom wall. (12 RT 2356.) At one point, Ramirez said to Ewert, "'They still have my I.D. but I got rid of the guns. I could just say that my I.D. got stolen earlier that day, right?'" (12 RT 2356.) Ramirez asked Ewert to drive him to the white Thunderbird so he could retrieve the shotgun from the backseat. Ewert refused. Ramirez and Ewert went to sleep. (12 RT 2356-2357.)

The next morning, Ewert turned on the television and saw news coverage of the murder. Ramirez's picture was displayed on the television screen. Until that moment, Ewert did not believe that Ramirez had actually killed a police officer. (12 RT 2357-2358.) When she saw Ramirez's picture on the news, she started "freaking out" and told Ramirez she was leaving. (12 RT 2358.) Ramirez grabbed her by the arm and told her she could not leave because she was "the only one that he had." (12 RT 2358.)

Ewert and Ramirez left the motel. Ramirez sat in the backseat of Ewert's Jetta with a towel over his head. (12 RT 2359.) He directed Ewert to a house in Daly City where they met a man and a woman. (12 RT 2360-2361.) The couple told Ewert to follow their red truck to a second residence, and Ewert complied. Ramirez rode in the truck with the couple. (12 RT 2361-2362.) Ewert had a court appearance that morning in Pleasanton. (12 RT 2358-2359.) She borrowed a cell phone from someone at the second residence and was on hold with the court as she followed the red truck. (12 RT 2362, 2395.)

At the second residence, someone instructed Ewert to follow a green Ford Expedition to a third residence. Ewert again complied. (12 RT 2363.) At the third residence, Ewert heard Ramirez say that he was going to go to

Arizona or Tijuana and get plastic surgery. Ramirez asked Ewert to come with him. She refused. (12 RT 2364.)

Before Ewert left the third residence, someone gave her a yellow Post-It note with two phone numbers written on it. Ramirez asked Ewert to call him later that night. (12 RT 2365.)

Once on the freeway, Ewert began to cry. She pulled over and called her friend Valerie. After her court appearance in Pleasanton, which she managed to reschedule to that afternoon, Ewert returned to Frank and Alina Vallejo's home in Newark. She shared with the Vallejos some of what Ramirez had told her. They advised her to call her father and hire a lawyer. (12 RT 2364-2367.)

5. Investigation and physical evidence

The day after the murder, around 11:30 p.m., Officer Christopher Tankson and Officer Tutor met Ewert and her father at the office of Ewert's attorney. Ewert provided the officers with information about Ramirez's involvement in the murder. (10 RT 2017-2019; 12 RT 2371-2372.) At Ewert's direction, Tankson and Tutor drove with Ewert, her father, and her attorney, to the marshy area by Thornton Avenue where Ramirez had discarded his clothes and the murder weapon the previous night. (10 RT 2019-2020; 12 RT 2372-2373.) Ewert told them to stop the car at specific location. Tankson got out and searched the identified area. Although it was "extremely dark," Ewert spotted the keys to the white Thunderbird on the side of the road. (10 RT 2021; 12 RT 2373.) Tankson collected the keys. (10 RT 2021-2023.)

The morning of July 27, 2005, San Leandro police officers and members of the Alameda County Sheriff's Office searched the marsh. (10 RT 2025-2026.) The search and rescue team found a pair of blue jeans and a single "athletic-type" shoe in the marsh. (10 RT 2029.) Inside the pockets of the blue jeans, they found an inhaler mouthpiece and a pocket

knife. The team also discovered a grey Stanford t-shirt. Rolled up inside the t-shirt were a silver Colt 10-millimeter semiautomatic pistol (People's Exh. 33), IDs belonging to Heredia and Rangel, and miscellaneous paperwork. (10 RT 2028-2035, 2039; 11 RT 2180-2181.) The Colt pistol was "completely empty." (10 RT 2037.) The search and rescue team returned to the marsh several months later and found a second pistol "coated in muck" (People's Exh. 32). (11 RT 2152, 2154-2155, 2311.)

A total of seven shell casings were recovered from the murder scene on Doolittle Drive. (11 RT 2147.) All seven were fired from the Colt pistol discovered in the marsh (People's Exh. 33). (11 RT 2196-2198, 2203.) An expert also determined that a bullet removed from Niemi's back (People's Exh. 8) and a bullet recovered from Ramirez's bedroom wall (People's Exh. 35) were fired from the same pistol. (10 RT 2114-2115; 11 RT 2206-2207, 2130, 2211-2212.)

In the white Thunderbird left at the scene, police discovered a shotgun on the floorboard of the backseat, a box of shotgun shells on the front passenger seat, and a single shotgun shell in the center console. (11 RT 2167.) The shotgun was loaded. (11 RT 2173.) A bottle of "Boss" cologne and a stun gun were also found in the car. (11 RT 2174, 2232.) Ramirez's fingerprints were on the shotgun shell, the cologne bottle, and the stun gun. (11 RT 2216-2217, 2241-2244, 2295, 2300-2303.)

B. Defense Evidence

The defense conceded that appellant had murdered Niemi on the evening of July 25, 2005. (9 RT 1831 [defense opening statement].) However, the defense disputed that the murder was committed with premeditation and deliberation, suggesting Ramirez's intoxication precluded him from forming the intent required for first degree murder. (9 RT 1831-1836 [defense opening statement].)

1. Witness accounts of Ramirez's drinking the day of the murder

July 25, 2005, was Ramirez's birthday. (12 RT 2474.) Alina Vallejo hosted a birthday party for him at her home. (12 RT 2485.) When Ramirez arrived around 3:00 p.m., Alina[4] had the impression he had been drinking. Her younger brother, Angel "Anthony" Miranda, testified that Ramirez was unsteady and slurring his words. (12 RT 2472-2475, 2484-2485.) Miranda himself was drunk by 4:00 or 5:00 p.m. (12 RT 2482.)

When Alina's husband, Frank, arrived home from work around 4:15 p.m., Ramirez was drinking Budweiser beer. (12 RT 2460, 2484.) Frank joined him drinking beer. Around 7:00 or 8:00 p.m., Ramirez and Miranda left the house to purchase more alcohol. By that time, Ramirez, Miranda, and Frank had consumed 24 beers. (12 RT 2461, 2475-2476.) Frank estimated that Ramirez drank around six beers. (12 RT 2460.) On the way to the liquor store, Ramirez and Miranda stopped at the Sun Pub Bar in Hayward, "drank a couple of beers, played pool, [and] smoked a couple of joints." (12 RT 2476-2477.) Afterward, they went to the liquor store next to the bar and bought a 12- or 18-pack of beer. (12 RT 2477.)

When they returned to the Vallejo residence, Frank and Ramirez took shots of Remy Martin and Hennessy that Ramirez had brought with him. Ramirez took "a minimum of two" shots from the Hennessy bottle, which was "quite full" when Frank first saw it. (12 RT 2461-2462, 2478.) Miranda estimated that the Hennessy bottle was three-quarters full. (12 RT 2478.) Ramirez also took at least two shots from the full bottle of Remy Martin, consuming a total of four to five shots of liquor. Ramirez and Frank "chas[ed]" their shots of liquor with beer. (12 RT 2462, 2478.)

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[4] Because Alina and her husband Frank share the same surname, we refer to them both by their first names for clarity.

According to Frank, Ramirez had a beer in his hand all night. (12 RT 2468.) In fact, whenever Frank saw Ramirez, he was drinking alcohol. (12 RT 2460.)

Alina prepared a birthday cake for Ramirez, but neither she nor Frank saw Ramirez eat any of the cake. Frank and his son had also barbecued some chicken, but Alina and Frank did not recall Ramirez eating that either. (12 RT 2465-2467, 2485, 2489.) Alina remembered that Ramirez ate some of the rice she prepared around 6:30 or 7:00 p.m. (12 RT 2489-2490.)

Later that evening, Ramirez got a phone call and left the Vallejo residence around 9:00 p.m. Frank, Miranda, and Alina were concerned about Ramirez driving because he was drunk. (12 RT 2463-2464, 2479, 2486-2487, 2490.) Ramirez was stumbling, slurring his words, and unsteady on his feet. Before Ramirez left, Miranda and Alina told him not to drive. (12 RT 2464, 2479, 2486.)

2. Prior statements of prosecution witnesses

The defense introduced prior statements made by Ewert, Heredia, and Arteaga. (12 RT 2445-2458.)

a. Statements to Officer Jouanicot

On July 27, 2005, Ewert told Officer Jeff Jouanicot that she "'knew for sure [Ramirez] was drunk'" the night of the murder. (12 RT 2447-2448.) She stated Ramirez was stumbling around his bedroom and smelled strongly of alcohol. Ramirez's behavior prompted her to ask him, "'What are you on right now?'" (12 RT 2447.)

The same day, Arteaga told Jouanicot that Niemi singled out Ramirez as the most intoxicated of the five men. According to Arteaga, Niemi said to Ramirez, "'You're drunk. You're slurring. You're slurring. You're the drunkest of them.'" (12 RT 2448-2449.)

b. Statements to Investigator Moreno

On the night of the murder, Heredia told District Attorney Investigator Mark Moreno, then an officer with the San Leandro Police Department, that he had never handled a gun and had gone straight home after the murder. (12 RT 2451-2452.) Heredia did not disclose to Moreno that he had driven Ramirez around after the murder. Heredia was "scared" and "nervous" during their interview. (12 RT 2452.)

At a second interview on July 27, 2005, Heredia told Moreno that Ramirez said it was his birthday the day of the murder and that he wanted "'to get fucked up.'" (12 RT 2452-2454.) Heredia said he had "'never'" seen Ramirez drunk "'like that,'" but also stated that if he were "'drunk like that, [he] would still know what's going on.'" (12 RT 2455.). According to Heredia, when Niemi arrived in his patrol vehicle that night, Ramirez had the bottle of Hennessy in his hand. Niemi said to Ramirez, "'Oh, you're the drunk one.'" (12 RT 2455-2456.) Heredia described Ramirez as "'swerving back and forth'" when Niemi spoke to him. (12 RT 2456.) Heredia told Moreno that Ramirez had been the last one to give his ID to Niemi. (12 RT 2455.)

Heredia stated that when he and Arteaga demanded an explanation from Ramirez for shooting Niemi, Ramirez said more than once, "'I don't know.'" (12 RT 2456-2457.) Ramirez also asked Heredia to drive him to his mother's house. (12 RT 2457.)

During this second interview, Heredia again failed to mention that he had a gun on the day of the murder. (12 RT 2453.)

3. Expert testimony

Clinical and forensic toxicologist John Treuting, Ph.D., opined that Ramirez was intoxicated when he murdered Niemi. (12 RT 2516-2517, 2524.) He based his opinion on his review of some of the witnesses'

testimony and statements to police, a toxicology report based on a blood sample taken from Ramirez shortly after his arrest, and an interview he conducted with Ramirez. (12 RT 2522-2524.)

According to Dr. Treuting, a person's emotional state is heightened when intoxicated. An intoxicated individual may also experience heightened fear and rage, and may react more impulsively. (12 RT 2528-2529.) Treuting explained that three or four alcoholic drinks can cause diminution of judgment and self-control. (12 RT 2525.) Around nine drinks, it is difficult for one to maintain balance and coordination. (12 RT 2527.) Given the number of drinks Ramirez consumed prior to the murder, Treuting concluded he lacked critical judgment, his cognitive functions were "diminished," and he experienced "mental confusion." (12 RT 2528.) Treuting further stated that he would expect a person who drank as much as Ramirez to act impulsively. (12 RT 2529.)

Treuting further concluded that Ramirez was "a chronic drinker" and had been for "a long time," which might explain why he did not vomit the night of the murder. (12 RT 2529-2530.) Treuting noted that an adrenaline rush might counteract the depressant effects of alcohol and suggested that becoming "aware of an event" could trigger such a rush. (12 RT 2531.)

On cross-examination, Treuting testified that as few as one to two drinks could affect a person's memory, but cautioned that individual variation in symptoms can be tremendous. (12 RT 2532, 2534.) He also conceded that hitting a target with a gun supported an inference of coordination and that attempting to retrieve one's ID card would "show some conscious thought." (12 RT 2539-2540). However, on redirect examination, he clarified that a person can have some hand-eye coordination but still be mentally confused and have difficulty processing information, and that a person who grabs someone else's ID card instead of his own might be experiencing "mental confusion." (12 RT 2546).

II. PENALTY PHASE

A. Prosecution Case in Aggravation

1. Ramirez threatens to kill a police officer in 2001

At 4:45 a.m. on April 3, 2001, Newark Police Officer Karl Geser was dispatched to Ramirez's home on a report of shouting and glass breaking. (13 RT 2706-2707.) Geser arrived to find Ramirez outside the residence, shouting and angry. His pants were muddy and he had on no shoes or socks. (13 RT 2707.)

Geser asked Ramirez if he was okay. Ramirez told the officer he was fine and started to walk away. Geser ordered him to stop. Ramirez told Geser to "'fuck off'" and to go away. (13 RT 2707.) Ramirez shouted toward the house for his mother. (13 RT 2707.)

Geser asked Ramirez if he had any medical problems. Ramirez responded that he had consumed $700 worth of alcohol and was drunk. (13 RT 2707.) He staggered and Geser caught him before he fell. He arrested Ramirez for public intoxication. (13 RT 2708.)

Geser handcuffed Ramirez and put him in his patrol car. As Geser left to speak to the 911 caller, Ramirez grew upset and began kicking the window of the patrol car, knocking it off of its track. (13 RT 2708.)

Geser drove Ramirez to the Newark Police Station. (13 RT 2708.) On the way, Ramirez threatened to kill Geser and his family, including his children. Ramirez was "angry," "upset," and "out of control." (13 RT 2709.)

2. Victim impact evidence

The jury heard testimony from various friends and family members regarding the impact of Niemi's death on their lives.

Curt Barr, a fellow officer at the San Leandro Police Department and "very close" friend of Niemi,[5] testified first. (13 RT 2717-2718.) Barr described Niemi as "a wonderful person," "so full of life" and "so helpful." (13 RT 2723.) Niemi was the best man at Barr's wedding. Their families were close and would often have dinner together. (13 RT 2720-2723.)

Barr went to the hospital the night of the murder. After everyone else left, he asked to see Niemi. He stood over his friend's body and prayed. Since the murder, he thought of Niemi "a great deal." (13 RT 2722.) Niemi's death affected Barr deeply because he knew Niemi so well and Niemi had "so many wonderful qualities." (13 RT 2722-2723.)

Another colleague and friend of Niemi's, Mario Marez, recalled first meeting Niemi in 1998, before he became a police officer. (13 RT 2724-2725.) Marez, who was a police officer at the time, told Niemi he "would make a great police officer" and encouraged him to apply for the job. (13 RT 2726.) Sometime before Niemi became a police officer, Niemi's wife, Dionne, asked Marez about the dangers associated with police work in San Leandro. Marez assured Dionne that San Leandro was a relatively safe place to be a police officer. That conversation "haunt[ed]" him following Niemi's murder. (13 RT 2726-2727.)

Marez was on duty the night Niemi was killed and was the fourth officer to arrive on scene. (13 RT 2727-2728.) He looked at Niemi's body and "knew he was gone." (13 RT 2728.) After the murder, he resigned from his job as a police officer, believing he could no longer serve the public the way he should. He felt guilty about encouraging Niemi to join the police force and thought about him "every day." (13 RT 2728-2729.)

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[5] For clarity, we refer to Niemi by his surname and to those with the same surname by their first names in this portion of the brief.

Deborah Trujillo also worked as a San Leandro police officer and met Niemi their first day on the job. (13 RT 2732.) She described him as "open and loving," "nonjudgmental," and "just a really good friend." (13 RT 2735.) Niemi helped Trujillo cope with a breakup and also counseled her on some of the difficulties she faced as a female police officer. (13 RT 2734-2736.)

Trujillo was on duty the night of the murder and heard the report of an officer shooting broadcast over the radio. She drove to the scene cautiously, as she was trained to do. (13 RT 2736-2737.) When she arrived, she saw Niemi on the ground and "knew that he was dead." (13 RT 2739.) Trujillo lived with the regret of not getting to the scene sooner. (13 RT 2737.) After the murder, she got into a car accident on the way to assist another officer at the scene of a robbery. She crashed because she "drove as fast as [she] could," not wanting to arrive at the scene too late as she had in Niemi's case. (13 RT 2738.)

The night of the murder, Trujillo and two other officers delivered the news of Niemi's death to his family. When they told his wife Dionne, she insisted that they drive to Alamo to give the news to Niemi's parents before going to the hospital. (13 RT 2739-2740.) Niemi's mother, Mildred, was incredulous at first, and told the officers, "'I don't believe you.'" (13 RT 2740.) Trujillo knelt down, took her hands, and told her "Dan was gone." (13 RT 2741.)

Since Niemi's death, there was a void in Trujillo's life that would forever be there. Her "entire life [had] changed, and nothing [was] the same." (13 RT 2742.)

Niemi's younger brother, Jim, learned of his brother's death from his mother in the middle of the night. (13 RT 2743, 2747.) When his mother told him the news, he let out a scream and dropped the phone. (13 RT 2747.)

As children, Jim and his brother did "a lot of things together," although Niemi was "more cerebral" than Jim. (13 RT 2744.) Their family was "very close." (13 RT 2744.) Niemi was the godfather of Jim's eldest son. Jim asked Niemi to be godfather because he trusted him and "knew he would be a great father." (13 RT 2746.)

Jim gave the eulogy at his brother's funeral. (13 RT 2748.) Initially, he did not want to speak at the funeral because he was nervous. He finally decided to give the eulogy when he thought about what Niemi would have done if their roles were reversed. Since the murder, Jim felt "alone" in that he did not "have a brother anymore." (13 RT 2748.) He also felt his parents' pain. His father, Rudie, could not even speak of Niemi's murder. (13 RT 2748-2749.)

Niemi's mother, Mildred, told of the impact her eldest son's death had on her and on her husband. She described it as "like a part of our heart is gone." (13 RT 2760.) Rudie and his son were "best friends." (13 RT 2756.) Niemi called his parents "all the time." (13 RT 2758.) Before the murder, Rudie served as secretary treasurer for the "Hundred Club"—an organization that donates money to families of police officers and firefighters killed in the line of duty. (13 RT 2760-2761.) Rudie resigned from that position after the murder because it reminded him too much of Niemi. (13 RT 2761.)

Mildred recalled that, as a child, Niemi "was a good boy" who was quiet and enjoyed reading. (13 RT 2754.) At age 19, Niemi wanted to become a police officer, but Mildred and Rudie discouraged him from pursuing that career at the time. After earning a degree in communications from Sacramento State, Niemi had jobs in the sales and computer industries. (13 RT 2754-2755.) When he eventually became a police officer in San Leandro, Mildred was proud of him because "he was finally doing what he really wanted to do for a long, long time." (13 RT 2756.)

When Dionne and Niemi's colleagues first told Mildred of Niemi's death, she refused to believe it and was convinced it "was a big lie." (13 RT 2758.) At the hospital, Mildred did not want to see her son's body because if she did, "it would be true." (13 RT 2758-2759.) When she finally did go into the hospital room where his body lay, hospital staff told her she could not touch him because "[it was] a crime scene." (13 RT 2759.) When Mildred first looked at her son's body, she said, "that's not my son." (13 RT 2759.) She looked at him again, saw her son's hair, and "knew it was him." (13 RT 2759.) The day Niemi died was "the worst and most terrible day of [Mildred's] life" and she thought of it "constantly." (13 RT 2760.)

Dionne was the last witness to testify for the prosecution in the penalty phase. She first met Niemi at a Reeds Sporting Goods store where she worked. Dionne was attracted to Niemi's intelligence and they shared many interests. Niemi gave her his phone number and from their first date on the two of them "were never apart." (13 RT 2762-2763.)

In 1998, Dionne gave birth to their daughter, Gabbie. She and Niemi married the following year. (13 RT 2764.) Niemi, Dionne, Gabbie, and Dionne's son from a previous relationship, Josh, were together as a family "[a]ll the time." (13 RT 2766.) Niemi referred to Josh as his son. (13 RT 2763-2764.)

Dionne was initially against Niemi becoming a police officer because she "thought it was dangerous." (13 RT 2766.) However, after Niemi lost his job at a startup company, she reconsidered her opposition. She had since made several friends in law enforcement and was confident in Niemi's abilities, particularly his knowledge of and experience with firearms. When the San Leandro Police Department hired Niemi, he was "so happy." (13 RT 2767.)

When Dionne saw her husband's body the night of the murder, he "had blood all over him." (13 RT 2771.) She wished she had not seen him in that condition. (13 RT 2771.) Josh and Gabbie did not come with Dionne to the hospital and were both asleep when she returned home. She woke Josh first, and told him Niemi had been killed. Josh, who had just turned 15 years old the day before, started to cry. She asked him to help her tell Gabbie the news. (13 RT 2772.) When Gabbie awoke, Dionne told her that "daddy had a very bad accident." (13 RT 2772.) Gabbie immediately started crying. At first, Gabbie did not understand that her father had died and asked to see him. (13 RT 2772-2773.) When she finally understood, she "collapsed" on the floor, screaming. (13 RT 2773.)

Niemi's funeral took place August 1. (13 RT 2773.) Dionne and Gabbie rode in a funeral procession to the church where the service was held. (13 RT 2774.) The streets were lined with citizens holding signs of support for Niemi and his family. Niemi was the first San Leandro police officer to be killed in 34 years. (13 RT 2774.) Gabbie looked out the car window and asked her mother, "Did all those people love my daddy too?" (13 RT 2774.) At the conclusion of the funeral service, Gabbie put her arm around Niemi's casket, laid her head on it, and said goodbye to her father. (13 RT 2775.)

Dionne told the jury how she had explained Niemi's cremation to Gabbie. About six months after the murder, Dionne and Gabbie were watching an animated movie in which the subject of cremation was raised. Dionne used the opportunity to tell Gabbie that her father had been cremated and that his ashes were in the vase on top of the entertainment center. (13 RT 2776-2777.) Gabbie asked to hold the vase, and the two of them watched the remainder of the movie with the vase in between them on the couch. (13 RT 2777.)

Gabbie was a "daddy's girl." (13 RT 2764.) After her father's death, she "became very withdrawn and very difficult." (13 RT 2775.) She missed many school days and slept with Dionne at night because she was having nightmares. Dionne arranged for both Gabbie and Josh to attend grief counseling. (13 RT 2775, 2778.) By the time of trial, Gabbie was "doing remarkably well." (13 RT 2777.) Josh, however, was "not dealing with [Niemi's death] well at all." (13 RT 2778.) He was really angry. He "loved [Niemi] so much." (13 RT 2777.) At school, Josh was assigned to write a paper about his hero. He wrote his paper about Niemi, whom he "absolutely idolized." (13 RT 2777-2778.)

