In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **RAYMOND LEE OYLER,** **Defendant and Appellant.**	**CAPITAL CASE** Case No. S173784

Riverside County Superior Court Case No. 133032
The Honorable W. Charles Morgan, Judge

RESPONDENT'S BRIEF

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INTRODUCTION

Appellant Raymond Lee Oyler set nearly two dozen arson fires in the Banning Pass in 2006. From May to October, he kept local fire fighters on edge. They knew a serial arsonist was active in the area, but they had not yet identified a suspect. In the early morning hours of October 26, 2006, Oyler set the Esperanza Fire in Cabazon, California. Because of the location, terrain, and time Oyler selected, the fire quickly burned out of control. At 7:30 a.m. that morning, it burned over United States Forest Service Engine 57, and its crew of five men. Three of the fire fighters died at the scene; two were airlifted to local hospitals but ultimately did not survive. In 2009, a Riverside County jury convicted Oyler of 20 counts of arson, 17 counts of possession of an incendiary device, five counts of first-degree murder, and found true two special circumstances as to each count of murder – that he committed first-degree felony murder during the commission of arson, and that he murdered multiple victims. He was sentenced to death.

In the instant appeal, Oyler has not shown any error at the guilt or penalty phase of his trial that would warrant reversal of his convictions or the sentence imposed by the jury. The record as a whole discloses Oyler received a fair trial and reliable determinations of guilt and punishment. This court should affirm the judgment in total.

STATEMENT OF THE CASE

On April 3, 2007, the Riverside County District Attorney filed a 45-count information charging Oyler with five counts of murder (Pen. Code[1] § 187, subd. (a); counts 1-5), 23 counts of arson (§ 451, subd. (c); counts 6-28), and 17 counts of possession of a flammable or explosive device with

[1] Unless otherwise indicated, future statutory references are to the Penal Code.

the intent to set a fire (§ 453, subd. (a); counts 29-45). Attached to each of the five murder counts were two special circumstance allegations: 1) the murder was committed while Oyler was engaged in the commission of arson (§ 190.2, subd. (a)(17)(H)), and 2) Oyler murdered multiple victims (§ 190.2, subd. (a)(3)). (3 CT 556-568.)

On March 6, 2009, the jury returned verdicts on 42 of the 45 counts. The jury convicted Oyler of the five counts of murder, and found true both special circumstances as to each. In addition, the jury convicted Oyler of one count of arson and one count of possession of an incendiary device with respect to the Esperanza Fire—the same fire underlying the five murder counts. Further, the jury convicted Oyler of 19 additional counts of arson pertaining to 19 different fires he set in 2006. For 16 of those 19 fires, the jury also convicted Oyler of possession of an incendiary device. (25 RT 3919-3946.) For the remaining three fires, Oyler was not charged with possession of an incendiary device. The jury could not reach a verdict on counts 9, 10, and 11 (three additional arson counts), and the court declared a mistrial as to those counts. (25 RT 3946.)

The penalty phase began on March 10, 2009, and jury deliberations began on March 17, 2009. (18 CT 4700-4701.) On March 18, the jury determined the appropriate penalty is death. (29 RT 4452; 18 CT 4753.)

On June 5, 2009, the trial court denied Oyler's automatic motion for modification of the judgment and sentenced him to death on counts 1, 2, 3, 4, and 5. (31 RT 4475.) On the additional arson counts, the court imposed a total determinate term of 28 years[2] (counts 6-8, 12-27). The court

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[2] At the sentencing hearing, the court only announced sentence on 17 of the additional arson counts, and failed to announce sentence on counts 13 and 14. (31 RT 4474.) The court also incorrectly calculated the determinate term as 21 years, and four months. (31 RT 4474-4475.) At an August 7, 2009, hearing to correct the record, the parties acknowledged

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selected count 6 as the principal, and imposed the mid-term of four years. On counts 7, 8, and 12 through 27, the court imposed one-third the mid-term and ran all of the sentences consecutive to count 6. (31 RT 4474; 18 CT 4942-4946.) The court stayed the sentence on count 28 pursuant to section 654 because count 28 was the same fire that killed the victims, and thus was punished under counts 1 through 5. (31 RT 4474.) The court found all of the possession-of-incendiary-device counts subject to section 654 as well, and selected the mid-term of two years as to each, but stayed the sentences. (31 RT 4474-4475; see also 18 CT 4944-4946.)

Oyler's appeal is automatic. (§ 1239, subd. (b).)

STATEMENT OF THE FACTS

I. GUILT PHASE

A. Introduction

In the Summer and Fall of 2006, the communities along the Banning Pass in Southern California were ravaged by wild land fires. More than two dozen fires were reported between May and October in the cities of Banning, Beaumont, Cherry Valley, Cabazon, and CaliMesa. Twenty-five such fires were determined to have been started by an arsonist, although at the time, investigators had not identified a suspect. In large part, the early fires were reported and responded to quickly, and thus they never had the opportunity to do much damage. Before September, seven fires had burned

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there had been a mistake in the calculation of the determinate term sentence. (1 Supp.RT 2.) The abstract of judgment correctly reflects determinate sentences on the additional 19 arson counts. Consistent with the court's announced sentence, it indicates count 6 as the principal, and imposition of the mid-term of four years. (18 CT 4942.) Further, it shows imposition of consecutive sentences on the other 18 arson counts at one-third the mid-term (1 year, 4 months) as to each. (18 CT 4942-4946.) This accounts for a total determinate term of 28 years.

an acre or more of wild land, with the largest fire burning 10 acres. No structures had been destroyed, and no one had been seriously injured. For approximately six weeks between July and August, the fires seemed to stop completely, and the communities breathed a collective sigh of relief. That relief ended abruptly when the fires started up again in September, with the Orchard Fire burning over 1,500 acres. Between September 16 and October 26, another six fires were reported in the same areas. The day after the Orchard Fire, the arsonist set the Ranch Fire which burned more than 1,600 acres. And another fire on October 22 (the Mias Canyon Fire) burned 40 acres. Still, luckily, no one had been seriously hurt.

Everything changed dramatically on October 26, 2006. The day was marked by Santa Ana winds, and authorities had issued a red flag warning for fire risk. At 1:00 a.m., fire fighters were called to respond to a brush fire on Esperanza Road just south of Cabazon, California. The fire was burning at the bottom of Cabazon Peak, up a natural drainage wash. It was quickly burning out of control.

Engine 57 was one of the fire companies that responded to the Esperanza Fire. Five fire fighters were on that truck – Captain Mark Loutzenhiser, Daniel Hoover-Najera, Jess McLean, Jason McKay, and Pablo Cerda. Engine 57 was routed to a spot near a vacation home, called The Octagon House. They were tasked with protecting the structure, and acting as a look out for their fellow fire engines.

As the fire rushed up the mountainside, it burned into the natural drainage area. This acted like a chimney, allowing the fire to heat fuels (grass and brush) far above the flames on the mountain. With the fuels ahead of it heated and ready to burn, the fire moved exceptionally quickly. Engine 57 did not have an opportunity to escape, or even to brace for the impact. In a matter of seconds, the fire truck and its crew were caught in a burn over. Three of the men burned to death at the scene; Captain

Loutzenhiser and Pablo Cerda were air lifted to local hospitals. Mark Loutzenhiser died en route to the hospital and Pablo Cerda died five days later from his injuries.

Oyler was convicted of setting 20 fires in the Banning Pass in 2006, including the Esperanza Fire on October 26 that killed the five fire fighters.

B. The Fires[3]

1. May 16 - Remote Device Fires (Counts 6-8, and 29-31)

The first three fires were all set on May 16, 2006, at three locations in Banning, California. The first fire (counts 6 & 29) started at 2:05 p.m. at Sunset Avenue and Wilson. (8 RT 1212-1213.) The second fire (counts 7 & 30) started at Sunset Avenue and Mesa around 2:11 p.m. (8 RT 1240.) And the third fire (counts 8 & 31) started at 2:21 p.m. at Gilman Road and Pump House Road. (8 RT 1240, 1243.)

The Sunset/Wilson fire burned an area of 20 feet by 10 feet, and took fire fighters approximately 15 minutes to extinguish. (8 RT 1214.) While fire fighters were responding to the Sunset/Wilson fire, they received a call about the Gilman/Pump House fire, approximately two and a half miles from the Sunset/Wilson location. (8 RT 1216.) The Gilman/Pump House fire burned one half an acre, and took fire fighters 45 minutes to extinguish. (8 RT 1217, 1244.) While responding to the Gilman/Pump House fire, fire fighters received a call about the Sunset/Mesa fire. (8 RT 1218.) The Sunset/Mesa fire was burning an area approximately 10 feet by 10 feet. (8 RT 1218.) The three fires were all connected by Sunset Avenue: the Sunset/Wilson fire was approximately one mile from the Sunset/Mesa fire,

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[3] For ease of reference, respondent has included, at Appendix A, a chart detailing all 23 charged fires, and the three uncharged fires for which evidence was presented during the guilt phase.

and the Gilman/Pump House fire was another mile up Sunset Avenue from the Sunset/Mesa location. (8 RT 1240, 1244; Exhibit 136.)

The Sunset/Wilson fire was started five to 10 feet from the road, (8 RT 1238), the Gilman/Pump House fire was started 10 feet from the road, (8 RT 1244), as was the Sunset/Mesa fire. (8 RT 1238.) On May 16, the temperature was over 90 degrees, the humidity was 30 percent and the winds were fairly calm. (8 RT 1241.)

An arson investigator responded to all three scenes and conducted an investigation. (8 RT 1233, 1237, 1238-1239.) The investigator determined all three May 16 fires were started by arson, and he found an incendiary device at the point of origin for all three fires. (8 RT 1235, 1238-1239, 1242.) All three devices found were constructed with a Marlboro Light cigarette and wooden matches attached to the cigarette with a rubber band. (8 RT 1235-1236, 1239, 1243, 1255.) The number of matches used varied slightly – 31 matches were used in the Sunset/Wilson device (8 RT 1235), and in the Sunset/Mesa device (8 RT 1245), while 30 matches were used in the Gilman/Pump House device. (8 RT 1243.)

2. May 28, 29, & 31 – The Match Fires[4] (Counts 9, 10, and 11)

On May 28, 2006, fire fighters responded to a fire at Brookside Avenue and Jonathan Avenue in Cherry Valley, California. (8 RT 1220; count 9.) The Brookside/Jonathan fire burned approximately one acre. (8

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[4] These are the three charges on which the jury could not reach a verdict. (25 RT 3946.) They are included here because experts considered the evidence regarding the incendiary devices used, and it informed their opinions regarding whether all of the charged fires were started by a single arsonist. The jury was instructed that it could consider the reasons an expert gave for an opinion, and the facts or information relied upon by the expert in reaching the opinion. (24 RT 3726; CALCRIM 332.)

RT 1247.) The arson investigator found three to four wooden safety-tip matches at the point of origin. (8 RT 1248, 1256.)

On May 29, 2006, fire fighters responded to a fire at Hathaway Street and Nicolet Street. (8 RT 1224; count 10.) The fire burned an area approximately 10 feet by 20 feet. (8 RT 1251.) The arson investigator found two to three wooden safety-tip matches at the point of origin. (8 RT 1251-1252.)

On May 31 at 2:51 p.m., fire fighters responded to a fire at San Timoteo and Redlands near Calimesa, California. (8 RT 1260, 1265; count 11.) The point of origin for the fire was five feet from the road. (8 RT 1268.) The fire burned up a natural drainage, and burned approximately one acre. (8 RT 1264.) The arson investigator found four wooden safety-tip matches at or near the point of origin. (8 RT 1268-1269, 9 RT 1285.)

3. June and July Fires – Lay-Over Device Series[5] (Counts 12-22, and 32-41)

On June 3 at 5:50 p.m., fire fighters responded to a fire at 6th Street and Xenia in Banning, California. (9 RT 1346; counts 12 & 32.) When fire fighters arrived, the fire was two acres large, but burning quickly due to high winds. (9 RT 1352.) Six fire engines responded with a total of 15 to 20 fire fighters. (9 RT 1352.) The fire threatened four structures, including homes with people inside. (9 RT 1349, 1362.) A fire investigator responded to the scene and determined the fire was started by arson. (9 RT 1371-1372.) He found a "lay-over" incendiary device at the point of origin. (9 RT 1367.) The device was constructed with a Marlboro Light cigarette

[5] While respondent has referred to this group of fires as the "lay-over device fires," investigators did not find a lay-over device for the June 16 fire. They found a single match stick at the point of origin, but noted that the point of origin had been disrupted by suppression efforts and winds. (11 RT 1730-1732.)

and three wooden matches laid on top of the cigarette. (9 RT 1367-1368, 1371.) In addition, the investigator found a blue paper towel, similar to those often found in an auto mechanic's shop, twisted up near the incendiary device. The paper towel was part of the device – it was used to prop up the cigarette and intended to act as an accelerant. (9 RT 1367-1368; 14 RT 2332-2333.)

On June 7 at 12:17 p.m., fire fighters responded to a fire at Jack Rabbit Trail and Highway 60. (9 RT 1237; counts 13 and 33.) A bystander extinguished the fire with a fire extinguisher before fire fighters arrived. (9 RT 1440.) The burned area was 20 feet by 50 feet, and at the base of a slope with a 40-degree incline. (9 RT 1439, 1449.) The fire was approximately 100 feet from the road. (9 RT 1444.) On June 7, the temperature was 82 degrees, the humidity was 28 percent and the winds were blowing at three to five miles per hour. (9 RT 1451.) A fire investigator determined the fire was started by arson, and found an incendiary device at the point of origin. (9 RT 1455, 1457.) The device was a lay-over device constructed with a Marlboro Red cigarette, and six wooden matches laid across the cigarette. (9 RT 1455-1457.)

On June 9 at 2:50 p.m., fire fighters responded to a fire at Millard Canyon and Maumee in Banning, California. (10 RT 1477-1478; counts 14 and 34.) The fire was burning a half-acre up a gradual slope when fire fighters arrived. (10 RT 1479.) The slope was concerning as fires burn faster uphill. (10 RT 1493.) The point of origin for the fire was less than five feet from the roadway. (10 RT 1482, 1498.) On June 9, the temperature was 86 degrees, the humidity was 27 percent and the winds were averaging seven miles per hour, with gusts up to 15 miles per hour. (10 RT 1494.) A fire investigator determined the fire was caused by arson and found a lay-over device at the point of origin. (10 RT 1498, 1505.) The device was constructed of a Marlboro Red cigarette and six wooden

stick matches placed on top of the cigarette. (10 RT 1498, 1501.) Based on the shape of the ashes left from the cigarette, the investigator could tell the cigarette had been smoked for several "drags" prior to being placed on the ground. (10 RT 1503.)

On June 10 at 4:00 a.m., fire fighters responded to a fire at Ramon Road and Chino Road in Banning, California. (10 RT 1485-1486; counts 15 and 35.) The fire burned a 20-foot by 20-foot area, and moved north consistent with the slight northern slope of the ground. (10 RT 1486-1487, 1510.) The fire was started by arson. (10 RT 1512.) Fire fighters found an incendiary device at the point of origin. (10 RT 1488.) The device was a Marlboro Red cigarette with seven wooden matches laid on top of it. (10 RT 1510-1511.) Like the device found on June 9, the cigarette involved in this fire had also been smoked prior to being placed on the ground. (10 RT 1511-1512.) On June 10 at 4:00 a.m., the temperature was 65 degrees, the humidity was 60 percent, and the investigator did not make a note of the wind speed that day. (10 RT 1533.)

On June 11 at 12:01 p.m., fire fighters responded to a fire at Highland Springs and Circle C in Beaumont, California. (10 RT 1568; counts 16 and 36.) The fire burned a 20 by 30-foot area of sloped terrain, and there were a number of bystanders watching the fire when fire fighters arrived. (10 RT 1569, 1579.) Later that day, at 7:30 p.m., fire fighters responded to another fire at Highway 243 and Mt. Edna[6]. (10 RT 1570; Uncharged A.) The Mt. Edna Fire burned a 50-foot by 50-foot area of steep sloped terrain, and was also observed by many bystanders. (10 RT 1571, 1585.) One of the

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[6] The Mt. Edna Fire (also known as "The Slope Fire") was not a charged incident. Evidence of this fire was admitted pursuant to Evidence Code section 1101, subdivision (b). (4 RT 466-472.) This fire was referred to as "Uncharged A." (10 RT 1592.) The jury was instructed on the permissible use of this evidence. (24 RT 3729-3730; CALCRIM 375.)

bystanders used a chemical fire extinguisher to attempt to put the fire out before fire fighters arrived; others shoveled dirt and threw blankets onto the fire. (10 RT 1573, 1585, 1592.)

On June 11, the temperature was 77 degrees, the humidity was 33 percent and the winds were blowing at four to five miles per hour. (10 RT 1579.) A fire investigator responded to both scenes and determined both June 11 fires were started by arson. (10 RT 1583, 1595.) At the Highland Springs/Circle C location, the investigator found a lay-over incendiary device consisting of a cigarette with six wooden matches laid on top of it. (10 RT 1581-1582.) The type of cigarette could not be identified. (10 RT 1582.) At the Mt. Edna location, no device could be located because the point of origin had been disrupted by the bystanders. (10 RT 1593.)

On June 14, three fires were set. At 8:50 a.m., fire fighters responded to another fire at Ramon Road and Chino Road in Banning (counts 17 and 37), the same location as the June 10 fire (counts 15 and 35). (10 RT 1608.) The fire was a quarter acre large, and moving up a northern slope. (10 RT 1608-1609.) Fire fighters found a device at the point of origin. (10 RT 1611.) Later that day, at 12:20 p.m., fire fighters responded to a fire at Broadway and Esperanza Avenue in Cabazon. (10 RT 1611-1612; counts 18 and 38.) When fire fighters arrived, the fire was burning three to four acres and moving quickly, spreading faster than 100 feet per minute. (10 RT 1612, 1614.) In total, the fire burned 10 acres, and required 15 fire engines, two air tankers, one bulldozer and one helicopter to put it out. (10 RT 1614.) At 6:42 p.m. on June 14, fire fighters were dispatched to a third fire at Old Banning Idyllwild Road in San Gorgonio. (10 RT 1623; counts 19 and 39.) The fire burned a total of three acres and moved uphill at a moderate rate of speed. (10 RT 1625, 1626.) Extinguishing this fire required seven fire engines, one bulldozer and one helicopter. (10 RT 1625.) Two air tankers were dispatched but could not respond because of

nearby power lines. (10 RT 1625.) If the wind had shifted, this fire would have threatened two structures. (10 RT 1626.)

June 14 was a "high dispatch day" which meant the potential for fires was high. A "high dispatch day" is one level below a "Red Flag warning" day. (10 RT 1618-1619.) The temperature was 75 degrees, the humidity was 38 percent and the winds were blowing between seven and nine miles per hour. (10 RT 1656.)

A fire investigator responded to all three June 14 fire scenes. (10 RT 1653, 1660, 1668.) All three fires were caused by arson. (10 RT 1655, 1663, 1672.) And at all three points of origin, the investigator found a lay-over incendiary device. (10 RT 1657, 1665, 1670.) All three devices were constructed using Marlboro Red cigarettes and five wooden matches laid across the cigarette. (10 RT 1657, 1659, 1666, 1671.) All three fires were started at or near slopes. The Ramon/Chino fire burned up a slope (10 RT 1657), the Broadway/Esperanza fire was started near the road on flat terrain, but burned south towards the foothills of Cabazon Peak (10 RT 1663), and the Old Banning/Idyllwild fire burned sloped terrain. (10 RT 1669.)

On June 16 at 8:45 a.m., fire fighters responded to a fire at Highway 243 and San Gorgonio. (11 RT 1709; count 20.) The fire slowly burned up a steep slope. (11 RT 1710, 1711, 1727.) To fight this fire, the fire fighters drove the engine to the top of the hill and fought the fire from the top, back down the hillside. (11 RT 1711.) In total, the fire burned one acre. (11 RT 1732.) A fire investigator responded to the scene, determined the fire was started by arson, and located one wooden stick match at the point of origin. (11 RT 1730-1732.) He did not find a cigarette, but the winds were gusting that day, and there was water suppression damage at the area of origin. (11 RT 1731.) On June 16 the temperature was 77 degrees, the humidity was 20 percent and the winds were blowing at six miles per hour, with gusts up to 20 miles per hour. (11 RT 1732-1733.)

On June 18 at 10:20 a.m., fire fighters responded to a second fire at 6th Avenue and Xenia in Beaumont[7]. (11 RT 1717-1718; Uncharged B.) Nearby residents had already extinguished the fire by the time fire fighters arrived. (11 RT 1718.) This fire was 50 yards east of the June 3 fire at 6th and Xenia. (11 RT 1719, 1738.) The area is mixed residential and business. The fire burned within 150 yards of structures. (11 RT 1721.)

On June 28 at 10:21 a.m., fire fighters responded to a fire at Winesap and Orchard Avenue in Cherry Valley. (11 RT 1770-1771; counts 21 and 40.) When they arrived, the fire was burning a quarter of an acre of an open field with rolling hills. (11 RT 1772, 1780.) In total, the fire burned two acres of land. (11 RT 1781.) That day it was 89 degrees with 28 percent humidity. (11 RT 1782.) A fire investigator responded to the scene and determined the fire was started by arson. (11 RT 1786.) The investigator located a lay-over device at the point of origin. (11 RT 1788.) The device was comprised of a cigarette and five wooden stick matches. (11 RT 1782, 1786.) The cigarette was either a Marlboro Red or a Marlboro Light. (11 RT 1798.) The fire was burning between two roads and up a hill. Because roads act as natural barriers, the fire would have continued burning up the hill as that was the path of least resistance. (11 RT 1791.)

On July 2 at 10:18 a.m., fire fighters responded to a vegetation fire at Highway 243 and Mt. Edna. (11 RT 1836; counts 22 and 41.) The fire burned a 25-foot by 30-foot area up a steep hillside. (11 RT 1837, 1848.) The temperature that day was 100 degrees, the humidity was 16 percent and

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[7] Like the Mt. Edna Fire (see fn. 5, *ante*), the June 18 fire was not a charged incident. Evidence of this fire was admitted pursuant to Evidence Code section 1101, subdivision (b). (4 RT 466-472.) This fire was referred to as "Uncharged B." The jury was instructed on the permissible use of this evidence. (24 RT 3729-3730; CALCRIM 375.)

the winds were blowing at two miles per hour, with gusts up to nine miles per hour. (11 RT 1848-1849.) A fire investigator responded to the scene, determined the fire was caused by arson, and located a lay-over device at the point of origin. (11 RT 1845, 1850-1851.) The device was constructed with a cigarette and five wooden matches. The type of cigarette could not be determined. (11 RT 1850.)