Niemi himself was "a prolific writer." (13 RT 2768.) Occasionally, he wrote about particularly difficult days on the job. (13 RT 2769-2770.) After his death, Dionne went onto his computer to look for some of his stories. One story she found was introduced into evidence (People's Exh. 76). (13 RT 2768-2769, 2778.)

B. Defense Case in Mitigation

The defense called a total of 12 witnesses to testify in the penalty phase. (13 RT 2786-2796 [Natividad Ramirez], 2797-2802 [Juana de Jesus Barahona de Ramirez], 2802-2806 [Salvador Viscarra], 2808-2815 [Yolanda Viscarra], 2815-2822 [Judith Ramirez], 2823-2828 [Aura Ramirez], 2828-2837 [Cayetano Ramirez], 2838-2843 [Maria Morataya], 2844-2848 [Jose Morataya], 2849-2853 [Danielle Gomez Ramirez], 2853-2855 [Anthony Ramirez], 2855-2867 [Maria Viscarra].)

Ramirez was born in Usulután, El Salvador. (13 RT 2787.) His mother, Maria Viscarra, was only 17 years old when she gave birth to him. She and Ramirez's father, Cayetano Ramirez, married when she was pregnant with Ramirez. (13 RT 2788-2789.) When Ramirez was around seven years old, his mother moved to the United States. His father

followed shortly thereafter. (13 RT 2789-2790, 2832.) Ramirez was separated from his mother for nine months during this time. (13 RT 2855.)

When Ramirez was a child in Usulután, there was a war going on in El Salvador and Usulután was a dangerous place. (13 RT 2791, 2803.) Dead bodies lined the streets and the sound of gunfire could be heard frequently. (13 RT 2790, 2800.) Ramirez was frightened by the wartime activity and would sometimes hide. (13 RT 2792.)

Ramirez's paternal grandparents cared for Ramirez until he joined his parents in the United States. His paternal grandfather, Natividad Ramirez, testified that Ramirez missed his mother very much when they were apart. (13 RT 2788-2790, 2855.) According to Cayetano,[6] Ramirez cried "every day for her." (13 RT 2833.)

By all accounts, Ramirez was a happy child. Ramirez's paternal grandmother, Juana de Jesus Barahona de Ramirez, described her grandson as "very happy," "very affectionate," and "obedient." (13 RT 2797-2798, 2801.) Ramirez's paternal aunt, Judith Ramirez, recalled that Ramirez was "always happy" and "always smiling" as a child. (13 RT 2818.) Cayetano, too, described his son as a happy child, stating that he was "happy all the time" and "very sweet." (13 RT 2833.) Even as Ramirez grew older, he remained affectionate with his father. (13 RT 2833-2834.)

Sometime after giving birth to Ramirez, Maria suffered a stillbirth and grew depressed. (13 RT 2798, 2830, 2839, 2860-2861.) Maria and Cayetano eventually divorced, and Ramirez only saw his father occasionally on the weekends. (13 RT 2831.) His father remarried, and Ramirez became close with his stepmother, Aura Ramirez, as well as his

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[6] Many of the defense witnesses share the same surname. For clarity, we refer to the witnesses by their first names in this portion of the brief.

half-siblings, Anthony and Valerie. Aura thought of Ramirez as a son and had visited him in jail every week of his incarceration. (13 RT 2824-2825, 2827.)

Several witnesses spoke of Ramirez's kindness toward younger family members and the impact his incarceration had on them. Ramirez's half-brother Anthony, who was only 11 years old at the time of the trial, testified that Ramirez used to play with him and tickle him, and that the two of them would watch Barney together. (13 RT 2853.) Anthony had gone with his mother, Aura, to visit Ramirez in jail. At night, Anthony cried thinking about Ramirez. (13 RT 2854.)

Maria testified that Ramirez's younger brother Jonathan loved him very much and that Ramirez was "so good" with him. (13 RT 2863.) After Ramirez was arrested for murder, Jonathan stopped doing his homework and performed poorly in school. (13 RT 2861.) Because of the difficulty Jonathan experienced with his brother's incarceration, Maria sent him to live in El Salvador with her cousin, Yolanda Viscarra. (13 RT 2810, 2813, 2861.)

Ramirez's younger cousin Danielle testified that Ramirez was like a brother to her. Ramirez cared for Danielle when she was a baby. (13 RT 2820, 2848-2849.) When Danielle was older, he advised her to do well in school and to refrain from using alcohol or drugs. (13 RT 2851.) Ramirez was an important person in Danielle's life. Indeed, in July 2005, he was supposed to play an honored role in Danielle's quinceañera. However, because Ramirez did not have the proper paperwork, he was unable to travel with the family to El Salvador for the celebration. (13 RT 2821-2822, 2849.)

Several witnesses testified to Ramirez's struggles in school. Ramirez was an intelligent child, but suffered from "some learning problems" as he grew older. (13 RT 2795, 2846.) When he was 12 years old, he was

diagnosed with "ADD" and prescribed medication. Although the medication helped him focus in class, he stopped taking it after three years. (13 RT 2856-2857.) In high school, he was separated from the other students, which concerned family friend Jose Morataya. (13 RT 2843-2844, 2846.) Ramirez did poorly in school and dropped out when he was 17 years old. (13 RT 2858.)

Many witnesses also testified about Ramirez's history of drug and alcohol abuse. According to Yolanda, Ramirez was experiencing substance abuse problems as young as 12 or 13 years old. (13 RT 2814.) Ramirez's maternal grandfather, Salvador Viscarra, and Ramirez's father, were also aware that he was abusing alcohol and drugs at a young age. (13 RT 2803, 2808, 2835.)

Maria testified that her son was suspended from school for drinking when he was 14 years old. (13 RT 2855.) That day, she picked him up from school around noon and brought him to a doctor at Kaiser Permanente. Ramirez was still intoxicated when she came to get him at 11:00 p.m. that evening. (13 RT 2855-2856.)

Jose described an incident where Ramirez was found smoking when he was 13 or 14 years old. (13 RT 2844-2845.) He also recalled that, when Ramirez was a sophomore in high school, he was discovered at school with a bottle of alcohol. (13 RT 2845.)

According to Maria, Ramirez had a temper when he drank alcohol. He would sometimes scream at her and throw things in the house. (13 RT 2865.) Maria "didn't like him when he was drunk." (13 RT 2866.) However, when he was not drinking, he was "so sweet." (13 RT 2865.)

Ramirez had a difficult relationship with his parents, and his mother in particular. Ramirez told his aunt Judith that he was resentful of his parents because they were not there for him. He felt "lonely." (13 RT 2819.) Yolanda testified that Ramirez fought with his mother. Their

fighting "was a serious problem." (13 RT 2814.) His mother's friend, Maria Morataya, testified that Ramirez did not like it when his mother wore miniskirts or had boyfriends, and that they argued over her going out. (13 RT 2841.) Maria told the jury that her son would try to convince her not to go out at night. In July 2005, Maria was fed up with Ramirez's drinking and told him she wanted him to move out of the house. (13 RT 2863-2865.)

On July 25, 2005, Maria did not wish Ramirez a happy birthday. She was upset with him for failing to acknowledge her own birthday a few days earlier. (13 RT 2859-2860.) Maria arrived home that day around 1:00 p.m. Ramirez, who had been drinking Hennessy, was drunk and mad. (13 RT 2860.) In previous years, Ramirez's stepmother, Aura, had thrown him a birthday party. However, because Aura was in El Salvador for Danielle's quinceañera along with the rest of the Ramirez family, she did not throw him a birthday party that year. Aura regretted that she had been unable to do so. (13 RT 2825.)

Those witnesses that were asked all testified they would visit and/or write to Ramirez in prison if he were to receive life without the possibility of parole. (13 RT 2796, 2808, 2827-2828, 2842, 2847, 2852.) Even Ramirez's paternal grandparents, who had only visited him the United States three times since he left El Salvador, and his maternal grandfather, who had never once visited him or even spoken to him on the phone, testified that they would come see him in prison. (13 RT 2794, 2796, 2801, 2807-2808.)

ARGUMENT

I. THE TRIAL COURT'S MODIFICATION OF CALCRIM NO. 521 WAS PROPER

Ramirez argues that the trial court erroneously modified CALCRIM No. 521 to instruct the jury that, in order to prove a willful, premeditated, and deliberate murder, the People were not required to prove Ramirez

maturely and meaningfully reflected on the gravity of his act. (AOB 39, 42-70.) Ramirez argues the concept of mature and meaningful reflection had no application to his case and "likely confused the concept of deliberation altogether." (AOB 39, 48-57.) He contends the modified instruction, along with the prosecutor's alleged mischaracterization of premeditation and deliberation during closing argument, rendered the instruction "ambiguous" and lowered the People's burden of proof in violation of state and federal law, requiring reversal of his conviction. (AOB 39, 48, 57-70.) The claims fail.

A. Relevant Proceedings

On May 1, 2007, the People filed a request for a special instruction in the guilt phase stating as follows: "To prove the killing was deliberate and premeditated, it is not necessary to prove the defendant maturely and meaningfully reflected upon the gravity of his act." (3 CT 861-864.) The People proposed either to incorporate the special instruction into CALCRIM No. 521, or to include it as a separate instruction, identified as CALCRIM No. 521A. (3 CT 863-864.)

At a hearing on jury instructions on May 3, 2007, the trial court stated its decision to give the requested instruction. (12 RT 2498.) The court acknowledged that the defense had an objection to the instruction, but noted the requested language was taken directly from Penal Code section 189 ("Murder; degrees")[7] and, further, that this Court in *People v. Smithey* (1999) 20 Cal.4th 936 had ruled it was "not inappropriate to give" such an instruction. (12 RT 2498-2499.)

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[7] Section 189 states in relevant part: "To prove the killing was 'deliberate and premeditated,' it shall not be necessary to prove the defendant maturely and meaningfully reflected upon the gravity of his or her act."

The trial court gave the proposed instruction to the jury, incorporating it into the language of CALCRIM No. 521 as follows:

> If you decide that the defendant has committed murder, then you must decide whether it's murder of the first degree or the second degree. [¶] The defendant is guilty of first-degree murder if the People have proved that he acted willfully, deliberately, and with premeditation. [¶] The defendant acted "willfully" if he intended to kill. In other words, with express malice. [¶] The defendant acted "deliberately" if he carefully weighed the considerations for and against his choice and, knowing the consequences, decided to kill. [¶] And the defendant acted with "premeditation" if he decided to kill before committing the act that caused death.
>
> The length of time the person spends considering whether to kill does not alone determine whether the killing was deliberate and premeditated. The amount of time required for deliberation and premeditation may vary from person to person and according to the circumstances. A decision to kill made rashly, impulsively, or without careful consideration is not deliberate and premeditated. On the other hand, a cold, calculated decision to kill can be reached quickly. The test, therefore, is not the length of time, but rather the extent of the reflection.
>
> *To prove that the killing was deliberate and premeditated, it's not necessary to prove that the defendant maturely and meaningfully reflected upon the gravity of his act.* [¶] The People have the burden of proving beyond a reasonable doubt that the killing was first-degree murder rather than a lesser crime. If the People have not met this burden, you may not find the defendant guilty of first-degree murder. [¶] And any murder which is not proven to be of the first degree is murder of the second degree.

(12 RT 2571-2572, italics added; 4 CT 936-937.)

In closing argument, the prosecutor reminded the jury that, in order to find the killing was willful, deliberate, and premeditated, it was not necessary to find that Ramirez "maturely and meaningfully reflected upon the gravity of his act." (12 RT 2584.)

During the defense closing argument, counsel argued that the instruction on mature and meaningful reflection was "kind of confusing" because the concept was not defined in the law. (12 RT 2605.) He suggested the phrase likely referred to the idea that ignorance and youth were not defenses to the crime of premeditated and deliberate murder, and that the ultimate decision to kill "doesn't have to be a wise one." (12 RT 2605-2606.) He emphasized that, "[w]hatever mature and meaningful means," the People were still required to prove that Ramirez carefully weighed and considered the pros and cons of killing Niemi before doing so. (12 RT 2606.)

In rebuttal, the prosecutor read Ewert's testimony recounting Ramirez's admission that he had murdered Niemi to avoid arrest. He argued the statement showed Ramirez had weighed the consequences of murdering Niemi, adding, "[m]aybe he didn't meaningfully and maturely reflect on the gravity of his act, but that's not necessary." (13 RT 2625.)

B. The Trial Court Did Not Commit Instructional Error

1. The modified instruction was correct in law and responsive to the evidence

Ramirez contends the added language was inapplicable to his case. (See AOB 42-48.) However, this Court has previously held in a capital murder case that instructing a jury with the language challenged here is not error. (*People v. Smithey*, *supra*, 20 Cal.4th at pp. 979-981.) In *Smithey*, the trial court modified the former pattern instruction on deliberate and premeditated murder, CALJIC No. 8.20, to include the same "maturely and meaningfully reflected" language. (*Id.* at p. 978.) Despite Ramirez's efforts to do so, he fails to demonstrate that *Smithey* is not dispositive of his claim.

Although "[i]t is error to give an instruction which, while correctly stating a principle of law, has no application to the facts of the case"

(*People v. Guiton* (1993) 4 Cal.4th 1116, 1129), here, the challenged language applied to the central dispute in Ramirez's guilt trial: the degree of murder. (See 9 RT 1831 [defense opening statement: "what's not at issue in this case is Officer Niemi was murdered"; "you, as jurors, are going to have to decide what kind of murder it was, what flavor, what degree"].) The phrase "maturely and meaningfully reflected upon the gravity of his act" is taken almost verbatim from section 189, distinguishing the two degrees of murder. (See § 189 [enumerating kinds of first degree murder and providing that "[a]ll other kinds of murders are of the second degree"].) Where the sole issue in the guilt phase was the degree of murder, it is difficult to see how language taken directly from the statute distinguishing those degrees was inapplicable to the case.

Ramirez argues the "maturely and meaningfully reflected" language was a "corrective measure" that was "not necessary" for proper instruction of his jury. (AOB 45.) He explains that the Legislature added the language to section 189 to abrogate *People v. Wolff* (1964) 61 Cal.2d 795, 819-822, which had imposed a requirement that a defendant must maturely and meaningfully reflect upon the gravity of his act in order to be found guilty of a willful, premeditated, and deliberate murder. (AOB 43-45; see also *People v. Smithey*, *supra*, 20 Cal.4th at pp. 978-979; *People v. Swain* (1996) 12 Cal.4th 593, 616.) He further notes that the amendment to section 189 was part of a legislative package abolishing the diminished capacity defense (AOB 43-45; *Swain*, *supra*, at p. 616; Stats. 1981, ch. 404, § 4, p. 1592), which had allowed a defendant to assert his lack of capacity "to achieve the state of mind requisite for the commission of the crime" (*People v. Anderson* (1965) 63 Cal.2d 351, 364). Because the language added to section 189 was merely a "corrective measure," Ramirez argues, its significance can only be appreciated in light of its legislative history, and is otherwise confusing. (AOB 45-48.) *Smithey* rejected a similar

argument that the challenged language could only be understood in the context of *Wolff* and its progeny concerning mentally impaired defendants. (*Smithey*, *supra*, at pp. 980-981.)

Ramirez attempts to distinguish *Smithey* on the basis that the defendant in *Smithey*, unlike Ramirez, introduced evidence of his mental disabilities and drug use. (AOB 46-47.) According to Ramirez, in light of that defense evidence in *Smithey*, the prosecutor—and implicitly the trial court—"may have been" concerned that the jury would improperly find the defendant "lacked the mental capacity" to premeditate and deliberate the murder, thus warranting instruction with section 189's "corrective" language. (AOB 46-47.) He argues that here, by contrast, the trial court "reached out to remedy a problem that did not exist." (AOB 47.)

Ramirez's argument is unpersuasive. He points to nothing in *Smithey* supporting a conclusion that this Court approved the modified instruction because there was a risk the jury would engage in a "diminished capacity analysis" of the defendant's mental disorder. (AOB 47.) Nor is there any indication in *Smithey* that the jury was told that "maturely and meaningfully reflected" referred to the mental capacity of the defendant such that corrective function of the added language would be appreciated.

Ramirez's claim of instructional error based on the alleged inapplicability of the "maturely and meaningfully reflected" language must be rejected.

2. There is no reasonable likelihood the jury misapplied the instruction

Ramirez contends the inapplicable language misled the jury about the mental state required for deliberate and premeditated murder (AOB 48), and lowered the People's burden of proof in violation of the federal Constitution (AOB 58). This Court rejected those same contentions in *Smithey*. (20 Cal.4th at pp. 979- 981.)

As Ramirez acknowledges (AOB 40, fn. 17), his trial counsel did not state specific grounds for the objection to the modified instruction on the record. (12 RT 2498.) Ramirez now complains on appeal that the instruction was, among other things, "ambiguous" and "confusing," noting that the phrase "maturely and meaningfully reflected" was not defined for the jury. (AOB 48-50.) However, Ramirez "was required to request [a] . . . clarifying instruction if he believed that instruction . . . needed elaboration." (*People v. Maury* (2003) 30 Cal.4th 342, 426.) To the extent his claim of instructional error is predicated upon the trial court's failure to clarify the challenged language "on its own motion," it is forfeited. (*People v. Anderson* (1966) 64 Cal.2d 633, 639.)

Even if the claim is not forfeited, it is meritless. In evaluating Ramirez's claim that his jury misapplied the modified instruction, this Court examines "whether there is a 'reasonable likelihood' that the jury understood the charge as the defendant asserts." (*People v. Kelly* (1992) 1 Cal.4th 495, 525; *People v. Smithey*, *supra*, 20 Cal.4th at p. 963 ["If a jury instruction is ambiguous, we inquire whether there is a reasonable likelihood that the jury misunderstood and misapplied the instruction"], citing *Estelle v. McGuire* (1991) 502 U.S. 62, 72 & fn. 4.) "[T]he correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction." (*People v. Burgener* (1986) 41 Cal.3d 505, 538, overruled on other grounds in *People v. Reyes* (1998) 19 Cal.4th 743, 753; *People v. Harrison* (2005) 35 Cal.4th 208, 252.) "'Instructions should be interpreted, if possible, so as to support the judgment rather than defeat it if they are reasonably susceptible to such interpretation.' [Citation.]" (*People v. Ramos* (2008) 163 Cal.App.4th 1082, 1088.)

There is no reasonable likelihood the jury misunderstood or misapplied the modified instruction here. Recognizing that the "language

of a statute defining a crime or defense is generally an appropriate and desirable basis for an instruction, and is ordinarily sufficient when the defendant fails to request amplification," this Court held in *Smithey* that the "words in the phrase 'maturely and meaningfully reflected' are commonly understood terms" and the trial court, therefore, "had no obligation to provide further clarification of the statutory language." (*People v. Smithey*, *supra*, 20 Cal.4th at p. 980, internal quotation marks and citations omitted.)

Nevertheless, Ramirez suggests the added language "confused the concept of deliberation," because the phrase "maturely and meaningfully reflected upon the gravity of his act," in common parlance, told the jury it could find Ramirez guilty of premeditated and deliberate murder if he acted rashly, impulsively, or without consideration of the consequences. (See AOB 49-51.) In rejecting the defendant's similar claim in *Smithey* that the challenged phrase allowed the jury to convict him of first degree murder if it found he had killed "with little thought or regard for the consequences," this Court concluded the instructions as a whole "made clear that reflection must have preceded commission of the crime and could not have been unconsidered or rash, but rather must have resulted from careful thought and a weighing for and against the chosen court of action." (*People v. Smithey*, *supra*, 20 Cal.4th at pp. 979-981.)

Here, as in *Smithey*, the trial court's instructions as a whole show there was no reasonable likelihood of confusion regarding the requirement of deliberation. The trial court began its charge to the jurors by admonishing them to "[p]ay careful attention to all of these instructions and consider them together." (4 CT 919.) It later instructed the jury with the standard instruction defining premeditation and deliberation, which provided that Ramirez acted deliberately "if he carefully weighed the considerations for and against his choice and, knowing the consequences, decided to kill." (4 CT 936; 12 RT 2572.) The court specifically directed

the jury that "[a] decision to kill made rashly, impulsively, or without careful consideration is not deliberate and premeditated." (4 CT 937; 12 RT 2572.) Considering the "entire charge of the court" (*People v. Burgener*, *supra*, 41 Cal.3d at p. 538), the instruction that Ramirez need not have reflected maturely and meaningfully upon the gravity of his act could not reasonably have been understood by the jury to mean that a sudden, impulsive and unconsidered murder was premeditated and deliberate. Thus, as in *Smithey*, the challenged language "did not mislead the jury regarding the requisite mental states for first degree murder . . . ." (*People v. Smithey*, *supra*, 20 Cal.4th at p. 981.)

Ramirez further complains that the prosecutor compounded the trial court's alleged instructional error by "erroneously describ[ing] the elements of deliberation and premeditation." (AOB 52-53.) He takes particular issue with the prosecutor's italicized statement below:

> Gravity means the seriousness or significance of. So it's not necessary for deliberation and premeditation for the person to reflect on the seriousness of the act meaningfully and maturely. *They just have to know what it is they're doing.* They don't have to reflect on how serious. So whether it's as minor as going through a red light or as serious as killing someone, both acts are willful, deliberate, and premeditated.

(12 RT 2585, italics added.)

Ramirez argues the italicized statement, to which his counsel did not object, "plainly misstated the law." (AOB 53.) He is incorrect. The prosecutor's statement, which must not be viewed in isolation, but "in the context of the argument as a whole" (*People v. Cole* (2004) 33 Cal.4th 1158, 1203), simply told the jury that first degree murder requires a defendant to deliberate the act itself, not its seriousness. Even if the prosecutor did misstate the law, "arguments of counsel 'generally carry less weight with a jury than do instructions from the court'" (*People v. Mendoza* (2007) 42 Cal.4th 686, 703), and the trial court here not only correctly

instructed the jury on premeditation and deliberation, it told jurors they "must follow" its instructions even if they conflicted with the attorneys' comments (4 CT 919, 936; 12 RT 2572).

According to Ramirez, defense counsel's definition of "maturely and meaningfully reflected" failed to correct the prosecutor's erroneous argument and "underscored" the confusion generated by the phrase, making "it more likely the jurors would understand the added language in a way that undercut the deliberation requirement." (AOB 54.) Ramirez contends the prosecutor's uncorrected argument conflating deliberation "with intent to kill or even mere knowing" distinguishes his case from *Smithey*. (AOB 56-57.)

The record belies Ramirez's claim. There is no "reasonable likelihood" the jury misunderstood its obligation to find he carefully weighed the considerations for and against his choice to kill, *especially* in light of the attorneys' arguments. (*People v. Kelly*, *supra*, 1 Cal.4th at p. 525.) As Ramirez acknowledges in a separate argument, "[a]t the guilt phase, both counsel argued extensively in their closing arguments about the sole contested issue in the case—whether [Ramirez] deliberated the murder." (AOB 180.) Both attorneys correctly explained the concept of deliberation to the jury and discussed the facts that supported or opposed a finding that Ramirez deliberated the murder.

The prosecutor repeated the trial court's instruction that "the defendant acted deliberately when he carefully weighed the considerations for and against his choice and, knowing the consequences, decided to kill." (12 RT 2582.) He also told the jury that a person who makes "a willful, deliberate, premeditated decision" has "thought about the consequences" and "weighed those considerations." (12 RT 2584.) The prosecutor's argument on rebuttal shows he did not equate "mature and meaningful reflection" with a rash or impulsive decision to kill:

> [Ramirez] thought it through. *He weighed the consequences of going to jail against killing a police officer.* Maybe he didn't meaningfully and maturely reflect on the gravity of his act, but that's not necessary. *He weighed the choices in his mind.* He had two choices: going to jail, or shooting a police officer. And he picked the latter.

(13 RT 2625-2626, italics added.)

Defense counsel, for his part, spent practically his entire closing argument discussing deliberation, and hinged the determination of guilt exclusively on that element. (See 12 RT 2598-2609; see also 12 RT 2600 [arguing "the clearest issue, the reason that I think you can't find first-degree murder in this case is that the killing has to be deliberate"].) Like the prosecutor, he repeated the trial court's instruction on deliberation to the jury. (12 RT 2600.) He also told the jury that a deliberate decision involved "careful consideration" and "careful weighing," and was not a decision "made rashly" or "impulsively." (12 RT 2602.) He listed adjectives that were inconsistent with deliberation, including "rash," "impulsive," "reflexive," "unthinking," and "drunken." (12 RT 2602.) At the end of his argument, he stated it was a "reasonable possibility" that Ramirez was "too drunk to have deliberated" and urged the jury to find "a reasonable possibility that he was unable to deliberate this act." (12 RT 2609.) Particularly in light of defense counsel's argument and that of the prosecutor, the jury could not have been led to believe Ramirez deliberated the killing if it found he rashly or impulsively decided to kill, or anything other than a finding that he "carefully weighed the considerations for and against his choice and, knowing the consequences, decided to kill." (4 CT 936; 12 RT 2572.)

In sum, where the court correctly instructed the jury on the elements of first degree premeditated and deliberate murder, and where both attorneys discussed deliberation in terms of weighing the considerations for

and against the killing, there is no reasonable likelihood the jury misinterpreted the modified instruction as not requiring the People to prove deliberation.

3. The modified instruction did not violate Ramirez's constitutional rights

Finally, because the instruction was not misleading in the manner suggested by Ramirez, it did not lessen the People's burden of proof by "inject[ing] ambiguity into the definition of deliberation" (AOB 59). Moreover, the trial court instructed the jury multiple times that the People must prove their case beyond a reasonable doubt. (See, e.g., 4 CT 921 [reasonable doubt], 934 [defendant's right not to testify], 936-937 [murder: degrees], 939 [personally used a firearm], 940 [intentional discharge of firearm], 941 [special circumstances: introduction], 946-947 [circumstantial evidence].) For all the reasons mentioned above, Ramirez's constitutional claims fail.

C. Any Error Was Harmless

Even if the trial court erred by giving the modified CALCRIM No. 521 instruction, the error was harmless under *People v. Watson* (1956) 46 Cal.2d 818, 836.

When a trial court erroneously gives an inapplicable instruction, the error is not of federal constitutional dimension; therefore, reversal is required only if it is reasonably probable that the result would have been more favorable to the defendant had the error not occurred. (*People v. Guiton*, *supra*, 4 Cal.4th at pp. 1129-1130, citing *People v. Watson*, *supra*, 46 Cal.2d at p. 836; see also *People v. Beltran* (2013) 56 Cal.4th 935, 955 [misdirection of the jury, including incorrect, ambiguous, conflicting, or wrongly omitted instructions that do not amount to federal constitutional error, are reviewed under the harmless error standard articulated in *Watson*].) "In determining whether there was prejudice [under the *Watson*

standard], the entire record should be examined, including the facts and the instructions, the arguments of counsel, any communications from the jury during deliberations, and the entire verdict." (*Guiton, supra,* at p. 1130.)

It is not reasonably probable that the challenged instruction prejudiced Ramirez for the same reasons the instruction was not reasonably likely to have misguided the jury. The court correctly defined premeditated and deliberate murder for the jury, and specifically directed the jury that "[a] decision to kill made rashly, impulsively, or without careful consideration is not deliberate and premeditated." (4 CT 936-937; 12 RT 2572.) The attorneys discussed deliberation in depth, and did not dwell on the concept of "mature and meaningful reflection." Notably, the jury did not express confusion with the phrase, nor with any of the guilt phase instructions for that matter. The only questions the jury submitted during deliberations were three requests to view exhibits and a request for six copies of the jury instructions. (4 CT 897-898, 902-903.)

The People also presented strong evidence that Ramirez murdered Niemi in a willful, deliberate, and premeditated manner. Ample evidence showed he had a preexisting motive for the murder. The evidence of his arrest in Pleasanton less than a year earlier showed he knew arrest and incarceration were possible consequences of an officer looking up his name, discovering his four-way search clause, and finding contraband on his person. (9 RT 1836-1849.) Indeed, three different witnesses testified that Ramirez confessed to killing Niemi because he did not want be arrested and sent to jail. (See 10 RT 1986 [Heredia], 2065 [Arteaga]; 12 RT 2345 [Ewert].) He told Ewert that he shot Niemi because "he had a search and seizure, and that if the police officer called in his name, he would be arrested, because he had two guns and drugs on him." (12 RT 2345.) Such evidence established that the murder "occurred as the result of preexisting thought and reflection rather than unconsidered or rash impulse." (*People v.*

Jennings (2010) 50 Cal.4th 616, 645 [defining premeditated and deliberate murder].)

The manner of the killing also overwhelmingly supports Ramirez's conviction for first degree murder. The undisputed facts show that Ramirez wanted to make certain Niemi died. Ramirez did not merely fire one shot and flee. He shot Niemi in the back of the head execution-style, then stood over the officer's supine body and fired his gun six more times, emptying it. (9 RT 1871-1876, 1896, 1915, 1917; 10 RT 2037, 2058, 2062; see also *People v. Hawkins* (1995) 10 Cal.4th 920, 956-957 [shooting victim in the back of the head in "execution-style murder" evinced premeditation and deliberation], overruled in part on other grounds in *People v. Lasko* (2000) 23 Cal.4th 101, 110 and *People v. Blakeley* (2000) 23 Cal.4th 82, 89.) This manner of killing "show[ed] a calculated design to ensure death." (See *People v. Horning* (2004) 34 Cal.4th 871, 902-903.)

The jury also rejected Ramirez's intoxication defense for good reason. Despite evidence that he drank heavily the day of the murder, the evidence as a whole showed his intoxication did not preclude him from premeditating and deliberating the killing.

Ramirez demonstrated rational behavior before, during, and after the murder. He was able to disassemble the gun he had loaned Heredia and explain to him why it jammed. (9 RT 1937-1938; 10 RT 1972-1973, 2051-2052.) When confronted with the possibility of arrest, he made a decision to shoot Niemi rather than be arrested for the drugs and guns in his possession. After he shot Niemi, he took numerous steps to eliminate the evidence against him.

The first such step was his decision to roll Niemi over and collect his ID. (12 RT 2345.) Ramirez then requested that Heredia drive him to the Dumbarton Bridge so he could dispose of the murder weapon into the bay, where it would be almost impossible to discover. (10 RT 1988.) When that

request was refused, he tossed the murder weapon (and other evidence) into the marsh off of Thornton Avenue so "the salt water would get rid of the forensics." (12 RT 2352.) In a possible attempt to rid himself of any gunshot residue or other biological evidence on his body, he showered with a can of "Comet" and swabbed himself with alcohol. (12 RT 2340-2341.)

Next, Ramirez gave Ewert directions to Arteaga's house, where he borrowed some money from Arteaga and they discussed getting their stories straight. (10 RT 2069; 12 RT 2342-2344.) In Ewert's car, he made a statement about finding someone "to take Louie and Vicente out," reflecting his rational—albeit disturbing—belief that he should eliminate the witnesses to the murder. (12 RT 2352.) Later, he returned to his house to retrieve a bag of bullets that matched the ones he used to kill Niemi—another possible link to the murder—and threw them off the Dumbarton Bridge. (12 RT 2349-2351.)

The evidence also showed Ramirez's memory was remarkably clear, despite his heavy drinking that day. Not only did he remember the bag of matching bullets at his house, he also remembered another matching bullet that was lodged in his bedroom wall. (12 RT 2356.) Significantly, he remembered exactly where he had tossed the murder weapon and other items into marsh, and identified that location to Ewert. (12 RT 2352.) At the "E-Z 8" Motel, he recalled leaving his shotgun in the backseat of the white Thunderbird left at the murder scene. (12 RT 2356.)

Given the strength of the People's evidence showing a premeditated and deliberate murder, and the comparative weakness of Ramirez's intoxication defense, it is not reasonably probable the jury would have rendered a verdict more favorable to Ramirez had the "maturely and meaningfully reflected" language been omitted from CALCRIM No. 521. (*People v. Watson*, *supra*, 46 Cal.2d at p. 836; see *People v. Breverman* (1998) 19 Cal.4th 142, 177.) Indeed, any error was also harmless beyond a

reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24 [setting forth prejudice standard for constitutional error].)

II. THE TRIAL COURT PROPERLY REFUSED RAMIREZ'S REQUEST FOR AN INSTRUCTION ON REASONABLE DOUBT AS TO THE DEGREE OF MURDER

Ramirez argues that the trial court's refusal to instruct the jury "explicitly" regarding reasonable doubt as to the degree of murder violated state and federal law, requiring reversal of his conviction. (AOB 71.) The argument is meritless. The trial court properly concluded that the requested instruction would be repetitious of other instructions and thus unnecessary.

A. Relevant Proceedings

On May 2, 2007, the defense filed its proposed jury instructions, which included a request that the trial court instruct the jury with the following language, taken from the former version of CALJIC No. 8.71:

> If you are convinced beyond a reasonable doubt and unanimously agree that the crime of murder has been committed by a defendant, but you unanimously agree that you have a reasonable doubt whether the murder was of the first or of the second degree, you must give defendant the benefit of that doubt and return a verdict fixing the murder as of the second degree, as well as a verdict of not guilty of murder in the first degree.

(3 CT 867-868.)

At a hearing on jury instructions that took place the following day, the trial court declined to give the requested defense instruction, noting that the concept was "adequately covered" in other instructions it intended to give. (12 RT 2503.)

B. The Trial Court Properly Instructed the Jury on Reasonable Doubt and the Degrees of Murder

1. Applicable legal principles

"A court is required to instruct on the law applicable to the case, but no particular form is required; the instructions must be complete and a

correct statement of the law." (*People v. Fiu* (2008) 165 Cal.App.4th 360, 370.) "The court has no duty to give an instruction if it is repetitious of another instruction also given." (*People v. Barajas* (2004) 120 Cal.App.4th 787, 791; see also *People v. Friend* (2009) 47 Cal.4th 1, 50 [trial court does not err in refusing to give a duplicative special instruction]; *People v. San Nicolas* (2004) 34 Cal.4th 614, 675 ["a judge need not include a legally correct jury instruction when it is duplicative of other instructions provided to the jury"].) On review, this Court determines the correctness of jury instructions "from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction." (*People v. Burgener*, *supra*, 41 Cal.3d at p. 538; *People v. Harrison*, *supra*, 35 Cal.4th at p. 252.) This Court also presumes that jurors are "able to understand and correlate instructions." (*People v. Sanchez* (2001) 26 Cal.4th 834, 852.)

Under *People v. Dewberry* (1959) 51 Cal.2d 548, "a criminal defendant is entitled to the benefit of a jury's reasonable doubt with respect to *all* crimes with lesser degrees or related or included offenses." (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1262, citing *Dewberry*, *supra*, at p. 556.) That principle is also codified in Penal Code section 1097, which provides that where "there is reasonable ground of doubt in which of two or more degrees of the crime or attempted crime [a defendant] is guilty, he can be convicted of the lowest of such degrees only." Accordingly, whenever the evidence supports a conviction of the charged offense and a lesser included offense, the jury must be instructed that if it has found the defendant committed an offense, but has reasonable doubt about which offense he committed, it must find the defendant guilty only of the lesser offense. (*Dewberry*, *supra*, at p. 555; see also *People v. Crone* (1997) 54 Cal.App.4th 71, 76 ["[I]n any case involving a lesser included offense, the trial court has a duty to give a *Dewberry* instruction sua sponte"].)

2. The trial court's instructions informed the jury of its duty to give Ramirez the benefit of any reasonable doubt regarding the degree of murder

In 2011, this Court disapproved of the unanimity language in former CALJIC No. 8.71—the instruction requested by the defense here. (*People v. Moore* (2011) 51 Cal.4th 386, 409-412.) CALJIC No. 8.71 now reads:

> If any juror is convinced beyond a reasonable doubt that the crime of murder has been committed by a defendant, but has a reasonable doubt whether the murder was of the first or of the second degree, that juror must give the defendant the benefit of that doubt and find that the murder is of the second degree.

(CALJIC No. 8.71.)

Ramirez argues the trial court should have given his jury an instruction like the one above. (See AOB 76-77.) This Court held in *People v. Friend*, *supra*, 47 Cal.4th 1, that a trial court's failure to instruct with such language is not error where its other instructions convey the same principles. (*Id.* at pp. 54-56.) Here, the trial court's instructions already covered the principles expressed in CALJIC No. 8.71, and further instruction with the CALJIC language would have been duplicative. (See *Id.* at p. 50; *People v. San Nicolas*, *supra*, 34 Cal.4th at p. 675.)

The trial court instructed Ramirez's jury with CALCRIM No. 521, providing in relevant part: "If you decide that the defendant has committed murder, you must decide whether it is murder of the *first* or *second* degree," and, further:

> The People have the burden of proving beyond a reasonable doubt that the killing was first degree murder rather than a lesser crime. If the People have not met this burden, you may not find the defendant guilty of first degree murder. [¶] Any murder which is not proven to be of the first degree is murder of the *second* degree.

(4 CT 936-937, original italics.)

The court thus instructed the jurors that, if they were convinced Ramirez committed murder, but had a reasonable doubt regarding the degree, they must find him not guilty of first degree murder. The instruction requested and the instruction given—CALJIC No. 8.71 and CALCRIM No. 521, respectively—simply employ different language to convey the same principle: that a jury cannot convict a defendant of first degree murder unless convinced beyond a reasonable doubt that he did not commit the lesser offense of second degree murder.

Furthermore, the trial court here instructed the jury pursuant to CALCRIM No. 220 that Ramirez was presumed innocent, that the People were required to prove his guilt beyond a reasonable doubt, and that any time the court advised that "the People must prove something, [it meant] they must prove it beyond a reasonable doubt." (4 CT 921.) The court also instructed the jury with CALCRIM No. 225 regarding circumstantial evidence of intent, which stated in relevant part: "If you can draw two or more reasonable conclusions from the circumstantial evidence, and one of those reasonable conclusions supports a finding that the defendant did have the required intent or mental state and another reasonable conclusion supports a finding that the defendant did not, you must conclude that the required intent or mental state was not proved by the circumstantial evidence." (4 CT 947; 12 RT 2578.) The forgoing instructions adequately informed the jury of "the general principle that if, from all the evidence, it had a reasonable doubt whether the defendant formed a specific intent or mental state, it must give him the benefit of that doubt and find he did not have that specific intent or mental state." (*People v. Friend*, *supra*, 47 Cal.4th at p. 56.)

Ramirez claims the CALJIC language requested by his trial attorney explained the "important consequences flowing" from the People's burden to prove first degree murder beyond a reasonable doubt, which he argues

were merely "implicit" in CALCRIM No. 521. (AOB 75-76.) He contends that, under the trial court's instructions, a jury that finds beyond a reasonable doubt that a defendant is guilty of murder "may think that the prosecution has overcome the defendant's presumption of innocence and may not appreciate that the requirement of proof beyond a reasonable doubt still applies to its determination whether the murder is first degree or second degree." (AOB 79-80.) He argues his jury would not have appreciated that it could entertain a reasonable doubt as to the degree of murder, nor would it have understood its obligation to give him the benefit of such doubt, unless those principles were expressed in the language of CALJIC No. 8.71. (See AOB 76-77.)

The contention is unpersuasive. We must presume the jury was "able to understand" the principles as they were expressed in CALCRIM No. 521. (*People v. Sanchez*, *supra*, 26 Cal.4th at p. 852.) Indeed, that instruction told the jury that its task did not end with a finding that Ramirez had committed murder; that it must then "decide whether it is murder of the *first* or *second* degree." (4 CT 936, original italics.) By directing the jury that it "may not find the defendant guilty of first degree murder" unless the People had met their burden "of proving beyond a reasonable doubt that the killing was first degree murder rather than a lesser crime," the instruction properly advised the jury what to do if it had reasonable doubt regarding first degree murder. (4 CT 937.)

Significantly, second degree murder was the only lesser included offense available to Ramirez's jury, and Ramirez conceded he was guilty of murder. (See, e.g., 9 RT 1831 [defense opening statement: "[W]hat's not at issue in this case is Officer Niemi was murdered"].) Accordingly, the attorneys' closing arguments focused almost entirely on whether or not the jury could entertain a reasonable doubt regarding the degree of murder. Their arguments further demonstrate it is not reasonably likely the jury

misunderstood the law regarding reasonable doubt and the degrees of murder. (See *People v. Kelly*, *supra*, 1 Cal.4th at pp. 526-527.)

The prosecutor began his closing argument by explaining the concept of reasonable doubt. (See 12 RT 2579-2580.) After arguing express malice, he told the jury it was their "duty to determine the degree, that's what we talked a lot about in this trial." (12 RT 2582.) He went on to argue why the evidence showed Ramirez was guilty of first degree murder. (See, e.g., 12 RT 2586-2594.) Defense counsel, in turn, vigorously argued that the People had failed to prove beyond a reasonable doubt that Ramirez committed first degree murder. He explained that "reasonable doubt" meant that "where even a small doubt lingers in your reasonable mind . . . on that point you have to find for the defendant." (12 RT 2596.) After repeating his concession that Ramirez committed murder, counsel argued:

> But the issue is, and the one that I hope you focus in on and the one I hope you take some time to consider is the degree of the murder because the People have the burden of proving, of course, beyond a reasonable doubt, as everything else, that the killing was first-degree murder. And if the People have not met the burden, you may not, not that you should not, you may not find the defendant guilty of first-degree murder.

(12 RT 2598.)

Defense counsel repeated several more times the jury's obligation not to convict Ramirez of first degree murder unless the People had proved it beyond a reasonable doubt. (12 RT 2599 ["I'll just leave it to you to consider whether the evidence in this case proves beyond a doubt whether this shooting was premeditated"], 2600 ["You have to be sure as can be beyond a reasonable doubt that Mr. Ramirez carefully weighed the consequences and knowing those consequences decid[ed] to go ahead and kill the officer"], 2609 ["If the People have not met their burden, you may not, you're not allowed to, you're oath doesn't allow you to find the defendant guilty of first-degree murder"].) In arguing that Ramirez was not

guilty of first degree murder, counsel referred to the court's instruction on circumstantial evidence and told the jury, "Clearly, *you've got to accept the* [*conclusion*] *that points to the second degree*, which is he was drunk as a skunk, and reject the one that points to first degree . . . ." (12 RT 2605, italics added.)

Under such circumstances, there is no danger the jury failed to understand its duty to give Ramirez the benefit of any reasonable doubt regarding the degree of murder. Ramirez's contrary arguments parsing the language of his requested instruction and the court's instructions must be rejected. (See AOB 75-77, 80-81, 83.) "'[A] commonsense understanding of the instruction in light of all that has taken place at the trial [is] likely to prevail over technical hairsplitting.'" (*People v. Huggins* (2006) 38 Cal.4th 175, 193, citing *Boyde v. California* (1990) 494 U.S. 370, 381.)

Ramirez claims the asserted instructional error was "just as stark as the error found in *Dewberry* itself." (AOB 84.) Not so. The concern raised in *Dewberry* was not presented by the circumstances here. In *Dewberry*, the trial court instructed the jury that, if it had a reasonable doubt as to whether the defendant committed first or second degree murder, it must convict him of second degree murder, and that, if it had a reasonable doubt as to whether the killing was manslaughter or justifiable homicide, it must acquit the him entirely. (*People v. Dewberry*, *supra*, 51 Cal.2d at p. 554.) On appeal, Dewberry challenged the court's refusal to give an instruction that would have directed the jury to give him the benefit of any reasonable doubt regarding second degree murder and manslaughter. (*Id.* at p. 555.) This Court held it was error not to give the defendant's requested instruction, because the given instructions left the jury "with the clearly erroneous implication that the rule requiring a finding of guilt of the lesser offense applied only as between first and second degree murder," and not also as between murder and manslaughter. (*Id.* at p. 557.)

Thus, the concern in *Dewberry* arose from the availability of multiple lesser included offenses and the trial court's decision to give the section 1097 instruction only as to one of them. Here, by contrast, the sole lesser included offense was second degree murder. (See 4 CT 919-950.) Unlike the court in *Dewberry*, the trial court here did not give any instructions implying the jury could convict Ramirez of the greater offense even if it reasonably doubted he was guilty of that offense. Rather, the court properly instructed the jury that it must not convict Ramirez of first degree murder unless the People proved that degree of murder beyond a reasonable doubt.

Considering the court's instructions as whole and the arguments of counsel, it is clear the jury was not "ignorant" of its obligation regarding reasonable doubt and the degrees of murder. (AOB 84.) For the same reason, the court's refusal to give the requested instruction did not violate the federal Constitution. (See AOB 85.)

C. Any Error Was Harmless

Even if the trial court did err in failing to give the defense's requested instruction, the error was harmless. It is not reasonably probable the result of the trial would have been more favorable to Ramirez had the trial court instructed his jury with the language from CALJIC No. 8.71. (*People v. Watson*, *supra*, 46 Cal.2d at p. 836; see *People v. Dewberry*, *supra*, 51 Cal.2d at p. 558 [applying *Watson* standard to *Dewberry* error].) To the extent the *Chapman* harmless error standard applies, the error was also harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.)