4. July 9 Fire- Return to Remote Device (Counts 23 and 42)

On July 9 at 2:54 p.m., fire fighters responded to a fire at Meadowlark Street and Durward Street in Banning. (11 RT 1844; counts 23 and 42.) The fire burned a 20-foot by 20-foot area of open field, and was mostly out when fire fighters arrived. (11 RT 1844, 1854.) The fire was 10 feet from the roadway. (11 RT 1854.) The temperature on July 9 was 104 degrees and the humidity was 14 percent. (11 RT 1853.) A fire investigator responded to the scene and found an incendiary device at the point of origin. (11 RT 1855.) The device was constructed with a Marlboro cigarette and six wooden stick matches attached to the cigarette with a small piece of duct tape. (11 RT 1855.) Because the duct tape was holding the matches to the cigarette, this device was a remote device which could have been thrown. (11 RT 1856.)

5. September 16, 17, and October 22 Fires (Counts 24-27, 43, and 44)

On September 16 at 2:27 p.m., fire fighters responded to a fire at Cherry Valley Boulevard and Roberts Road in CaliMesa. (11 RT 1876; counts 24 and 43.) The fire burned an eight-foot by eight-foot area. (12 RT 1914.) An incendiary device was found at the point of origin, and caused the fire. (12 RT 1914, 1916, 1920.) The device was a cigarette with six paper matches wrapped around it. (11 RT 1878, 12 RT 1917-1918.) The matches were attached to the cigarette with some kind of adhesive

substance, although investigators could not determine what the substance was. (12 RT 1950.) Investigators also could not determine the brand of cigarette because the butt of the cigarette had burned all the way off. (12 RT 1934.)

Within five minutes of the first report of the Cherry Valley/Roberts fire, a report came in of another fire (at 2:32 p.m.) at Taylor Street and Orchard Street (the "Orchard Fire"), one mile from the Cherry Valley/Roberts fire. (11 RT 1884; 12 RT 1902, 1921; count 25.) When fire fighters arrived, two acres of land were burning, and the fire had moved into a small natural drainage wash. (11 RT 1884.) The fire was moving at a moderate rate of speed until it came out of the drainage and became a wind-driven fire. (11 RT 1886-1887.) The fire quickly burned out of control and additional resources had to be called in. (11 RT 1888-1889.) Three homes were immediately threatened. (11 RT 1880.) The fire was "spotting" ahead of itself, meaning embers were flying to unburned areas and igniting small fires ahead of the large fire. (11 RT 1892-1893.) Fire fighters fought this fire for 16 straight hours, and the fire came within 20 feet of homes. (11 RT 1893, 1896.) Six air tankers and 1,000 fire fighters responded to this fire. (12 RT 1904, 1906-1907.) The aerial support was critical to containing the fire. (11 RT 1896-1897.)

In total, The Orchard Fire burned 1,560 acres, completely destroyed the historic Butterfield Stage House (a stage coach house and pony express stop from the 1800s), damaged other structures, and destroyed two historic vehicles. (12 RT 1905, 1927.) During the suppression efforts, one of the air tankers flew too low and hit some trees with its landing gear. To avoid a crash, the plane dumped its load of retardant, which landed in a nearby swimming pool. (11 RT 1908.)

September 16 was the first day the region experienced Santa Ana winds that season, with winds blowing 15 to 20 miles per hour. (12 RT

1903, 1914-1916.) The temperature was 90 degrees and the humidity was 12 percent, typical of Santa Ana conditions (dry and hot). (12 RT 1903, 1915.) Such conditions are known as "Red Flag warning" days. (12 RT 1916.) If the winds had blown in the opposite direction, the Cherry Valley/Roberts fire would have burned into The Orchard Fire. (12 RT 1921.)

The Orchard Fire's point of origin was 15 to 20 feet from the road. (12 RT 1925.) A fire investigator determined the cause was arson, but an incendiary device was not recovered because the area of origin had been trampled during the suppression efforts. (12 RT 1925-1929, 1930.)

On September 17 at 11:33 a.m., fire fighters responded to a fire at 1560 Gilman Street. (12 RT 2005; counts 26 and 44.) This fire became known as "The Ranch Fire." (12 RT 2006.) One to two acres were burning when fire fighters arrived. (12 RT 2007.) The fire burned up through a natural drainage wash and into the hills, threatening a nearby mobile home park. (12 RT 2008-2009.)

The battalion chief called for additional resources including 10 additional engines, air tankers, hand crews and bulldozers. (12 RT 2011.) Fifty fire engines and 350 fire fighters responded to The Ranch Fire. (12 RT 2013.) Three structures burned, and at least 30 homes were threatened. (12 RT 2016.) Consistent with fire department policy, the battalion chief ordered the engines to protect the structures and thus to put themselves between the advancing fire and the threatened structures. (12 RT 2017.) In total, The Ranch Fire burned 1,658 acres. (12 RT 2012.)

A fire investigator responded to the scene and found an incendiary device, and determined arson was the cause of The Ranch Fire. (12 RT 2041, 2046.) The incendiary device was a Marlboro cigarette with six paper matches attached to it with some adhesive material. (12 RT 2041, 2044.) The butt of the cigarette had been clipped, which was either done to

enhance the nicotine effect of the cigarette or to remove any DNA left on the butt. (12 RT 2043-2044, 2075.) That day the temperature was 85 degrees, the humidity was eight percent, and the winds were blowing at seven miles per hour, with gusts up to 15 miles per hour. (12 RT 2044-2045.)

On October 22, fire fighters responded to another fire at Mias Canyon and Bluff Street, just outside Banning. (12 RT 2021; count 27.) When they arrived, five acres at the base of a hill were burning at rapid speed. (12 RT 2021.) The battalion chief ordered additional resources to help: another 30 fire engines, bull-dozers, 16 hand crews, two helicopters, and two air tankers. (12 RT 2022.) The fire threatened four structures and burned a total of 40 acres. (12 RT 2024, 2027.) Because the fire was set at the base of a slope with natural drainage washes, it could have burned into those drainages and moved quickly towards the nearby communities of Cherry Valley and Oak Glen. (12 RT 2024.) Without the air tankers, the fire would have burned over 1,000 acres. (12 RT 2027.)

On October 22, the temperature was 79 degrees, with 12 percent humidity and winds of seven to 12 miles per hour. (12 RT 2048.) A fire investigator responded to the scene of the Mias Canyon fire and determined it was caused by arson. (12 RT 2051.) The investigator was unable to locate an incendiary device at the origin of this fire. (12 RT 2051.)

6. October 26—The Esperanza & Seminole Road Fires (Counts 1-5, 28, and 45)

On October 25, the Banning Pass area was experiencing Santa Ana winds, and fire officials had issued a Red Flag warning to local media outlets. (6 RT 949-950, 996-997.)

Shortly after 1:00 a.m. on October 26, fire fighters were dispatched to a wild land fire at Esperanza Road and Almond Street in Cabazon. (6 RT 947.) From the freeway, they could tell the fire was very large. (6 RT 947.)

Captain Andrew Bennett, the battalion chief from CalFire, ordered additional resources even before arriving on the scene. (6 RT 953.) He asked for five engines from the U.S. Forest Service. (6 RT 953.) Those U.S. Forest Service engines began arriving around 2:00 a.m. (6 RT 954.) Among them was Engine 57 based out of Allendale, California. (6 RT 954.)

When crews arrived on scene, the fire was burning at the bottom of a slope, leading up to Cabazon Peak. (6 RT 959.) The slope had an incline of 55 percent, and the fire was spreading at a critical speed. (6 RT 960.) Given the incline, the fire was moving four times faster up the hill than it would have moved across flat land. (6 RT 960.) When Captain Bennett arrived, the fire was burning five acres of land. Within minutes it had spread to 50 acres. (6 RT 959-960.) The flames were burning 70 to 100 feet high, and the fire behavior was the most extreme Captain Bennett had seen in his 23-year career with CalFire. (6 RT 967-968.) Typically, with a fire of this size and speed, the fire crews would rely on air tankers to slow its progression, but because the fire started in the middle of the night, the air tankers could not be dispatched. (6 RT 962.)

At 2:45 a.m., Captain Bennett ordered the evacuation of a nearby probation camp and the community of Twin Pines. (6 RT 964-965.) As the fire burned into the early morning hours, Engine 57 was positioned up the mountain, at a vacation home known as "The Octagon House." (6 RT 974-975.) Engine 57 was positioned between the advancing fire and residential communities in the direct path of the fire. (6 RT 984.) The fire burned up a natural drainage wash in the mountain. (6 RT 974.) This wash acted like a chimney, heating fuels ahead of the fire, which helped the fire move up the mountain at exceptional speed. (6 RT 979; 7 RT 1100.) Around 7:00 a.m., Engine 57 was caught in a burn-over as the fire burned through their location and The Octagon House and kept moving past them. (6 RT 974-975, 980.) The fire fighters from Engine 57 did not have time to employ

their protective gear. (8 RT 1103-1105.) Daniel Hoover-Najera, Jess McLean, and Jason McKay died at the scene. (18 RT 2840-2841.) Captain Mark Loutzenhiser was still conscious when crews reached the site of the burn over. (10 RT 1629-1631.) He was evacuated by helicopter, but died approximately three hours after the burn over. (10 RT 1630; 18 RT 2836.) Pablo Cerda was also alive when rescuers got to him. He was evacuated by medical helicopter and transported to the Arrowhead Regional Burn Center. (10 RT 1632.) Cerda died five days later from his injuries. (18 RT 2846.)

An arson investigator responded to the scene and determined the area of origin for the Esperanza Fire. (8 RT 1093-1094.) The origin of the fire was 12 feet from the side of Esperanza Road. (8 RT 1143.) At the point of origin, investigators found an incendiary device located on top of a grass fuel bed. (8 RT 1158, 1209; 10 RT 1522.) The device was comprised of a Marlboro cigarette with six wooden matches attached to it by a rubber band. (8 RT 1158; 14 RT 2345.) The October 26 Esperanza Fire was one mile from the origin of the June 14 fire at Esperanza and Broadway. (10 RT 1614.)

Dr. Joseph Cohen, a forensic pathologist, testified that four of the five victims of the Esperanza Fire died from "total body thermal injury and inhalation of products of combustion." (18 RT 2836, 2840, 2843, 2845-2846.) Pablo Cerda, the fire fighter who survived five days after the fire, ultimately died from severe complications from his burn injuries. (18 RT 2849.)

Around 4:00 a.m. on October 26, while readying to leave the fire station to respond to the Esperanza Fire, fire fighters noticed another smaller fire on Seminole Road[8], off the north side of Interstate 10. (18 RT

[8] The Seminole Road fire was not a charged incident, but was admitted as evidence of Oyler's presence near the scene. (4 RT 466-472.)

2984.) At least two engines were diverted from the Esperanza fire and sent to the Seminole Road fire. (6 RT 958; 18 RT 2987.) It took fire fighters approximately one hour to put the Seminole Road fire out. (18 RT 2987.)

C. Expert testimony

1. Fire and fire fighter behavior

Fire burns farther and faster uphill, and even faster through a natural drainage. (9 RT 1276-1277.) South or southwest facing slopes will burn faster because they are exposed to more sunlight during the day which dries out the fuels. (9 RT 1279.)

When responding to a fire, CalFire prioritizes life, property preservation, and then resource preservation, in that order. (6 RT 959-960.) Resources (including man power) are allocated according to those priorities. It is particularly dangerous for fire fighters to get in front of a fire that is spotting, because a spot can grow into a new fire and the fire fighters can get caught between two advancing flanks of the fire. (12 RT 2018.) Air tankers are critical to fighting a rapidly moving fire. They dump retardant ahead of the flames to slow the fire's progress, which allows hand crews to put out the fire. (12 RT 2028.)

2. Incendiary devices

A "lay-over" device is the term the investigators used to refer to devices where the matches were laid on top of the cigarette, but not bound to the cigarette with anything. (10 RT 1499.) The cigarette is lit and placed on the ground, and then the matches are laid on top. The cigarette eventually burns down to the matches and ignites them. (10 RT 1499.) A lay-over device must be constructed on site, and cannot be thrown or delivered remotely. (9 RT 1378; 14 RT 2332.) The advantage is the arsonist can specifically select a fuel bed or other location where the fire will ignite, but constructing a lay-over device comes with additional risk in

that the arsonist is exposed while constructing the device, and thus there is a greater likelihood of being seen. (14 RT 2332, 2334, 2339, 2397-2398.) If placed in a fuel bed, this device will start a wild land fire. (10 RT 1499.)

"Remote" devices, as referred to in this case, also involved a cigarette and matches, but the matches were attached in some fashion to the cigarette, so the device could be constructed ahead of time and thrown from a car window, or otherwise delivered remotely (i.e. flung from a slingshot). (14 RT 2333-2334, 2397-2398.) The advantage of a "remote" device is it reduces the chances of detection, because the arsonist never has to get out of his car to start a fire. (14 RT 2334.) The disadvantage of a remote device is that the arsonist cannot select the specific location for the start of the fire. (14 RT 2397-2398.) The remote device may land in an area with low or no fuels thus reducing the chances of starting a large fire. (*Ibid.*) In experiments, investigators recreated a device similar to that used in the Esperanza Fire, and they were able to throw it (from a car) 10.5 to 17 feet from the edge of the roadway. (8 RT 1207-1208.)

Both "lay-over" and "remote" devices are time-delay devices in that the cigarette is lit, but the matches will not ignite until the cigarette burns down far enough to ignite the match heads that are either placed on top of the cigarette or attached to it. (8 RT 1205.) Time-delay devices (either lay-over or remote) provide four to eight minutes of delay before the matches ignite, depending on how far down the matches are placed on the cigarette. (8 RT 1207.) "Lay-over" devices give more flexibility with timing, because the arsonist can place the matches further back on the cigarette to maximize the delay time. (9 RT 1371.) Time-delay devices allow the arsonist an opportunity to leave the scene undetected. (14 RT 2334.)

The use of wooden matches in an incendiary device is highly unusual. (8 RT 1245.) Five arson investigators testified regarding the rarity of wooden matches in an incendiary device.[9] Of those five, four were directly involved in the investigations of these crimes. In total, those four arson investigators had been involved in nearly 2,000 fire investigations, and none had seen wooden matches used in an incendiary device prior to this case. (8 RT 1090, 10 RT 1539 [Matt Gilbert- investigated 400 fires]; 8 RT 1232, 1245 [Charlie DeHart – investigated 350 fires]; 9 RT 1447, 1457-1458 [Bart Chambers – investigated 150 fires]; 8 RT 1182, 1206, 14 RT 2319-2320, 2323 [James Engel – investigated over 1,000 fires].) The fifth, Doug Allen (the People's rebuttal expert) had seen cigarette and wooden match devices "once in awhile," over the course of his nearly 50-year career as a fire fighter and arson investigator. (23 RT 3580-3581, 3594.) The defense expert, David Smith, had been involved in fire fighting and arson investigations in the U.S., Canada, Mexico, and other countries for 28 years, and had seen such a device two to three times. (22 RT 3369, 3382.) More traditionally, fire investigators find match books used in incendiary devices. (8 RT 1205.)

3. Single Arsonist

California Department of Forestry Battalion Chief James Engel testified for the prosecution as an expert in arson investigations and

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[9] Gary Eidsmoe, a retired arson investigator with CalFire, testified for the defense about the investigation into the Seminole Road fire on October 26. (20 RT 3157.) Over his 34-year career, he had investigated six fires that involved an incendiary device comprised of a cigarette and wooden matches, including the Esperanza Fire. (20 RT 3161-3162.) It is not clear from his testimony if the other five fires he investigated involving wooden stick matches and a cigarette were related to this case (i.e. other charged or uncharged incidents), or unrelated to this case.

incendiary devices. (14 RT 2310.) Engel testified that, in his opinion, all of the fires were started by a single arsonist. (14 RT 2351.)

In support of his opinion, Engel explained that the devices used in the May 16 fires were consistent with a relatively inexperienced arsonist experimenting with device construction. (14 RT 2323-2324.) The use of 30 plus matches was "overkill" and unnecessary for the device to start a fire. (15 RT 2323.) Further, the devices were clumsy which would make them harder to light, again showing they were constructed by a relatively novice arsonist. (14 RT 2324.) The next three fires were single match fires, which was consistent with an arsonist experimenting with different methods of starting fires. (14 RT 2330.) Further, the single match fires allowed the arsonist to select the point of origin, as opposed to throwing the remote device into an area of wild land without much control over where it lands. (14 RT 2331, 2398-2399.)

Following the three May match stick fires, 10 of the next 11 fires were started with a "lay-over" device, where the matches were placed on top of the cigarette, and not attached to it. (14 RT 2332.) Lay-over devices, like the match sticks, had the advantage that the arsonist could select a location for the start of the fire. (14 RT 2397.) The first of the lay-over device fires on June 3 also used the blue paper towel as an accelerant, which was consistent with Engel's opinion that the arsonist was experimenting with different types of devices to achieve maximum success. (14 RT 2332.) In general, the lay-over devices were used in the more remote locations where the risk of detection was otherwise low. (14 RT 2351.) The consistency in the construction and placement of all of the lay-over devices supported Engle's opinion that a single arsonist was responsible for all of these fires. (14 RT 2338.)

But, arsonists are mindful of leaving evidence behind and getting caught. (14 RT 2348, 2370.) Changes in the configuration of the device

showed an attempt to limit detection once the arsonist became aware an investigation was being conducted. (14 RT 2338-2341, 2406-2407.) After the May 16 remote-device fires, and the May match fires, the arsonist used a lay-over device in 10 of the next 11 fires[10]. Then, the arsonist switched back to a remote device on July 9, but that device used only six wooden matches, instead of the 30+ used with the May 16 fires. (14 RT 2341.) The change to fewer matches was consistent with the number of matches used in the lay-over devices, and further showed the evolution of this arsonist's device. (14 RT 2341, 2343.) The two remote devices found in the September fires also used six matches, although they were paper, not wooden. (14 RT 2343-2344.) The device used to start the Esperanza Fire also used six matches, but wooden ones, not paper. (14 RT 2345.) It was also significant that the change in devices came in phases, and thus showed an evolution by the arsonist as he was learning about the advantages and disadvantages of the different types of devices. (14 RT 2396-2397.) Had the lay-over and remote devices alternated or been interspersed, that same evolution would not have been apparent. (14 RT 2397.)

The remote devices were, in general, used in the more visible locations, and the lay-over devices were constructed in the more remote areas. (14 RT 2351.) An arsonist may also select lighter materials, like paper matches, for a remote device when the winds are high because he intends the wind to be able to carry the device farther. (14 RT 2348.)

The devices used got more sophisticated as time went on, and changed to better accomplish the arsonist's purpose, i.e. starting large fires and avoiding detection. (14 RT 2397.) In addition, some of the devices

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[10] At the scene of the 11th fire (the June 16 fire at Highway 243/San Gorgonio), the arson investigator found one wooden stick match, but no cigarette device, but the winds were gusting that day and there was water suppression damage at the area of origin. (11 RT 1730-1732.)

were constructed in a manner that showed an intent to destroy the device. With several of the remote devices, one or more matches faced the filter, and not the lit cigarette head. These matches would not make the device more likely to ignite, but could aid in burning up the filter and destroying the device. (14 RT 2325-2326, 2335.) The three May 16 fires, the July 9 fire, the September 17 Ranch Fire, and the Esperanza Fire all had matches placed in the opposite direction. (14 RT 2325-2326 [May 16]; 14 RT 2342, 23 RT 3649 [July 9]; 14 RT 2344; 23 RT 3655 [September 17]; 14 RT 2347 [Esperanza].) Further, the June 7 fire, a lay-over device fire, had a match placed on top of the filter for the same reason—to destroy the device. (14 RT 2335[referencing People's 28, photo of the June 7 fire (count 13)].)

With the exception of the four match-stick fires[11] and the three fires where no device was found[12], all of the fires involved a "time delay device" comprised of a cigarette and matches. This is unusual with wild land arsonists. (14 RT 2352.) Wild land arsonists typically use an open flame device, and not a time delay device. (14 RT 2352.) The evolution of the devices, and the commonalities between all of the devices supported Engel's opinion that the fires were started by a single arsonist. (14 RT 2351.)

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[11] These were the fires on May 28, 29, 31 and June 16, and were charged in counts 9, 10, 11, and 20. The jury hung on counts 9, 10, and 11, but found Oyler guilty of count 20.

[12] No device was found for the June 11 Mt. Edna fire (Uncharged A), the September 16 Orchard Fire, or the October 22 Mias Canyon fire. The June 11 fire was not charged, and the jury found Oyler guilty of the September 16 and October 22 fires.

D. Oyler was the Responsible Serial Arsonist

1. Eyewitnesses & The Pole Camera

On June 11, John Lawrence was travelling northbound from Idyllwild on Highway 243. (9 RT 1388.) As he was stopped at a turn out along the highway, he saw Oyler driving his distinctive Ford Taurus in the southbound lane of Highway 243. (9 RT 1391, 1397, 1403.) In early 2006, Oyler bought a Ford Taurus from his then-boss. (12 RT 1960-1961.) The car was blue-grey when Oyler purchased it. (12 RT 1962.) A few months after buying the car, Oyler spray-painted it a flat black. (13 RT 2124-2125, 2145; 16 RT 2560.) When Oyler saw Lawrence, Oyler raised his arm to cover his face. (9 RT 1398-1399.) Lawrence then got back into his car and continued travelling north on the highway, in the direction Oyler had come from. (9 RT 1403.) Four hundred feet from where Lawrence had been stopped initially, he saw a fire next to the road. (9 RT 1401, 1403.) The fire was next to the southbound lane, the lane Oyler had been travelling in. (9 RT 1403.)

Ronald McKay was visiting Southern California in June 2006. (10 RT 1547-1548.) On June 14 McKay saw Oyler's Ford Taurus drive up the hill on Old Banning Idyllwild Road. (10 RT 1550, 1555.) About 30 minutes later, McKay saw the same car come down the hill. (10 RT 1553.) Shortly after seeing the car come down the hill, McKay saw smoke from a fire in the direction Oyler's car had traveled from. (10 RT 1548-1549, 1555-1556.) McKay called the fire department. (10 RT 1549.) McKay identified the car as Oyler's Taurus, and while he could not identify Oyler as the driver, he observed that the driver was a Caucasian male with very short hair (i.e. shaved head) and a mustache. (10 RT 1551-1552.)

Deeann Noland owns property near Winesap and Orchard Avenue, the location of the June 28 fire. (11 RT 1804.) On June 28, Noland was on

her property feeding her horses. (11 RT 1805.) The entrance to the property has a gate, and people do not normally drive onto her property through the gate. (11 RT 1806-1807.) That morning, a car drove onto Noland's property without slowing down. When the driver noticed Noland, he stopped abruptly, waved at Noland, and then turned around and drove off the property. (11 RT 1807-1811.) Noland could not identify the car or the driver, but testified a man was driving the car, and the car was a dilapidated, older model dark-colored sedan with very "oxidized" paint, a description that matched Oyler's Taurus. (11 RT 1808, 1812.) Fifteen minutes after seeing the car, Noland smelled smoke and saw a fire burning down the road. (11 RT 1817-1818.) She called 911. (11 RT 1819.)