If the trial court's instructions on reasonable doubt were insufficient, the arguments of counsel clarified for the jurors that a reasonable doubt regarding first degree murder required them to convict Ramirez of second degree murder. Ramirez's claim that neither attorney discussed giving him

the benefit of a reasonable doubt as to the degree of murder is belied by the record. (AOB 87.) As demonstrated above, both attorneys focused heavily on that very subject. "Although counsel's arguments are not a substitute for a proper jury instruction, such detailed argument supports [the] conclusion that the error in refusing the instruction was harmless in this case." (*People v. Fudge* (1994) 7 Cal.4th 1075, 1111.) Furthermore, the court provided the jury with three verdict forms related to the charge of murder: one for a finding of first degree murder, one for a finding of second degree murder, and one for an acquittal. (4 CT 908, 916-917.) That the jury had those verdict forms before it further demonstrates it was not "ignorant" of its obligation to convict Ramirez of second degree murder if it found beyond a reasonable doubt he committed murder, but was not so persuaded it was first degree. (AOB 84.)

Finally, given the strength of the People's evidence showing the murder was willful, deliberate, and premeditated, it is not reasonably probable the result of Ramirez's trial would have been different had the court instructed the jury with the requested language (*People v. Watson*, *supra*, 46 Cal.2d at p. 836), and any constitutional error was harmless beyond a reasonable doubt (*Chapman v. California*, *supra*, 386 U.S. at p. 24).

III. THE TRIAL COURT DID NOT ERR IN REFUSING TO LIMIT THE NUMBER OF UNIFORMED POLICE OFFICERS IN THE COURTROOM

Ramirez claims the presence of multiple uniformed police officers during closing arguments in the guilt phase was inherently prejudicial, and that the trial court's failure "to take steps to balance" his rights with those of the officers violated state law and the federal Constitution, requiring reversal of the entire judgment. (AOB 89.) The claim lacks merit. The

record does not show the officers' presence impacted the fairness of Ramirez's trial.

A. Relevant Proceedings

On February 21, 2007, the defense filed a motion to exclude all uniformed police officers as spectators in the courtroom. (3 CT 614-618.) The defense requested that the court order any police officer who wished to be present in the courtroom at the same time as a juror or prospective juror to wear civilian clothing and not display any "sign of his or her occupation" or show support or animus for either party. (3 CT 615.) The defense argued that the presence of uniformed officers in the courtroom would "severely" affect Ramirez's right to a fair trial, in that there existed a substantial likelihood the jurors would view the uniformed officers' presence as "implicit advocacy" to convict Ramirez and condemn him to death. (3 CT 614.)

The trial court and the attorneys discussed motions in limine on February 26, 2007. (3 CT 644-646.) The court asked the prosecutor for his response to the defense motion to exclude uniformed police officers as spectators, and the prosecutor responded that he would "submit it to the court." (2 RT 37.) The trial court denied the defense motion without prejudice. (2 RT 37-39.) The court explained:

> [A]n on-duty police officer, a person who just gets off duty or is going to go on-duty, who wants to come in and watch a little bit of the trial, may be wearing a uniform for that reason, that they're about to go on duty, or they've just come off duty. To say that they have to go change clothes first, I don't think is really necessary.

(2 RT 38.)

When defense counsel protested that the officers' intentions were not relevant and that his concern was the effect their appearance would have on the jury, the court explained that it "under[stood]" the basis for counsel's

motion, but "[t]he fact of the matter is, the jury is going to know on the day they walk into this courtroom as potential jurors that this is what this case is all about, is a police officer having been shot and killed." (2 RT 38.) The court told defense counsel that it could raise the issue again "[i]f you think it's being over done." (2 RT 39.)

On the morning of May 8, 2007, the date of jury instructions and closing arguments in the guilt phase, the defense raised a concern regarding the number of uniformed police officers in the gallery. (12 RT 2610.) The court and counsel summarized their conversation about that subject during the lunch break. (12 RT 2610.)

Defense counsel stated that "the last time [he] counted," there were "17 or 18 uniformed San Leandro police officers in the gallery," which was full, and noted that one of the jurors was unable to use the stairs and had to walk through the gallery. (12 RT 2610.) He argued the presence of the uniformed officers was "coercive" and moved the court "to limit the number of uniformed officers or somehow ameliorate that effect." (12 RT 2610.) He did not specifically ask the court to admonish the jurors regarding the officers' uniforms, nor did he move for a mistrial based on the officers' presence.

The trial court, finding no undue prejudice, denied the motion. (12 RT 2611.) The court explained it was "not a secret" that Ramirez's case involved the killing of a police officer, and also pointed out that it had directed uniformed persons not to occupy the front rows of the gallery, "which could make them much more prominent." (12 RT 2611.) Defense counsel noted that the front row on the defense side had "a fair amount of uniformed officers" when the court was instructing the jury. (12 RT 2611.) The court then clarified as follows:

> Forgive me, you're right. I changed it. The row right behind the bailiff was all uniformed officers. There was nobody

> in the front row behind the jurors, the alternates. I changed that. I put the defendant's family in the front row behind the bailiff and I put nonuniformed people in the front row which had been vacant behind the jurors.

(12 RT 2612.)

The trial court maintained there was no undue prejudice to Ramirez as a result of the uniformed officers' presence. The court had not witnessed any intimidating conduct by the officers nor any conduct directed at drawing attention to themselves. (12 RT 2612.) The court added that "everybody has behaved and conducted themselves quite well here in the courtroom." (12 RT 2612.)

In closing argument, which took place before the lunch break, defense counsel addressed the officers' presence in the courtroom to the jury:

> To the extent you may feel some public pressure, acknowledging that we have a gallery full of police officers, that's not appropriate. You're not here to send a message to anybody. And to the extent that you feel influenced by that, I would not only reject it, I would resent it and ignore it. You've got a job to do and it has nothing to do with anything other than the evidence and the law in this case.

(12 RT 2596.)

B. The Presence of Uniformed Officers in the Gallery Did Not Impact the Fairness of Ramirez's Trial

1. Applicable legal principles

"The right to a public trial is not that of the defendant alone." (*People v. Cummings* (1993) 4 Cal.4th 1233, 1298.) Police officers, as members of the public, have "both common law and constitutionally based rights to attend" a trial, and the "[e]xclusion of any group on the basis of the members' status would be impermissible." (*Id.* at p. 1299.) "Only if restriction is necessary to preserve a defendant's right to a fair trial may the court restrict attendance by members of the public." (*Id.* at pp. 1298-1299.)

The right to a fair trial is, of course, "a fundamental liberty secured by the Fourteenth Amendment." (*Estelle v. Williams* (1976) 425 U.S. 501, 503.) In *Holbrook v. Flynn* (1986) 475 U.S. 560, the United State Supreme Court acknowledged that certain courtroom conduct violates the federal Constitution if it is "so inherently prejudicial as to pose an unacceptable threat to defendant's right to a fair trial." (*Id.* at p. 572.) The court found the mere presence of uniformed officers in itself is not prejudicial (*id.* at p. 569), but cautioned that "a roomful of uniformed and armed policemen might pose [a risk] to a defendant's chances of receiving a fair trial" (*id.* at pp. 570-571).

In *Carey v. Musladin* (2006) 549 U.S. 70, the high court held that the "inherent prejudice" test "did not clearly extend to the conduct of independently acting courtroom spectators." (*Wright v. Van Patten* (2008) 552 U.S. 120, 123; see *Musladin*, *supra*, at p. 76.) The court held that, although it "articulated the test for inherent prejudice that applies to state conduct in *Williams* and *Flynn*, [it had] never applied that test to spectators' conduct. Indeed, part of the legal test of *Williams* and *Flynn*—asking whether the practices furthered an essential *state* interest—suggests that those cases apply only to state-sponsored practices." (*Musladin*, *supra*, at p. 76.)

This Court has held that "[a] spectator's conduct is grounds for reversal if it is 'of such a character as to prejudice the defendant or influence the verdict.'" (*People v. Myles* (2012) 53 Cal.4th 1181, 1215.) A trial court is afforded broad discretion in determining whether the conduct of a spectator is prejudicial. (*Ibid.*; *People v. Panah* (2005) 35 Cal.4th 395, 451.) "Having observed the courtroom proceedings firsthand, the trial judge [is] in the best position to evaluate the impact" of the spectator's conduct on the jury. (*Myles*, *supra*, at pp. 1215-1216, citing *People v. Cornwell* (2005) 37 Cal.4th 50, 87.)

Acknowledging the United States Supreme Court's holding in *Musladin*, *supra*, 549 U.S. 70, Ramirez argues the "inherent prejudice" test applies to his claim because the officers, by wearing their police uniforms, "appeared in their official capacities, not as private citizens." (AOB 99 & fn. 35.) However, there is no evidence the officers were directed by a governmental entity to wear their uniforms or to attend the trial. Indeed, the record contains no evidence that the officers, presumably friends and colleagues of Niemi's, were present in any official capacity. Nevertheless, as explained below, Ramirez's claim fails under the "inherent prejudice" test, and the trial court properly found no undue prejudice resulted from the uniformed officers' presence in the gallery. (12 RT 2611-2612.)

2. The record does not support the conclusion that the officers' presence was prejudicial; therefore, the court did not act unreasonably in refusing defense counsel's request

Based on the record below, the trial court did not act unreasonably in denying defense counsel's motion to "ameliorate" the effect of the uniformed officers' presence on the jury. (12 RT 2610.) There is no showing their presence in the courtroom was of such character as to prejudice Ramirez or deny him a fair trial. (*Flynn*, *supra*, 475 U.S. at p. 572; *People v. Myles*, *supra*, 53 Cal.4th at p. 1215.)

A comparison to other cases addressing similar claims demonstrates the trial court's ruling here was not unreasonable.

Both the United States Supreme Court and this Court have found no error in allowing some uniformed officers to sit in the front row of the gallery. In *Flynn*, *supra*, 475 U.S. 560, the high court ruled that four uniformed state troopers sitting in a row immediately behind the defendant did not create such an inherent risk of prejudice that it denied the defendant a fair trial. (*Id.* at pp. 570-571.) Similarly, in *People v. Cummings*, *supra*, 4 Cal.4th 1233, this Court held the trial court did not err by permitting an

unspecified number of uniformed police officers to attend the trial of two defendants accused of murdering a police officer, where those officers "occasionally occupied seats in the front row of the audience." (*Id.* at pp. 1255, 1298-1299.)

In a related case involving the murder of a state highway patrolman, *People v. Zielesch* (2009) 179 Cal.App.4th 731, the Court of Appeal found the lower court's failure to stop some spectators from wearing commemorative buttons depicting the fallen officer's likeness did not infringe on the defendant's right to a fair trial. (*Id.* at pp. 734, 742-745.) In explaining its ruling, the Court of Appeal declared the defendant's contrary claim was "an insult to the intelligence, integrity, and resolve of jurors," stating there was "no reason to believe that the jurors, when faced with the image of a fallen officer, would be unable or unwilling to base their verdict solely on the evidence presented during the trial." (*Id.* at p. 745.) The *Zielesch* court noted with approval the trial court's instruction telling jurors to disregard the buttons, to base their verdict solely on evidence presented during the trial, and not to allow sympathy for the victim to play a role in their decision. (*Ibid.*)

Cases from other states are also instructive. In *Brown v. State* (Md. Ct. Spec. App. 2000) 752 A.2d 620, the Maryland Court of Special Appeals found the presence of 10 to 40 uniformed police officers during the defendant's trial and, again, at sentencing, did not violate his right to a fair trial. (*Id.* at pp. 630-631.) Like Ramirez, the defendant in *Brown* was tried and convicted of murdering a police officer. (*Id.* at p. 622.) In rejecting the defendant's claim that the trial court should have ordered a mistrial based on the officers' presence in the courtroom, the Court of Special Appeals noted that no record was made of the total number of spectators at the trial and there was further "no showing that the officers sat together or did anything in particular to reflect a show of solidarity or force." (*Id.* at p.

630.) The court also observed there was "no evidence of disruption or any intimidation of the witnesses or jurors" and the "fact that police officers were interested in the case should not have been surprising or particularly prejudicial in itself." (*Id.* at p. 631.)

In *Howard v. State* (Tex. Crim. App. 1996) 941 S.W.2d 102 (en banc), overruled on other grounds in *Easley v. State* (Tex. Crim. App. 2014) 424 S.W.3d 535, the Texas Court of Criminal Appeals rejected the defendant's similar claim that the presence of 20 uniformed peace officers during closing arguments in the penalty phase of his trial violated his right to fundamental fairness. (*Id.* at pp. 117-118.) Like Ramirez, the defendant did "not claim the peace officers actively conducted themselves in a manner which prejudiced his opportunity to receive a fair trial," but challenged "their presence and any message such presence might entail." (*Id.* at p. 117) The defendant was convicted of murdering a trooper with the Department of Public Safety. (*Id.* at pp. 106-107.) When he objected to the officers' presence below, the trial court judicially noticed that "the officers were spectators," they were in the back of the courtroom, and there were 81 other civilian spectators in attendance. (*Id.* at p. 117.) The record in *Howard* did not indicate any "overt conduct or expression" on the officers' part, nor was there any indication the officers "gravitated toward the jury." (*Id.* at p. 118.) Under such circumstances, the *Howard* court "fail[ed] to see . . . how the presence of these officers resulted in inherent prejudice such that it could be deemed to inherently lack due process." (*Ibid*; see also *Davis v. State* (Tex. Ct. App. 2006) 223 S.W.3d 466, 474 [no inherent prejudice when as many as eight uniformed officers sat in gallery over course of trial; officers vastly outnumbered by civilian spectators and no indication they "gravitated" toward jury].)

Finally, in *Pratt v. State* (Ga. Ct. App. 1997) 492 S.E.2d 310, the Georgia Court of Appeals held the trial court was not obligated to exclude

25 uniformed correctional officers from the courtroom "in order to assure a fair trial" for the defendant, who was ultimately convicted of "mutiny" for biting a correctional officer. (*Id.* at pp. 310-311.) The uniformed officers appeared in the courtroom after the close of evidence, but before the trial court's charge to the jury. (*Id.* at p. 311.) The trial court overruled defense counsel's objection to their presence, noting the officers were sitting toward the back of the courtroom "away from the jury." (*Ibid.*) The Court of Appeals found that ruling was proper, observing that there was "no evidence of pretrial publicity, a hostile community atmosphere, or any other factor" which would warrant the conclusion that the presence of the correctional officers was prejudicial. (*Ibid.*) The court also noted that the officers "were not even acting as guards but only as spectators." (*Ibid.*)

In the instant case, the record reflects the gallery was "full," but does not indicate what fraction of the audience the 17 to 18 uniformed officers comprised. The ratio of uniformed officers to other spectators is, therefore, unknown. The record also affirmatively shows that none of the uniformed officers sat in the front row behind the jury. (12 RT 2611-2612.) There is no indication the 17 to 18 uniformed officers all sat together as a group, as opposed to sitting interspersed throughout the spectators, nor is there any indication they "gravitated toward" the jury or engaged in any intimidating behavior. (*Howard v. State*, *supra*, 941 S.W.2d at p. 118.) Indeed, the trial court, which was in "the best position to evaluate" the situation (*People v. Myles*, *supra*, 53 Cal.4th at pp. 1215-1216), stated it had not witnessed any misconduct by the officers, and even remarked that all the spectators had "behaved and conducted themselves quite well" (12 RT 2612).

As far as the record shows, no uniformed officers were in the gallery at any other time during Ramirez's trial. No evidence was disclosed by virtue of the officers' presence and, given the nature of the case, their attendance at the trial "should not have been surprising or particularly

prejudicial in itself." (See *Brown v. State*, *supra*, 752 A.2d at p. 631; see also *Smith v. Farley* (7th Cir. 1995) 59 F.3d 659, 664 ["Of course if you kill a policemen and are put on trial for the crime, you must expect the courtroom audience to include policemen"]; *Lambert v. State* (Ind. 2001) 743 N.E.2d 719, 732 ["The jurors were aware that the trial focused on the murder of a police officer and likely would have expected the victim's fellow officers to follow the trial"].)

Moreover, the trial court instructed the jurors on the presumption of innocence and told them Ramirez was entitled to have his guilt determined solely on the basis of evidence introduced at trial. (4 CT 919, 921.) It also admonished them not to "let bias, sympathy, prejudice or public opinion influence [their] decision." (4 CT 919.) We presume the jurors followed the trial court's admonitions and instructions. (*Romano v. Oklahoma* (1994) 512 U.S. 1, 13.) Defense counsel also specifically related the court's instructions to the uniformed officers, arguing in closing that any "influence" the officers had on the jurors should be "ignored" and "resented" because the jurors had "a job to do and it has nothing to do with anything other than the evidence and the law in this case." (12 RT 2596.) Thus, there is no reason to believe the jurors "would be unable or unwilling to base their verdict solely on the evidence presented during the trial." (*People v. Zielesch*, *supra*, 179 Cal.App.4th at p. 745.)

Finally, contrary to Ramirez's claim that the court "did not even attempt to balance" his interests with those of the officers (AOB 95), the trial court purposely arranged the courtroom so that no uniformed officers were sitting directly behind the jury. (12 RT 2611-2612) Under such circumstances, the record does not support the contentions that the mere presence of the uniformed officers was prejudicial or affected the fairness of Ramirez's trial, or that the trial court should have taken further steps to "ameliorate" their impact. (12 RT 2610.) "When defense counsel

vigorously represents his client's interests and the trial judge assiduously works to impress jurors with the need to presume the defendant's innocence, we have trusted that a fair result can be obtained." (*Flynn*, *supra*, 475 U.S. at pp. 567-568.)

The presence of uniformed officers in this case was certainly less inflammatory than spectator conduct this Court has upheld in other cases. For example, in *People v. Lucero* (1988) 44 Cal.3d 1006, the mother of a child murder victim hysterically "cried out" as the jury was preparing to leave the courtroom to begin guilt phase deliberations about why the victim's screams could not be heard. (*Id.* at p. 1022.) This Court concluded the trial court, who had given the jury a "cursory admonition" following the incriminating outburst, did not abuse its discretion by denying the defense motion for a mistrial. (*Id.* at pp. 1022-1024.) Likewise, in *People v. Hinton* (2006) 37 Cal.4th 839, this Court found the defendant "could not have been prejudiced" by the murder victim's mother stating, "Thank you, Jesus. Kill him," in front of the jury after the guilt phase verdicts were announced. (*Id.* at p. 898.) This Court noted her comment was "brief and unsurprising." (*Ibid.*)

The presence of the uniformed officers here was also far less extreme than the conduct at issue in cases cited by Ramirez. (See AOB 94-95, 100-103.) Ramirez relies heavily on the Eleventh Circuit's decision in *Woods v. Dugger* (11th Cir. 1991) 923 F.2d 1454 (see, e.g., AOB 94-95, 102), where the defendant was convicted of murdering a correctional officer. On appeal, the defendant alleged he was denied a fair trial due to the hostile atmosphere in the "small rural community" where his trial took place and to the number of uniformed prison guards who attended his trial. (*Id.* at pp. 1455-1456.) Four state prisons located in two adjacent counties employed a large number of local residents and also accounted for $71 million of the local economy. (*Id.* at pp. 1457-1458.) Prior to his murder, the

correctional officer told a local newspaper that the prison was dangerously understaffed and that he feared for his safety as a prison guard. (*Id.* at p. 1458.) The victim's death "became a focal point for the lobbying efforts" of groups seeking better prison staffing and generated significant pretrial publicity. (*Ibid.*) Several of the defendant's jurors either had previously been employed by the prison system or had relatives who currently worked in the prison system, and about half the trial spectators were uniformed correctional officers. (*Ibid.*) The Eleventh Circuit reversed and remanded to the district court to issue the writ of habeas corpus, stating: "[T]he record demonstrates that the pretrial publicity combined with the large number of uniformed spectators rose to the level of inherent prejudice, thereby depriving the petitioner of a fair trial." (*Id.* at p. 1460.)

Unlike *Woods*, the record here does not disclose a hostile community atmosphere, nor does it reflect that uniformed officers predominated the courtroom gallery. Ramirez's trial was held in Alameda County, not a "small rural county," and no unusual community economic circumstances related to law enforcement appear in the record. (*Woods v. Dugger*, *supra*, 923 F.2d at p. 1456.) Furthermore, while the correctional officer's death was a significant local political issue in *Woods*, here, the record shows no such political activity centered on Niemi's death. Accordingly, *Woods* does not assist Ramirez in his claim that the uniformed officers infringed his right to a fair trial.

Ramirez also relies on *Shootes v. State* (Fl. Dist. Ct. App. 2009) 20 So.3d 434 (AOB 100-102), but that case, too, is distinguishable. In *Shootes*, the Florida Court of Appeal found the presence of at least 25[8] uniformed police officers at the defendant's trial for aggravated assault of a police

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[8] Three affiants stated that between 50 and 70 uniformed officers attended. (*Shootes v. State*, *supra*, 20 So.3d at p. 436.)

officer denied him a fair trial. (*Id.* at pp. 435-436.) Significantly, "unlike cases where clothing or accessories worn by spectators might merely have shown support for the victim or another party in general, in [*Shootes*,] the officers' apparel was actually a feature of the trial, directly related to [the defendant's] theory of self-defense." (*Id.* at p. 439.) Indeed, the defendant claimed that when he shot at the officers, he did not recognize them as officers and believed he was acting in self-defense. (*Ibid.*) Thus, the appearance of the officers' uniforms—displayed by the officers in attendance at trial—was "pivotal" to the defense theory. (*Id.* at p. 436.) In Ramirez's case, the appearance of the officers' uniforms was neither a "feature of the trial" nor "pivotal to [Ramirez's] theory of defense." (*Id.* at p. 436.) The officers' uniforms "did not imply that [Ramirez] murdered [Niemi], nor suggest a comment about a disputed issue between the parties." (See *People v. Houston* (2005) 130 Cal.App.4th 279, 316.) Furthermore, unlike the instant case, the record in *Shootes* disclosed that the uniformed police officers constituted "half or more" of the spectators, and a substantial number of officers "sat together as a group in the seats closest to the jury." (*Id.* at pp. 436, 439.)

Finally, Ramirez cites another case from Florida, *Ward v. State* (Fl. Dist. Ct. App. 2012) 105 So.3d 3 (AOB 100), in which the Court of Appeal found the defendant made facially sufficient claims regarding his counsel's ineffective assistance for failing to object to the presence of uniformed officers at his trial. (*Id.* at pp. 4-5.) The defendant alleged in his motion for postconviction relief that "there were enough officers in the audience to make 'the courtroom look like a policeman's benefit'" and argued the officers' presence "'influenced the jury to convict [him] out of fear and sympathy.'" (*Id.* at p. 5) *Ward* is unpersuasive. The appellate court simply reversed the summary denial of relief appealed by the defendant and remanded the case to "the post-conviction court to either attach portions of

the record conclusively refuting" the defendant's claims "or to conduct an evidentiary hearing." (*Ibid*; see also *Ward v. State* (Fl. Dist. Ct. App. 2014) 150 So.3d 1149 (Table) (per curiam) [affirmed on appeal after remand].)

In sum, Ramirez fails to show that the presence of uniformed officers during instructions and closing arguments of the guilt phase of his trial was prejudicial such that it affected his verdict or denied him fair trial. The officers did not predominate the courtroom, nor did they exhibit any intimidating behavior. The trial court, further, directed the uniformed officers not to sit in the front row closest to the jury and instructed the jury to base its decision solely on the evidence before it. On such a record, the court's refusal to limit the number of uniformed officers in the courtroom or "somehow ameliorate" their impact was neither unreasonable nor prejudicial. (12 RT 2610.)

IV. THE CUMULATIVE EFFECT OF THE ASSERTED ERRORS DOES NOT REQUIRE REVERSAL

Ramirez contends that, even if no single error was prejudicial, the cumulative effect of the asserted errors requires reversal of his conviction and death judgment. (AOB 108-110.) As set forth above, Ramirez has failed to establish that any prejudicial error occurred in the guilt phase of his trial. Accordingly, the cumulative nature of the asserted errors does not require reversal. (See *People v. Booker* (2011) 51 Cal.4th 141, 186; *People v. Virgil* (2011) 51 Cal.4th 1210, 1290-1291.)

V. THE VICTIM IMPACT EVIDENCE WAS PROPERLY ADMITTED

Ramirez claims the trial court abused its discretion by admitting victim impact testimony from three of Niemi's colleagues and a short story Niemi authored. He argues admission of that evidence rendered the penalty phase of his trial fundamentally unfair and his death sentence arbitrary and unreliable under the federal Constitution. He further argues that the error was not harmless because the penalty phase evidence was "roughly in

equipoise." (AOB 111.) The claim fails. The evidence was relevant and was not so voluminous, cumulative, or inflammatory as to divert the jury's attention from it proper role or invite an irrational response.

A. Relevant Proceedings

On February 21, 2007, the People filed a notice of aggravating evidence pursuant to Penal Code section 190.3. (3 CT 630-631.) The People intended to call four of Niemi's family members and six of his colleagues from the San Leandro Police Department to provide victim impact testimony in the penalty phase. (3 CT 630-631.)

On Monday, May 14, 2007, the trial court indicated that the defense had requested "more detailed information" from the People regarding the nature of the intended victim impact testimony and had suggested the court possibly limit the subject matter and length of that testimony. (13 RT 2654.) The defense had also expressed its intent to object to testimony from Niemi's friends and colleagues. (13 RT 2655.) The court and counsel agreed that the People would provide more information on its proposed victim impact evidence the following Thursday. (13 RT 2655.)

That Thursday, May 17, 2007, the defense filed a motion to limit the People's victim impact testimony to immediate family members. (4 CT 956-958.) In support of its motion, the defense argued that any testimony from Niemi's friends and colleagues was unduly prejudicial under Evidence Code section 352 and violated Ramirez's rights to a reliable penalty determination under the federal Constitution. (4 CT 956.) The defense further asserted that victim impact testimony from nonfamily members was "not contemplated or authorized" by the high court's decision in *Payne v. Tennessee* (1991) 501 U.S. 808. (4 CT 957.)

On Tuesday, May 22, 2007, the court and counsel convened to discuss the penalty phase evidence and instructions. (13 RT 2660.) The People narrowed the number of nonfamily witnesses to three people: Curt Barr,

Mario Marez, and Deborah Trujillo. (13 RT 2661-2662.) At the court's request, the prosecutor summarized the anticipated testimony of those three witnesses. (13 RT 2662-2666.) Afterward, the court acknowledged the defense objection to their testimony, which was based in part on the defense's mistaken belief that the United States Supreme Court had not authorized victim impact testimony from nonfamily members. (13 RT 2666-2667.) Defense counsel then argued that, to the extent a nonfamily member was permitted to testify, he or she must be a "very, very close personal friend" of the victim and in that respect, the defense took particular issue with the testimony Marez and Trujillo. (13 RT 2668-2669.) Counsel did not specifically contend that the coworkers' testimony would be cumulative to that of other prosecution witnesses.

The trial court denied the defense motion to exclude testimony from Barr, Marez, and Trujillo. (13 RT 2669, 2671.) The court noted that a victim's death impacts his friends and colleagues, and the challenged witnesses would provide testimony showing not only what kind of person Niemi was, "but what kind of cop he was." (13 RT 2670-2671.) The court concluded the testimony was relevant and "admissible in general," and was not "inappropriate." (13 RT 2671.) It further found that, based on the People's offer of proof, the witnesses' testimony was not cumulative under Evidence Code section 352. (13 RT 2671.)

The court next addressed the People's intent to introduce two short stories written by Niemi, which the defense had opposed in a written motion filed that day. (13 RT 2673; 4 CT 964.) One of the stories, entitled "Cold Phrase," was four pages in length (13 RT 2673), and concerned two young children burning to death in a house fire while several firemen restrained their screaming mother (4 CT 964). The untitled second story was just over a page in length and described the experience of finding a newborn baby's body in a garbage can. (People's Exh. 76; 13 RT 2673.)

The untitled story detailed the baby's appearance, including the gray color of his skin and the size of his fist, the backstory of the teenaged mother who arrived at the hospital "with blood between her legs and a severed umbilical cord still dangling," and the narrator's reaction to the incident—"muted frustration"—and resolve to "appreciate the life I have." (People's Exh. 76.)

The prosecutor argued that the stories were "extremely probative of the kind of person" Niemi was, which directly related to the impact of his death on those who knew him. (13 RT 2674.) Defense counsel objected to both stories based on foundation, hearsay, Evidence Code section 352, and the Eighth and Fourteenth Amendments. (13 RT 2675.) He explained that the stories were "very emotionally loaded" and would "sidetrack" the jury from the true issues. (13 RT 2675.) The prosecutor, in turn, explained that he was not offering the stories for the truth of the matters asserted, but rather "to show sensitivity, and the kind of man that Officer Niemi was." (13 RT 2676.)

The court found it was "not inappropriate to offer such evidence" in the penalty phase, acknowledging that the stories said "something about the author" and gave "some insight into the person" Niemi was. (13 RT 2677.) However, the court granted the defense motion to exclude the lengthier story about the burning children, finding the subject matter of that story to be too emotional and the admission of both stories to be cumulative. (13 RT 2677-2678.) The court further ruled that the shorter, untitled story could not be read into evidence by anyone with an "emotional connection" to Niemi. (13 RT 2678.)

On May 29, 2007, the defense filed an additional request to limit the People's victim impact evidence in which it asked the court to preclude Barr from testifying that he had spent time alone with Niemi's body and prayed over him. (13 RT 2693-2694; 4 CT 981.) The defense argued such testimony was "the type of inflammatory rhetoric" prohibited by relevant

case law. (4 CT 981.) The court denied the defense motion, explaining that the challenged testimony would "make clear" the nature of Barr's relationship with Niemi and the impact of Niemi's death. (13 RT 2694.) The court clarified, however, that the content of the prayers would not be admitted. (13 RT 2694.)

B. The Trial Court Properly Admitted the Victim Impact Evidence Under State Law

1. Applicable legal principles

"Under California law, victim impact evidence is admissible at the penalty phase under section 190.3, factor (a), as a circumstance of the crime, provided the evidence is not so inflammatory as to elicit from the jury an irrational or emotional response untethered to the facts of the case." (*People v. Pollock* (2004) 32 Cal.4th 1153, 1180; *People v. Edwards* (1991) 54 Cal.3d 787, 835-836.) Victim impact evidence "does not include characterizations or opinions about the crime, the defendant, or the appropriate punishment, by the victims' family members or friends, and such testimony is not permitted." (*Pollock, supra*, at p. 1180, citing *People v. Smith* (2003) 30 Cal.4th 581, 622.) "[I]rrelevant information or inflammatory rhetoric that diverts the jury's attention from its proper role or invites an irrational, purely subjective response should be curtailed." (*People v. Edwards, supra*, 54 Cal.3d at p. 836, internal citations & quotation marks omitted; *People v. Harris* (2005) 37 Cal.4th 310, 351.)

"[T]he trial court's discretion to exclude evidence regarding the circumstances of the crime as unduly prejudicial is more circumscribed at the penalty phase than at the guilt phase of a capital murder trial, because the sentencer is expected to weigh the evidence subjectively." (*People v. Salcido* (2008) 44 Cal.4th 93, 158.) A trial court's admission of victim impact evidence over an Evidence Code section 352 objection is reviewed for an abuse of discretion. (See *People v. Hawthorne* (2009) 46 Cal.4th 67,

103 [trial court did not abuse its "broad discretion" in concluding victim impact evidence was more probative than prejudicial], abrogated on another ground in *People v. McKinnon* (2011) 52 Cal.4th 610, 637-638.)

2. The trial court did not abuse its discretion in allowing Barr, Marez, and Trujillo to testify

Although Ramirez does not dispute that the testimony of Niemi's former colleagues and friends was relevant under factor (a), he argues it should have been excluded under Evidence Code section 352. (AOB 122.) He contends the coworkers' testimony was unduly prejudicial, characterizing it as "evocative" and "play[ing] on the emotions of the jury." (AOB 122-123.) The contention is unavailing. The testimony was typical of the victim impact evidence this Court routinely has allowed.

For example, in *People v. Brady* (2010) 50 Cal.4th 547, which also involved the murder of a police officer, this Court upheld testimony from the victim's two fellow officers, who "testified extensively about how they learned of the shooting, their initial reactions to learning that the downed officer was their friend Officer Ganz, the efforts to save his life both at the scene and at the hospital, their immediate reaction to his death, and the effect his death had on their lives." (*Id.* at p. 552, 573-574, 576.) One of the officers rode in the ambulance with the victim, stayed by his side at the hospital after he died, and insisted that another officer escort the victim's body to the coroner's office. (*Id.* at p. 570.) During his testimony, the officer "broke down on the stand." (*Id.* at p. 574.)

Like Ramirez, the defendant in *Brady* argued the officers' testimony was "inflammatory" and "unduly prejudicial." (*People v. Brady*, *supra*, 50 Cal.4th at p. 574.) This Court rejected his claim. Noting that "[e]motional testimony is not necessarily inflammatory" (*id.* at p. 575), this Court concluded "the officers' testimony did not invite a purely irrational response or otherwise render defendant's trial fundamentally unfair" (*id.* at

p. 576). Accordingly, it found "the trial court did not abuse its discretion in permitting the officers to testify." (*Ibid.*)

Similarly, in *People v. Ervine* (2009) 47 Cal.4th 745, this Court held that victim impact testimony from the Lassen County Sheriff regarding the reaction of a slain deputy's coworkers was not unduly prejudicial (*id.* at p. 793), where the sheriff

> testified that all of the members of his "very close" and cohesive department, along with their families, were struck with grief at the loss of Deputy Griffith, and that two counselors were brought in to provide them some comfort. The peace officers struggled with the "abrupt" realization of their own vulnerability, which caused many to have doubts about their abilities. Deputy Aldridge, in particular, quit because he wanted "to be able to see his kids grow up." The remaining officers have increased their requests for backup when responding to domestic violence calls. The dispatchers, too, were upset, and the one who sent Deputy Griffith to respond to the call still "has difficulty dealing with that reality." Sheriff Jarrell also recalled his own feelings of anger, helplessness, and desire for retribution.

(*Id.* at p. 792.)

This Court explained that victim impact witnesses are not "limited to expressions of grief," but are permitted to testify regarding "'the specific harm caused by the defendant.'" (*People v. Ervine*, *supra*, 47 Cal.4th at p. 793.) It concluded the sheriff's testimony "was neither inflammatory nor emotionally charged." (*Ibid.*)

The testimony challenged by Ramirez bears striking resemblance to the testimony at issue in *Brady* and *Ervine*. Given the testimony upheld in those two cases, Barr's testimony that he prayed over Niemi's body, Marez's emotional breakdown on the stand, and Trujillo's story of speeding to the scene of a robbery—all identified by Ramirez as particularly inflammatory aspects of their testimony (AOB 123-124)—cannot be deemed unduly prejudicial in Ramirez's case. Furthermore, as to the

identified portions of Marez's and Trujillo's testimony, Ramirez "did not object . . . consequently forfeiting the issue on appeal." (*People v. Brady*, *supra*, 50 Cal.4th at p. 576.)

While the testimony of Barr, Marez, and Trujillo "would naturally have tended to arouse emotion and evoke strong feelings of sympathy . . . , it was not so inflammatory as to have diverted the jury's attention from its proper role or invited an irrational response." (*People v. Mitcham* (1992) 1 Cal.4th 1027, 1063.) "As the officers' testimony did not invite a purely irrational response or otherwise render the trial fundamentally unfair [citation], the trial court did not abuse its discretion in permitting the officers to testify." (*People v. Brady*, *supra*, 50 Cal.4th at p. 576.)

Ramirez also argues that the coworkers' testimony was "unnecessary" in light of the testimony from Niemi's family members (AOB 122), in essence contending that it was cumulative. However, defense counsel did not specifically argue that the testimony was cumulative, and the claim is thus forfeited. (Evid. Code, § 353, subd. (a); *People v. Demetrulias* (2006) 39 Cal.4th 1, 22.) It is also meritless. Victim impact evidence is not limited to what can be provided by a single witness. (See *People v. McKinnon*, *supra*, 52 Cal.4th at p. 690; *People v. Blacksher* (2011) 52 Cal.4th 769, 841.) "Victim impact evidence is commonly provided by several family members, colleagues, or friends." (*People v. Scott* (2011) 52 Cal.4th 452, 495 [finding no merit to defendant's claim that victim impact testimony should have been excluded as "cumulative" and "repetitive"].) Moreover, any repetition "comprised a comparatively small amount of the officers' total testimony and is not unusual when multiple witnesses testify about the same event." (*People v. Brady*, *supra*, 50 Cal.4th at p. 576.) Indeed, in *Brady*, the trial court allowed the victim's two fellow officers and police chief to testify in addition to four of the victim's sisters, his

fiancée, and the treating physician from the hospital. (*Id.* at pp. 573.) Their testimony spanned several hours over two days. (*Ibid.*)

Finally, the record here shows the trial court exercised its discretion to exclude some of the victim impact evidence proffered by the People. The court excluded photographs depicting Gabbie hugging her deceased father's casket, Niemi holding Gabbie as a baby, and Niemi, Jim, and their grandmother together at Jim's wedding. (13 RT 2680-2682.) The court also excluded a second story written by Niemi, entitled "Cold Phrase," about two children dying in a house fire. (4 CT 964.) Thus, the court properly "curtailed" the victim impact evidence in accordance with its duty. (*People v. Edwards*, *supra*, 54 Cal.3d at p. 836; *People v. Harris*, *supra*, 37 Cal.4th at p. 351.)

In sum, "[t]he jury here heard traditional victim impact evidence: family members and friends extolled [Niemi's] virtues and demonstrated they missed him." (See *People v. Brady*, *supra*, 50 Cal.4th at p. 577.) In allowing such evidence, the trial court did not abuse its discretion under Evidence Code section 352.

3. The trial court did not abuse its discretion in admitting the short story authored by Niemi

Ramirez claims the untitled short story written by Niemi was also unduly prejudicial and likewise should have been excluded. (AOB 124.) He concedes that "the story reflected Niemi's sensitivity" (AOB 124), but argues it was "highly inflammatory" and served only "to evoke a gut-wrenching response from the jury" (AOB 125). On the contrary, the story served to humanize Niemi by demonstrating his uniqueness as an individual. This is precisely what "victim impact evidence is designed to do." (*People v. Kelly* (2007) 42 Cal.4th 763, 797.)

As the United States Supreme Court recognized in *Payne v. Tennessee*, *supra*, 501 U.S. 808, the People should be permitted to remind the jury that

"'the victim is an individual whose death represents a unique loss to society and in particular to his family.' [Citation.]" (See *id.* at p. 825; see also *id.* at p. 823 [victim impact evidence is "designed to show . . . each victim's 'uniqueness as an individual human being . . .'"], italics omitted.) Evidence pertaining to the victim's character "conveys the insight into the victim that the high court has concluded is appropriate." (*People v. Dykes* (2009) 46 Cal.4th 731, 783.)

It is not inappropriate for a court to admit victim impact evidence in some form other than testimony. Indeed, in *People v. Dykes*, *supra*, 46 Cal.4th 731, this Court upheld the trial court's admission of an eight-minute videotape depicting the victim and his family "preparing for and enjoying a trip to Disneyland." (*Id.* at pp. 783, 785.) It found the tape "was relevant to humanize the victim and provide some sense of the loss suffered by his family and society." (*Id.* at p. 785.) Similarly, in *People v. Kelly*, *supra*, 42 Cal.4th 763, this Court found no prejudicial error in the admission of a 20-minute videotape consisting of a montage of still photographs and video clips of the victim's life, from her infancy until shortly before her murder. (*Id.* at p. 796.) A portion of the videotape showed the victim singing a solo in front of her classmates. (*Id.*at pp. 796, 798.) With respect to the singing performance, this Court concluded it was "relevant to the purpose of demonstrating what the [victim] was like." (*Id.* at p. 798.)

This Court has also approved of victim impact evidence in the form of material produced by the victim. In *People v. Verdugo* (2010) 50 Cal.4th 263, this Court upheld the admission of a 40-minute cassette tape of Mexican songs recorded by one of the two murder victims. (*Id.* at pp. 297, 299.) The victim made the cassette tape for her father, with whom she was "very close." (*Id.* at p. 297.) Some of the songs were played for the jury. (*Ibid.*) All of the songs were about "'losing someone, leaving someone, [and] having to say goodbye.'" (*Ibid.*)

This Court found that the tape showed the impact of the victim's death on her father and the relationship lost as a result of her murder. (*People v. Verdugo*, *supra*, 50 Cal.4th at p. 299.) It recognized that the "tape was moving because it demonstrated the close bond between [the victim] and her father, because it included songs about the loss of a loved one, and because [the victim] presented it to her father shortly before her death." (*Id.* at pp. 298-299.) It explained that "[v]ictim impact evidence is emotionally moving by its very nature, but that fact alone does not make it improper." (*Id.* at p. 299). It also reasoned that "[p]laying a 'few' songs from the tape simply illustrated the gift [the victim's mother] had described in her testimony" and suggested that the trial court would have acted properly in admitting "a collage of photographs of Mexico," had the victim made that for her father instead of the cassette tape. (*Ibid.*)

Similarly here, Niemi's untitled short story illustrated Dionne's testimony that Niemi wrote about particularly difficult days on the job. (13 RT 2769-2770.) Like the videos and the cassette tape in the cases above, the story served to "humanize [Niemi] and provide some sense of the loss suffered by his family and society." (*People v. Dykes*, *supra*, 46 Cal.4th at p. 785.) At the end of the story, after recounting the discovery of the dead infant, Niemi wrote:

> We walk into the mess and the mire, we do our job as best we know, and then we walk out again. But we never leave without taking a little bit with us; it's called learning. We take a little piece of every situation with us that help us deal with the next time we are called on to walk back into the mess and the mire. [¶] From this one I will take a little bit to carry with me so that when I see my little girl I make sure to give her an extra hug, or let her stay up just a minute longer. I will use it as a reminder to make sure and wave back when the children wave at me. I will use it to appreciate the life I have. [¶] I only fear that this time I may have left a little bit of me back there, in that mess and that mire.

(People's Exh. 76.)

Niemi's story showed he was a kind, sensitive, and thoughtful person. It showed his love for his daughter, Gabbie. And—as Ramirez observes (AOB 126)—it showed his talent as a writer. Although it was "emotionally moving," it was not improper. (See *People v. Verdugo*, *supra*, 50 Cal.4th at p. 299.) A reader knew Niemi better after reading the story, but the story "expressed no outrage over [his] death." (See *People v. Kelly*, *supra*, 42 Cal.4th at p. 797.) The People were properly allowed to offer this "'quick glimpse'" into the life Ramirez chose to extinguish, and the loss to the community resulting from his murder. (See *Payne v. Tennessee*, *supra*, 501 U.S. at p. 822.)

Ramirez argues that the jury's only outlet for its revulsion at the subject matter of the short story was its decision regarding penalty, that its ignorance of whether anyone had been prosecuted for the incident "exacerbated" the story's prejudicial impact, and that it "may have" used the story unfairly to aggravate Ramirez's moral responsibility. (AOB 127-128.) These speculative arguments are unpersuasive. Any outrage the jury may have felt toward the person responsible for the infant's death would not have been misdirected toward Ramirez, especially where the point of the story's introduction was made clear by the prosecutor's argument. The prosecutor directed the jury's attention to the short story in the context of arguing that Niemi "was a unique individual." (14 RT 2890.) The prosecutor did not review the story's description of finding the dead infant, nor did he connect the story to Ramirez. Instead, he recited the last part of the story, quoted above, and urged the jury to read the full story "to learn more about what a unique individual" Niemi was "from Dan Niemi himself." (14 RT 2890-2891.)

The short story was certainly not as dramatic as the 20-minute videotape at issue in *People v. Kelly*, *supra*, 42 Cal.4th 763, nor was it as

dramatic as the victim impact evidence this Court has upheld in numerous other cases. (See, e.g., *People v. Booker*, *supra*, 51 Cal.4th at p. 193 [testimony by victim's mother about her suicide attempt and hospitalizations "was relevant victim impact evidence"]; *People v. Hawthorne*, *supra*, 46 Cal.4th at pp. 101-103 [no abuse of discretion in admitting audiotape of 911 call made by victim's daughter where daughter's screams were audible on tape]; *People v. Jurado* (2006) 38 Cal.4th 72, 131 [evidence that defendant terminated 17-week-old fetus that victim was carrying was admissible victim impact evidence].)

Ramirez contends that, while the short story demonstrated Niemi's sensitivity, that particular character trait was "already established by other evidence," as was the overall impact of his death. Thus, he asserts, the story "was cumulative of other undisputed evidence." (AOB 124.) As stated, victim impact evidence is not limited to what can be provided by a single witness. (*People v. McKinnon*, *supra*, 52 Cal.4th at p. 690; *People v. Blacksher*, *supra*, 52 Cal.4th at p. 841.) In *People v. Huggins*, *supra*, 38 Cal.4th 175, this Court found no error where various witnesses painted a portrait of the victim as "compassionate, loyal, and extroverted, and made clear that they mourned her loss." (*Id.* at pp. 238-239.) Here, Niemi's short story "supplemented, but did not duplicate" the other witnesses' testimony. (See *People v. Kelly*, *supra*, 42 Cal.4th at p. 797.) Furthermore, the trial court placed reasonable limitations on the People's use of the story, prohibiting anyone with an emotional connection to Niemi from reading the story into evidence. (13 RT 2678.) In doing so, "[t]he trial court exercised appropriate caution to avoid introducing irrelevant drama and undue emotion into the penalty determination." (*People v. Dykes*, *supra*, 46 Cal.4th at p. 784.)