In an effort to identify the arsonist, investigators placed hidden cameras on power poles near the major roads travelling in and out of the Banning Pass. (12 RT 2051-2052.) On October 22, the cameras captured a vehicle travelling northbound towards the location of the Mias Canyon fire, and then again captured the same car travelling southbound ten minutes later, away from the origin of the Mias Canyon Fire. (12 RT 2055-2056.) Within a few minutes of the car travelling southbound past the camera, the Mias Canyon fire was first reported. (12 RT 2055-2056.) The area where the Mias Canyon fire occurred is very remote and the road was not well-traveled. (12 RT 2056.) The car seen on the pole camera surveillance footage from October 22 was Oyler's Ford Taurus. (13 RT 2120, 2123-2124; Exhibits 77 & 160.)

2. Physical Evidence

a. DNA

The cigarettes from the June 9 and 10 fires were submitted to the Department of Justice for DNA testing. (10 RT 1514.) DNA collected from the cigarettes used in the June 9 and 10 fires matched Oyler. (13 RT

2251-2252.) A complete profile was collected from the June 9 cigarette, and it matched Oyler. (13 RT 2251.) The DNA analyst was only able to obtain a partial profile from the June 10 cigarette, but the partial profile matched Oyler. (13 RT 2251-2252.)

b. Tire Treads

Noland, the property owner who saw a car enter her property on June 28, spoke with investigators and showed them the tire tracks left by the car she saw that morning. (11 RT 1820.) An impression was taken of the tire tracks, and compared to the tires on Oyler's Ford Taurus. (10 RT 1640; 13 RT 2289, 2297.) The tire tread expert found that the two had similar tread design and tire dimension, but could not say definitively they were a match because of the amount of time (and thus unknown wear and tear) that passed between the June 28 tread cast from the fire scene and the tread cast taken from Oyler's Taurus on October 28. (13 RT 2290.)

Charlie DeHart a fire investigator heavily involved in this case investigated the three May 16 fires (8 RT 1233, 1237, 1238), the June 3 fire (9 RT 1361), the two June 11 fires (10 RT 1577, 1584), the June 28 fire (11 RT 1829), and the July 2 and July 9 fires (11 RT 1848, 1852.) He saw tire tracks at the July 9 fire scene that looked similar to tire tracks he had observed at other fire scenes. (11 RT 1868.) Because the tracks were too shallow, a cast could not be made of the July 9 tracks. (11 RT 1874.) The tire tread expert compared a picture of the July 9 tire tread to the tire tread from Oyler's Taurus and found a similar tread design. (13 RT 2299.) The tire tread expert also looked at photos of tire treads found at one of the June 14 fire scenes and again found that the tread design was similar to the tread design on appellant's Taurus tires. (13 RT 2291-2293.)

c. Match Analysis

A criminalist from the Department of Justice examined the matches collected from the various scenes for similar characteristics and elemental composition. (14 RT 2408-2412.) The matches recovered from the June 3 fire, all three June 14 fires, the June 16 fire, and the July 2 fire, had similar length, match head color, measurements, shape, and elemental composition. (14 RT 2412-2415.) The matches recovered from the June 11 fire (uncharged A) and the June 28 fire had similar length, match head color, measurements, shape and elemental composition. (14 RT 2415-2416.) The matches recovered from two of the May 16 fires (Sunset/Wilson and Gilman/Pump House) and the July 9 fire had similar characteristics and elemental composition. (14 RT 2416-2418.) The matches recovered from the June 9 and June 10 fires were similar to each other and were similar to the Diamond Strike-On-Box matches recovered from Oyler's fiancé's mother's house. (14 RT 2418-2420.) The Diamond Strike-On-Box matches were compared to the other groups, and did not match. (14 RT 2425-2426.) The matches from the May 28, 29, 31 fires and the Esperanza Fire did not match any of the others. (14 RT 2427-2429.)

3. Oyler's Motive and Opportunity

In 2006, Oyler and his fiancé, Crystal Breazile, lived with their infant daughter in an apartment complex on Xenia Street in Beaumont. (16 RT 2516-2517.) Their apartment complex was immediately adjacent to the point of origin for the two fires set at 6th Avenue and Xenia – the June 3 and June 18 fires. (11 RT 1719, 1738; 13 RT 2192.) Breazile knew Oyler was an arsonist. At some point in 2006, Breazile found a Ziploc bag of newspaper articles in the closet of their apartment. (16 RT 2544-2545.) The bag contained five to seven articles clipped from local newspapers that covered local fires. (16 RT 2544-2547.) When Breazile confronted Oyler,

he admitted the articles described fires he had started. (16 RT 2546.) Oyler told Breazile he never told anyone about his fire setting and he always acted alone. (16 RT 2548.) He explained to Breazile that he used a cigarette and matches to start his fires, and explained that he "wrapped" something around the cigarette to secure the matches to it. (16 RT 2536, 2548, 2551.)

In 2000, Oyler filled out an application to become a volunteer fire fighter and completed some of the training. (17 RT 2772, 2766.) He completed three months of training which included orientation, training regarding dealing with the public, and training on the safety gear for both structure fires and wild land fires. (17 RT 2776-2779.) In July 2006, in the middle of the string of fires, Oyler approached CalFire Captain Andrew Bennett as Captain Bennett was leaving the Banning fire station. (17 RT 2768.) Oyler asked Captain Bennett how he could become a volunteer fire fighter, and Bennett told him where to go. (17 RT 2769.) In addition, Oyler owned two retail police scanners – a portable one was found in his bedroom at his parent's house, and a larger one was found in the living room of his apartment. (13 RT 2220; 16 RT 2544; 17 RT 2746-2747.) The scanner in his apartment was hooked up to external speakers and was on constantly—"pretty much 24/7." (16 RT 2595; 18 RT 2936.) Oyler had 16 presets programmed into the scanner, and the scanner was set to "scan" mode, which meant it would automatically scan the presets and stop at any channel that had activity. (18 RT 2937-2939.) Police scanners pick up communications between CalFire and other agencies, like the Forest Service. (6 RT 998.)

In addition to the infant daughter Oyler had with Breazile, Oyler had another daughter, Samantha (age 2), from a previous relationship. (17 RT 2763-2764.) On May 18, 2006, after a custody battle, Oyler's cousins, Matt and Amber Anderson were awarded full custody of Samantha. (16 RT 2540.) Oyler was angry about the custody dispute and told Breazile he

tried to frame Matt Anderson for setting fires in order to regain custody of his daughter. (16 RT 2536-2538.) The first May 16 fire at Sunset Avenue and Wilson Street was less than one mile from the Anderson's home. (16 RT 2658.) The second fire at Sunset and Mesa was two miles north of the first fire, up Sunset Avenue, and the third fire at Gilman and Pump House was another mile up the road to the north. (Exhibit 136.) All three locations border a common open space. (Exhibit 136.)

In May and early June, Oyler worked part-time as an auto mechanic. (12 RT 1957-1958.) On June 20, he started a full-time job at Highland Springs Automotive, an automotive repair shop on Highland Springs Road in Beaumont. (12 RT 1967-1969.) Seventeen of the charged fires occurred before Oyler started working full time. (See Statement of Facts, section B "The Fires" *infra.*) Eight fires were set after Oyler started his full-time job, but all eight were set on days Oyler was not working, or before he had clocked in for the day. (12 RT 1977-1998, 2002-2003; Exhibits 236-243.)

Breazile testified that she and Oyler fought about his setting fires in 2006. (16 RT 2533.) Breazile and Oyler saw media coverage of a fire in Moreno Valley, and Oyler told Breazile he had started the fire. (16 RT 2532.) In response, Breazile gave him an ultimatum and told him she would leave if he did not stop setting fires. (16 RT 2534.) At one point, Breazile suspected Oyler was starting fires and packed her bags to leave. (16 RT 2534.) Breazile testified this fight occurred in January or February of 2006 (16 RT 2532), but the CalFire public information officer confirmed the only fire in Moreno Valley that garnered media attention (and would have been covered on television) between November 2005 and October 2006 was on July 5, 2006. (17 RT 2732-2735; see also 17 RT 2708, 2710-2711.)

In September 2006, at the time of the Orchard Fire in Cherry Valley, Oyler and Breazile were at Breazile's parents' house in Cherry Valley, a

few blocks from the origin of the Orchard Fire. (16 RT 2553; 13 RT 2187.) During their visit, Oyler left Breazile's parents' house for approximately 30 minutes. Shortly after he returned, they noticed the fire burning nearby. (16 RT 2621.) Breazile thought Oyler had started the fire, and confronted him about it. (16 RT 2622.) When confronted by Breazile, Oyler admitted starting the fire. (16 RT 2632.) After The Orchard Fire, Breazile was so convinced Oyler was setting fires that she broke into the trunk of Oyler's Taurus to look for evidence. (16 RT 2620.)

Jill Frame, Breazile's friend and Oyler's second cousin, (16 RT 2617), also knew Oyler was an arsonist. In 2004, Oyler told Frame he was upset that another fire in Moreno Valley had been larger than the fires he had set. (16 RT 2635.) Frame was in a car with Oyler the day after the Cherry Valley Fire (The Orchard Fire) was started. (16 RT 2634.) Oyler had binoculars and was looking in the direction of Cherry Valley through the binoculars. (16 RT 2634.) It was dark out, and Frame could barely see the flames in the distance. (16 RT 2634.)

Frame was at Oyler and Breazile's apartment in the evening on October 22. (16 RT 2623.) While there, Oyler asked Frame if she had heard anything over the police scanner about fires being set that day (October 22). (16 RT 2623-2624.) Oyler told Frame he had tried starting a fire that day. (16 RT 2624.) Frame also saw and heard Oyler fight with Breazile that evening. (16 RT 2625.) They were fighting because Oyler had not come home the night of the 21st. He explained he had fallen asleep in his car in the Banning High School parking lot while he was casing the area for a location to start a fire. (16 RT 2625-2626.)

All of the fires were set within 15 miles of Oyler's apartment, and were often close to his apartment, his work place, or Breazile's parents' house. (Exhibit 136.)

4. Access to or Possession of Instrumentalities of the Fires

Oyler was a smoker, and he preferred Marlboro Reds, although he was known to smoke other cigarette varieties as well, including Marlboro Lights. (16 RT 2517, 21 RT 3266.) Investigators searched Oyler's tool box from the auto shop and found three cigarette filters that had been cut. (13 RT 2191-2192.) Oyler's manager testified he often saw Oyler clip the filters on cigarettes. (21 RT 3268.)

At the time of the June 3 fire, Oyler worked part-time as an auto mechanic. (12 RT 1957-1958.) The auto shop where he worked had blue paper towels like the one used in the June 3 incendiary device. (12 RT 1963.)

When investigators searched Oyler's Taurus, they found Marlboro cigarette butts in the ashtray, and empty Marlboro cigarette packs in the car. (13 RT 2130, 2146.) Inside the car they also found a wooden stick match, two paper matches, a wig, a knit cap, latex gloves, and women's clothing. (13 RT 2133-2134, 2137-2138, 2145, 2147.) Oyler had a sling shot in his car, and the rubber bands on the slingshot had burn marks on them. (13 RT 2138-2139.) A grocery list found inside the car also had burn marks on it. (13 RT 2150.) The Taurus was filthy—covered in dirt, dust and twigs. (13 RT 2135.)

In a search of Oyler's apartment, investigators found cigarette butts in an ashtray by the front door. (13 RT 2194.) These included Marlboro Reds, Marlboro Lights, one Doral, three "GT 1" cigarettes, a Carnival, and a Kool cigarette. (13 RT 2232.) In total, 149 cigarette butts were collected of varying brands. A sample of nine of these were tested for DNA and eight of the nine came back with Oyler's DNA on them. (13 RT 2253-2255.) The Kool cigarette was the only cigarette tested that did not have Oyler's DNA on it. (13 RT 2253.) In Oyler's apartment, investigators also found

binoculars, and inside a duffle bag, they found rubber bands. (13 RT 2197, 2199.)

Investigators also searched Oyler's parents' home. Inside a tool shed in the bag yard, they found Oyler's baseball equipment bag. (13 RT 2213, 2215-2216.) Near the bag, also inside the tool shed, they found a box of Plenty Match Sticks. (13 RT 2216.) In another of Oyler's bags found at his parents' house, they found two chapters from *The Anarchist's Cookbook* which covered explosive devices and booby traps. (13 RT 2217-2218, 2220, 2225.) At Breazile's parents' house, investigators found Diamond Strike-On-Box matches. (13 RT 2187.)

5. Oyler's Motive and Whereabouts for the Esperanza Fire

On October 12, 2006, one of Oyler's sister's dogs bit someone. On October 21, the dog was taken by animal control and placed in an animal shelter. (16 RT 2517-2519; 20 RT 3129.) Oyler was very angry about the dog being held at the shelter, and on October 22, he and his sister, Joanna Oyler, had a conversation about setting the dog free by setting a fire to create a diversion. (16 RT 2524.)

On October 22 and 24, Oyler told Frame he wanted to "set the mountain on fire." (16 RT 2626 – 2628, 2656-2657.) He was referring to the mountain behind the animal shelter. (16 RT 2656.) At the time, the Taurus was not working and had a flat tire. (16 RT 2570, 2584.) Oyler asked Frame for a ride so he could set the mountain on fire. (16 RT 2627.) Oyler was "amped up" and excited; he wanted to go immediately. (16 RT 2628.) When Frame refused to give him a ride, he told her he would get a ride from someone else, and mentioned his brother, Jeff. (16 RT 2628-2629, 2633.)

Approximately one week prior to the Esperanza Fire, Oyler's new manager (at Highland Automotive) sold him a Chevy Malibu. (12 RT

1977-1978.) On October 25, 2006, Oyler drove the Malibu to drop Breazile off at work at Sizzler at 6:00 p.m. (16 RT 2558.) He returned to the restaurant with the couple's infant daughter at 8:45 p.m. to eat dinner with Breazile. He and the baby left Sizzler at 9:29 p.m. (16 RT 2561, 2563.) At 11:00 p.m., Oyler returned to pick Breazile up from work, and they drove back to their apartment. (16 RT 2564.)

At 11:30 p.m. on October 25, Oyler's sister, Joanna[13], asked to borrow her friend, Colete Nunez's car so she could go, "talk to her brother"—referring to Oyler. (17 RT 2692, 2693.) Nunez gave Joanna the car, and Nunez's cell phone was inside the vehicle at the time. (17 RT 2693, 2694.) When Joanna left in Nunez's car, Joanna was wearing Spiderman slippers. (17 RT 2696.) After Joanna took the car, Nunez called her own cell phone and Oyler's apartment trying to get the car returned. (17 RT 2695, 2701.) Joanna eventually returned the car around 4:00 a.m. on October 26. (17 RT 2696.) When Joanna returned the car, there were cigarette butts in the ash tray, and Nunez never smoked in her own car. (17 RT 2697-2698.)

Cell phone records corroborate these events, showing a call from Nunez's cell phone to Oyler's apartment at 11:26 p.m. on October 25, about the time Joanna borrowed Nunez's car. Then, in the early morning hours of October 26, Nunez's cell phone placed seven phone calls to Oyler's apartment – at 12:34 a.m., 1:52 a.m., 2:02 a.m., 2:23 a.m., 2:48 a.m., 2:50 a.m., and 2:54 a.m. (Exhibits 429 and 430.) From 12:00 a.m. to 12:36 a.m. on October 26, 10 phone calls were made from Nunez's cell phone. And from 1:49 a.m. to 3:36 a.m., 26 phone calls were made from Nunez's cell phone, but between 12:36 a.m. and 1:49 a.m., the time when

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[13] Because Oyler and his sister share a last name, respondent has referred to his sister by her first name to avoid confusion.

the Esperanza Fire was being set, no calls were made from Nunez's cell phone. The records also show six calls made from Oyler's parents' house to Nunez's cell phone between 1:55 a.m. and 3:00 a.m., consistent with Nunez's testimony that she was trying to get her car back. (Exhibit 429.)

Before 1:00 a.m. (on October 26), Breazile left the apartment and took the Malibu to Wal-Mart. (16 RT 2565.) She arrived at Wal-Mart at 1:01 a.m. (16 RT 2609.) Breazile was shopping in Wal-Mart until 2:27 a.m. (16 RT 2566.) She left Wal-Mart, drove to Jack-in-the-Box for food, and then returned home around 2:50 a.m. (16 RT 2569.) When she returned home, Oyler was there with the baby. (16 RT 2569.) She and Oyler got into a fight and he left the house in the Malibu at 3:30 a.m. (16 RT 2570.) When originally asked, Breazile lied and told Jill Frame that she was with Oyler the entire night of October 25 to the 26. (16 RT 2612.)

At 2:30 a.m. on October 26, James Carney was delivering gasoline to a Shell station in Cabazon. (17 RT 2665-2666.) The Shell station was one-half to three-quarters of a mile from the point of origin of the Esperanza Fire. (6 RT 958.) From the gas station, there was a clear view of the fire burning up Cabazon Peak. (17 RT 2670-2671.) Carney saw Oyler standing in between the pumps watching the Esperanza Fire burn. (17 RT 2673, 2674, 2681-2683 [identifies Oyler].) Oyler's car was not pulled up to a gas pump. (17 RT 2672, 2673.) Carney and Oyler talked about the fire, and when Carney said the fire was burning in an unusual manner, Oyler told Carney the fire was burning normally given the conditions. (17 RT 2674-2675.) Throughout their conversation, Oyler remained focused on the fire and spoke about it in a manner that led Carney to believe he had some training or expertise with fire. (17 RT 2677.) The Seminole Road fire that fire fighters noticed around 4:00 a.m. on October 26 was less than one mile from this Shell gas station. (18 RT 2985.)

On October 27, 2006, Riverside Sheriff's detective Scott Michaels interviewed Oyler. (18 RT 2857.) Oyler denied any involvement in the fires. (15 CT 3989, 4046, 4055.) Oyler told Detective Michaels his preferred brand of cigarette was Kools. (15 CT 4009-4010.) Oyler initially told Detective Michaels that he was home all night on October 25-26. (15 CT 4029.) Later, he corrected that and claimed he forgot he had gone to the Morongo Casino around 1:00 a.m. (15 CT 4031.) Oyler admitted stopping at the Shell station on his way home and seeing the fire from the gas station. (15 RT 4033.) Oyler claimed he was driving the Chevy Malibu. (15 CT 4039.) Detective Michaels told Oyler they had found tire tracks from Oyler's Taurus at the scene of the Esperanza Fire. Oyler adamantly insisted that that had to be a mistake, and there was no way his tire tracks could have been at the scene of the Esperanza Fire. (15 CT 4055, 4057, 4066.)

In an effort to confirm Oyler's alibi, investigators reviewed the surveillance video from Morongo Casino on the night of the Esperanza Fire and neither Oyler nor his car appeared on any of the videos. (19 RT 2918-2920.)

E. An inhabited structure burned in the Esperanza Fire

Lori Cornell lived in Twin Pines in October 2006. (19 RT 2992-2993.) She was evacuated with her husband just after sunrise on October 26, 2006, because the Esperanza Fire was approaching. (19 RT 2994.) Her house was completely destroyed by the Esperanza fire. (19 RT 2995.)

F. Defense Case

The defense called Shawn Martin, the gas station attendant from the Shell station on Seminole. (19 RT 3002.) He testified that he was the man standing between the pumps watching the fire in the early morning hours of October 26, and that he likely had a conversation with James Carney. (19 RT 3006-3007.) He and Carney knew each other from previous deliveries,

and often spoke when Carney delivered the gas. (19 RT 3010, 3015.) On cross-examination, he admitted he had to be wrong about identifying himself in at least one of the photos. (19 RT 3020.)

Detective Michaels testified that Daniel Contreras was found in Oyler's Taurus when investigators located the car on October 27, 2006. (19 RT 3029.) Michaels also clarified that no tire treads were found at the scene of the Esperanza Fire. (19 RT 3035.)

Joanna, Oyler's sister, testified that she, Oyler, and Jill Frame all used methamphetamine daily in October 2006. (19 RT 3041-3042.) On October 24, Joanna, Oyler, and Frame smoked methamphetamine together and then Oyler asked Frame for a ride to the animal shelter so they could get the dog out of the pound. (19 RT 3050-3051.) Frame agreed to give him a ride, and Frame, Joanna, and Oyler left Oyler's apartment in Frame's SUV. (19 RT 3052.) They drove to the pound with bolt cutters, cut the lock, and then hurried back to the car. (19 RT 3055-3056.)

On the night of October 25, Joanna borrowed Nunez's car, but did not drive to her brother's apartment until 3:00 a.m. (19 RT 3061, 3079.) Joanna claimed in the interim she drove Nunez's car to various friends' houses looking first for money, and then for drugs. (19 RT 3064-3076.) She testified she made all of the phone calls from Nunez's cell phone to Oyler's apartment. (19 RT 3064-3079.)

In the ten days following the Esperanza Fire, Joanna spoke with detectives four times, including two lengthy interviews on November 1 and 2, and she never mentioned being out on October 26 looking for drugs, despite assurances from the detectives that they did not care about drug offenses, and were not investigating drug-related crimes. (20 RT 3108-3110, 3111-3112.) Joanna also testified at the preliminary hearing and did not mention the story about buying drugs. (20 RT 3110.) She gave this account of the early hours of October 26 for the first time at Oyler's trial in

2009. (20 RT 3107.) In her previous interviews, Joanna told detectives she borrowed Nunez's car and drove directly to Oyler's apartment. (20 RT 3112-3113.) Joanna also testified she was at Oyler's apartment at 2:00 a.m., when her daughter called from her parents' house. Joanna said she answered the phone and spoke to her daughter. (20 RT 3117.) The only call after 10:00 p.m. between Joanna's parents' house and Oyler's apartment that night was at 2:03 a.m. (20 RT 3118-3119, Exhibit 430.) On November 1, Joanna told investigators she spoke with Oyler around 11:30 p.m. and then drove to his house. But in an interview with detectives the next day, Joanna claimed that Oyler had called her parents' house between 12:00 a.m. and 1:00 a.m. (20 RT 3125-3126.) No such phone call is reflected in the phone records. And by November 2, Joanna knew that the start time of the fire was around 1:00 a.m. (20 RT 3126.)

Joanna admitted Oyler said he wanted to start a fire to create a diversion to get the dog out of the pound. (20 RT 3127.) Joanna also admitted she lies when she is afraid of something. (20 RT 3130.)

No incendiary device was found for the Seminole Road fire on October 26. (20 RT 3162.) Gary Eidsmoe, an arson investigator, had seen five other devices that involved wooden stick matches. (20 RT 3162.)