The short story gave insight into Niemi's character and showed his uniqueness as a person. It concerned who he was in life, thereby

demonstrating the impact of his death. The trial court did not abuse its discretion in admitting it.

4. Reversal is not required

Finally, any error in admitting the testimony of Niemi's colleagues or his short story was harmless.

When assessing the effect of state law error at the penalty phase of a capital trial, this Court applies the "reasonable-possibility" test. (*People v. Brown* (1988) 46 Cal.3d 432, 448; *People v. Clark* (2011) 52 Cal.4th 856, 941, fn. 24 [errors occurring in penalty phase of capital trial are assessed by the higher "reasonable possibility standard"].) Under that standard, this Court "will affirm the judgment unless [it] conclude[s] there is a reasonable (i.e., realistic) possibility that the jury would have rendered a different verdict had the error or errors not occurred." (*Brown*, *supra*, at p. 448.)

No such possibility exists here. The circumstances of Niemi's murder under factor (a), even excluding the victim impact evidence at issue, strongly supported the jury's verdict of death. Ramirez murdered Niemi for the selfish, trivial reason of avoiding arrest for his possession of drugs and guns. The manner of killing showed a callous determination to ensure Niemi's death. Ramirez shot Niemi in the head when the officer's back was to him. Then, as Niemi lay helpless on the ground, Ramirez shot him five more times, emptying his weapon. Immediately afterward, he rolled Niemi's body over, collected what he thought was his ID, and fled the scene.

Ramirez's selfish behavior continued after the murder. He took multiple steps to eliminate the evidence against him, disposing of the murder weapon and other evidence into the marsh, collecting potentially incriminating items from his house, and, disturbingly, trying to find someone who would "take Louie and Vicente out"—i.e., murder his friends. (12 RT 2351-2352.) His choices on the evening of July 25, 2005, had a

profoundly negative impact. Three members of Niemi's family—Jim, Mildred, and Dionne—testified about the devastating effect of Niemi's murder on their lives. Niemi's family was "very close." (13 RT 2744.) Following the murder, Jim felt "alone" because he did not "have a brother anymore." (13 RT 2748.) Mildred testified that she and Rudie felt "like a part of our heart is gone." (13 RT 2760.) Rudie, for his part, could not even speak of his son's death. (13 RT 2748-2749.) For Dionne, Niemi's death was "[s]till surreal." (13 RT 2778.) Her son Josh, who "absolutely idolized" Niemi, was "not dealing with [his death] well at all." (13 RT 2777-2778.) Their daughter Gabbie had improved by the time of trial, but in the initial aftermath of her father's death, "became very withdrawn and very difficult." (13 RT 2775, 2777.) The family's testimony demonstrated the expansive consequences of Ramirez's decision to murder Niemi.

Thus, even absent the contested victim impact evidence, the People's case in aggravation was strong. The defense evidence in mitigation—Ramirez's early childhood years in El Salvador, unstable family life, and early substance abuse—was on balance not substantially compelling.

Ramirez argues to the contrary. He contends the prosecutor's heavy reliance on the challenged victim impact testimony, particularly Niemi's short story, and the trial court's failure instruct on the use of that specific evidence, showed a reasonable possibility of a different outcome. (AOB 135-136.) The prosecutor, however, focused much of his argument on the circumstances of the crime shown by the guilt phase evidence. (See, e.g., 14 RT 2888-2889, 2894-2895.) Ramirez also overstates the prosecutor's reliance on Niemi's short story. (AOB 135.) The prosecutor did not read the full story to the jury, but briefly referenced it in arguing that Niemi was a unique individual. (14 RT 2890-2891.) As for the court's failure to provide "some cautionary or guiding instruction" regarding the coworker's testimony and the short story (AOB 136), Ramirez's trial counsel failed to

request such an instruction below, and the standard instructions, in any event, adequately conveyed the proper consideration and use of the victim impact evidence. (*People v. Tate* (2010) 49 Cal.4th 635, 708.)

Finally, Ramirez points to the jury's questions during penalty phase deliberations and the length of their deliberations as evidence that the jury viewed the question of penalty to be a close one. (AOB 136-137.) However, this Court has rejected the assumption that lengthy penalty deliberations indicate a jury had difficulty reaching a decision. (See, e.g., *People v. Avena* (1996) 13 Cal.4th 394, 436.) Indeed, "the jury may simply have sifted the evidence with special care." (*People v. Brown* (1985) 40 Cal.3d 512, 535, revd. on other grounds sub nom. *California v. Brown* (1987) 479 U.S. 538.) Furthermore, both the jury's questions and the length of deliberations demonstrate that the jury was not imposing death based on emotion, but as a "reasoned moral response." (See *People v. Crew* (2003) 31 Cal.4th 822, 855-856.) In *People v. Jurado*, *supra*, 38 Cal.4th 72, where the jury deliberated on penalty for five days before reaching a verdict, this Court found that the "length of their deliberations rather strongly implies that, rather than rushing to judgment under the influence of unbridled passion, the jurors arrived at their death verdict only after a full and careful review of the relevant evidence and of the legitimate arguments for and against the death penalty." (*Id.* at p. 134.)

Under the circumstances, any error in admitting the challenged victim impact evidence was harmless, and reversal is not required.

C. The Victim Impact Evidence Did Not Violate the Federal Constitution

1. Applicable legal principles

Evidence showing the direct impact of the defendant's acts on the victims' friends and family is not barred by the Eighth or Fourteenth Amendments to the federal Constitution. (*Payne v. Tennessee*, *supra*, 501

U.S. at pp. 825-827.) Consistent with state law principles (*People v. Dykes*, *supra*, 46 Cal.4th at p. 781), "[t]he federal Constitution bars victim impact evidence only if it is so unduly prejudicial as to render the trial fundamentally unfair" (*People v. Brady*, *supra*, 50 Cal.4th at p. 574; *Payne*, *supra*, at p. 825).

2. The testimony of Barr, Marez, and Trujillo was proper

Ramirez argues that, under *Payne v. Tennessee*, *supra*, 501 U.S. 808, only family members can give victim impact testimony, and therefore testimony from Niemi's coworkers should have been excluded. (AOB 138.) As he acknowledges (AOB 138), this Court has repeatedly rejected such claims. (See, e.g., *People v. Brady*, *supra*, 50 Cal.4th at p. 578 ["Victim impact evidence . . . is not limited to family members, but may include the effects on the victim's friends, coworkers, and the community—including when the victim's coworkers are law enforcement personnel"]; *People v. Ervine*, *supra*, 47 Cal.4th at p. 792 ["As we have previously observed, victim impact evidence is not limited to the effect of the victim's death on family members [citation], but may include its effects on the victim's friends, coworkers, and the community"]; *People v. Pollock*, *supra*, 32 Cal.4th at p. 1183 [victim impact testimony "is not limited to the effect of the victims' death on the members of their immediate family; it extends also to the suffering and loss inflicted on close personal friends"].) Ramirez provides no persuasive reason for reconsideration of those decisions.

3. The testimony of Niemi's coworkers and the short story he wrote did not render the trial fundamentally unfair, nor did that evidence render the death sentence arbitrary and unreliable

Ramirez finally contends that admission of the challenged victim impact evidence rendered his trial fundamentally unfair, in violation of his rights to due process and to a reliable penalty determination (U.S. Const., 8th & 14th Amends.). (AOB 142-145.)

For the same reasons the challenged evidence did not violate state law, it did not infringe on Ramirez's constitutional rights. (*People v. Hawthorne*, *supra*, 46 Cal.4th at p. 103 ["Having concluded there was no error and no prejudice, we also reject the claims that admission of the 911 tape deprived defendant of his federal constitutional rights to due process, a fair trial, and a reliable and nonarbitrary penalty determination"].) Here, the complained-of evidence did not invite "a purely irrational response from the jury," nor was it "'so unduly prejudicial' as to render the trial 'fundamentally unfair.'" (*People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1056-1057.) Relevant, but emotional, victim impact testimony does not surpass constitutional limits. (See *People v. Jurado*, *supra*, 38 Cal.4th at pp. 133-134.) Furthermore, because, as shown above, there was no reasonable possibility that admission of the challenged evidence affected the penalty verdict, any error was also harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24; *People v. Abilez* (2007) 41 Cal.4th 472, 526 [state "reasonably possibility" standard for assessing penalty-phase error is the same in substance and effect as the beyond-a-reasonable-doubt standard of *Chapman*].)

VI. THE TRIAL COURT PROPERLY DENIED RAMIREZ'S REQUEST FOR AN INSTRUCTION ON LINGERING DOUBT

Ramirez argues the trial court erroneously denied his request for an instruction on lingering doubt in violation of "longstanding state law" and his constitutional rights. (AOB 146.) This Court has repeatedly rejected such claims, and Ramirez offers no persuasive reason for this Court to rule differently here.

A. Relevant Proceedings

On May 22, 2007, the defense filed a proposed special instruction on lingering doubt that stated in pertinent part: "'In determining mitigating factors, the jurors may also consider any lingering doubt they may have concerning their verdict in the guilt phase.'"[9] (4 CT 969.) In urging the court to give the requested instruction, the defense cited case law holding that jurors are entitled to consider any lingering doubts they may have regarding a defendant's guilt. (*People v. Zapien* (1993) 4 Cal.4th 929, 989.) However, the defense also cited authority holding that a defendant has no federal or state constitutional right to an instruction on lingering doubt. (4 CT 969-970.) The defense included statements suggesting that the prosecutor had asked some of the jurors during voir dire about "their willingness not to 'worry about lingering doubt' of defendant's guilt" in the penalty phase, but also clarifying that the defense was not arguing prosecutorial misconduct and acknowledging its failure to object to the prosecutor's voir dire questions. (4 CT 969.)

The People filed a response the same day, arguing that the court may, but is not required, to give an instruction on lingering doubt. (4 CT 965-

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[9] The proposed instruction also contained an incomplete sentence that read: "to consider the perceived financial cost of either penalty." (4 CT 969.) The language appears to have been included inadvertently.

967.) The People summarized pertinent case law explaining that an instruction on Penal Code section 190.3, factor (k),[10] adequately conveys the concept of lingering doubt. (4 CT 966-967.) The People added that "unnecessary instructions obscure clarity," and on that basis, urged the court not to give the defense's special instruction. (4 CT 967.)

The court and counsel discussed the penalty phase jury instructions that day. (13 RT 2684-2685.) The court asked defense counsel if there was anything she wished to add to the defense request for a special instruction on lingering doubt. She declined to add any argument. (13 RT 2686.)

The trial court refused the defense instruction on lingering doubt, noting "abundant case law" holding such an instruction was not required. (13 RT 2686.) The court then added: "Actually, I think it's inappropriate to—for the court to invite the jury to question the verdict that they've reached. That's not to say that counsel can't argue it, but I'm just not going to give it as an instruction." (13 RT 2686.)

B. The Trial Court Properly Refused the Defense Instruction on Lingering Doubt

1. The court's ruling did not violate state law

This Court has "repeatedly held that instruction on lingering doubt is not required by state law, and that the standard instructions on capital sentencing factors, together with counsel's closing argument, are sufficient to convey the lingering doubt concept to the jury." (*People v. Hartsch* (2010) 49 Cal.4th 472, 513; see also *People v. Lewis* (2009) 46 Cal.4th 1255, 1314 ["Although a defendant may assert his or her possible innocence in mitigation, and the jury may consider lingering doubt in

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[10] Section 190.3, factor (k), states: "In determining the penalty, the trier of fact shall take into account any of the following factors if relevant: . . . (k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime."

determining the appropriate penalty, there is no requirement that the court specifically instruct the jury to consider lingering doubt"]; *People v. Robinson* (2005) 37 Cal.4th 592, 653-654; *People v. Demetrulias*, *supra*, 39 Cal.4th at p. 42; *People v. Hines* (1997) 15 Cal.4th 997, 1068.) Ramirez acknowledges this (AOB 150), but offers no persuasive reason for reexamining this Court's previous decisions. (*People v. Watson* (2008) 43 Cal.4th 652, 697; *People v. Zamudio* (2008) 43 Cal.4th 327, 370.)

In *People v. Thomas* (2012) 53 Cal.4th 771, this Court held that an instruction on lingering doubt is not required where the jury is properly instructed regarding the aggravating and mitigating factors described in section 190.3, factors (a) (circumstances of the crime) and (k) (other circumstances that extenuate the gravity of the crime). (*Id.* at p. 826.) Here, the trial court instructed the jury pursuant to CALCRIM No. 763 that it "must consider, weigh, and be guided by specific factors," including the "circumstances of the crime"—factor (a)—and "[a]ny other circumstance, whether related to these charges or not, that lessens the gravity of the crime even though the circumstance is not a legal excuse or justification"—factor (k). (4 CT 1050-1053.) The trial court also instructed the jury that it "must disregard all of the instructions" from the guilt phase "and follow only [the] new instructions [given] in this phase of the trial." (4 CT 1043.) Thus, "the instructions given adequately conveyed the message that the jury could consider lingering doubts about guilt. Nothing more was required." (*People v. Price* (1991) 1 Cal.4th 324, 489.)

Furthermore, during closing argument, defense counsel argued the concept of lingering doubt to the jury:

> Ladies and Gentlemen, you spent hours, you came up with your verdicts in the first part of the trial and I really am not asking you to go back and redo that, but if any of you still have perhaps not a reasonable doubt but some residual, minor, lingering doubt about Mr. Ramirez's state of intoxication, was

> he as drunk as he said. If I would have dranken (sic) that much of that Hennessy bottle—well, never mind. I couldn't have, I'm short, I'm little. Medically, physically, I would have been passed out. But if you have still some question, despite your verdict that's been given Mr. Ramirez, I'm going to ask you, that's a mitigating factor for you to look at in order to support a verdict of life in prison.

(14 RT 2914.)

Counsel's argument, together with the trial court's instructions on capital sentencing factors, sufficiently conveyed the concept of lingering doubt to the jury. (*People v. Hartsch*, *supra*, 49 Cal.4th at p. 513.)

Ramirez contends that the "mandatory" language in Penal Code sections 1093, subdivision (f), and 1127, and this Court's decision in *People v. Cox* (1991) 53 Cal.3d 618, disapproved of on another ground by *People v. Doolin* (2009) 45 Cal.4th 390, at page 421 and footnote 22, demonstrate that the trial court had a statutory duty to provide the requested instruction on lingering doubt. (AOB 150-151.) In a footnote, *Cox* cited the same Penal Code provisions in concluding that, "[a]s a matter of statutory mandate, the court must charge the jury 'on any points of law pertinent to the issue, if requested,'" and suggesting a trial court "may be required to give a properly formulated lingering doubt instruction when warranted by the evidence." (*Id.* at p. 678, fn. 20.) However, in *People v. Hartsch*, *supra*, 49 Cal.4th 472, this Court rejected that contention, stating: "The *Cox* dictum that a lingering doubt instruction *may* be required as a matter of statutory law, which itself was based on dictum from *Thompson*, has been put to rest." (*Id.* at pp. 512-513; see also *People v. Thomas*, *supra*, 53 Cal.4th at p. 826 [since its decision in *Cox*, this Court has concluded "that such an instruction is unnecessary when the jury is properly instructed . . . regarding the aggravating and mitigating factors described in" § 190.3, factors (a) and (k)].) Ramirez acknowledges this

Court's decision *Hartsch* (AOB 151), and presents no persuasive reason for its reconsideration.

2. The court's ruling did not violate Ramirez's constitutional rights

Ramirez also argues the instruction on lingering doubt was constitutionally compelled. (AOB 154.) The claim lacks merit. "The United States Supreme Court has held that there is no federal constitutional right to a 'residual doubt' instruction at the sentencing phase of a capital case." (*People v. Hartsch*, *supra*, 49 Cal.4th at p. 512, citing *Franklin v. Lynaugh* (1988) 487 U.S. 164, 172-174; *People v. Harris*, *supra*, 37 Cal.4th at p. 359.)

Invoking *Hicks v. Oklahoma* (1980) 447 U.S. 343, Ramirez argues that the alleged instructional error violated due process because he had a right to have the jury exercise its discretion based on statutory and judicially-recognized mitigating factors, and the failure to instruct on lingering doubt "unfairly cabined" the jury's sentencing discretion. (AOB 155.) In *Hicks*, the high court recognized that a state law guaranteeing a criminal defendant procedural rights at sentencing, even if not constitutionally required, may give rise to a liberty interest protected against arbitrary deprivation by the due process clause. (*Hicks*, *supra*, 447 U.S. at p. 346.) Because Ramirez is not entitled under state law to an instruction on lingering doubt at the penalty phase, he cannot claim a protected liberty interest under the Fourteenth Amendment. (See *People v. Frye* (1998) 18 Cal.4th 894, 1026, [discussing *Hicks* and rejecting claimed instructional error at penalty phase], disapproved of on another ground by *People v. Doolin*, *supra*, 45 Cal.4th at p. 421 & fn. 22.) In any event, "every state law error does not automatically result in a violation of the federal Constitution under [*Hicks*]." (*People v. Bryant* (2014) 60 Cal.4th 335, 413, fn. 34.)

Citing *Eddings v. Oklahoma* (1982) 455 U.S. 104, Ramirez also contends that, without an instruction on lingering doubt, the jury was not allowed "to give meaningful consideration and full effect to his evidence, theory, and argument explaining and applying that factor." (AOB 157.) However, in *People v. Lewis*, *supra*, 46 Cal.4th 1255, this Court held that CALJIC No. 8.85, which contains language similar to CALCRIM No. 763,[11] was sufficient to comply with the holding of *Eddings* requiring that the jury in a capital case be allowed to consider any relevant mitigating factor. (*Id.* at p. 1315.) Ramirez was not denied the right to present a defense of lingering doubt (AOB 157), where trial court specifically stated it would allow the defense to argue the concept (13 RT 2686), and counsel did so (14 RT 2914).

C. Any Error Is Harmless

Under either the "reasonable possibility" standard for assessing state law error in the penalty phase (*People v. Brown*, *supra*, 46 Cal.4th at p. 448) or the "beyond a reasonable doubt" standard for assessing error of federal constitutional dimension (*Chapman v. California*, *supra*, 386 U.S. at p. 24), the alleged instructional error was harmless.

As stated, the trial court instructed the jury that it "must consider," if relevant, the "circumstances of the crime" and "[a]ny other circumstance, whether related to these charges or not, that lessens the gravity of the crime even though the circumstance is not a legal excuse or justification." (4 CT 1050-1053.) "These instructions on the scope of mitigating circumstances were sufficient to encompass the concept of residual doubt about defendant's guilt." (*People v. Price*, *supra*, 1 Cal.4th at p. 488.)

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[11] "Language similar to former CALJIC No. 8.85 now appears in CALCRIM No. 763." (*People v. Burney* (2009) 47 Cal.4th 203, 260, fn. 16.)

Furthermore, defense counsel argued the concept of lingering doubt to the jury. "Although counsel's arguments are not a substitute for a proper jury instruction," they can "support[] [the] conclusion that the error in refusing the instruction was harmless in this case." (See *People v. Fudge*, *supra*, 7 Cal.4th at p. 1111.) The prosecutor, for his part, "never suggested it was not a relevant consideration if the jury found it supported by the evidence." (*People v. Cox*, *supra*, 53 Cal.3d at p. 676.)

Furthermore, the People's case in aggravation was strong. Ramirez murdered Niemi for a selfish, trivial reason, and did so in a callous manner designed to ensure his death. The People also presented powerful victim impact testimony from Niemi's family and friends. By all accounts, Niemi was a wonderful son, husband, father, and police officer. His murder had a devastating impact on the lives of those who knew him. The defense case in mitigation, on balance, was not compelling.

There is no reasonable possibility that, had the court instructed the jury with the proposed instruction on lingering doubt, it would have reached a different verdict. (*People v. Brown*, *supra*, 46 Cal.4th at p. 448.) Indeed, failure to give the instruction was harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24; *People v. Abilez*, *supra*, 41 Cal.4th at p. 526 [reasonably possibility standard akin to *Chapman* reasonable-doubt standard].)

VII. THE TRIAL COURT PROPERLY RESPONDED TO THE JURY'S QUESTIONS DURING PENALTY PHASE DELIBERATIONS

Ramirez contends that the trial court erred in responding to four questions posed by the jury during penalty phase deliberations. He argues the court's responses were misleading and undermined confidence in the jury's death verdict, violating both state law and the federal Constitution. (AOB 163-164.) As to at least one of the court's responses, Ramirez's

claim is forfeited due to his failure to object below. As to all of them, his claims are meritless.

A. Applicable Legal Principles

Penal Code section 1138 provides that when, after they have retired for deliberation, the jurors "desire to be informed on any point of law arising in the case, . . . the information required must be given in the presence of, or after notice to, the prosecuting attorney, and the defendant or his counsel, or after they have been called." "This provision imposes on the court the 'primary duty to help the jury understand the legal principles it is asked to apply.'" (*People v. Cleveland* (2004) 32 Cal.4th 704, 755, citing *People v. Beardslee* (1991) 53 Cal.3d 68, 97.) "This does not mean the court must always elaborate on the standard instructions. Where the original instructions are themselves full and complete, the court has discretion under section 1138 to determine what additional explanations are sufficient to satisfy the jury's request for information." (*Beardslee*, *supra*, at p. 97.) "An appellate court applies the abuse of discretion standard of review to any decision by a trial court to instruct, or not to instruct, in its exercise of its supervision over a deliberating jury." (*People v. Waidla* (2000) 22 Cal.4th 690, 745-746.)

If the trial court's instruction to the jury "is ambiguous, we inquire whether there is a reasonable likelihood that the jury misunderstood and misapplied the instruction." (*People v. Smithey*, *supra*, 20 Cal.4th at p. 963, citing *Estelle v. McGuire*, *supra*, 502 U.S. at p. 72 & fn. 4.) "[T]he correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction." (*People v. Burgener*, *supra*, 41 Cal.3d at p. 538; *People v. Harrison*, *supra*, 35 Cal.4th at p. 252.) "'Instructions should be interpreted, if possible, so as to support the judgment rather than defeat it if

they are reasonably susceptible to such interpretation.' [Citation.]" (*People v. Ramos*, *supra*, 163 Cal.App.4th at p. 1088.)

B. Request to Define "Circumstances of the Crime"

1. Relevant proceedings

On the afternoon of June 5, 2007, the jury requested "a definition of 'an element of a crime' as included in the definition of an 'aggravating circumstance'" and "a definition of 'circumstances of the crime' as included in Factor A." (4 CT 1012.)