The defense also re-called many of the criminalists that analyzed the physical evidence. (20 RT 3192, 3204, 3224.) The DNA expert tested the cigarettes from the May 16 fire and could not find any detectable genetic material. (20 RT 3200, 3202.) Another criminalist testified that the rubber bands recovered from the fire scenes were not the same as those recovered in the search warrants of Oyler's apartment and his parents' home. (20 RT 3208.) She also testified that she could not positively identify the brand of many of the recovered cigarettes. (20 RT 3209-3219.) The tire tread expert compared tire tread impressions taken from the Esperanza scene and

determined they did not match Oyler's Taurus or Malibu; she was not asked to compare them to a green Saturn. (20 RT 3225-3227.)

Breazile testified that she never broke into the trunk of the Taurus with Jill Frame, she never let Joanna babysit her daughter, and that items in their apartment referring to "Insane Clown Posse" and "lite it up" belonged to her, not Oyler. (20 RT 3230-3246.)

A defense investigator testified that she went to 47 stores in the area to buy wooden stick matches, and they were available at 14 of the 47 stores. (21 RT 3288.)

The defense also called an arson expert, David Smith. (22 RT 3368-3369.) Smith testified that he had seen wooden matches used in incendiary devices two or three times previously. (22 RT 3382.) Smith testified that, in his opinion, the fires were started by more than one arsonist because the differences in the devices indicated different people constructed them. (22 RT 3392.) At minimum, two arsonists were involved—one who set the lay-over device fires, and one who set the remote device fires. (22 RT 3397.) According to Smith, serial arsonists do not change the composition of their incendiary device because the incendiary device acts as their signature, and thus, allows the arsonist to take credit for having started the fire. (22 RT 3394, 3396, 3403, 3413.) Smith agreed that if Oyler was responsible for the June 9 and 10 fires, he was likely responsible for all of the lay-over device fires. (22 RT 3407.) Smith also testified that some serial arsonists target wild land and structures, not just one or the other. (22 RT 3417.) The communities along the Banning Pass are small and not densely populated, but Smith maintained two serial arsonists could have been operating in the same area at the same time. (22 RT 3416.)

Additional DNA testing showed the presence of a partial DNA profile on the rubber band from the second May 16 device (the Sunset/Mesa fire), but Oyler was excluded as a possible contributor. (22 RT 3510.) Testing

of additional items was unable to produce any DNA profiles. (22 RT 3477-3515.)

G. Rebuttal Evidence

Carney testified on rebuttal and reiterated he spoke to Oyler, not Martin. (23 RT 3662, 3665.) Carney explained that he knew Martin from previous deliveries and would have known if he had been talking to him. (23 RT 3657-3658.)

David Allen, another arson expert, testified that he had been involved in the investigation of over 100 serial arsonists—either as the primary investigator or the supervisor. (23 RT 3582.) In his experience, serial arsonists do change the make up of their incendiary device in order to make the device more successful, or to avoid detection. (23 RT 3592.)

Allen testified that in his opinion all of the devices involved in the case were constructed by a single arsonist. (23 RT 3597-3598, 3647.) His opinion was based on the locations of the fires, and the commonalities amongst the devices. (23 RT 3598.) All of the fires were roadside starts, and the use of wooden matches was abnormal. (23 RT 3594, 3637.) Further, many of the devices had a match facing in the opposite direction, or a match placed on the filter, which showed a common purpose of constructing the devices in a manner that would destroy the cigarette filter. (23 RT 3594, 3598-3599.) Allen explained that large remote devices, such as those used in the May 16 fires, have a higher failure rate because the arsonist cannot select the ignition location, and the cigarette will often extinguish on impact. (23 RT 3595.) In addition, the fires that were started on flat terrain tended to be towards the beginning of the series, and then the arsonist started selecting sloped terrain, and terrain that included drainages. (23 RT 3601.)

Allen also observed a "shotgun" pattern to the fire locations. In his experience, an arsonist will return to an area they want to burn and try a

second or third time to start a fire. (23 RT 3604-3605.) The arsonist is likely to return to an area where they have had success starting a large fire in hopes of starting another large fire. (23 RT 3606.) An arsonist's purpose in setting a fire in an open area is to burn a large area. If an arsonist intended only to start a small fire, or to see if an incendiary device would work, they could do that in their back yard in a controlled situation. (23 RT 3625-3626.) An arsonist would not consider a small fire successful. (23 RT 3625, 3628.)

Arsonists commonly progress from wild land fires, to structure fires because they are more damaging. (23 RT 3647-3648.)

Allen testified the single match fire on June 16 could have been a fire of opportunity. The serial arsonist gets an urge to set a fire and uses whatever means is available to set a fire immediately. (23 RT 3650.) This explains why the June 16 fire, in the middle of the lay-over device fires, was set with a single match. (23 RT 3650.)

H. Surrebuttal

Detective Peter Wittenberg testified that he interviewed Carney and showed him a photographic lineup. Carney identified Oyler as the man he was talking to at the Shell station but also told Wittenberg he thought Oyler looked familiar, and that he may have recognized him from the auto repair shop, or because he had seen his picture on television. (23 RT 3669-3675.) Carney told Wittenberg when he spoke to Oyler that night, Carney said the fire appeared to be spreading in an unusual fashion, and Oyler corrected him saying the fire was burning as he would have expected. (23 RT 3674-3675.)

II. PENALTY PHASE

A. People's Evidence in Aggravation

1. The Esperanza Fire

When Engine 57 responded to the Esperanza Fire on October 26, 2006, it was among a group of five engines from the United States Forest Service that all responded to the fire together. (25 RT 3974.) The other four were Engines 51, 52, 54, and 56. (25 RT 3974.) The captains of the other four engines all testified during the penalty phase about their role that day, and responding to the scene of the burn over. (25 RT 3973-4004 [Captain Chris Fogle—Engine 52]; 25 RT 4004-4009, 26 RT 4036-4045 [Captain Richard Gearhart—Engine 51]; 26 RT 4046-4052 [Captain Anna Dinkel—Engine 54]; 26 RT 4053-4062 [Captain Freddie Espinoza – Engine 56].)

United States Forest Service Battalion Chief Chris Fogle, Captain of Engine 52 on October 26, testified about seeing the burn over and finding the bodies of the men from Engine 57. (25 RT 3973-4004.) Fogle was a close friend of Mark Loutzenhiser's—they had worked together for 16 years and ran a volleyball league together. (25 RT 3974-3975.) Chief Fogle's crew was positioned in an area called "the double wide zone" near another house ("The Tile House"), when they saw the fire burn up the mountain and over the location of Engine 57. (25 RT 3981-3982.) An isolated run-off ignited and burned over the Octagon House in three to five seconds. (25 RT 3982.) Chief Fogle watched the burn over knowing his close friend and the crew from Engine 57 were in its path. (25 RT 3989-3990.) Immediately after the burn over, Chief Fogle tried to contact Engine 57, but got no response. (25 RT 3990.) Chief Fogle directed his crew towards the Octagon House, but the smoke was too thick to drive the fire

engine down the road. He and his EMT got out of the fire truck and continued on foot to the location of the burn over. (25 RT 3991-3993.)

Chief Gearhart of Engine 51 and Chief Espinoza of Engine 56 also traveled on foot to the location of the burn over. (25 RT 4009.) They found Pablo Cerda first. Cerda was badly burned, and in the pugilistic pose. (26 RT 4038.) Upon seeing Cerda, Chief Gearhart radioed that they had found the men and they were all dead. (25 RT 3994, 4009.) But when Cerda moved his arm immediately thereafter, Chief Gearhart radioed for immediate first aid. (25 RT 4009.) Upon arriving at the scene, Chief Fogle assigned his EMT to start treatment for Pablo Cerda. (25 RT 3995.)

Chief Gearhart found Mark Loutzenhiser second. Loutzenhiser's body was also dark, and he was rolling back and forth. (26 RT 4039.) Gearhart knelt next to Loutzenhiser, and tried to comfort him. (26 RT 4040.) Loutzenhiser's skin was badly burnt and his fingernails were peeled backwards. (26 RT 4040.) Gearhart knew he would die. (25 RT 4040.) Chief Gearhart radioed back to Chief Fogle to let him know, and then ran back to Fogle's position to warn him of Loutzenhiser's condition—knowing that Fogle and Loutzenhiser were very close friends. (25 RT 3996.) When Fogle got to Loutzenhiser he was very badly burned. His hands were sticking straight out, but he was still conscious. Fogle took Loutzenhiser's hand and told him he was there and that everything would be okay. (25 RT 3996.) Loutzenhiser looked at Fogle, and tried to say something, but Fogle could not make out what he was saying. (25 RT 3996.)

Next, the fire crews found the body of Daniel Hoover-Najera. (25 RT 3997.) Hoover-Najera was already dead when they arrived. (25 RT 3997.) Hoover-Najera was burning with a tree stump –the stump was still burning a divot into his side when fire fighters found him. (26 RT 4041-4042.)

Hoover-Najera's body was also still on fire, so the fire fighters had to pull hose from one of the engines and extinguish him. (25 RT 3999.)

The men tried to get closer to the actual engine, but it was still engulfed in flames, and the oxygen tanks were exploding. (25 RT 4000.) They eventually reached the engine, and found the body of Jess "Gus" Mclean two to three feet from the driver's door of the engine. (25 RT 4002, 4043.) Jason McKay's body was the last to be found. He was burnt so badly that Chief Fogle walked past him several times before realizing it was a body. (25 RT 4003-4004.) He too was still on fire, and fire fighters had to extinguish him. (25 RT 4003-4004.)

Bradley Harris, with CalFire, led the safety investigation into the Esperanza Fire burn over. (26 RT 4063.) The investigation was aimed at determining if anything could have been done differently to avoid the deaths of the five men. (26 RT 4063.) To that end, Harris' investigation reconstructed the events at The Octagon House in the final moments before and during the burn over. (26 RT 4046.) From that investigation, Harris could tell both Jess McLean and Jason McKay had moved a short distance trying to escape the fire. (26 RT 4069.) Both also attempted to assume a prone position, which is a last-ditch effort to assume a position that will protect one's airway. (26 RT 4069.) The footprints of Daniel Hoover-Najera showed that he had run rapidly around the house, and at one point, stopped, dropped, and rolled, trying to extinguish the fire from his gear. (26 RT 4070.) Hoover-Najera was running while on fire for over 30 seconds. (26 RT 4072.) Based on everything at the scene, the fire was moving at 30 miles an hour, which is "beyond extreme." (26 RT 4074.) Three miles an hour is considered a rapid rate of speed for fire. (26 RT 4074.)

The helicopters that responded to air lift Pablo Cerda and Mark Loutzenhiser landed in 57 mile-per-hour winds, more than 15 miles-per-

hour faster than the safe zone for helicopters to be flying (40 miles per hour). (27 RT 4132-4133.) The pilots landed the helicopters with great risk to themselves and the aircraft. (27 RT 4133.)

Thirty-nine homes burned in the Esperanza Fire. (27 RT 4134.) The total estimated cost of the loss caused by the fire (not including the loss of the five fire fighters) was $100 million. (27 RT 4136.) One home owner drove his back-hoe through several fire fronts, trying to escape the fire, and suffered non-life threatening burn injuries to his hands and face. (27 RT 4136-4137.)

2. The Uncharged Fires on October 26

On October 26, 2006, witnesses reported a fire at Dump's Road and Lamb's Canyon near Beaumont. According to the witnesses, the fire started at 7:30 a.m. that morning. (26 RT 4078.) A fire investigator responded to the scene at 6:00 p.m. that evening, and was the first fire personnel to respond. (26 RT 4078.) Fire fighters did not respond earlier because they were fighting the Esperanza Fire at the time. (26 RT 4083-4084.) The Investigator could not determine if the fire was caused by a vehicle or arson, but eliminated all other causes. (26 RT 4079.) The fire burned an area two feet by five feet, and some smaller clumps of grass down the road to the south. (26 RT 4079-4080.)

Oyler clocked into work on October 26 at 7:52 a.m., and clocked out at 4:30 p.m. (Exhibit 243.) Charles Cilio testified that during the day of October 26, the television was on at Highland Springs Automotive, and the employees were aware of the death of the five fire fighters and discussing it. (27 RT 4126-4127.)

On October 27, 2006, an investigator responded to a fire scene at Avenida Altura Bella, in Cherry Valley. (26 RT 4085.) The start time for the fire was around 4:50 p.m. on October 26, and the dispatch was sent out at 5:01 p.m. (26 RT 4086.) The fire had burned an area 50 feet by 100 feet.

(26 RT 4085.) The investigator found the remains of a cigarette-match device at the point of origin. (26 RT 4086.) The cigarette butt was completely burned, so the brand could not be determined. Attached to the cigarette with some sort of adhesive device were six paper matches. (26 RT 4087.) One of the matches was facing the butt of the cigarette, not the lit end. (26 RT 4089.) The device was similar to the device found at the Roberts Road Fire on September 16. (26 RT 4099.) The point of origin was five feet from the road. (26 RT 4087.)

3. Victim Impact Testimony

Mark Loutzenhiser's wife, brother and daughter testified. (26 RT 4100-4117; 27 RT 4120-4124.) Jason McKay's mother, sister, and fiancé testified. (27 RT 4138-4149, 4152-4157, 4191-4195.) Jess McLean's mother, brother, and sister testified. (27 RT 4157-4177.) Daniel Najera-Hoover's mother, aunt, sister, and girlfriend testified. (27 RT 4177-4189, 4196-4202.) And Pablo Cerda's father testified. (28 RT 4215-4221.) In general, the victim-impact witnesses testified about the kind of person the victim was, how they found out he had died, and what they missed most about him after his death. (26 RT 4100-4117; 27 RT 4120-4124, 4138-4202; 28 RT 4215-4221.)

B. Defense Evidence of Mitigation

1. CalFire Chief Jeff Brand

Jeff Brand, a battalion chief with CalFire Special Operations testified for the defense. (28 RT 4234.) Chief Brand was involved in the safety investigation of the Esperanza Fire, and specifically the burn over of Engine 57. (28 RT 4235.) His role was to determine what happened and provide "lessons learned" for the Fire Service. (28 RT 4236.) Chief Brand testified that Engine 57 was directed to go down Wonderview/Gorgonio to conduct structure triage and evacuations; they were not specifically directed

to The Octagon House. (28 RT 4242, 4244.) The "double wide" zone, near The Tile House, where the other engines were located, had been identified as a safety zone where fire fighters could seek refuge. (28 RT 4242-4243.) The branch operations chief noticed the headlights from Engine 57 at The Octagon House, and went to investigate around 6:20 a.m. (28 RT 4244-4245.) The branch operations chief spoke to Captain Loutzenhiser and Loutzenhiser told the branch chief he was there as a lookout for the other engines. (28 RT 4245-4246.) The branch chief left The Octagon House location at 6:30 a.m. (28 RT 4245.)

From his lookout location at The Octagon House, Captain Loutzenhiser gave word to the other engines that they needed to initiate a backfire immediately. (28 RT 4265.) The backfire was intended to increase the defensible space at the "double wide" location and to decrease the intensity with which the fire would hit those engines. According to Chief Brand, the backfire made the difference in terms of the other engines' ability to survive the fire as it burned passed them. (28 RT 4263-4264.) Captain Loutzenhiser's command saved their lives. (28 RT 4264-4265.) Engine 57 could not initiate a backfire at their location without putting the other engines at risk, so they did not ignite a backfire to increase the defensible space at The Octagon House. (28 RT 4265.)

When fighting the Esperanza Fire, the incident commander and the branch chiefs used a structure protection contingency map of the area that indicated defensible and nondefensible structures. (28 RT 4250, 4252.) The map had been developed in 2002. (28 RT 4254.) The Octagon House was marked with a red dot, indicating it was not a defensible structure. (28 RT 4250-4251.) Two other structures on the same property, a garage and a Quonset hut, had green dots indicating they were defensible. (28 RT 4266-4267.)

Chief Brand explained that the map is used as a tool during an active fire, but it is not the exclusive means by which the fire fighters determine how and where to allocate resources. (28 RT 4250-4251.) Even with a map, fire engines still have to physically go out into the threatened areas to triage structures and ensure no one is inside any of the homes. (28 RT 4250, 4263.) And, because the map is subject to changed conditions (improved defensible space, etc.) and the specific conditions of a given fire, the engine captain makes the ultimate decision about which structures can or should be defended. (28 RT 4251.)

In the case of The Octagon House, it was a concrete structure, with a tile roof and an available water source. All of these factors favored its safety as a location for the fire fighters. (28 RT 4272, 4265.) A fire captain would assume those building materials could withstand a significant fire. (28 RT 4272.) The shape of the house and its large picture windows made it unsafe. (28 RT 4253.) But, nobody would have known that the shape of the house was problematic because no one had experience with a fire burning over an octagon-shaped residence. (28 RT 4268-4269.)

Chief Brand explained the fire moved up the unnamed drainage at an "extreme rate of speed that ... – is off the scales." (28 RT 4246.) The velocity of the fire as it came over the location of Engine 57 was "nonsurvivable." (28 RT 4253.) The conditions that contributed to this extreme fire were unpredictable. The fire aligned in the unnamed drainage and was aided by 30 mile-per-hour winds blowing northeast—directly up the unnamed drainage. (28 RT 4254-4255, 4258.) The "spot" or "finger" that burned over Engine 57 lit instantaneously and immediately ignited an area of 500 acres. (28 RT 4270-4271.) The men of Engine 57 would have had no way to know or predict that it was coming. (28 RT 4270-4271.)

2. Oyler's Fiancé, Mother, and Daughter

Crystal Breazile testified that Oyler could not have started the Esperanza Fire because she did not leave the apartment until 1:00 a.m. and he would not have had enough time to get to the location and start the fire. (28 RT 4277.) She also testified that the photographs of the person at the Shell station were not Oyler. (28 RT 4279-4280.)

Oyler's mother testified that she would continue to go see Oyler if he remained in prison. (28 RT 4300.) She also identified several family pictures of Oyler as a child. (28 RT 4305-4307, 4308-4310.) Mrs. Oyler testified that she and Oyler's father, Donovan, tried to teach Oyler values and how to develop a good character. (28 RT 4307-4308.) They raised him in the Mormon Church. (28 RT 4308.) Oyler was not a violent or aggressive child. (28 RT 4309.) Oyler's father passed away a year before trial, and his mother testified she was lost without Oyler's help. (28 RT 4312.) Mrs. Oyler also identified several pictures of Oyler's children, and his grand-child. (28 RT 4312- 4314.) Oyler believed in god, and prayed with his mother. (28 RT 4316.) As an adult, Oyler showed kindness towards his mother, and brought her gifts. (28 RT 4318.) Oyler was a good father to his daughter, Heather. (28 RT 4319-4320.) Mrs. Oyler believed her son would continue to support his family, and communicate with her from prison. (28 RT 4320-4321.)

Oyler's 21-year old daughter, Heather Oyler, testified that she was living in Minnesota when Oyler was arrested. (28 RT 4323-4325.) Heather immediately bought a one-way plane ticket to California, because she thought Oyler would need her. (28 RT 4325-4326.) Heather moved to Minnesota when she was eight years old, but stayed in constant contact with her father, and visited him in California every summer. (28 RT 4326-4327.) Oyler was a good father to Heather, and a good, caring grandfather to Heather's daughter. (28 RT 4329-4334.)

3. Expert Opinion regarding Oyler's Future Dangerousness

An expert testified that Oyler would adjust to institutional life very well, and not pose a threat to others. (28 RT 4290.)

C. People's Rebuttal

Captain Fogle testified that Engine 57 had not selected an unsafe location, and had not stayed at The Octagon House too long – past what they reasonably thought was safe. (28 RT 4336-4337.) Captain Fogle communicated with Captain Loutzenhiser when Engine 57 got to the Octagon House, and Loutzenhiser told him the house was a safe place to be with good clearance. (28 RT 4338-4339.) According to Captain Fogle, nothing about the location of The Octagon House would have indicated it was an unsafe location. (28 RT 4330.) Loutzenhiser did not do anything to endanger the lives of his men, and did everything he was supposed to do that day. (28 RT 4341.)

ARGUMENT – GUILT PHASE CLAIMS

I. THE TRIAL COURT CORRECTLY ABSTAINED FROM CONDUCTING A HEARING REGARDING THE QUALIFICATIONS OF OYLER'S RETAINED ATTORNEY

Oyler contends that the trial court erred in failing to ensure his retained attorney was qualified to represent him. (AOB 14.) Importantly, for purposes of this appeal, Oyler explicitly does not raise a claim that he received constitutionally inadequate representation. (AOB 25, fn. 6.) Instead, Oyler argues the error at issue was the trial court's for failing to sufficiently inquire into his trial counsel's qualifications to represent him and for failing to ensure Oyler was present at a hearing on the issue.

Oyler's argument alleges three separate claims of error. First, he argues the trial court erred because it failed to appoint competent counsel to represent him. (AOB 24-25.) Second, Oyler contends his due process

rights were violated because he was not present at a critical stage of the proceedings – a closed hearing on December 14, 2007, where the issue of his attorney's qualifications was discussed. (AOB 32-42.) Finally, Oyler argues the trial court erred when it appointed *Keenan*[14] counsel, because it failed to ensure Oyler's lead attorney was qualified under the applicable Rule of Court to serve as lead appointed counsel in a capital case, and failed to qualify *Keenan* counsel as lead counsel pursuant to the same rule. (AOB 42-52.) Oyler argues all three errors are structural, and require the automatic reversal of all of his convictions. (AOB 25, 42, 52.)

None of Oyler's claims demonstrates error. The trial court had no constitutional or statutory duty (or indeed, any authority) to ensure Oyler's attorney was qualified to represent him because Oyler's attorney was retained, not appointed. Because the December 14, 2007 hearing was not a critical stage of the proceedings, and so Oyler's absence was neither erroneous nor unconstitutional. And finally, the trial court did not err in failing to ensure Oyler's lead attorney was qualified under the Rules of Court because again, Oyler's lead attorney was retained, not appointed, and the trial court had no authority to impose the requirements of the Rules of Court on retained counsel. The trial court did confirm *Keenan* counsel was qualified to serve as associate counsel under the Rules, as required. The court was not required to do more. Further, even assuming the trial court erred in its application of the Rules of Court, such an error is one of state law only, and thus would only warrant reversal if Oyler could show the error resulted in a miscarriage of justice. Oyler cannot make this showing, and thus, even if the trial court erred, any error was harmless.

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[14] *Keenan v. Superior Court* (1982) 31 Cal.3d 424, 430.

A. Additional Background

At Oyler's arraignment on November 2, 2006, private attorney Mark McDonald had been retained to represent Oyler. (1 CT 10.) Mr. McDonald represented Oyler at all pretrial proceedings through the preliminary hearing on March 20, 2007. (1 CT 133.)

On June 19, 2007, McDonald filed a request pursuant to section 987.9 that Oyler be declared indigent so the court could appoint and authorize payment for "certain experts, and investigators essential to Mr. Oyler's competent representation in this capital prosecution." (AOB 24, 30; see also Confidential 987.9 Supp. CT 3-11, 25-29, 37-43, 71-80.) While the record does not contain a transcript of any section 987.9 hearings or findings, McDonald's subsequent filings indicate Oyler was declared indigent for these purposes. (4th Supp. CT 666-5.) At some point before December 11, 2007, McDonald also made a request to the Pay Judge Panel for the appointment of associate (*Keenan*) counsel. The request itself does not appear in the transcripts, but a letter regarding his request was received on December 11, 2007. (4th Supp. CT 659-1.)

On October 15, 2007, the People filed a "Request for Inquiry and Waiver Regarding Attorney's Qualifications as a Capital Litigator." (3 CT 614; 4th Supp. CT 615-1.) The prosecutor asked the trial court to conduct a hearing regarding McDonald's qualifications, to inform Oyler of the minimum qualifications for *appointed* counsel in California Rules of Court, rule 4.117, and to get a waiver from Oyler regarding his choice of counsel. (4th Supp. CT 615-1-615-7.) In support of his request for such an inquiry, the prosecutor cited *People v. Ramirez* (2006) 39 Cal.4th 398. (4th Supp.CT 615-5-615-6.)

As noted above, on December 11, 2007, McDonald received a letter from the Pay Judge Panel regarding his request for *Keenan* Counsel. The Panel indicated the trial judge must approve a request for associate counsel

in a given case, and must make the finding that associate counsel is qualified. (4th Supp.CT 659-1.)

On December 14, 2007, the court and counsel met in chambers, and discussed the prosecutor's motion, as well as the defense motion for the appointment of *Keenan* counsel. (4 CT 651; 2A RT 33-46.) Regarding the defense request for the appointment of *Keenan* counsel, McDonald told the court about the letter he had received, and explained, in accordance with the Pay Judge Panel's instructions, he planned to file the request directly with the trial judge. (2A RT 33, 44.) With regards to the prosecutor's motion, defense counsel indicated he was, "prepared to address that at any time, and Mr. Oyler is." (2A RT 34.) The court indicated it was concerned a hearing on the motion would be misrepresented by the media if it were public. (2A RT 34-35.) In addition, the court noted that it had reviewed the Ninth Circuit's *Jackson Daniels*[15] opinion and this court's opinion in *Ramirez*[16]. It concluded the *Ramirez* decision may have given the prosecutor the basis for filing such a motion, but the trial court was "extraordinarily wary" about interfering with the attorney/client relationship. (2A RT 34-35.) The trial court had not decided on the appropriate procedure, and sought the parties' input: "I would appreciate both counsel's input in advance of any hearing we do with respect to the appropriate manner in which to proceed, mostly to avoid any suggestion that there's an interference with the attorney/client relationship." (2A RT 36.) The court also indicated "if we do go forward on that type of a hearing, that it should be closed in order to avoid any misrepresentation through the media." (2A RT 35.) The court and McDonald agreed that the appointment of *Keenan* counsel would alleviate many of the prosecutor's concerns. (2A RT 37, 44.) The parties

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[15] *Daniels v. Woodford* (9th Cir. 2005) 428 F.3d 1181.
[16] *People v. Ramirez* (2006) 39 Cal.4th 398 (*Ramirez*).

set a future date of January 25, 2008, to conduct the hearing on the qualification motion, and set February 22, 2008, as the date for a section 995 motion hearing. (2A RT 43.) The court ordered the transcript from this in-chambers discussion sealed. (2A RT 45-46.)

Back on the record, and while Oyler was present, the court asked that the minutes reflect that there had been a chambers conference regarding certain procedural and logistical matters including a "discussion with respect to certain substantive issues pertaining to defendant's Fifth and Sixth Amendment rights," which the court had ordered sealed. (2 RT 47.) When confirming dates, the trial court noted the hearing set for January 25, 2008, and stated, "I had indicated that in ... this matter pertaining to issues which, if open to the public, could potentially cause extreme prejudice to the defendant in this matter and possible prejudice to the People's rights, at this time I find good cause to order that the hearing on January 25, 8:30, in this department, be closed." (2 RT 51.)

On December 26, 2007, the court issued an *ex parte* order, vacating the January 25, 2008, hearing date, but confirmed the February 22, 2008 hearing date. (4 CT 664.) On January 4, 2008, McDonald filed another request pursuant to section 987.9 asking the Pay Judge Panel to appoint the Riverside County Public Defender's Office Death Penalty Investigations Unit to conduct the investigative services needed. (4th Supp. CT 666-1-666-9.) The request indicated the Riverside Public Defender's Office had already been appointed by the trial court to serve as *Keenan* counsel on or about December 31, 2007. (4th Supp.CT 666-2.)

On January 25, 2008, *The Press Enterprise* filed a motion to unseal the December 14 hearing transcript and the correspondence filed with the court from December 11, 2007. (4 CT 667-668.) On January 28, 2008, the court heard the motion to unseal. (4 CT 894.) Oyler was present at this hearing. (2 RT 52.) During the January 28 hearing on the motion to unseal,

the court explained the December 14 hearing transcript was sealed, and that the defense was objecting to its unsealing. (2 RT 56.) In responding to *The Press Enterprise*'s argument to unseal the December 14 transcript, McDonald stated, "The other thing is – that was discussed in the December 14 transcript was the 25th of January hearing which the court uncalendered. I don't know why exactly that was taken off calendar, but it was to be a closed hearing anyway, unrelated to Mr. Oyler's – it is unrelated to the charges. It's unrelated to the facts, the allegations, or anything to do with this case. It's related to procedural trial safeguards, ..." (2 RT 61.) McDonald reiterated that Oyler's "rights would be impaired if it was released." (2 RT 61.)

The attorney for *The Press Enterprise* asked if the court intended to reschedule the January 25 closed hearing to a future date. The court explained that based on "certain developments" in the case, it was appropriate to vacate the hearing date, and pending the conclusion of those "developments" it would determine if the closed hearing was still needed. (2 RT 64-65.)

In an order dated January 31, 2008[17], the trial court indicated it had previously appointed the Riverside County Public Defender's Office to serve as *Keenan* counsel, but that the office had declined the appointment due to a conflict of interest. (4th Supp. CT 896-1.) The court ordered the Criminal Defense Lawyers panel to appoint qualified *Keenan* counsel in the ordinary course of business. (*Ibid.*)

On February 22, 2008, the court ruled on *The Press Enterprise*'s motion to unseal and ordered a redacted portion of the December 14 hearing unsealed. (4 CT 897, 899-900; 2 RT 66-68.) Because the

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[17] The file stamp on respondent's copy of this order is difficult to read, but appears to be January 31, 2008.

December 14 hearing related to 987.9 material, the court redacted those portions, but otherwise unsealed the transcript. (4 CT 900; see 2 RT 47 [indicating pages 33-46 sealed].) The discussion regarding how to proceed on the prosecutor's qualification motion remained sealed. (*Ibid.*)

On April 7, 2008, McDonald filed a motion specifically requesting the appointment of attorney Thomas Eckhardt as *Keenan* counsel. (4 CT 927.) Attached to the motion was a declaration from Attorney Eckhardt detailing his experience which included serving as lead counsel in over 250 criminal jury trials. Mr. Eckhardt had never tried a death penalty case but handled the pretrial proceedings for a capital case as a prosecutor, and was currently the lead attorney in *People v. Felix* (INF 051224), another pending capital case. (4 CT 929.) He had tried to a jury more than 50 cases involving expert witnesses, and as of March 2008, Mr. Eckhardt had completed a 21-hour training on capital litigation through the Death Penalty Seminar. (4 CT 929.)

On April 18, 2008, the court held a hearing regarding the motion to appoint Mr. Eckhardt as *Keenan* counsel. The court inquired into his qualifications, confirmed he was qualified to serve as associate counsel pursuant to California Rules of Court, Rule 4.117(e), and appointed him as *Keenan* or associate counsel. (4 CT 950; 5 CT 951; 2 RT 76-79.)

B. The trial court had no duty to ensure Oyler's retained attorney was qualified to be appointed lead counsel

Oyler argues the trial court failed in its duty to appoint competent counsel to represent him. (AOB 24-25.) Fundamentally, the trial court has no duty to ensure a *retained* attorney meets minimum qualifications used for courts to *appoint* qualified counsel where the defendant requires appointed counsel. Requiring such interference by trial courts in the attorney-client relationship would likely run afoul of the Sixth Amendment.

The trial court here expressed understandable concern over this issue and ultimately correctly decided no such hearing should be held.

The Sixth Amendment guarantees a criminal defendant the right to be represented by counsel. "[A]n element of this right is the right of a defendant who does not require appointed counsel to choose who will represent him." (*U.S. v. Gonzalez-Lopez* (2006) 548 U.S. 140, 144 [126 S.Ct. 2557, 165 L.Ed.2d 409] (*Gonzalez-Lopez*), citing See *Wheat v. United States* (1988) 486 U.S. 153, 159 [108 S.Ct. 1692, 100 L.Ed.2d 140]; Cf. *Powell v. Alabama* (1932) 287 U.S. 45, 53 [53 S.Ct. 55, 77 L.Ed. 158] ["It is hardly necessary to say that, the right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his own choice"]; see also *Caplin & Drysdale, Chartered v. United States* (1989) 491 U.S. 617, 624–625 [109 S.Ct. 2646, 105 L.Ed.2d 528] ["[T]he Sixth Amendment guarantees a defendant the right to be represented by an otherwise qualified attorney whom that defendant can afford to hire, or who is willing to represent the defendant even though he is without funds."].)

The Sixth Amendment's guarantee of a right to counsel of one's choosing, "commands, not that a trial be fair [(a guarantee found in the Fourteenth Amendment)], but that a particular guarantee of fairness be provided—to wit, that the accused be defended by the counsel he believes to be best." (*Gonzalez-Lopez*, *supra*, 548 U.S. at p. 146.) "The right to select counsel of one's choice... has been regarded as the root meaning of the [Sixth Amendment] constitutional guarantee." (*Id.*, at pp. 147–48.) And where a trial court erroneously interferes with a defendant's right to be represented by the counsel of his choosing, the error is structural and his convictions are reversible per se. (*Id.*, at p. 150.)

Oyler argues that his choice of retained counsel transitioned into an appointment of counsel when he ran out of money to pay Mr. McDonald, and asked the Pay Judge Panel to declare him "indigent." (AOB 24.) But

the procedural history reveals McDonald never sought appointment, and thus was never appointed by the court. It is true that McDonald filed a request with the pay panel asking that Oyler be declared indigent for purposes of securing funds for experts and investigators. (AOB 24, 30; see also Confidential 987.9 Supp.CT 3-11, 25-29, 37-43.) But, McDonald never filed a request seeking funds for his representation, i.e. a request that he be *appointed* as counsel. (See e.g. *Harris v. Superior Court* (1977) 19 Cal.3d 786 [authorizing a retained attorney to seek appointment in such situations]; and *People v. Cole* (2004) 33 Cal.4th 1158, 1179.) Accordingly, McDonald was never *appointed* counsel, he was throughout the duration of the representation, *retained* counsel. Thus, the rules regarding appointed counsel plainly did not apply. (See Cal. Rules of Court, rule 4.117.) Instead, the rules requiring trial courts to exercise extreme caution in the interference with the attorney-client relationship were in full force and effect.

Oyler's more general contention that the court had a duty to ensure he was being represented by "competent" counsel, should likewise be rejected. This court has already expressly rejected the argument that trial courts have a sua sponte duty to ensure defendants are represented by competent counsel. (*People v. Ramirez* (2006) 39 Cal.4th 398, 422.) Instead, as this court explained in *Ramirez*, permitting (or worse, requiring) trial courts to ensure the effectiveness of counsel's representation would violate the defendant's right to counsel of his choosing, and to, "defend himself in whatever manner he deems best." (*Ibid.*, citation omitted.) A defendant's "right to decide for himself who best can conduct the case must be respected wherever feasible." (*Ibid.*, citing *Maxwell v. Superior Court* (1982) 30 Cal.3d 606, 615.) Further, while the trial court in *Ramirez* did issue a warning to the defendant regarding the retained attorneys' qualifications (*Ramirez*, *supra*, 39 Cal.4th at pp. 419-422), there is no

authority for the position that such a warning is required where a retained attorney in a capital case does not meet the qualifications enumerated in the Rules of Court.

Accordingly, contrary to Oyler's argument (AOB 24), the trial court had no duty to ensure McDonald met the requirements of the Rules of Court governing *appointment* of counsel, and no independent duty to ensure McDonald was otherwise "qualified" or providing "competent" assistance[18]. While the courts have a set of qualifications that must be met before it *appoints* an attorney in a capital case (Cal. Rules of Court, rule 4.117), the courts cannot impose those qualifications on *retained* counsel. To require courts to conduct such an inquiry, impose those requirements, or otherwise monitor retained counsel's performance in such circumstances would almost assuredly interfere with a defendant's constitutional right to counsel of his choosing, and would disrupt "the sensitive nature of the relationship between a criminal defendant and his lawyer." (See *People v. Ortiz* (1990) 51 Cal.3d 975, 987.) This court has warned that, "the state should keep to a necessary minimum its interference with the individual's

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[18] Oyler contends this court's reasoning in *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*) is "relevant and instructive" on the issue of the trial court's duty to inquire into McDonald's qualifications. (AOB 38.) On the contrary, *Marsden* is not helpful because a trial court's duty to inquire in a *Marsden* situation is a direct result of the nature of the defendant's representation, i.e. that he has an *appointed* attorney whom he cannot discharge for any reason (as he could with a retained attorney). (See *Ramirez, supra*, 39 Cal.4th at p. 424 [cases addressing trial court duties with appointed counsel have "no application" in retained counsel context].) Further, this court has held that a defendant's right to counsel is personal, and cannot be asserted vicariously. (*People v. Martinez* (2009) 47 Cal.4th 399, 419.) A trial court's obligation to conduct a *Marsden* hearing only arises when the defendant personally notifies the court of his or her dissatisfaction with appointed counsel. No such obligation exists when, as happened here, a third party raises concerns about the quality of the representation the defendant is receiving. (*Ibid.*)

desire to defend himself in whatever manner he deems best." (*Id.*, at p. 982, and see *Smith v. Superior Court of Los Angeles County* (1968) 68 Cal.2d 547, 560–61 ["The inhibition imposed on a defense attorney by [threat of removal for 'incompetence' as determined by the trial judge] constitutes a serious and unwarranted impairment of his client's right to counsel."]; *People v. Crovedi* (1966) 65 Cal.2d 199, 206 [same].)

Despite the sanctity of a defendant's right to choose his own attorney, Oyler essentially argues the trial court should have intervened to deny him this right, or at a minimum to interfere with the right. But, the trial court appropriately refrained from doing so. There was no error.

Oyler also assigns error to the trial court because it failed to inform him of his right to appointed counsel. (AOB 38-40.) The trial court did not err. Penal Code section 987 requires the trial court to inform a capital defendant of his right to an appointed attorney, "if the defendant appears for arraignment *without counsel*..." (§ 987, subd. (b) (emphasis added).) But, Oyler appeared for arraignment *with counsel*, (1 CT 10), and thus, presumably he understood that he had the right to an attorney because he had already hired one. The trial court had no additional obligation to ensure Oyler understood he had a right he was already exercising. This situation is similar to a defendant's right to testify on his own behalf at trial. A trial court has no sua sponte duty to inform a defendant of this right, and no obligation to secure a waiver of the right on the record. Instead, this court has repeatedly explained that "'a trial judge may safely assume that a defendant, who is ably represented and who does not testify is merely exercising his Fifth Amendment privilege against self-incrimination and is abiding by his counsel's trial strategy....'" (*People v. Bradford* (1997) 14 Cal.4th 1005, 1053 (*Bradford*), quoting *People v. Mosqueda* (1970) 5 Cal.App.3d 540, 545.) Here too, and consistent with the express language of section 987, the trial court could safely assume Oyler understood he had

the right to be represented by counsel, because he appeared for arraignment with counsel. Oyler has failed to show the trial court committed any error.

C. The December 14, 2007 closed hearing was not a critical stage of the proceedings

Oyler next argues that the December 14, 2007, hearing was a critical stage of the proceedings, and his absence from that *in chambers* discussion was a violation of his constitutional rights. (AOB 32-42.) This claim should also be rejected.

A defendant has a federal constitutional right to be present at any stage of the criminal proceedings that is, (1) critical to the outcome of the case, and (2) one at which the defendant's presence would have contributed to the fairness. (*People v. Perry* (2006) 38 Cal.4th 302, 311–12 (*Perry*), citing *Kentucky v. Stincer* (1987) 482 U.S. 730, 745 [107 S.Ct. 2658, 96 L.Ed.2d 631] (*Stincer*); *People v. Bradford* (1997) 15 Cal.4th 1229, 1356-1357 (*Bradford*).) There is no error in excluding a defendant from routine procedural discussions on matters that do not affect the outcome of the trial. (*Perry, supra*, 38 Cal.4th at pp. 311-312, citing *People v. Hines* (1997) 15 Cal.4th 997, 1039–1040.) Further, defendants can be excluded from *in chambers* discussions on questions of law because a defendant's presence would not contribute to the fairness of proceedings. (*Perry, supra*, 38 Cal.4th at p. 312, citing *Kentucky v. Stincer*, *supra*, 482 U.S. 730 [exclusion of defendant from conference on the competency of child witnesses]; *People v. Morris* (1991) 53 Cal.3d 152, 210 [conference on jury instructions].)

A trial court's exclusion of a criminal defendant from trial, either in whole or in part, is reviewed de novo. (*People v. Waidla* (2000) 22 Cal.4th 690, 741.) Erroneous exclusion of the defendant is not structural error that is reversible per se, but trial error that is reversible only if the defendant proves prejudice. (*Perry, supra*, 38 Cal.4th at pp. 311-312, citing *Rushen v.*

Spain (1983) 464 U.S. 114, 118–119 [104 S.Ct. 453, 78 L.Ed.2d 267]; *Bradford, supra*, 15 Cal.4th at p. 1357.)

In *People v. Hovey* (1988) 44 Cal.3d 543, 573, this court concluded the defendant was properly excluded from an *in chambers* hearing to determine whether his attorney was providing effective assistance, after the attorney had announced he was unprepared for certain trial proceedings. (*Ibid.*) This court concluded that the defendant, "was properly excluded from the competency hearing, for it is very doubtful as a matter of sound public policy that a criminal defendant's presence should be required at in-chambers inquiries regarding his counsel's competence, unless the defendant himself has initiated the inquiry. Attendance at such hearings could well undermine the confidence and cooperation so necessary to insure an effective representation." (*Ibid.*) The hearing in this case was not initiated by Oyler, the defendant, but instead, was initiated by the prosecutor's motion. Accordingly, under *Hovey*, Oyler's absence was proper and did not violate any of his constitutional rights.

Further, the specifics of the December 14, 2007 closed hearing demonstrate that the hearing fails to satisfy either prong of the test concerning critical stages of criminal proceedings. First, the hearing itself did not decide anything. It was merely an opportunity to set dates for a future hearing at which the court would decide how to handle the prosecutor's motion. (2A RT 34-36.) Thus, this particular proceeding was not critical to the outcome of the case. In addition, the trial court asked both attorneys for input about how to proceed on such a motion, assuming there was authority to file a motion for an inquiry into defense counsel's qualifications. (2A RT 35-36.) The court was seeking legal guidance on the appropriate procedure, but never decided or ruled on the motion. (See *People v. Rundle* (2008) 43 Cal.4th 76, 178, disapproved of on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390 [holding meetings

between defense counsel and the trial court concerning potential juror misconduct were not critical stages requiring defendant's presence because the meetings "were merely exploratory discussions concerning the potential problem of juror misconduct and possible courses of action that might be taken to resolve that issue."].) Oyler's presence at this hearing could not have contributed to its fairness because Oyler would not have had anything to offer in terms of the appropriate legal procedure the trial court should follow in hearing and deciding an unusual motion.

In addition, Oyler's true contention appears to be, not that he should have been present at this hearing, but that he should have been informed of the prosecutor's concerns regarding his attorney's qualifications (and his presence at this hearing would have so informed him). (AOB 33-34, 37, 39-40.) But the record demonstrates Oyler was aware of the prosecutor's motion and was prepared to address it for the court. When the issue regarding the qualification motion was raised in chambers, defense counsel indicated he was, "prepared to address that at any time, *and Mr. Oyler is*." (2A RT 34, emphasis added.) Thus, Oyler knew about the prosecutor's motion and was prepared to address his choice of counsel for the court at the December 14 hearing.

Oyler's knowledge of the content of the prosecutor's motion is further supported by the proceedings that followed the December 14 hearing. Immediately after the chambers conference, the parties went back on the record with Oyler present, and the court noted that during the chambers conference, the parties had discussed, "substantive issues pertaining to defendant's Fifth and Sixth Amendment rights," and that the hearing had been sealed. (2 RT 47.) Later, the court noted that the matter they had discussed, if made public, "could potentially cause extreme prejudice to the defendant." (2 RT 51.) On January 28, again when Oyler was present, Oyler's attorney explained that he was objecting to the unsealing of the

December 14 chambers conference transcript because unsealing the transcript would "impair" Oyler's rights. (2 RT 61.) Then, responding to *The Press Enterprise* attorney's question about whether the motion would be recalendared, the court explained that it did not yet know if such a hearing was going to be necessary, and had to await the conclusion of "certain developments" in the case. (2 RT 64-65.)

It is incredibly unlikely that these conversations would be had in front of a defendant, and assuming he did not already know what his attorney and the court were referencing, he would not ask his attorney for more information. The record references were vague, but indicated the content of the chambers discussion was important and could implicate Oyler's constitutional rights, or cause him "extreme prejudice." If Oyler did not already know that the references were to the prosecutor's qualification motion, he certainly would have asked McDonald for an explanation. Accordingly, based on McDonald's direct statement at the December 14 hearing that Oyler was prepared to address the motion, and based on the proceedings that followed, Oyler was aware of the content of the prosecutor's motion, and his presence at the December 14 chambers discussion was not necessary to ensure he had been so informed. For these reasons, the *in chambers* discussion was neither critical to the outcome of the case, nor would Oyler's presence have contributed to its fairness. It was not a critical stage of the proceedings.

In support of his argument that this was a critical stage of the proceedings, Oyler cites *Bradley v. Henry* (9th Cir.2005) 428 F.3d 811, and an unpublished[19] Iowa Court of Appeals case – *State v. Morris* (Iowa Ct.

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[19] Iowa Rule of Appellate Procedure 6.14(5)(b) permits citation to unpublished cases as persuasive authority, but such cases are not to be considered controlling precedent. (See *State v. Goyette* (Iowa Ct. App.

(continued...)