The trial court responded to the jury's question as follows:

> The "elements of a crime" are those things that must be proven in order to establish that a crime was committed. In this case, the 'elements' of first-degree murder are (1) the unlawful killing of a human being (2) with malice aforethought, which is (3) willful, (4) deliberate, and (5) premeditated.
>
> "Circumstances of the crime," means the manner in which the crime was committed and the events immediately surrounding its commission, as well as those leading up to and following the commission of the crime. This includes the harmful impact of the crime on the victim's family and friends.

(4 CT 1012.)

The court excluded language, requested by the prosecutor, stating that the impact on the victim's family and friends included "their pain and suffering." (14 RT 2940.) In discussing its response to the jury's question, the court told defense counsel, "I want to give you every opportunity to make your position on this, as a matter of record." (14 RT 2938-2939.) Defense counsel objected to the second paragraph of the court's response—the only portion of the response challenged by Ramirez here (AOB 165)—noting that the court had already instructed the jury that words and phrases not specifically defined in the instructions "are to be applied using their ordinary everyday meaning." (14 RT 2941.) She also argued that the

court's answer equated "circumstances of the crime" with "aggravating circumstances." (14 RT 2945).

The trial court observed that this Court in *People v. Harris*, *supra*, 37 Cal.4th 310, held it was appropriate to instruct the jury that victim impact evidence was included within the meaning of factor (a). (14 RT 2940.) The court added that CALCRIM No. 763, defining aggravating and mitigating circumstances and listing the factors to consider, was potentially confusing because it defined aggravating circumstances to include the "harmful impact" of the crime, yet told the jury it "may not consider as an aggravating factor anything other than the factors contained in [the] list," which did not expressly include "harmful impact." (14 RT 2941-2942; 4 CT 1050-1053.) The court believed the jury's question pertained to that specific issue, and that the response it had given fulfilled the court's "obligation to clear that up for them." (14 RT 2942.)

2. The trial court's response was proper

Under *People v. Edwards*, *supra*, 54 Cal.3d 787, "circumstances of the crime" under Penal Code section 190.3, factor (a), includes evidence of the specific harm caused by the defendant, such as the impact on the victim's friends and family. (*Id.* at p. 835.) The trial court's response, therefore, was "a generally correct and pertinent statement of the law." (*People v. Dykes*, *supra*, 46 Cal.4th at p. 802.)

Ramirez argues the trial court's response singled out a specific aggravating circumstance and "left the jurors with the message that the circumstances of the crime are aggravating, although the circumstances of the crime can be mitigating as well." (AOB 166.) He contends that the instruction, by allegedly "highlight[ing]" the victim impact evidence, "improperly supported" the prosecution. (AOB 167.) The arguments are unpersuasive.

As the trial court recognized (14 RT 2940), this Court has already approved an instruction very similar to the one at issue here in *People v. Harris*, *supra*, 37 Cal.4th 310. In *Harris*, the prosecutor requested, and the trial court gave, the following instruction: "'[if] supported by the evidence, it is proper to consider the impact of the murder on the victim's family (including their pain and suffering) when determining the appropriate penalty. You are further instructed that such evidence is to be included within the meaning of factor (a), the circumstances of the offenses, in the preceding instruction (CALJIC No. 8.85)[12] and is not a separate factor in aggravation.'" (*Id.* at p. 358.) Similar to Ramirez, the defendant argued that the court instructed the jury on victim impact evidence "in an uneven and unfair manner, interfering with the jury's discretion to give whatever weight it chose to any factor in mitigation or aggravation." (*Ibid.*) This Court disagreed, finding that the instruction "properly informed the jury of the law regarding victim-impact evidence" and that the trial court's instructions, as a whole, did not "improperly suggest what weight the jurors should give to any mitigating or aggravating factor." (*Id.* at pp. 358-359.)

This Court reached a similar conclusion in *People v. Souza* (2012) 54 Cal.4th 90. In *Souza*, the trial court also gave the prosecutor's proposed instruction pinpointing victim impact evidence as a circumstance of the crime within the meaning of factor (a). (*Id.* at p. 138.) The court incorporated the instruction into a modified version of CALJIC No. 8.85, which read: "(a) The circumstances of the crimes of which the defendant was convicted in the present proceeding and the existence of any special circumstance found to be true. *As part of the circumstances of the offense*

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[12] "Language similar to former CALJIC No. 8.85 now appears in CALCRIM No. 763." (*People v. Burney*, *supra*, 47 Cal.4th at p. 260, fn. 16.)

under factor A, you may also consider the testimony offered in this penalty phase portion of the trial concerning the impact of the crimes on the family and friends of the victims." (*Ibid.*, original italics.) The defendant argued the instruction was "incomplete and improper" because it "highlighted certain aspects of the evidence without explaining the legal limitations on the use of such evidence." (*Ibid.*) In rejecting the defendant's claim that an additional instruction explaining those limitations should have been given, this Court found that "the standard instructions and the pinpoint instruction actually given here adequately convey[ed] to the jury the proper consideration and use of victim impact evidence." (*Id.* at p. 139.)

As in *Harris* and *Souza*, the trial court's response here, rather than favor the prosecution's case in aggravation, "properly informed the jury of the law regarding victim-impact evidence." (*People v. Harris*, *supra*, 37 Cal.4th at p. 358; see also *People v. Souza*, *supra*, 54 Cal.4th at p. 139.) Contrary to Ramirez's claim (AOB 166), the instruction plainly informed the jury that victim impact evidence—which addresses events "following the commission of the crime"—was not the sole circumstance of the crime under factor (a), but that "the manner in which the crime was committed and the events immediately surrounding its commission, as well as those leading up" to its commission, were also "circumstances of the crime." (4 CT 1012.)

The trial court's response, particularly in light of its instructions as a whole, did not improperly suggest to the jury that it should ascribe more weight to the victim impact evidence than to any factors in mitigation. (See *People v. Harris*, *supra*, 37 Cal.4th at p. 359; *People v. Souza*, *supra*, 54 Cal.4th at p. 139.) The trial court instructed the jurors that each of them was "free to assign whatever moral or sympathetic value you find appropriate to each individual factor," and, that once a juror concluded a factor existed, he or she "may give the factor whatever weight he or she

believes is appropriate." (4 CT 1056 [CALCRIM No. 766].) The court also told the jury not to assume just because the court gave a particular instruction that it was "suggesting anything about the facts." (4 CT 1044 [CALCRIM No. 761].) Finally, the court instructed the jury that some of the factors listed in CALCRIM No. 763 "may be aggravating" and some "may be mitigating." (4 CT 1050.) The jury would have understood that instruction to apply to the circumstances of the crime under factor (a).

Defense counsel also argued that some of the circumstances of the crime were mitigating, further demonstrating that the jury would not have misunderstood the court's response to preclude its consideration of any such circumstances. For example, counsel argued that Ramirez's intoxication during the murder was mitigating, and even suggested the fact that he did not know Niemi, and was, therefore, ignorant of Niemi's good character, mitigated his blameworthiness. (14 RT 2915-2916.)

The court's understanding that the jury's question pertained to the role of victim impact evidence was reasonable. (14 RT 2941-2942.) Its response, identifying the impact of a victim's death as a "circumstance of the crime," correctly stated the law and did not mislead the jury in the manner suggested by Ramirez, particularly in light of the court's instructions as a whole and defense counsel's penalty phase argument noting certain mitigating circumstances of the crime. Accordingly, the trial court complied with its obligation under section 1138 to clarify a point of law upon the jury's request, and did not abuse its discretion in doing so. (*People v. Waidla*, *supra*, 22 Cal.4th at pp. 745-746.)

C. Question Regarding Quality of Counsel's Arguments

1. Relevant proceedings

On the morning of June 7, 2007, the jury asked the trial court the following question: "From section 766 (Weighing Process) can the quality

of 'the arguments of counsel' be considered as a mitigating circumstance?" (4 CT 1026.) The trial court responded as follows:

> In reaching your decision, you must consider and weigh the aggravating and mitigating circumstances or factors shown by the evidence. [¶] Statements of counsel are not evidence. [¶] The answer is: no.

(4 CT 1026.)

The court and counsel memorialized for the record their discussion regarding that response. (14 RT 2955-2957.) Defense counsel argued that factor (k)[13] allows "basically anything to be considered in mitigation." (14 RT 2956.) She stated her belief that the jury's question referred to the substance of her argument and "if anything [she] said caused them to feel some sympathy, or mercy for Mr. Ramirez, that they are allowed to consider that." (14 RT 2956.) She acknowledged, however, that counsel's argument is "not evidence." (14 RT 2956.)

The prosecutor believed the court's response was appropriate and "legally accurate." (14 RT 2956.) The court, for its part, explained that its response repeated portions of the instructions it had already given the jury before penalty phase deliberations, and that the jury's question, contrary to defense counsel's interpretation, was not directed at the content of the argument, but at its quality. (14 RT 2956-2957.) Thus, the court felt its response was "an accurate statement of the law" properly given in response to the jury's question. (14 RT 2957.)

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[13] Factor (k), as listed in CALCRIM No. 763, instructed Ramirez's jury to consider the following: "Any other circumstance, whether related to these charges or not, that lessens the gravity of the crime even though the circumstance is not a legal excuse or justification. In reaching your decision, you may consider sympathy or compassion for a defendant or anything you consider to be a mitigating factor, regardless of whether it is one of the factors listed above." (4 CT 1052.)

2. The trial court's response was proper

Ramirez concedes that the "trial court's response may have been accurate in telling the jury that arguments of counsel are not evidence and cannot be considered as a mitigating circumstance" (AOB 172), but argues the response was "confusing" in the context of the other instructions (AOB 170), and that the court should have instead told the jury "that although counsel argument is not a mitigating circumstance or factor in and of itself, the jury must consider counsel's arguments and their persuasiveness, in other words, the quality of counsel's arguments, in determining which circumstances or factors were mitigating (or aggravating), the relative weight to assign them in light of the evidence, and the appropriate penalty" (AOB 172-173). Defense counsel, however, did not propose such an instruction, forfeiting the contention on appeal. (*People v. Dykes*, *supra*, 46 Cal.4th at p. 802 ["When the trial court responds to a question from a deliberating jury with a generally correct and pertinent statement of the law, a party who believes the court's response should be modified or clarified must make a contemporaneous request to that effect"].)

The trial court would have properly denied such an instruction, in any event. The jury's question regarding the "quality" of counsel's argument is reasonably understood as referring to how good or bad the argument was, not to the points raised by the argument, which could appropriately be considered by the jury in identifying aggravating and mitigating factors shown by the evidence. (See *People v. Lucero* (2000) 23 Cal.4th 692, 727 [arguments of counsel may assist jury in determining which facts are relevant to the penalty determination and which are not].) Thus, the court correctly told the jury, in accordance with its earlier instructions, that counsel's argument was not itself evidence and could not be considered a mitigating circumstance. (4 CT 1026, 1045.)

Ramirez nevertheless contends that "the jurors were given no guidance how they could use closing arguments" and likely viewed the instructions overall to be "conflicting and unresponsive to their question." (AOB 175.) The record does not support his contention. The court told the jury that, while "[n]othing that the attorneys say is evidence" (4 CT 1045 [CALCRIM No. 222]), the jury must "consider the arguments of counsel" in deciding which penalty Ramirez would receive (4 CT 1056 [CALCRIM No. 766].) The court also instructed the jury that it "must consider and weigh the aggravating and mitigating circumstances or factors *shown by the evidence*." (4 CT 1050 [CALCRIM No. 763], italics added). The court's response to the jury's question, repeating those correct legal principles and expressly answering the jury's question in the negative, made clear that the jury could not consider counsel's argument *itself* as evidence in determining Ramirez's penalty. Considering those instructions as whole, the jury would have understood its duty to consider counsel's arguments to the extent they assisted it in identifying and weighing the mitigating and aggravating factors shown by the evidence. Notably, the jury did not ask any additional questions about arguments of counsel. The record thus shows the trial court did not abuse its discretion in deciding that further explanation was not "desirable" and that it was better to "reiterate the instructions already given." (*People v. Beardslee*, *supra*, 53 Cal.3d at p. 97.)

In support of his claim, Ramirez points to the court's response to another question from the jury—not contested here—where the jury asked whether factor (k) circumstances must be supported by evidence (4 CT 1035). (AOB 176.) In response to that question, the court advised the jury, in pertinent part: "As I told you at the beginning of [CALCRIM No. 763], you must consider and weigh the aggravating and mitigating circumstances or factors *shown by the evidence*." (4 CT 1035, original italics.) Ramirez

argues the court's repetition of that particular admonition "increased the likelihood" that the jury believed it could not "contemplate" counsel's argument. (AOB 176-177.) On the contrary, the court specifically told the jury that it "*must* consider the arguments of counsel" in deciding which penalty Ramirez would receive. (4 CT 1056, italics added.) It also instructed the jury that, if it repeated "any instruction or idea," not to "conclude that it is more important than any other instruction or idea just because [the court] repeated it." (4 CT 1044 [CALCRIM No. 761].) We must presume the jury followed the court's direction not to place undue emphasis on the repeated instruction. (*Romano, supra*, 512 U.S. at p. 13.)

The trial court's response was a correct statement of law and sufficiently answered the jury's question. Its repetition of instructions already given did not create a reasonable likelihood that the jury misunderstood the role of counsel's argument in determining penalty. Accordingly, the court did not abuse its discretion under section 1138.

D. Request for Definition of "Maturely and Meaningfully Reflected"

1. Relevant proceedings

On June 7, 2007, toward the end of the morning, the jury asked the following question: "From the definition of first degree murder, what does 'maturely and meaningfully reflected upon the gravity of his act' mean? What is the definition of 'maturely,' in the above? What is the definition of 'meaningfully,' in the above?" (4 CT 1024.)

The trial court responded as follows:

> As I instructed you on Monday, you must disregard all of the instructions I gave you in the earlier phase of the trial, and follow only the new instructions given in this phase of the trial. [¶] The new instructions do not include the instruction regarding "mature and meaningful reflection."

(4 CT 1024.)

The trial court originally intended to include a statement explaining that "mature and meaningful reflection" was not one of the elements of first degree murder, but deleted that language at defense counsel's request. (14 RT 2958.) The court and defense counsel then had the following exchange:

> [THE COURT]: So, Ms. Levy, any comments—any position regarding my response here?
>
> LEVY: If I may have just a moment, your honor? I think the court is correct. I was concerned that if the court told the jurors that their question about mature, meaningful reflection was not part of the elements of the crime, they might assume that they could use it as aggravation in the crime, so I did ask for that.
>
> THE COURT: And you persuaded me. About that which I did send to the jury, any position on that?
>
> LEVY: Submitted, your honor.
>
> THE COURT: Well, if I remember correctly, you concurred with me.
>
> LEVY: That's correct. I'm not trying to say anything different.

(14 RT 2958-2959.)

2. The claim is forfeited and lacks merit

On appeal, Ramirez complains that the court abused its discretion by (1) instructing the jury that it could not consider whether he "maturely and meaningfully reflected upon the gravity of his act" (AOB 183); and (2) failing to define the phrase "maturely and meaningfully reflected" (AOB 188). However, defense counsel not only failed to object to the court's response, but also "concurred" with it. (14 RT 2959.) Accordingly, "the issue is not cognizable on appeal." (*People v. Cleveland*, *supra*, 32 Cal.4th at p. 754.) In other words, Ramirez's "claim is forfeited on appeal, because [he] did not object or request clarification at trial; he instead agreed with the

court's formulation." (*People v. Dykes, supra*, 46 Cal.4th at p. 802; see also *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1193 ["Inasmuch as defendant both suggested and consented to the responses given by the court, the claim of error has been waived"].)

Ramirez tries to avoid this result by arguing that the instruction, in context, "was not a correct statement of law." (AOB 192.) He further asserts that his claim is cognizable because the court's allegedly erroneous response affected his substantial right to have the jury consider all relevant mitigating circumstances in its penalty decision. (AOB 192.) However, Ramirez concedes the instruction itself "was literally correct" in stating that the "new instructions do not include the instruction regarding 'mature and meaningful reflection'" (AOB 192, citing 4 CT 1024), and he does not dispute the correctness of the court's charge to the jury that it "must disregard all of the instructions" from the earlier phase of the trial "and follow only the new instructions given in this phase of the trial" (4 CT 1024, 1043). Notably, during the discussion on penalty phase instructions, the defense made clear it was not requesting the deleted guilt phase instructions. (13 RT 2873.) If Ramirez wanted the court to amplify or clarify its legally correct response, his counsel should have said so. "When the trial court responds to a question from a deliberating jury with a generally correct and pertinent statement of the law, a party who believes the court's response should be modified or clarified must make a contemporaneous request to that effect; failure to object to the trial court's wording or to request clarification results in forfeiture of the claim on appeal." (*People v. Dykes, supra*, 46 Cal.4th at p. 802.)

To the extent the deleted language, informing the jury that "mature and meaningful reflection" was not an element of first degree murder, would have remedied some deficiency in the court's response, defense counsel invited the error by requesting that the court delete the language.

For the doctrine of invited error to apply, it "'must be clear that counsel acted for tactical reasons and not out of ignorance and mistake.'" (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 49.) Here, defense counsel expressed a tactical reason for removing the deleted language; namely, that she did not want the jury to consider "mature and meaningful reflection" as an aggravating circumstance. (14 RT 2958.) For this reason, too, Ramirez's claim is not cognizable on appeal.

The claim of error is meritless, in any event. The trial court did not abuse its discretion in either of the respects alleged by Ramirez. The jury did not ask the court if it could consider whether Ramirez "maturely and meaningfully reflected on the gravity of his act," therefore it would not have understood the court's response as directing it not to do so. The jury asked the court to define a term that was not contained in the penalty phase instructions. The court properly declined to define it. It also appropriately reminded the jury that it had been instructed to "disregard all of the instructions" the court had given it earlier and to "follow only the new instructions" given in the penalty phase of the trial. (4 CT 1024, 1043.) The court did not abuse its discretion in deciding that further explanation was not "desirable" and that it was better to "reiterate the instructions already given." (*People v. Beardslee*, *supra*, 53 Cal.3d at p. 97.)

Ramirez contends the trial court's response likely misled the jury to believe it could not consider Ramirez's intoxication and age at the time of his crime. (AOB 182-183.) However, the court specifically instructed the jury to consider Ramirez's "age at the time of the crime of which he was convicted" and whether his "capacity to appreciate the criminality of his conduct or to follow the requirements of the law was impaired as a result of . . . intoxication." (4 CT 1052.) The trial court also instructed the jury to consider "all of the evidence from the entire trial," as well as the statutory sentencing factors listed in CALCRIM No. 763. (4 CT 1043, 1050-1053.)

Moreover, defense counsel argued that Ramirez's intoxication and age at the time of the crime were both mitigating factors. (See, e.g., 14 RT 2908-2909, 2911-2913.) Under such circumstances, the jury could not have misunderstood the trial court's response in the manner suggested by Ramirez.

This Court's decision in *People v. Murtishaw* (1989) 48 Cal.3d 1001, further demonstrates that the trial court was not required to define the requested phrase. In *Murtishaw*, the jury sent a note requesting that the trial court define the term "first degree murder." (*Id.* at p. 1021.) The trial court declined to do so. (*Ibid.*) After further deliberations, the jury sent the trial court another note, stating, "We need a specific definition of what first degree murder is." (*Ibid.*) The trial court responded: "'You must accept as an established fact that defendant is guilty of first degree murder. As far as penalty is concerned, you have all of the instructions upon which you are to determine whether it is to be death or life in prison without the possibility of parole. I cannot instruct you further on this subject.'" (*Ibid.*) The jury made no further request for a definition of first degree murder, nor did it indicate it could not reach a verdict without that definition. (*Id.* at pp. 1021-1022.)

On appeal, Murtishaw claimed the court committed reversible error by failing to define first degree murder for the jury. (*People v. Murtishaw*, *supra*, 48 Cal.3d at p. 1022.) This Court disagreed. (*Id.* at p. 1023.) It noted that the "meaning of first degree murder was not a general principle of law necessary to the jury's proper understanding of the case." (*Ibid.*) It also observed that the "only relevance of the guilt phase evidence was whether the jury might find factors in aggravation or mitigation from the circumstances of the crime," and since the jury was informed of such circumstances, there was "no error in failing to instruct on first degree murder." (*Id.* at pp. 1023-1024.) This Court further disagreed with

Murtishaw's assertion that the definition of first degree murder was "'eminently qualified'" as a point of law "'arising in the case'" under section 1138, explaining that, because the defendant's guilt of first degree murder had already been established, "the jury need only know the circumstances of the crime in order to assist it in deciding on the appropriate penalty." (*Id.* at p. 1024.)

Like the definition of first degree murder at issue in *Murtishaw*, the definition of "maturely and meaningfully reflected" here "was not a general principle of law necessary to the jury's proper understanding of the case." (48 Cal.3d at p. 1023.) Ramirez argues that whether he "maturely and meaningfully reflected" on the gravity of his crime was "directly relevant" to his moral culpability (AOB 191); however, the jury was not required to determine whether the circumstances of the crime evinced mature and meaningful reflection. Rather, it was required to consider the circumstances of the crime "in order to assist it in deciding on the appropriate penalty." (*Id.* at p. 1024.) Because the jury was informed of such circumstances, the trial court did not err in failing to "expressly instruct[]" the jury that it could consider whether Ramirez "maturely and meaningfully reflected" on his act or, in failing to define that phrase. (AOB 180.) Notably, the jury did not indicate it was unable to reach a verdict without a definition of "maturely and meaningfully reflected" and "made no further request for that definition." (*Id.* at pp. 1021-1022.)

Finally, Ramirez argues that the trial court's failure to define "maturely and meaningfully reflected" is akin to the trial court's erroneous failure to define certain terms for the jury in *People v. Miller* (1981) 120 Cal.App.3d 233, and *People v. Solis* (2001) 90 Cal.App.4th 1002. (AOB 189.) Those cases are distinguishable, however, because "they involve situations where the jury's request for clarifying instructions was pertinent to an issue the jury was directly required to decide." (See *People v.*

Murtishaw, *supra*, 48 Cal.3d at p. 1024; see *Miller, supra*, at pp. 234-236 [defendant charged with assault causing great bodily injury; jury asked for clarifying instruction on meaning of term "great bodily injury"]; *Solis*, *supra*, at pp. 1014-1015 [defendant charged with criminal threats, requiring that threat reasonably caused victim to be in "sustained fear"; jury asked for clarifying instructions on meaning of "sustained"].) Here, as explained, the jury was not required to decide whether Ramirez "maturely and meaningfully reflected" upon the gravity of his act. The trial court's response to the jury, refusing its request for a definition of a term used in the guilt phase instructions, was proper.