App. 2011) 801 N.W.2d 33. (AOB 33.) But, this court has already recognized that the *Bradley v. Henry* opinion on which Oyler relies was vacated when the Ninth Circuit granted rehearing en banc. (*Perry, supra*, 38 Cal.4th at p. 313.) Following rehearing, the en banc court did not reach the same conclusion that an *in camera* hearing regarding representation constituted a critical stage of the proceedings. (*Bradley v. Henry* (9th Cir. 2007) 510 F.3d 1093, 1097–98 (*Bradley II*).)

In *Bradley II*, a five-judge plurality concluded that a determination by the trial court that the defendant could not afford to hire an attorney without asking the defendant about her financial situation was an "unconstitutional proceeding." (*Bradley II, supra* 510 F.3d at p. 1098.) The plurality held, "[i]n the initial substitution of appointed counsel for retained counsel, petitioner was given no chance to contest the conclusion, apparently reached by the judge even prior to the in-camera proceeding, that she could not pay. Due process does not permit a judge to decide such a question without hearing the affected party." (*Id.*, at pp. 1097-1098.) Thus, the plurality opinion following en banc rehearing is not supportive of Oyler's contention here. At best, the plurality opinion holds that a defendant's presence at a hearing on her ability to pay for an attorney would contribute to the fairness of the hearing because only the defendant could confirm or rebut the relevant factual finding regarding her financial means. And, in *Bradley II*, that led directly to a change in representation (i.e. the hearing was critical to the outcome of the case). The hearing at issue here is distinguishable because there was no finding or holding made by the court and Oyler did not possess any exclusive knowledge that would have been

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(...continued)
2008) 758 N.W.2d 841, abrogated on other grounds by *State v. Jenkins* (Iowa 2010) 788 N.W.2d 640.)

determinative of the issues. His presence could not have contributed to the fairness of the proceeding. And again, the hearing itself was procedural and the only ruling by the court was to set a future date for a possible substantive hearing on the prosecutor's motion. Such a hearing was not critical to the outcome of the case.

Even assuming the plurality opinion in *Bradley II* was helpful to Oyler's contention, as the concurring judge pointed out, because only five judges joined the majority opinion, it did not announce the law of the circuit, and could not be considered precedent. (See *Bradley v. Henry* (9th Cir. 2008) 518 F.3d 657, 658 [amendment following second petition for rehearing], citing *Marks v. United States* (1977) 430 U.S. 188, 193 [97 S.Ct. 990, 51 L.Ed.2d 260].) Instead, the narrower grounds expressed in the concurring opinion were the only grounds for which a majority existed, and constituted the holding of the case. (*Ibid.*) The concurring opinion did not weigh in at all on the defendant's absence from the proceeding, instead it determined the completely distinct issue that the trial court erred in denying a motion to substitute counsel. (*Bradley II*, *supra*, 510 F.3d at p. 1099.)

Oyler's citation to the unpublished Iowa Court of Appeal case is similarly unhelpful. There, the trial court received reports that defense counsel smelled of alcohol during court proceedings, and questioned the attorney outside the defendant's presence. (*State v. Morris* (Iowa Ct. App. 2011) 801 N.W.2d 33, *1.) First, as noted in footnote 18, the opinion is unpublished and thus cannot be cited for any precedential value. (See Iowa Rule of Appellate Procedure 6.14(5)(b).) Second, the court expressly declined to decide the constitutional issue, finding that the issue could be resolved under the applicable Iowa statute: "We find it unnecessary to flesh out the parameters of her constitutionally-grounded argument, as we believe the language of the [Iowa] rule is dispositive." (*State v. Morris*, *supra*, 801 N.W.2d at *2.) Third, to the extent the court's analysis under

the Iowa rule was similar to the constitutional inquiry, respondent has explained above why the hearing at issue in this case, contrary to that at issue in *Morris*, does not constitute a critical stage of the proceedings under the applicable authorities. Briefly, the hearing in *Morris* was on the substance of the representation issue; the hearing in this case did not decide or even consider the substance of the prosecutor's motion.

For the foregoing reasons, the *in chambers* hearing on December 14, 2007, was not a critical stage of the proceedings, and Oyler's absence did not violate his constitutional rights.

Further, Oyler argues the error is structural and requires automatic reversal. (AOB 42.) But, this court has expressly held otherwise: "Erroneous exclusion of the defendant is not structural error that is reversible per se, but trial error that is reversible only if the defendant proves prejudice." (*Perry*, *supra*, 38 Cal.4th at p. 312, see also *People v. Blacksher* (2011) 52 Cal.4th 769, 799 ["Defendant has the burden of demonstrating that his absence prejudiced his case or denied him a fair trial."].) Oyler makes no argument regarding the prejudice to his case, and cites to nothing in the record demonstrating he was denied a fair trial. (AOB 42.) Accordingly, he has forfeited this issue and failed to carry his burden of demonstrating prejudice. (See e.g. *People v. Duff* (2014) 58 Cal.4th 527, 550, fn. 9 [claim of ineffective assistance of counsel raised by defendant for the first time in reply brief is forfeited].) Even if Oyler preserved this argument, the record does not disclose any prejudice. As explained above, the record shows Oyler was aware of the prosecutor's motion on December 14, 2007, when he was prepared to address the court regarding his selection of his attorney. (2A RT 34.) Even if he was not aware of the motion on December 14, he was certainly made aware of the content of the motion at future proceedings. (2 RT 47, 51, 61, 64-65.) Even absent his knowledge of the content of the motion, there is nothing in

the record that shows he ever expressed any reservations or concerns about the quality of his attorney's representation. Therefore, he cannot show a reasonable probability that he would have discharged his attorney or otherwise proceeded differently if he had been informed of the prosecutor's motion. Without this, Oyler cannot show his absence from the December 14 *in chambers* discussion prejudiced him or denied him a fair trial. Accordingly, Oyler has failed to demonstrate that any error was prejudicial.

D. The trial court did not err when it appointed *Keenan* counsel without first ensuring either counsel was qualified under California Rules of Court, Rule 4.117 to serve as lead appointed counsel

Next, Oyler argues the trial court's appointment of Attorney Eckhardt as *Keenan* counsel violated his rights in two respects: 1) Oyler argues the appointment violated rule 4.117 and Penal Code section 987 because, before the trial court could appoint associate counsel, it had a duty to find McDonald was qualified to serve as lead counsel (AOB 50-52), and 2) Oyler contends the court violated rule 4.117 because it appointed only one attorney in Oyler's case (Eckhardt) and failed to ensure Eckhardt was qualified to serve as lead counsel. (AOB 47-48.) Neither contention is supported by the plain language of rule 4.117 or section 987, and the trial court had no duty to ensure either Eckhardt or McDonald had the experience necessary to meet the requirements for *appointed lead counsel* pursuant to rule 4.117, because neither served as appointed lead counsel.

As Oyler observed, it is unclear that a trial court has any authority to appoint *Keenan* counsel based on a written request from *retained* lead counsel. (AOB 44, citing *People v. Carrasco* (2014) 59 Cal.4th 924, 954-955.) Notably, the issue in *Carrasco* was whether the trial court erred in *denying* a request for *Keenan* counsel from a retained attorney. (*Ibid.*) Here, the trial court granted the request. At bottom, this amounts to affording Oyler more representation than that to which he was entitled. It is

unclear how giving Oyler two attorneys where he was potentially only entitled to one could prejudice him.

That aside, the appointment of *Keenan* counsel in this case, did not require, as a prerequisite, an inquiry into McDonald's qualifications to serve as lead counsel. California Rules of Court, rule 4.117 does establish minimum requirements for the qualification of appointed attorneys in capital cases. But, at the risk of redundancy, McDonald was not appointed, he was retained. Thus, rule 4.117 is irrelevant as to McDonald, and the trial court had no duty (and indeed, no authority) to require McDonald meet the qualifications enumerated in rule 4.117.

Rule 4.117 states explicitly that its purpose is to "define[] minimum qualifications for attorneys *appointed* to represent persons charged with capital offenses in the superior courts. These minimum qualifications are designed to promote adequate representation in death penalty cases and to avoid unnecessary delay and expense by assisting the trial court in *appointing* qualified counsel. Nothing in this rule is intended to be used as a standard by which to measure whether the defendant received effective assistance of counsel." (Cal. Rules of Court, rule 4.117(a), emphasis added.) Subdivision (b) reiterates that "the attorney may be *appointed* only if the court...determines that the attorney... [can] diligently and competently represent the defendant." (Rule 4.117(b), emphasis added.) The plain language of rule 4.117 confirms the rule applies only to appointed counsel.

A plain reading of the rule also confirms that the trial court had no obligation to ensure Eckhardt was qualified to serve as lead counsel. Subdivision (c) explains that if the court appoints more than one attorney, one must be designated lead counsel, and meet the qualifications stated in subdivision (d) or (f), and the other attorney must be designated associate counsel and meet the qualifications stated in (e) or (f). There is no dispute

here that the court qualified Eckhardt as associate counsel, and ensured he met the qualifications of subdivision (e). (4 CT 950, 5 CT 951; 2 RT 76-79.) Because Eckhardt was serving as associate counsel, not lead counsel, this was appropriate. The fact that McDonald had not been qualified as lead counsel demonstrates only that Oyler got an associate attorney to which he was potentially not entitled, as explained above. (See *Carrasco*, *supra*, 59 Cal.4th at pp. 954-955.) Oyler argues rule 4.117, subdivision (c)(2), ought to be read to require trial courts to qualify associate attorneys as lead attorneys in a situation such as this, where the lead attorney is retained, not appointed. (AOB 47-48.) But, read in context with subdivision (c)(1), the plain meaning of the rule is that where the trial court is *appointing* only one attorney to represent the defendant (and is not appointing "more than one," i.e. associate counsel), that attorney must be designated the lead attorney and meet the qualifications enumerated in subdivisions (d) or (f). (Cal. Rules Court, Rule 4.117(c)(2).) Where the court is appointing more than one attorney to represent a defendant, it must designate lead counsel and ensure he or she meets the qualifications in subdivision (d) or (f), and must designate the other attorney "associate counsel" and ensure he or she meets the qualifications in subdivision (e) or (f). Here, the court only appointed one attorney, but it appointed "associate counsel," not lead counsel, because Oyler's lead counsel was retained. The trial court fully complied with its duties under the Rules by ensuring the appointed associate counsel met the qualifications enumerated in subdivision (e).

Further, even assuming the trial court committed some error in its application of rule 4.117, the error is one of state law only and thus Oyler is required to show a reasonably probability that a more favorable result would have been reached absent the error. (*People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*); see e.g. *People v. Williams* (2006) 40 Cal.4th

287, 300–302 [error by the trial court in revoking the appointment of *Keenan* counsel is evaluated under the *Watson* standard]; see also *People v. Doolin* (2009) 45 Cal.4th 390, 432–33 [error in denying request for *Keenan* counsel is state law error evaluated under *Watson*].) Again, Oyler argues only that the error was structural and requires automatic reversal. (AOB 52.) Because he bears the burden of demonstrating prejudice following errors of state law, his failure to make any argument about the resulting prejudice forfeits any claim of prejudice.

In addition, as explained above, the record does not demonstrate any prejudice because nothing indicates Oyler was personally dissatisfied with his representation. Had the trial court been required to ensure either McDonald or Eckhardt was qualified under rule 4.117 to serve as lead counsel, Oyler's private, established, and seemingly cooperative relationship with McDonald (coupled with McDonald's experience) would have been sufficient for the trial court to determine McDonald was qualified under subdivision (f), even if his experience fell short of meeting the technical requirements of subdivision (d). In light of the sanctity of a defendant's right to choose his attorney (discussed above), the trial court would have sought to comply with the rule in a manner that protected Oyler's Sixth Amendment rights—appointing McDonald under subdivision (f) would have struck that balance. (See *People v. Noriega* (2010) 48 Cal.4th 517, 523, quoting *People v. Jones* (2004) 33 Cal.4th 234, 244 ["[A] trial court may abuse its discretion in refusing to appoint an attorney 'with whom the defendant has a long-standing relationship.'"]; see also *Noriega*, *supra*, 48 Cal.4th at p. 529 (disn. opn. J. Werdergar) ["The importance of an established attorney-client relationship to the overall fairness of a trial (and, by extension, the legitimacy of our adversarial system of jurisprudence) cannot be overstated."].) The same would have been true for Eckhardt. Assuming the trial court had to find Eckhardt qualified to serve

as lead counsel, the trial court would likely have qualified him under subdivision (f), even if he did not meet the requirements of subdivision (d), because he met the requirements of subdivision (e), and was not functionally going to serve as lead counsel since Oyler had already retained McDonald as lead counsel. Thus, even if Oyler is correct that the trial court somehow violated rule 4.117, any error was harmless and does not require reversal of Oyler's convictions.

II. THE REASSIGNMENT OF THE CASE FROM JUDGE PREVOST TO JUDGE MORGAN WAS NOT ERROR

Oyler contends the trial court erred in reassigning his case to Judge Morgan after the "sudden and unexplained" reassignment of Judge Prevost to a new courthouse. (AOB 53.) Oyler argues such error is structural, requiring reversal of all of his convictions without consideration of whether he was prejudiced by the purported error. (AOB 53, 64.) Further, he contends the proceeding where the case was reassigned was a critical stage from which he was absent—and thus, again, the error is structural. (AOB 64.) Assuming this court finds any such error was not reversible per se, Oyler argues the rulings of Judge Morgan evidence a bias in favor of the prosecution, and thus the error in replacing Judge Prevost with Judge Morgan was not harmless. (AOB 65.)

At the outset, this claim is forfeited because Oyler never objected to the reassignment of the case below. Additionally, he cannot show any error. Judge Prevost's reassignment to a different courthouse was neither sudden, nor unexplained, and the record affirmatively establishes it was a routine procedural matter (of which defense counsel was aware), not a critical stage of the proceedings. Even if he could show some error occurred, this court has already determined such errors are not reversible per se, and Oyler has not demonstrated any resulting prejudice.

A. Additional background

After Oyler was arraigned, the case was assigned to Department 31, the Honorable Judge Jeffrey J. Prevost, for all purposes on November 2, 2006. (1 CT 11, 1 RT 3.) Judge Prevost presided over the preliminary hearing in March 2007, and some of the pretrial proceedings. (1 RT 3, 9, 13, 17; 1 CT 143.)

On July 6, 2007, the parties met in chambers and Judge Prevost informed them (on the record) that a team of judges was arriving in mid-August. (1 RT 27.) Oyler's attorney confirmed he was aware of this fact. (1 RT 27.) And Judge Prevost explained that because of this, there was a possibility he would be reassigned to the Banning courthouse for a temporary period of time. (1 RT 27.) At the time, Judge Prevost anticipated the reassignment would last four months, and that he would be available in Riverside on select days to hear matters in this case. (1 RT 27-28.) The parties set a trial date of December 14, 2007, and anticipated Judge Prevost would be back in Riverside at that time to preside over the trial. (1 RT 28-31.) On December 14, 2007, a hearing was held in Riverside, Judge Prevost presided over that hearing, and he continued to preside over the pretrial matters through June 6, 2008. (2 RT 47, 110.) At the June 6, 2008, hearing, the parties set a new trial date of November 3, 2008, and the record makes clear that at least as of that June 6 hearing, Judge Prevost intended to preside over the trial. (2 RT 117, 119.)

On August 29, 2008, the case was called before the Honorable Helios J. Hernandez in Department 63. (2 RT 119-1.) McDonald announced his appearance and then waived Oyler's presence. (2 RT 119-1; see also 5 CT 1217.) On the record, Judge Hernandez said, "This case has previously been assigned to Judge Prevost, but as you know he has a new assignment. So I'm going to reassign it. This is hereby reassigned to Department 32, Judge Morgan." (2 RT 119-1.) That same day, the parties appeared in

Department 32 before Judge Morgan, the newly assigned judge. (2 RT 120.) Oyler's attorney never objected to the reassignment of the case. (2 RT 119-1, 120.) The parties indicated the November 3 trial date was not likely feasible. The court set a hearing for Septemebr 12, 2008 to discuss any pending or anticipated motions and to discuss a more feasible trial date. (2 RT 120-122.)

On December 19, 2008, the parties appeared before Judge Morgan in Department 32. Oyler was present at this hearing. (3 RT 185.) At that pre-trial hearing, Judge Morgan calendared a hearing in Department 31 before Judge Prevost to allow the parties to correct any errors to the transcript of the preliminary hearing, over which Judge Prevost had presided. (3 RT 191-192.) Judge Morgan noted he was scheduling the hearing for January 16, 2009, because "[h]e (Judge Prevost) is going out to Banning..." (3 RT 191.) Again, neither Oyler nor his attorney objected, raised any concerns, or otherwise indicated any surprise about Judge Prevost's reassignment to Banning.

B. Oyler forfeited this claim by failing to object

The record shows Judge Prevost's reassignment was not a surprise. Judge Hernandez indicated on the record that the parties were aware of the reassignment – "*as you know* he has a new assignment." (2 RT 119-1, emphasis added.) Oyler's attorney did not contest this, did not object in Department 63 when the reassignment was announced, and he further did not object when he appeared in Department 32 before Judge Morgan. It is not clear from the record if Judge Prevost's permanent reassignment to Banning in 2008 was connected to his temporary reassignment in July 2007, but because no objection was made either time, it is immaterial.

Failure to object to the substitution of a judge at the time it occurs in the trial court forfeits the issue. (*People v. Rogers* (2009) 46 Cal.4th 1136, 1171-1172, see also *People v. Cowan* (2010) 50 Cal.4th 401, 460, and

People v. Halvorsen (2007) 42 Cal.4th 379, 427 (*Halvorsen*).) Because Oyler never objected below, he cannot now complain that the substitution was somehow improper.

This case, like *Halvorsen*, "perfectly exemplifies the basis for the forfeiture doctrine." (*Halvorsen, supra*, 42 Cal.4th at p. 427.) Had Oyler objected to the substitution in the trial court, the court would have had an opportunity to expand on the reasons for the substitution, thus clarifying any ambiguity in the record. Oyler contends the trial court failed to sufficiently justify the substitution, but without an objection, the trial court had no reason to think either party required further explanation, or that it should further expound on the reasons for the reassignment. Similarly, had Oyler objected, the trial court could have considered other alternatives – i.e. exploring whether the parties would have preferred to try the case in Banning in front of Judge Prevost, or inviting Oyler to challenge Judge Morgan (Code Civ. Proc., § 170.6). Because neither party objected, there was no reason to explore these possibilities.

To consider the merits of this claim now, for the first time on appeal, would be unfair to the trial court, who easily could have avoided or corrected any error had it been brought to its attention. (See *People v. Saunders* (1993) 5 Cal.4th 580, 590 [purpose of forfeiture rule is to encourage defendants to bring errors to the attention of the trial court, so that they may be corrected or avoided and a fair trial had]; *People v. Simon* (2001) 25 Cal.4th 1082, 1103 [same].) Further, reaching the merits of this claim would encourage defendants to engage in gamesmanship by choosing not to object, awaiting the outcome, and then claiming error. (See *People v. French* (2008) 43 Cal.4th 36, 46.) Because he sat silently by in the trial court and never voiced any objection to or concern about the reassignment of the case, Oyler cannot now challenge the substitution of the trial court judge.

C. Oyler has failed to show any error

Even if this claim had been preserved, it is meritless. Oyler bears the burden of affirmatively demonstrating error on the record. (*People v. Montes* (2014) 58 Cal.4th 809, 853, citing *People v. Morris* (2003) 107 Cal.App.4th 402, 408.) And he has failed to carry that burden. Oyler has not identified any cognizable right that was violated. The judicial substitution here was not mid-trial, but instead, preceded the start of the trial by five months. (2 RT 119-1.) Oyler does not cite authority for a right to an "all purpose assignment" in capital cases; he only cites authority explaining why such a practice is used and the benefits it provides to judicial efficiency. (AOB 53, citing *People v. Superior Court (Lavi)* 4 Cal.4th 1164, 1179-1180.) Respondent could locate no authority for the proposition that a defendant has any right (statutory, constitutional, or otherwise) to any particular judge presiding over the various *pre-trial* matters in a given case.

Even section 1053, which applies *after* the trial has commenced, permits substitution of a trial judge when the original judge becomes unavailable for any reason. It provides in relevant part: "If after the commencement of the trial of a criminal action or proceeding in any court the judge or justice presiding at the trial shall die, become ill, or *for any other reason be unable to proceed with the trial*, any other judge or justice of the court in which the trial is proceeding may proceed with and finish the trial...." (§ 1053 (emphasis added); see also *People v. Rogers* (2009) 46 Cal.4th 1136, 1171-1172.) Thus, even had the substitution of Judge Morgan for Judge Prevost occurred mid-trial, it was proper under section 1053.

Oyler argues the substitution was procedurally improper because Judge Hernandez "made no findings and failed to offer any legal basis for removing Judge Prevost." (AOB 64.) First, he does not identify any

authority to support his assertion that such findings are required. (See AOB 64.) Further, Judge Hernandez did make a finding – Judge Prevost had a new assignment. (2 RT 119-1.) Without an objection, or a request for additional justification, Judge Hernandez's finding was sufficient. The parties were also apparently aware of the reassignment and that, on account of the new assignment, Judge Prevost would be unable to proceed with the trial. (2 RT 119-1.) As the presiding judge, Judge Hernandez had the legal authority to reassign the case when Judge Prevost became unavailable. (See generally Cal. Rules of Court, rules 10.603 & 4.115(b).) Without a request, Judge Hernandez had no reason or duty to announce the legal justification for every ruling issued. Oyler insinuates something sinister was afoot, and even suggests that the prosecutor had some motive to seek or bring about the substitution of Judge Prevost because Judge Prevost's rulings had been unfavorable to the People. (AOB 54-60, 63.) There is absolutely no evidence of any of this in the record. By all accounts, this was a routine matter handled in a routine manner.

Further, a mid-trial substitution pursuant to section 1053 does not require the defendant's consent or violate his due process rights. (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1211–1212 ["[Section 1053] does not require the consent of the defendant or his counsel."] (*Gonzalez*), abrogated on other grounds in *In re Steele* (2004) 32 Cal.4th 682, 690.) Nor does a mid-trial substitution of the trial judge implicate either the federal or the state constitutional right to jury trial. (*People v. Espinoza* (1992) 3 Cal.4th 806, 829 (*Espinoza*).) If a *mid-trial* substitution can be effectuated over defense objection, and does not implicate the defendant's rights to due process or a jury trial, at a minimum, the same must be true of a *pre-trial* substitution.