E. Question Regarding Lack of Evidence of a Prior Felony Conviction Under Factor (C)

1. Relevant proceedings

Among the factors the jury was told to consider in its penalty determination was factor (c)—"Any felony of which a defendant has been convicted other than the crime of which he was convicted in this case." (4 CT 1051.) The trial court instructed the jury that if it found no evidence of a factor, it "should disregard that factor." (4 CT 1050.)

On the afternoon of June 7, 2007, after two full days of deliberation, the jury asked the court whether the People and the defense "stipulate[d] no previous felony convictions." (4 CT 1011, 1019-1020, 1030.) In response to that question, the court replied there was no evidence of prior felony convictions and the jury "must therefore assume there are none." (4 CT 1030.) Neither counsel objected to that response. (14 RT 2969.)

Shortly thereafter, the jury asked the court if it must "dismiss factor (c) due to the lack of evidence of other felony convictions." (4 CT 1032.) The trial court responded, "You may attach whatever significance you find appropriate to the lack of evidence of a prior felony conviction under factor (c)." (4 CT 1032.)

Defense counsel expressed dissatisfaction with the court's response to the latter question, arguing that "lack of felony convictions is a mitigating circumstance." (14 RT 2969.) The court explained that its role was not to tell the jury "what is or isn't mitigating or aggravating." (14 RT 2970.) The court also stated that its response suggested "in a roundabout way" that the jury "might find" mitigating the lack of evidence of a prior felony conviction. (14 RT 2970.)

2. The trial court's response was proper

Ramirez argues that the trial court's latter response, in the context of its other instructions, created a reasonable likelihood the jurors would not understand their ability to consider and give mitigating effect to his lack of felony convictions. (AOB 196-197.) The claim must be rejected. The court instructed the jury it "must" assume Ramirez had no felony convictions and that it could ascribe "whatever significance [it found] appropriate" to their absence. (4 CT 1030, 1032.) Deciding whether or not to ascribe significance to Ramirez's lack of felony convictions, and to what degree, necessitated consideration of the fact that he had no felony convictions. Moreover, both attorneys addressed Ramirez's lack of felony convictions in their closing arguments. (See 14 RT 2892 [prosecutor's closing argument], 2907-2908 [defense counsel's closing argument].) Under such circumstances, it is not reasonably likely the jury believed it could disregard factor (c) in determining Ramirez's penalty.

Ramirez complains that the version of CALCRIM No. 763 given to his jury did not explicitly state, under factor (c), that the jury could consider the absence of a prior felony conviction. (AOB 194, 197-198 & fn. 54.) He points out that the current version now directs the jury to consider "[w]hether *or not* the defendant has been convicted of any prior felony other than the crime[s] of which (he/she) was convicted in this case" (CALCRIM No. 763, italics added). (AOB 194.) Ramirez, however, did

not object to the wording of the older instruction below, even though the trial court specifically asked the attorneys if there were "any additional instructions you think I should give that I haven't included here?" (13 RT 2874.) To the extent Ramirez claims the old CALCRIM instruction required clarification, the claim is forfeited. (*People v. Maury*, *supra*, 30 Cal.4th at p. 426 [defendant required to request clarifying instruction if he believed instruction needed elaboration].) Moreover, the trial court's response to the jury's mid-deliberation question about factor (c) clarified any potential confusion resulting from CALCRIM No. 763 by telling the jury it could ascribe significance to the absence of a felony conviction.

Ramirez contends the court's response to a subsequent jury question supports the inference that his jury believed it needed "affirmative evidence" in order to consider his lack of prior felony convictions. (AOB 201.) Shortly after asking the court whether it should "dismiss factor (c)," the jury asked whether a circumstance under factor (k) must be supported by evidence. (4 CT 1032, 1035.) After withdrawing its initial response (14 RT 2964-2966, 2970), the court responded that factor (k) included "two categories of things:" (1) sympathy or compassion for the defendant; and (2) anything the jury considered to be a mitigating factor, regardless of whether it was one of the other listed factors. (4 CT 1035.) The court also reminded the jurors that they "must consider and weigh the aggravating and mitigating circumstances or factors *shown by the evidence*." (4 CT 1035, original italics.) The court's response to the jury's question regarding factor (k) did not negate its instruction to the jury that it could ascribe "whatever significance [it found] appropriate" to Ramirez's lack of felony convictions under factor (c). (4 CT 1032.) And, the jury did not ask for further clarification regarding factor (c), or any of the penalty phase instructions, after the court gave that response.

Ramirez claims the trial court "should have instructed the jury that although there was no evidence of prior felony convictions, the jury was nonetheless free to consider the absence of prior felony convictions under factor (c) and give it whatever *mitigating* weight, if any, the jury thought it deserved." (AOB 203, italics added.) As the trial court correctly told defense counsel below, it was not required to identify mitigating factors to the jury. (14 RT 2970.) This Court has repeatedly held as much. (See, e.g., *People v. Frye*, *supra*, 18 Cal.4th at p. 1026; *People v. Ray* (1996) 13 Cal.4th 313, 359.) In fact, this Court has specifically held that a trial court need not instruct that the absence of prior felony convictions is necessarily mitigating, even if requested to do so. (*People v. Russell* (2010) 50 Cal.4th 1228, 1269 ["[N]o error results from a court's refusal to provide a more specific instruction informing the jury that it may consider a defendant's lack of prior felony convictions to be a factor in mitigation"]; *People v. Monterroso* (2004) 34 Cal.4th 743, 788 [trial court need not instruct that absence of prior felony convictions is mitigating, even if defendant requests such an instruction].) Other than identifying the lack of prior felony convictions as a mitigating factor, Ramirez's proposed instruction does not differ significantly from the response given by the trial court.

For all the foregoing reasons, Ramirez's claim that the court erred in its response to the jury's question about factor (c) must be rejected.

F. The Responses Did Not Violate the Federal Constitution

1. The trial court's responses did not violate the Eighth and Fourteenth Amendments

Ramirez contends that the trial court's alleged improper responses violated his Eighth and Fourteenth Amendment rights to a fair and reliable sentencing determination. (AOB 205-209.) Specifically, he argues the responses to the jury questions "likely precluded the jury from fully

considering and giving effect to the mitigating evidence and circumstances that would support a life-without-parole sentence." (AOB 206.) For the same reasons the trial court's responses did not violate state law, considered individually or collectively, they did not violate the Eighth and Fourteenth Amendments either.

2. The trial court's responses did not violate "other federal constitutional guarantees"

Ramirez argues that the trial court's response to the jury's request for a definition of "circumstances of the crime" violated due process principles because it unfairly emphasized the prosecution case with no reciprocal benefit to the defense. (AOB 210.) As previously explained, the court's response did not highlight victim impact evidence or favor the prosecution. Ramirez thus fails to establish federal constitutional error on this basis.

Ramirez also argues that the trial court's response to the jury's question regarding the quality of counsel's arguments violated his Sixth Amendment right to have defense counsel "make a closing summation to the jury." (AOB 211, citing *Herring v. New York* (1975) 422 U.S. 853, 858, 862.) He asserts the court's response, instructing the jury that counsel's arguments were not evidence, "was akin to not having had counsel argument in the first place." (AOB 211.) The claim must be rejected.

The record shows that "defense counsel was able to make a full closing argument before the jury" and, therefore, Ramirez's "ability to have counsel participate fully and fairly in the factfinding process was not significantly diminished," nor were his Sixth Amendment rights violated. (*People v. Gurule* (2002) 28 Cal.4th 557, 649, citing *People v. Bonin* (1988) 46 Cal.3d 659, 694-695, overruled on other grounds in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.)

Finally, Ramirez argues that the trial court's response to the jury's question regarding mature and meaningful reflection "prevented an important part of [his] theory of defense" from going to the jury, in violation of his right to due process. (AOB 212.) As previously explained, the jury was never prevented from considering the mitigating circumstances shown by both the guilt and penalty phase evidence, nor was the jury directed not to consider Ramirez's age and intoxication at the time of the murder. Ramirez's due process challenge accordingly fails.

G. Any Error Was Harmless

For many of the same reasons the asserted instructional errors were not reasonably likely to have been misunderstood by the jury, considered individually or together, they were also harmless. Furthermore, as explained, the prosecution's case in aggravation was strong, and the defense case in mitigation was, on balance, not compelling. There is no "reasonable possibility" of a different outcome in the penalty phase had the court not given the challenged responses. (*People v. Brown*, *supra*, 46 Cal.4th at p. 448) Indeed, any error was harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, *supra*, 386 U.S. at p. 24.)

VIII. CALIFORNIA'S DEATH PENALTY LAW IS CONSTITUTIONAL

Ramirez asserts a number of challenges to California's capital sentencing scheme. (AOB 220-236.) We briefly address the claims below.

A. Penal Code Section 190.2 Is Not Impermissibly Broad

Ramirez argues that Penal Code section 190.2 is constitutionally defective because it fails to properly narrow the class of death-eligible defendants. (AOB 220-221.) This Court has repeatedly rejected such claims. (See, e.g., *People v. Beames* (2007) 40 Cal.4th 907, 933-934; *People v. Stanley* (2006) 39 Cal.4th 913, 968 [and cases cited therein]; *People v. Demetrulias*, *supra*, 39 Cal.4th at p. 43 [and cases cited therein].)

B. The Application of Penal Code Section 190.3, Subdivision (a), Did Not Violate Ramirez's Constitutional Rights

Ramirez contends that Penal Code section 190.3, subdivision (a), fails to adequately guide the jury's deliberations in the penalty phase. (AOB 221-222.) This Court has repeatedly rejected such claims. (See, e.g., *People v. Bryant*, *supra*, 60 Cal.4th at p. 469; *People v. Bramit* (2009) 46 Cal.4th 1221, 1248 [and cases cited therein]; *People v. Stanley*, *supra*, 39 Cal.4th at p. 967 [and cases cited therein]; *People v. Harris*, *supra*, 37 Cal.4th at p. 365 [and cases cited therein].)

C. The Death Penalty Statute and Accompanying Jury Instructions Were Not Required to Allocate a Burden of Proof

1. Ramirez's death sentence was not required to be premised on findings made beyond a reasonable doubt

Ramirez argues that the federal Constitution requires the jury to find beyond a reasonable doubt that aggravating factors are present, that the aggravating factors outweigh mitigating factors, and that death is the appropriate penalty. (AOB 222-224.) This Court has repeatedly rejected such claims. (See, e.g., *People v. Sapp* (2003) 31 Cal.4th 240, 316-317; *People v. Bemore* (2000) 22 Cal.4th 809, 859; *People v. Hawthorne* (1992) 4 Cal.4th 43, 79 [penalty phase determinations are not subject to burden of proof quantification because they are "'moral and normative, not factual'"].)

2. No burden of proof is required, and the court was not required to instruct the jury to that effect

Ramirez claims that some burden of proof was required in the penalty phase, that his jury should have been instructed that life without parole is presumed to be an appropriate sentence, and, if no burden of proof was

required, that his jury should have been instructed to that effect. (AOB 224-225.) This Court has previously rejected those claims. (See, e.g., *People v. Leonard* (2007) 40 Cal.4th 1370, 1429 [neither federal Constitution nor Evid. Code, § 520 requires trial court to instruct jury that prosecution bears burden of proof; trial court not required to instruct jury that neither party bears burden of proof]; *People v. Gonzales* (2011) 51 Cal.4th 894, 958 [trial court not required to instruct jury on "presumption of life"].)

3. Ramirez's death verdict was not required to be premised on unanimous jury findings

a. Aggravating factors

Ramirez argues that California's death penalty statute is constitutionally defective because it fails to require juror unanimity on the existence of aggravating factors. (AOB 226-227.) This Court has repeatedly rejected that claim, and Ramirez provides no persuasive reason to reexamine it. (See, e.g., *People v. Jackson* (2009) 45 Cal.4th 662, 701 [and cases cited therein]; *People v. Stanley*, *supra*, 39 Cal.4th at p. 963 [and cases cited therein]; *People v. Rogers* (2006) 39 Cal.4th 826, 893 [and cases cited therein]; *People v. Brown* (2004) 33 Cal.4th 382, 402 ["Recent United States Supreme Court decisions in *Apprendi v. New Jersey* (2002) 530 U.S. 466 . . . and *Ring v. Arizona* (2002) 536 U.S. 584 . . . have not altered our conclusions regarding burden of proof or juror unanimity"].)

b. Unadjudicated criminal activity

Ramirez claims that, because his "jury was not instructed that prior criminality had to be found true by a unanimous jury," any use of unadjudicated criminal activity by a member of the jury as an aggravating factor violated the federal Constitution. (AOB 227.) This Court has repeatedly rejected such claims. (See, e.g., *People v. Scott*, *supra*, 52

Cal.4th at p. 497 [and cases cited therein]; *People v. D'Arcy* (2010) 48 Cal.4th 257, 308 [and cases cited therein].)

4. The instructions did not cause the death penalty determination to turn on an impermissibly vague and ambiguous standard

Ramirez challenges the court's instruction to the jurors that in order to return a judgment of death, each of them must "be persuaded that the aggravating circumstances both outweigh the mitigating circumstances and are also so substantial in comparison to the mitigating circumstances that a sentence of death is justified and appropriate." (AOB 228, citing 14 RT 2886; 4 CT 1057 [CALCRIM No. 766].) He argues the phrase "so substantial" is "impermissibly broad" and does not sufficiently "channel or limit the sentencer's discretion" in violation of the Eighth and Fourteenth Amendments. (AOB 228-229.) This Court has repeatedly rejected such claims. (See, e.g., *People v. Chatman*, *supra*, 38 Cal.4th at p. 409 [and cases cited therein]; *People v. Jackson*, *supra*, 45 Cal.4th at pp. 701-702 [and cases cited therein]; *People v. Breaux* (1991) 1 Cal.4th 281, 315-316 & fn. 14.)

5. The instructions were not required to inform the jury that it must sentence Ramirez to life without the possibility of parole if it determined that mitigating factors outweighed aggravating factors

Ramirez contends that CALCRIM No. 766, which he claims "only informs the jury of the circumstances that permit the rendition of a death verdict," conflicts with due process principles and "numerous cases disapproving instructions that emphasize the prosecution theory of the case while ignoring or minimizing the defense theory." (AOB 229-230.) The contention fails. The instruction did not "tilt[] the balance of forces in favor of the accuser and against the accused" (AOB 230), but rather it indicated "that a death verdict could be entered only if aggravating

circumstances outweighed mitigating ones" (*People v. Medina* (1995) 11 Cal.4th 694, 781-782). By conditioning the death verdict on a finding that factors in aggravation outweigh factors in mitigation, the instruction implicitly informed the jury that it could not reach that verdict if it determined that mitigating factors outweighed aggravating factors. Moreover, "[t]here is no right to parity of jury instructions, as [Ramirez] appears to imply in his arguments; both parties simply have the right to instructions that properly explain the law." (*People v. Moore* (2011) 51 Cal.4th 1104, 1140.)

6. The failure to inform the jury of a standard of proof and the absence of a nonunanimity instruction regarding mitigating factors did not violate the Sixth, Eighth and Fourteenth Amendments

Ramirez repeats his argument that the failure to set forth a burden of proof in the penalty phase violated the federal Constitution. (AOB 230.) As stated, this Court has previously rejected that argument. (See, e.g., *People v. Lewis & Oliver*, *supra*, 39 Cal.4th at p. 1066.) Ramirez also contends that, because the jury was instructed that unanimity was required to acquit him in the guilt phase, the absence of a contrary instruction in the penalty phase created "a substantial likelihood that the jurors believed unanimity was also required for finding the existence of mitigating factors." (AOB 230-231.) This Court has consistently rejected such claims. (See, e.g., *People v. Bryant*, *supra*, 60 Cal.4th at p. 457; *People v. Moore*, *supra*, 51 Cal.4th at p. 1140; *People v. Phillips* (2000) 22 Cal.4th 226, 239.)

7. The court properly did not instruct the jury on the presumption of life

Ramirez argues that the "trial court's failure to instruct the jury that the law favors life and presumes life imprisonment without parole to be the appropriate sentence" violated the federal Constitution. (AOB 232.) The

argument must be rejected. The failure to inform the jury that there is a presumption of life is not unconstitutional. (*People v. Moon* (2005) 37 Cal.4th 1, 43; *People v. Maury*, *supra*, 30 Cal.4th at p. 440 [and cases cited therein].) Indeed, "[b]ecause the appropriate penalty is not presumed and is a question for each individual juror, no presumption exists in favor of life or death in determining penalty in a capital case." (*Maury*, *supra*, at p. 440.)

Ramirez further contends that other sections of his brief demonstrate that "this state's death penalty law is remarkably deficient in the protections needed to insure the consistent and reliable imposition of capital punishment," and therefore "a presumption of life instruction is constitutionally required." (AOB 232.) However, this Court has previously rejected each and every one of Ramirez's challenges to California's death penalty scheme. Accordingly, California's death penalty scheme is not deficient, and a presumption of life is not constitutionally required.

D. The Failure to Require Written Findings Does Not Violate Ramirez's Right to Meaningful Appellate Review

Ramirez claims the failure to require "written or other specific findings by the jury" violates the federal Constitution and his right to meaningful appellate review. (AOB 232.) As he concedes (AOB 232-233), this Court has previously rejected that claim. (See, e.g., *People v. Cook* (2006) 39 Cal.4th 566, 619 [and cases cited therein].)

E. The Jury Instructions on Aggravating and Mitigating Factors Are Not Unconstitutional

1. Use of restrictive adjectives in the list of potential mitigating factors

Ramirez argues that the inclusion of qualifying adjectives such as "extreme" and "substantial" with respect to various sentencing factors "acted as barriers to the consideration of mitigation factors" in violation of the federal Constitution. (AOB 233, citing CALCRIM No. 763; § 190.3, factors (d) and (g); 14 RT 2881-2884; 4 CT 1051-1052.) This Court has previously rejected such claims. (See, e.g., *People v. Perry* (2006) 38 Cal.4th 302, 319 [and cases cited therein]; *People v. Moon*, *supra*, 37 Cal.4th at p. 42, citing *People v. Weaver* (2001) 26 Cal.4th 876, 993.)

2. Failure to delete inapplicable sentencing factors

Ramirez contends that the trial court's failure to delete inapplicable sentencing factors set forth in CALCRIM No. 763 likely confused jurors and prevented them "from making any reliable determination of the appropriate penalty," in violation of his constitutional rights. (AOB 233-234.) This Court has previously rejected such claims. (See, e.g., *People v. Cook*, *supra*, 39 Cal.4th at p. 618.)

3. Failure to instruct that statutory mitigating factors were relevant solely as potential mitigators

Ramirez complains that the trial court's failure to instruct the jury which factors were aggravating, which were mitigating, and which could be either aggravating or mitigating was unconstitutional. (AOB 234.) This Court has previously rejected that argument. (See, e.g., *People v. Edwards* (2013) 57 Cal.4th 658,766; *People v. Burney*, *supra*, 47 Cal.4th at pp. 260-261; *People v. Moon*, *supra*, 37 Cal.4th at p. 41, citing *People v. Williams* (1997) 16 Cal.4th 153, 268-269.)

F. There Is No Constitutional Requirement of Intercase Proportionality Review

Ramirez asserts that California's capital sentencing scheme is unconstitutional because it does not require intercase proportionality review. (AOB 235.) This Court has previously rejected that claim. (See, e.g., *People v. Bryant*, *supra*, 60 Cal.4th at p. 469; *People v. Famalaro* (2011) 52 Cal.4th 1, 44; *People v. Harris*, *supra*, 37 Cal.4th at p. 366; see also *Pulley v. Harris* (1984) 465 U.S. 37, 50-51 [proportionality review not constitutionally required].)

G. California's Capital Sentencing Scheme Does Not Violate the Equal Protection Clause

Ramirez argues that the California death penalty statute violates the Equal Protection Clause because it does not require a specific burden of proof or unanimous, written findings for aggravating circumstances. (AOB 235-236.) Such claims have previously been rejected by this Court. (See, e.g., *People v. Johnson* (2015) 60 Cal.4th 966, 997 [and cases cited therein]; *People v. Harris*, *supra*, 37 Cal.4th at p. 366 [and cases cited therein]; *People v. Manriquez* (2005) 37 Cal.4th 547, 590.)

H. California's Use of the Death Penalty Does Not Fall Short of International Norms

Ramirez argues that California's use of the death penalty falls short of international norms. (AOB 236.) As he acknowledges (AOB 236), this Court has repeatedly rejected claims that California's use of the death penalty violates international law and the federal Constitution. (See, e.g., *People v. Johnson*, *supra*, 60 Cal.4th at p. 997; *People v. Demetrulias*, *supra*, 39 Cal.4th at pp. 43-44; *People v. Harris*, *supra*, 37 Cal.4th at p. 366 [and cases cited therein].)

IX. THERE WAS NO CUMULATIVE ERROR

Ramirez claims the cumulative effect of the asserted penalty phase errors alone, or the combined effect of the asserted errors in both phases of his trial, requires reversal of his death judgment. (AOB 237-239.) He is incorrect. As set forth above, Ramirez has not established that any prejudicial error occurred at either phase of his trial; therefore, his claim fails. (*People v. Virgil*, *supra*, 51 Cal.4th at pp. 1290-1291.)

CONCLUSION

Accordingly, the People respectfully request that the judgment be affirmed.

Dated: April 19, 2016

Respectfully submitted,

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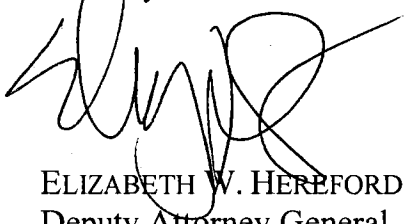
CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 36,852 words.

Dated: April 19, 2016

KAMALA D. HARRIS
Attorney General of California



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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Irving Alexander Ramirez**
No.: **S155160**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On April 19, 2016, I served the attached **RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

The Honorable Nancy O'Malley
District Attorney
Alameda County District Attorney's Office
1225 Fallon Street, Room 900
Oakland, CA 94612-4203

The Honorable Jon Rolefson
Judge
Alameda County Superior Court
Criminal Division - Rene C. Davidson
1225 Fallon Street, Department 10
Oakland, CA 94612-4293

CAP - SF
California Appellate Project (SF)
101 Second Street, Suite 600
San Francisco, CA 94105-3647

Maria J. Morga
Deputy State Public Defender
Office of the State Public Defender
Oakland City Center
111 Broadway, 10th Floor
Oakland, CA 94607

Michael J. Hersek
State Public Defender
Office of the State Public Defender
Oakland City Center
111 Broadway, 10th Floor
Oakland, CA 94607

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on April 19, 2016, at San Francisco, California.

T Pham
Declarant

Signature

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