Oyler argues the improper substitution of Judge Prevost was structural error requiring reversal, and is not subject to harmless error review. (AOB

64.) This court has already rejected this contention with respect to an improper substitution of the trial judge, *mid-trial*. In *Halvorsen, supra*, 42 Cal.4th at p. 429, this court determined an erroneous substitution of a judge mid-trial is not structural error, and instead, is subject to harmless error review under *Chapman v. California* (1967) 386 U.S. 18 [87 S.Ct. 824, 17 L.Ed.2d 705]. (*Halvorsen, supra*, 42 Cal.4th at p. 429.) But, the error at issue in *Halvorsen* was a *mid-trial* substitution of a trial judge, which arguably touched on a federal constitutional right to have the same judge and jury hear the trial from start to finish. (*Id.*, at pp. 427-428, citing *Espinoza, supra*, 3 Cal.4th at p. 828.) As noted, this case is different in a fundamental respect—the substitution of Judge Prevost was not mid-trial, it was five months before trial began. Oyler has not cited any authority that supports a federal constitutional right to have the same trial court judge preside over and determine all *pre-trial matters*, as well as preside over the trial itself. Indeed, no such federal constitutional right exists. Accordingly, even if this court found error in the substitution, that error would not warrant reversal unless Oyler could establish prejudice under the applicable standard for state law errors—i.e. a reasonable probability of a more favorable outcome absent the error. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) He cannot make such a showing.

In any event, the record demonstrates that the substitution of Judge Morgan for Judge Prevost was harmless under the *Watson* standard and the *Chapman* standard. Under *Watson*, Oyler cannot show a reasonable probability of a more favorable outcome. It is important first to recognize the error at issue—Oyler has not alleged that the pre-trial substitution of a trial judge is unconstitutional or unlawful in all circumstances. He claims simply that the court did not make sufficient factual and legal findings on the record to support the substitution. (AOB 64.) Thus, absent the alleged error (insufficient factual and legal findings), the result would have been

exactly the same. The trial court would have simply made additional findings on the record. As explained above, the reassignment could have been effectuated over Oyler's objection, so in all likelihood, absent the error, the case still would have been transferred to Judge Morgan, and the outcome would have been identical. For the same reasons, under *Chapman*, this court can conclude beyond a reasonable doubt, that any error in the failure of the trial court to state sufficient reasons justifying substitution of the judge five months before the trial started did not contribute to the verdicts.

Even if Oyler could establish that, absent this alleged error, his case would have been tried before a different judge, he still has not shown prejudice. His argument that prejudice is shown through the "biased" rulings of Judge Morgan is without merit[20]. (AOB 64-65.) He contends Judge Morgan's rulings reveal a pattern of bias that favored the prosecution. This court rejected an identical claim in *People v. Farley* (2009) 46 Cal.4th 1053, 1110, finding, the claim was "essentially ... a claim of judicial bias, which defendant forfeited by failing to assert it below." (*Id.*, at p. 1110, citing *People v. Samuels* (2005) 36 Cal.4th 96, 114, see *People v. Chatman*

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[20] Oyler never raises a substantive claim of judicial bias or prosecutorial misconduct. But, throughout his Opening Brief, he often levies accusations of both. (See AOB 25, 64, 79, 119, 135, 138, 244, 246, 251, 322 [accusations of judicial bias], and see AOB 76-77, 200, 201, 248, 251, 318, fn. 56 [accusations of prosecutorial misconduct].) At times, Oyler cites cases discussing the standards used to assess claims of judicial bias and prosecutorial misconduct, but these citations are most often raised in the context of his arguments regarding prejudice from other asserted trial errors. Because Oyler's accusations of judicial bias and prosecutorial misconduct are not accompanied by the necessary separate headings, citations to authority, and argument that would be sufficient to raise the claims on appeal, respondent has not separately addressed the substance of these issues. (See Cal. Rules of Court, rule 8.204(a)(1)(B); see also *Allen v. City of Sacramento* (2015) 234 Cal.App.4th 41, 52.)

(2006) 38 Cal.4th 344, 362–363.) The same is true here—Oyler never claimed below that Judge Morgan's rulings were biased and indeed, he does not raise a substantive claim of judicial bias on appeal. He has forfeited any such claim by failing to object below. This court has also already held that a trial court's rulings against a party, *even if erroneous*, do not establish a charge of judicial bias. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1112.)

Further, Oyler's contentions of bias are more accurately characterized as disagreements with the rulings. As explained in the sections below, Judge Morgan's rulings on the change of venue motion, the exclusion of a juror for cause, and the admission of various items of evidence at both the guilt and penalty phase were all correct under the law, do not constitute an abuse of discretion, and certainly do not evidence any bias in favor of the prosecution. What is more, the record as a whole affirmatively establishes Judge Morgan was not biased in favor of the prosecution. Before trial, the People sought admission of 23 additional uncharged fires pursuant to Evidence Code section 1101, subdivision (b). (6 CT 1327-1353.) Judge Morgan excluded all but two, finding the effect of the evidence would prejudice Oyler. (4 RT 466-472.) During the trial, Judge Morgan initially excluded, over the prosecution's objection, the evidence of the ignition device found in Oyler's apartment, and the testimony of David Allen, the serial arson expert who was scheduled to testify in the People's case-in-chief. (12 RT 2113; 17 RT 2791-2796.) Judge Morgan also excluded all of the autopsy photographs at the guilt phase, because of the potential prejudicial impact. (18 RT 2809-2812.) Judge Morgan's rulings, when consider in the context of the entire record, demonstrate that he was impartial and even-handed. Any alleged bias is not borne out in the record, and Oyler has failed to show his trial was anything but fair.

D. The reassignment hearing was not a critical stage of the proceedings, and Oyler cannot show that his absence from the hearing resulted in any prejudice

Oyler also frames the issue as one implicating his constitutional rights because he claims this was a critical stage of the proceedings and he was denied the opportunity to be present. (AOB 64.) Framed this way, he again claims this error is reversible per se. (AOB 64.) First, Oyler's attorney waived Oyler's presence at this hearing (2 RT 119-1; 5 CT 1217), so he cannot claim any violation of his constitutional rights on account of his absence. "[T]his court has concluded, as a matter of both federal and state constitutional law, that a capital defendant may validly waive presence at critical stages of the trial." (*People v. Price* (1991) 1 Cal.4th 324, 405 (*Price*), citing *People v. Lang* (1989) 49 Cal.3d 991, 1026 (*Lang*); *People v. Robertson* (1989) 48 Cal.3d 18, 59–62; see also *People v. Sully* (1991) 53 Cal.3d 1195, 1238–1240.)

Even if his presence had not been waived, this was not a critical stage of the proceedings. A defendant cannot be excluded from proceedings that are 1) critical to the outcome of the case, and (2) ones at which the defendant's presence would contribute to the fairness of the proceeding. (*Perry, supra,* 38 Cal.4th at p. 312, citing *Stincer*, *supra*, 482 U.S. at p. 745, and *Bradford*, *supra*, 15 Cal.4th at pp. 1356-1357.) "A defendant claiming a violation of the right to personal presence at trial bears the burden of demonstrating that personal presence could have substantially benefited the defense." (*Price, supra*, 1 Cal.4th at p. 408, citing *Lang, supra,* 49 Cal.3d at p. 1027; see also *People v. Medina* (1990) 51 Cal.3d 870, 902–903.) Oyler cannot carry his burden of demonstrating either of the requisite showings to establish this was a critical stage of the proceedings.

First, assuming the judge that ultimately presided over the trial was unbiased, the substitution of one judge for another is not critical to the

outcome of the case. As explained in the sections that follow, the rulings Oyler contends were biased were not, and the record shows Judge Morgan was a fair and impartial arbiter. Second, Oyler's presence at the reassignment hearing could not have contributed to the fairness of that proceeding because, as indicated above, substitution of a trial judge can occur without the consent of the defendant or his attorney. (*Gonzalez, supra,* 51 Cal.3d at p. 1211.) Because the substitution can occur without Oyler's consent, his presence would have made no difference. "[C]onferences on questions of law, even if those questions are critical to the outcome of the case, [are not critical stages of the proceedings] because the defendant's presence would not contribute to the fairness of the proceeding." (*People v. Perry* (2006) 38 Cal.4th 302, 312.)

A routine substitution of a trial court judge is akin to other procedural matters the United States Supreme Court and this court have concluded do not constitute critical stages of the proceedings. (See *Stincer*, *supra*, 482 U.S. at p. 745 [conference on the competency of child witnesses]; *People v. Morris* (1991) 53 Cal.3d 152, 210 [conference on jury instructions]; *People v. Hines* (1997) 15 Cal.4th 997, 1039–1040 [when to resume proceedings after a recess].) "[T]here is no error in excluding a defendant from routine procedural discussions on matters that do not affect the outcome of the trial..." (*Perry, supra*, 38 Cal.4th at p. 312.) Accordingly, the reassignment hearing was neither critical to the outcome of the case, nor would Oyler's presence have contributed to its fairness. His absence from this proceeding did not violate any of his constitutional rights.

Finally, even assuming this was a critical stage of the trial, this court has also already explicitly rejected Oyler's contention, (AOB 64), that such error is reversible per se: "Erroneous exclusion of the defendant is not structural error that is reversible per se, but trial error that is reversible only if the defendant proves prejudice." (*Perry, supra,* 38 Cal.4th at p. 312,

citing *Rushen v. Spain* (1983) 464 U.S. 114, 118–119 [104 S.Ct. 453, 78 L.Ed.2d 267].) Oyler's only claim of prejudice relies on the "biased" rulings of Judge Morgan. (AOB 64-65.) As explained, in section II(C), the record belies Oyler's contention that Judge Morgan was biased. Additionally, Oyler cannot show prejudice because he cannot show that his trial would have proceeded any differently. Assuming he was present at the reassignment hearing, and assuming he personally objected to the reassignment, in all likelihood, the case still would have been reassigned over his objection. (See *Gonzalez*, *supra*, 51 Cal.3d at pp. 1211-1212.) Importantly, Oyler was present on December 19, 2008, when the reassignment was referenced again, and he did not personally object, or raise any concerns. (3 RT 185-191.) For these reasons, Oyler has failed to demonstrate prejudice and his claim must be rejected.

III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED OYLER'S MOTION FOR A CHANGE OF VENUE, AND THE DENIAL OF THE MOTION DID NOT VIOLATE ANY OF OYLER'S RIGHTS

Oyler contends the trial court abused its discretion when it denied his motion for change of venue. (AOB 65-133.) He further contends the voir dire was insufficient to ferret out biased jurors and thus, Oyler argues he did not receive a fair trial. (AOB 110-133.)

At the outset, this claim has been forfeited because Oyler failed to re-raise it after voir dire despite the trial court's invitation to re-raise the claim if voir dire revealed a biased jury pool. Additionally, he failed to exhaust all available peremptory challenges.

Further, the trial court appropriately and correctly denied the motion at the time it was made, finding Oyler had failed to establish he could not receive a fair trial in Riverside County. And, even assuming the motion was erroneously denied, Oyler cannot show that there is a reasonable likelihood he did not receive a fair trial.

A. Background

On August 13, 2008, Oyler filed a motion for a change of venue. (5 CT 960.) Attached to the motion was a transcript of the press conference held on November 2, 2006, the day of Oyler's arraignment. (5 CT 977.) In addition, Oyler included, as an exhibit, a table which detailed 62 newspaper articles published about the case, and a copy of each article. (5 CT 983-1161.) He also presented the report of a media analyst, Martin Buncher, of Intercontinental Marketing Investigations, Inc. (5 CT 1162- 1212.)

The press conference held on November 2, 2006, included statements from a number of local agency officials. (5 CT 977-982.) The Riverside County Undersheriff, Neil Lingle, told the media he and the Fire Department knew early on that the Esperanza Fire was started by an arsonist, and that the agencies worked "tirelessly" to find the responsible party. He also told the media that Oyler's arrest demonstrated they had done their jobs. (5 CT 977.) He then thanked a long list of people and agencies who had supported and assisted in the investigation. (5 CT 977-978.) Riverside County District Attorney-elect, Rod Pacheco spoke at the conference as well. He indicated the District Attorney's office supported the recommendation from law enforcement that Oyler be charged, and told the media that his office intended to file a complaint against Oyler that day. (5 CT 978.) He indicated that seeking the death penalty was a possibility, and that the District Attorney's office would have to make that decision in the coming months. (5 CT 979.) Pacheco referred to Oyler as the "suspect and soon-to-be-defendant." (5 CT 979.) Riverside County Fire Chief John Hawkins described what happened on October 26, and recognized the Fire Department for the months of hard work investigating all of the fires throughout the summer. (5 CT 979.) Hawkins praised the collaboration and support from the elected officials. (5 CT 979-980.) San Bernardino National Forest Supervisor Jean Wade-Evans thanked all of the agencies

that participated in the investigation that led to "an arrest" and said she was confident in the investigation and expected that "justice will be served." (5 CT 980.) Assistant Special Agent James Crowell from the Bureau of Alcohol, Tobacco, and Firearms (ATF) offered condolences to the families and said he was proud of the role ATF played in the investigation. (5 CT 980.)

Four members of the Riverside County Board of Supervisors also spoke. (5 CT 981-982.) Bob Buster said the "rapid apprehension, and now the prosecution of the suspect will bring Justice." (5 CT 981.) John Tavaglione and Marion Ashley praised the agencies involved in the investigation, the speed with which they were able to identify and arrest the suspect, and offered condolences to the families. (5 CT 981.) Jeff Stone also offered condolences to the family, thanked Chief Hawkins specifically as he was new to his position. (5 CT 981-982.) Stone also thanked the DA, "for the hundreds of lives that you've saved by apprehending this arsonist, where this is not his first act of a heinous crime, for investigating and file (sic) the charges against this pro-maniacal murderer in such a short period of time." (5 CT 982.) Stone indicated the Board had pledged to "bring this perpetrator to justice expeditiously... this has been accomplished." He stated the arrest would give some closure to the families of the victims and the affected citizens "that the perpetrator is behind bars and that he will answer to the charges that have been filed against him." (5 CT 982.) Stone also said the community could breathe a sigh of relief that "this sick individual is behind bars and is expected never to see the light of day." (5 CT 982.)

On September 10, 2008, the district attorney filed an opposition to Oyler's motion for change of venue. (5 CT 1232.) He argued the defense had failed to meet its burden of showing that Oyler could not get a fair trial in Riverside County. (5 CT 1232-1235.)

On November 7, 2008, the trial court conducted a hearing regarding the change of venue motion. At the hearing, the defense called Buncher to testify regarding his report on the pretrial publicity and the likelihood of Oyler getting a fair trial. (2 RT 134.)

Buncher testified he was an expert in polling. (2 RT 136.) He conducted a survey to assess the attitudes and feelings about Oyler in the community. (2 RT 136.) In assessing the impact of pretrial publicity in this case, Buncher reviewed 62 media articles to determine how Oyler was portrayed by the media and whether that portrayal would have impacted the public's perception of him. (2 RT 137.) Buncher explained that pictures of people with frowns tend to portray a negative impression of the person, as opposed to pictures of people smiling. (2 RT 139.) The picture of Oyler used most frequently in media coverage of the fires was of him "scowling." (2 RT 140.) This picture, according to Buncher, contributed to the portrayal of Oyler as a "villain" and thus contributed to a negative view of him by the public. (2 RT 140.) Based on, "the flow of information and the nature of the bias that [the media stories] contained towards" Oyler, Buncher opined that Oyler could not receive a fair trial in Riverside County. (2 RT 141, 155.) The prosecutor pointed out during cross examination that the media analysis was completely dependent upon Buncher's own opinions regarding the impact of the photographs of Oyler on the public, meaning Buncher never confirmed or dispelled his belief that the images, in fact, resulted in a negative view of Oyler in the community. Instead, Buncher felt the images contributed to a negative view of Oyler, and so he concluded that they did. (2 RT 160-161.)

Buncher also conducted a survey of a random sample of Riverside County residents and based on his survey, concluded there would be bias amongst a Riverside County jury pool. (2 RT 155.) In total, Buncher interviewed 198 Riverside County residents regarding their knowledge of

Oyler's case and their perceptions of his guilt or innocence. (2 RT 144-149.) The survey showed a large percentage of the participants associated the Esperanza Fire with the loss of life, and had "strong negative feelings of sadness and tragedy over what occurred." (2 RT 150.) The survey also revealed that 36 percent of survey participants thought the fire was caused by arson. (2 RT 150.) Sixty-five percent of participants paid "a lot" or "some" attention to the media coverage of the fire. (2 RT 152.) Forty-eight percent of the survey participants were familiar or extremely familiar with the circumstances surrounding the fire, 20 months after the fire. (2 RT 151.) Sixteen percent of survey participants associated Oyler with the fire. (2 RT 153.) Less than half (42 percent) of the sixteen percent of participants who associated Oyler with the fire thought he was responsible for it. (2 RT 154.) This amounted to 18 people of the 198-person sample who associated Oyler's name with the fire, and of those 18 people, six people thought Oyler was guilty. (2 RT 174-175.)

After reviewing the entire motion and the testimony presented, the trial court found that Buncher's statistics actually supported denial of the motion and clarified that Oyler could in fact get a fair trial in Riverside County. (2 RT 179, 180.) The court found that given the county's size, it was possible to empanel jurors who had never heard of the case. (2 RT 179-180.) The court made note of the press conference, but concluded that the trial would start so long after that press conference, that it was not likely the jurors would remember it. (2 RT 180.)

The trial court denied the motion for change of venue and noted explicitly that the denial was without prejudice, and that if circumstances arose during jury selection which demonstrated Oyler could not get a fair trial, he should re-raise the change of venue motion at that time. (2 RT 180.) Specifically, the court said, "I will say this, as the law allows me, and rightly so, that at the time that we are in the process of selecting a jury, this

is – I'm denying your motion without prejudice. If we see that we can't, heck, we'll have to face that, absolutely, to ensure that the Constitution works for everybody." (2 RT 180.)

B. Oyler forfeited this claim by failing to object to venue after voir dire

When a trial court initially denies a change of venue motion without prejudice, a defendant must renew the motion after voir dire to preserve the issue for appeal. (*People v. Johnson* (2015) 60 Cal.4th 966, 982 (*Johnson*); *People v. McCurdy* (2014) 59 Cal.4th 1063, 1076.)

In this case, just as in *Johnson*, "the trial court expressly stated that the denial was without prejudice to renewing the motion during jury selection." (*Johnson, supra*, 60 Cal.4th at p. 982; and see 2 RT 180.) Oyler forfeited his claim because he never re-raised the objection after voir dire. Failing to re-raise the objection suggests that his fears about being unable to secure an impartial jury in Riverside County turned out to be unfounded, and the jury selection process convinced him that he could receive a fair trial from an impartial jury. (*Id.* at p. 987.) This inference is further supported by the fact that Oyler also failed to exercise all of his peremptory challenges. (See *People v. Dennis* (1998) 17 Cal.4th 468, 524 [failure to exhaust peremptories is a "strong indication jurors were fair and defense itself so concluded"].) He exercised only eight of his 20 available challenges. (5 RT 675-677, 778-779.) Because he never re-raised his venue objection, this claim has been forfeited.

C. The trial court correctly denied the motion for change of venue

Even if not forfeited, substantial evidence supports the trial court's ruling denying the motion. A trial court must order a change of venue "when it appears that there is a reasonable likelihood that a fair and impartial trial cannot be had in the county." (§ 1033, subd. (a).) On appeal

from the denial of a change of venue, the reviewing court must "accept the trial court's factual findings where supported by substantial evidence, but... review independently the court's ultimate determination whether it was reasonably likely the defendant could receive a fair trial in the county." (*People v. Rountree* (2013) 56 Cal.4th 823, 837.)

To determine whether the defendant has shown a reasonable likelihood that he cannot receive a fair trial, the trial court (and this court, in conducting its independent review), consider the following five factors: (1) the nature and gravity of the offense; (2) the nature and extent of the media coverage; (3) the size of the community; (4) the community status of the defendant; and (5) the prominence of the victim. (*People v. Suff* (2014) 58 Cal.4th 1013, 1044–45, citing *People v. Leonard* (2007) 40 Cal.4th 1370, 1394; see also *People v. Avila* (2014) 59 Cal.4th 496, 507.)

To prevail on appeal, "[a] defendant challenging the court's denial of a change of venue must show both error and prejudice, that is, that it was not reasonably likely the defendant could receive a fair trial at the time of the motion, and that it is reasonably likely he did not in fact receive a fair trial." (*Rountree, supra*, 56 Cal.4th at p. 837.)

1. Nature and gravity of the offense

This was obviously a capital murder case, and so the nature and gravity of the offenses were severe. But, "the disturbing facts inherent in most capital murder cases standing alone do not require a change of venue." (*People v. McCurdy* (2014) 59 Cal.4th 1063, 1076-1077 (*McCurdy*).) In some senses, the facts of this capital murder case were less severe than others, in that the special circumstances of arson murder and multiple victims did not require proof of an intent to kill, and did not involve the types of disturbing and gruesome facts that accompany many capital murder cases. (See e.g. *McCurdy, supra*, 59 Cal.4th at p. 1076 [upholding denial of change of venue motion where case involved abduction and

murder of young girl from a shopping center, and "sensational" allegations of incestuous molestations], see *People v. Famalaro* (2011) 52 Cal.4th 1, 21-22 [upholding denial of change of venue motion where case involved kidnapping, sexual assault, and murder]; see also *People v. Ramirez* (2006) 39 Cal.4th 398, 407, 434–435 [upholding change of venue denial in serial rapist and murder case of "The Night Stalker."].)

In this regard, the nature and gravity of the offense here, while serious, was not prejudicial to Oyler's ability to receive a fair trial. And while the case did involve the murder of five victims, this court noted in *People v. Farley* (2009) 46 Cal.4th 1053, "on numerous occasions we have upheld the denial of change of venue motions in cases involving multiple murders." (*Id.* at p. 1083; see also *People v. Suff* (2014) 58 Cal.4th 1013, 1045 [13 counts of murder]; and see, e.g., *People v. Ramirez* (2006) 39 Cal.4th 398, 407, 434–435 [13 counts of murder].) Accordingly, despite the severity of the charges, this factor did not weigh heavily for or against a change of venue.

2. Nature and extent of media coverage

The press conference held on November 2, 2006, included some comments that indicated the speaker's confidence in Oyler's guilt, and even comments that could be considered inflammatory, i.e. Stone's characterization of Oyler as a "promaniacal murderer" and a "sick individual." (5 CT 982.) But, these were comments at a press conference, made by an elected official, not comments from the news media. The jury pool would have understood that Stone's comments were not intended to be a neutral or unbiased account of the facts of the case. The press conference, on the whole, was not inflammatory and instead was predominantly an opportunity for the officials to thank the other agencies involved in the investigation, to offer condolences to the families, and to announce that a "suspect" had been arrested and would be charged. Moreover, the press

conference was on November 2, 2006, more than two years before the jury was empaneled and the trial began. This solitary media event did not compel a change a venue.

In addition to the press conference, Oyler supplied 62 articles in support of his motion for a change of venue. (5 CT 986-1161.) But, the record discloses, "the tone of most of the articles was relatively neutral, and none was especially prejudicial or inflammatory." (*People v. McCurdy* (2014) 59 Cal.4th 1063, 1077–78.) Many of the articles covered the extent of the damage done by the fire and the death of the five fire fighters, (5 CT 986-987, 988, 998, 1016-1026, 1067-1070), but those were the facts of the case, and "[m]edia coverage is not biased or inflammatory simply because it recounts the inherently disturbing circumstances of the case." (*People v. Harris* (2013) 57 Cal.4th 804, 826.)

The majority of the articles covered the proceedings of the case, such as when Oyler was identified as a person of interest, when he was charged, arraigned, and other appearances in court. (5 CT 986, 988, 1002, 1027, 1071-1072, 1100, 1099, 1100, 1124-1126, 1127, 1128, 1132-1133, 1134-1135, 1136, 1138-1140.) In addition, there was considerable coverage of the preliminary examination and the judge's ruling that the evidence was sufficient to hold Oyler to answer on the charges. (5 CT 1073, 1074, 1076-1079, 1101-1103, 1148-1152, 1153-1155.) Additional articles discussed the District Attorney's process for determining when to pursue the death penalty. (5 CT 1156-1157, 1158-1159.) But all of these articles simply reported what was happening in the case, and none could be considered "inflammatory" or "unduly prejudicial" as to Oyler's guilt in the charged crimes. To the extent the articles discussed the facts of the case, nearly all of the discussion covered evidence that was eventually admitted at trial. (See *Suff, supra*, 58 Cal.4th at p. 1048 ["The reporting was largely factual, and most of the coverage referred to evidence that was ultimately admitted

at trial."]; and see *Rountree*, *supra*, 56 Cal.4th at p. 838 [considering coverage of "incriminating facts or evidence not actually presented at trial" when assessing prejudicial impact of media coverage].)

Most importantly, the media coverage was balanced. (See *People v. Harris* (2013) 57 Cal.4th 804, 824 [Crediting trial court's finding that the media coverage was "pretty evenhanded" overall]; and see *Rountree*, *supra*, 56 Cal.4th at p. 838 [affirming denial of change of venue, in part because media coverage was "reasonably balanced"].) Several articles discussed evidence and facts which tended to point towards Oyler's innocence. (See e.g., 5 CT 987 ["Residents saw two young men leaving the area where the fire began."]; 5 CT 1095-1096 [Discussing the absence of DNA evidence linking Oyler to the majority of the charges]; 5 CT 1027 [indicating Oyler was one of three "persons of interest" contacted as part of the investigation].) The main themes of Oyler's eventual defense at trial were also prominent features in the media coverage. The articles consistently mentioned Oyler's denial of any involvement with the fires (5 CT 990-991, 994, 1002, 1004-1005, 1006, 1008, 1010, 1015, 1032-1033, 1034, 1143), his alibi defense (5 CT 996, 1048, 1058-1061), and his attorney's theory that the investigators had rushed to judgment and pinned the crimes on the wrong person. (5 CT 996, 1039.) Several articles called into question the purported strength of the prosecution's case. (5 CT 996-997, 1058 ["Experts: Arson case has holes"], 1075.) And several more articles highlighted possible tactical mistakes and protocol violations made by the fire fighters which may have contributed to their deaths. (5 CT 1089-1094, 1106-1112, 1160-1161.)

The expert testimony from Buncher did not demonstrate that the nature of the media coverage was likely to bias the jury pool against Oyler. Buncher testified that Oyler was portrayed negatively in the media, because the picture used most often depicted Oyler "scowling." (2 RT 140.) But,

Buncher's opinion that this would contribute to a negative public perception of Oyler was based on nothing more than his own baseless assumption. (2 RT 160-161.) The trial court could, and likely did, reject this opinion as unsupported. Further, Buncher's own statistics demonstrated that the jury pool was not unduly prejudiced against Oyler as a result of the media coverage. Less than 10 percent of the survey participants associated Oyler's name with the fire, and of that 10 percent, one-third thought Oyler was guilty. (2 RT 174-175.) The survey confirmed the jury pool was not prejudiced by the extensive media coverage. (See *Harris*, *supra*, 57 Cal.4th at p. 825-826 [Affirming denial of change of venue where 72 percent of survey participants had heard of the case, and of those, 55 percent thought the defendant was definitely or probably guilty]; and see *Famalaro*, *supra*, 52 Cal.4th at p. 24 [Affirming denial of change of venue where 83 percent surveyed had heard of the case, and of those, 70 percent said the defendant was definitely or probably guilty of murder, and 72 percent said he should receive the death penalty].) On the whole, the *nature* of the coverage was neutral and unbiased.

The *extent* of the coverage also did not weigh in favor of a change of venue. Of the 62 articles submitted by appellant, nearly half (29) were published in 2006. Two of the articles pre-dated Oyler's arrest, and the other 27 articles from 2006 were published within two months of his arraignment. (5 CT 983-985.) Of the remaining articles cited by the defense, 28 were published in 2007, more than a year before the trial began. (5 CT 983-985.) And five articles were published in 2008—all five in January and February, still a year before trial began. (5 CT 983-985.) Notably, the defense did not cite to any articles that appeared between February 2008 and November 2008, when the trial court heard testimony

and ruled on the change of venue motion. While there may have been additional media coverage in the weeks immediately preceding the trial[21], because Oyler never renewed his motion, that information is not in the record, and importantly, his claim on appeal must be limited to whether the trial court erred in denying the change of venue motion *at the time it was made*. Based on the information provided, the trial court appropriately found that the media coverage dissipated substantially over time and was not so pervasive and prejudicial as to weigh in favor of a change of venue.

This court held similarly in *McCurdy, supra,* 59 Cal.4th 1063. After finding approximately a third of the 60 cited newspaper articles were published within two months of the defendant's arrest and 20 months before trial, this court noted, "[t]he passage of time ordinarily blunts the prejudicial impact of pretrial publicity." (*Id.*, at p. 1077, citing *People v. Harris* (2013) 57 Cal.4th 804, 827; see also *People v. Suff* (2014) 58 Cal.4th 1013, 1048 ["[T]he passage of time from the early intense media coverage diminished the potential for prejudice.") Further, in *McCurdy* this court pointed out that it had, "affirmed the denial of motions to change venue in cases with more media coverage. (*Id.*, at 1077, citing as e.g., *Harris, supra*, 57 Cal.4th at pp. 823–825 [48 newspaper articles, 294 television reports; media coverage described as "substantial"]; *People v.*

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[21] In support of his argument about the extent of the media coverage, Oyler cites and relies on the requests by media outlets to have cameras in the courtroom during the trial. (AOB 107.) These requests were not part of the motion for a change of venue, and should not be considered. As explained, Oyler never re-raised his objection to venue after the trial court denied the motion in November 2008. Because it was not re-raised, the trial court was never given an opportunity to assess any changes in the nature and extent of coverage between November 2008, and the start of trial in January 2009.

Ramirez (2006) 39 Cal.4th 398, 434 [coverage of serial murder case described as "saturation"].)

The nature and extent of the media coverage weighed against granting Oyler's change of venue motion. Because the coverage was neutral, balanced, and concentrated at the time of the crimes, the media coverage did not demonstrate Oyler could not receive a fair trial in Riverside County.

3. Size of the community

As of July 2007 (1 year and 4 months before the hearing), the population of Riverside County was 2, 073, 571. (5 CT 969, citing Exhibit D to Oyler's motion.) Riverside's population was comparable to that of Orange County, San Diego County, and San Bernardino County. (5 CT 969.) Oyler concedes this factor did not weigh in favor of a change of venue. (AOB 99-100.) But it is more than just the neutral factor he concedes it is. Riverside County's two million-person population weighed "strongly *against* a change of venue." (See *People v. Famalaro* (2011) 52 Cal.4th 1, 23 (emphasis original) [Holding that Orange County's population of two and a half million people (the fifth largest county in the United States) weighed strongly *against* a change of venue.].)

In *Suff, supra*, 58 Cal.4th 1013, this court concluded Riverside's population (in 1994) of 1, 357, 000 people was a neutral factor. (*Id.*, at p. 1045, citing *People v. Anderson* (1987) 43 Cal.3d 1104, 1131 [the size of the community was a neutral factor when Riverside County's population was 600,000]; see also *People v. Kelly* (1990) 51 Cal.3d 931, 955 ["The community, Riverside County, is large and diverse"].) "When, as here, there is a 'large, diverse pool of potential jurors, the suggestion that 12 impartial individuals could not be empanelled is hard to sustain.'" (*People v. Famalaro* (2011) 52 Cal.4th 1, 23.) By 2007, the population of Riverside County had increased by more than 50 percent since this court's assessment of the size of the Riverside community in *Suff.* With more than two million

residents and a population size comparable to some of the largest counties in California (and in the country), "the suggestion that 12 impartial individuals could not be empanelled [was] hard to sustain." (*Ibid.*)

The defense expert's testimony confirmed this. Of the 198 people surveyed by Buncher, 18 associated Oyler's name with the fire, and of those 18 people, six people thought Oyler was guilty. (2 RT 174-175.) Based on Buncher's own statistics, it was clear Riverside County was large enough that the parties would be able to empanel 12 impartial individuals, with little to no knowledge of the case and no preconceived notions of Oyler's guilt. Accordingly, this factor weighed strongly against a change of venue.

4. Community status of the defendant

Oyler's status in the community weighed against a change of venue. He was not a prominent figure in the Riverside County community, and neither he nor his family was well-known before his arrest. He did have a relatively minor criminal record that some early articles mentioned, but his record was too minimal to have prejudiced the jury pool against him. (See 5 CT 989, 1032-1038.) One article mentioned his prior conviction for possession of a controlled substance, and his "mostly minor run-ins with the law" when he lived in Missouri from 1997 to 1999, the most severe incident being a misdemeanor charge for violating a protection order. (5 CT 989.) Another mentioned his conviction in 1995 for taking a vehicle without consent. (5 CT 1037.) Nothing in his criminal record was similar to the charges he faced in this case, a fact that would make coverage of his criminal history more significant. And, importantly, the articles that discussed Oyler's criminal history were nearly all published in 2006, around the time of Oyler's arrest and arraignment. (5 CT 989, 1032-1038.) After that, the articles mentioned his criminal history in the context of the

factors the District Attorney considered when determining whether to seek the death penalty. (5 CT 1006, 1012, 1159.) And, the only article to cover his criminal history in any detail (on November 3, 2006) was favorable to Oyler, and noted that the comments from the press conference did not accurately portray him. Instead, the author wrote, "A more complete picture of Oyler – that of a nice, hard-working kid who gradually fell into a life of drugs and crime – emerges in court documents and interviews with some of those who have known him through the years." (5 CT 1035.) The discussion of his criminal history in the media coverage of the case was not substantial or prejudicial so as to weigh in favor of a change of venue. Oyler's criminal history was relatively minor, and the latest reference to it in the media was in May 2007, nearly two years before trial started. (5 CT 1006, 1012, 1159.)

Further, Oyler was not "associated with any group (such as a disfavored racial minority or juvenile street gang) towards which the community was 'likely to be hostile.'" (*People v. Famalaro* (2011) 52 Cal.4th 1, 23, citing *Odle v. Superior Court* (1982) 32 Cal.3d 932, 940; see also *Rountree, supra*, 56 Cal.4th at p. 838 [fact that defendants were not members of "any racial or ethnic group that could be subject to discrimination" cut against change of venue].)

Oyler also argues his status in the community weighed in favor of a change of venue because he was a drug addict, impoverished, and had a negative appearance. But these issues did not feature prominently (if at all) in the media coverage. Several early articles mentioned his tattoos, but did so when giving a physical description of Oyler. (5 CT 990, 1032.) Without more, these observations do not demonstrate a status in the community that was likely to prejudice the jury pool against Oyler. Poverty and addiction may be reasons to feel sympathy for a defendant, not contempt. (See e.g. 5 CT 1035.) His bare assertion of these traits does not demonstrate the

necessary resulting prejudice in the jury pool. He also argues that the reliance on his sister's testimony at trial made this factor particularly persuasive in favor of a change of venue. (AOB 100.) But his sister's anticipated testimony at trial, which included her drug use and criminal record, was not the subject of any pretrial publicity, and thus could not have impacted the jury pool or prospective jurors' views of Oyler before being empaneled. In addition, his sister's ultimate testimony at trial was vastly different from the testimony she had given at the preliminary hearing. (Compare 2 CT 404-411 with 19 RT 3041-3130.) Accordingly, at the time the trial court denied the change of venue motion, Oyler's sister's future trial testimony could not possibly have impacted the weight the trial court assigned to this factor. The community status of Oyler weighed against a change of venue.

5. Prominence of the victims

The victims were fire fighters, and were celebrated in the community for their heroism after their deaths. There was significant coverage of the memorial services for the five victims, and the emotional impact of their loss. (See 5 CT 990, 1028-1029, 1041-1044, 1045-1047, 1049, 1050-1053, 1054-1058, 1113, 1118-1123.) But, all of that coverage was close in time to the fire, and the death of the victims. Thus, any sympathy engendered for the victims by virtue of the media coverage was likely to have dissipated when the case went to trial more than two years later.

In addition, while a portion of the victims' prominence was due to the fact that they were local to the area, the majority of their prominence was due to the fact that they were fire fighters who died in the line of duty, and this aspect of the case (and any resulting prejudice in a jury pool) would have necessarily "followed the case to any county to which venue was changed." (*People v. Famalaro* (2011) 52 Cal.4th 1, 24; *People v. McCurdy* (2014) 59 Cal.4th 1063, 1079; *Prince, supra*, 40 Cal.4th at p.

1214.) Even if this factor weighed in favor of a change of venue, it alone should not carry the day. When considered with the other factors, the trial court correctly determined that Oyler failed to satisfy his burden of showing he could not receive a fair trial in Riverside County.

6. The trial court correctly determined Oyler could receive a fair trial in Riverside County

The trial court weighed and considered the appropriate factors and the evidence presented by the defense, and correctly determined Oyler had not shown he was at risk of being tried unfairly by a biased jury. "When pretrial publicity is at issue, 'primary reliance on the judgment of the trial court makes especially good sense' because the judge 'sits in the locale where the publicity is said to have had its effect' and may base the evaluation on the judge's 'own perception of the depth and extent of news stories that might influence a juror.'" (*Famalaro, supra*, 52 Cal.4th at p. 24, citing *Skilling v. United States* (2010) 561 U.S. 358, 386 [130 S.Ct. 2896, 177 L.Ed.2d 619].)

While this was a serious case, the media coverage had been balanced and neutral, and the case was set to be tried in one of the largest counties in California, with a correspondingly large and diverse jury pool. Oyler was not a prominent figure in the community, and the understandable sympathy for the fire fighters who were killed would have been concentrated around the time of their deaths in October 2006. This trial did not begin until January 2009. Accordingly, the trial court correctly denied the motion.

D. Oyler has not shown prejudice

As noted above, to prevail on this claim, Oyler must show not only that the trial court erred when it denied his change of venue motion, but also that he was prejudiced by the denial, i.e. that it is "reasonably likely that a fair trial was not *in fact* had." (*People v. Prince* (2007) 40 Cal.4th

1179, 1213, emphasis original.) He has failed to make this required showing.

First, Oyler argues this is one of the rare cases where the court must presume prejudice. The case law compels the opposite conclusion. This is not "an extraordinary case in which the publicity was 'so pervasive and inflammatory' that prejudice is presumed and the jurors' assurances of impartiality should not be believed." (*People v. Johnson* (2015) 60 Cal.4th 966, 982–83, citing *People v. Hensley, supra*, 59 Cal.4th at p. 796.) As this court has explained, "'[t]he category of cases where prejudice has been presumed in the face of juror attestation to the contrary is extremely narrow. Indeed, the few cases in which the [high] Court has presumed prejudice can only be termed extraordinary, [citation], and it is well-settled that pretrial publicity itself—'even pervasive, adverse publicity—does not inevitably lead to an unfair trial.' (*DeLisle v. Rivers* [(6th Cir. 1998)] 161 F.3d [370,] 382.) This prejudice is presumed only in *extraordinary* cases—not in every case in which pervasive publicity has reached most members of the venire." (*People v. Prince* (2007) 40 Cal.4th 1179, 1216, emphasis original.)

In support of his contention that this court should presume prejudice, Oyler points only to the news conference held when Oyler was arraigned and the otherwise pervasive coverage of the case pretrial. (AOB 102-109.) Even if the news conference can be categorized as "inflammatory" or "prejudicial," it predated the start of the trial by over two years. There is nothing in the record to suggest this solitary media event irreparably prejudiced the community in a way that would give rise to a presumption that Oyler's trial was unfair. Beyond that news conference, the fact that the case was the subject of significant media attention, cannot create a presumption of prejudice. In *Prince*, this court noted that it is "well-settled that pretrial publicity itself – even pervasive, adverse publicity – does not

inevitably lead to an unfair trial." (*Prince*, *supra*, 40 Cal.4th at p. 1216 (internal citations and quotations omitted).)

Here, as explained above, the pretrial publicity was extensive, but concentrated around the time of Oyler's arrest and arraignment. The trial did not begin until two years later, and the record demonstrates that the publicity around the case had diminished substantially in the interim. Further, as explained, the majority of the coverage was balanced and not "adverse." Oyler was certainly mentioned as a "suspect" and the man "charged" with the crimes, but the media coverage was not inflammatory and prejudicial in the sense that it would convince prospective jurors of Oyler's guilt beyond any doubt. Indeed, the media covered Oyler's alibi defense and claims of innocence as well. While most of the prospective jurors were familiar with the Esperanza Fire and the death of the victims, wide-spread knowledge of the case did not correlate to wide-spread assumptions of Oyler's guilt based on the media coverage. This court has repeatedly reaffirmed that the relevant inquiry is not how much media coverage there was about a case, but what kind and what likelihood existed that the coverage created in the jury pool an unfair presumption of the defendant's guilt. (*Famalaro, supra*, 52 Cal.4th at p. 31 ["'The relevant question is not whether the community remembered the case, but whether the jurors ... had such fixed opinions that they could not judge impartially the guilt of the defendant.'"]; and see *Prince*, *supra*, 40 Cal.4th at p. 1216; *Harris*, *supra*, 57 Cal.4th at p. 830.) Oyler's reliance on the extent of the coverage is insufficient to show an unfair presumption of his guilt was prevalent in the jury pool. As explained above, given the balanced and neutral coverage, it is unlikely such a presumption was common amongst members of the Riverside community. For these reasons, the court should not presume prejudice in this case.

Further, Oyler has failed to demonstrate a reasonable likelihood he was prejudiced, that is, that he did not in fact receive a fair and impartial trial. (*People v. Proctor* (1992) 4 Cal.4th 499, 523 (*Proctor*); see *Beck v. Washington* (1962) 369 U.S. 541, 556 [82 S.Ct. 955, 8 L.Ed.2d 98] [no 'constitutional infirmity' in denying a change of venue motion 'if petitioner actually received a trial by an impartial jury'].) "With regard to the second part of the showing, in order to determine whether pretrial publicity had a prejudicial effect on the jury, we ... examine the voir dire of the jurors[22]." (*Proctor*, *supra*, 4 Cal.4th at p. 524.)

At the outset, Oyler's argument that the voir dire was insufficient to ferret out biased jurors has been forfeited. (See AOB 110-126.) His argument on appeal is that the questionnaire and in-court questioning were insufficient, and should have included more detailed and probing questions on the issue of bias. (AOB 113-126.) But Oyler never raised these objections below, and never asked the trial court to make substantive changes to its questionnaire. The trial court explicitly invited the parties to give input on the questionnaire, (2 RT 181), and after defense counsel had an opportunity to review Judge Morgan's proposed questionnaire, Judge Morgan specifically asked Oyler's attorney if he would like any "corrections, deletions, or additions" made to the questionnaire. (3 RT 185.) Oyler's attorney asked that one correction be made regarding the number of

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[22] At times, Oyler appears to argue the analysis of the voir dire should take into consideration the voir dire of all 95 prospective jurors. (AOB 115-121, 128.) But, the question of whether Oyler in fact received a fair trial before 12 impartial jurors turns exclusively on the 12 *seated* jurors. (See *McCurdy, supra*, 59 Cal.4th at p. 1080 ["Nothing in the record suggests that any of the *seated* jurors could not put aside outside influences and fairly try the case. Nor does the record disclose evidence that any of the *seated* jurors harbored a bias that was not detected during voir dire." (Emphasis added.)].)

charged fires, but made no other requests for additional questions on any topic. (3 RT 185-187.) Thus, to the extent Oyler argues now on appeal, that the juror questionnaire and Judge Morgan's voir dire were insufficient to ferret out bias, he has forfeited this issue by failing to raise it below. (*People v. Foster* (2010) 50 Cal.4th 1301, 1324; *People v. Taylor* (2010) 48 Cal.4th 574, 608.)

In *Foster*, this court held the defendant's failure to object to "the manner in which voir dire was conducted," forfeited any challenge to the adequacy of the voir dire. (*Foster, supra*, 50 Cal.4th at p. 1324.) "[N]or did [Foster] indicate he believed the trial court should undertake examination in addition to the questions posed by the questionnaire and the unlimited questioning afforded defendant and the prosecution. [Foster] therefore has forfeited his claim that the voir dire was inadequate." (*Ibid.*, citing *People v. Taylor* (2010) 48 Cal.4th 574, 608 [the defendant forfeited his claim of inadequate voir dire "because his counsel failed to suggest follow-up questions ... or otherwise complain about the adequacy of the trial court's voir dire"]; *People v. Rogers* (2009) 46 Cal.4th 1136, 1149 ["Defendant neither objected to the questionnaire used, nor proposed any modifications of additional questionnaire inquiries. He therefore has forfeited any claim that the questionnaire and its contents were inadequate to root out any pro-death-penalty bias on the part of the prospective jurors"]; *People v. Robinson* (2005) 37 Cal.4th 592, 620 ["If counsel had believed that further inquiry was necessary ..., he could have submitted additional questionnaire inquires or suggested additional oral questions.... [D]efense counsel's failure to do so forfeits the claim on appeal"].)

The same is true here. Defense counsel received the proposed questionnaire ahead of time, reviewed it, and had an opportunity to submit suggestions for additional questions. (3 RT 185-187.) Further, counsel was present when the court conducted its voir dire of individual jurors and never

objected that the questioning was somehow inadequate with respect to ferretting out the prospective jurors' bias based on their exposure to pre-trial media coverage. Defense counsel's failure to object to the adequacy of the questionnaire and voir dire forfeits his claim on appeal.

Further, the record demonstrates the jury actually empanelled to hear Oyler's case was fair and impartial. The jury questionnaire included an entire section which asked the prospective jurors about their knowledge of the case. (6 CT 1373.) The court gave the prospective jurors a description of the crimes with which Oyler was charged and asked them if they had, "read, heard, or seen anything about this case from any media source or any other source..." (6 RT 1374.) The court asked the prospective jurors if they had any opinion about Oyler's guilt or innocence, and whether they thought Oyler was guilty simply because he had been charged. (6 CT 1375.) Finally, the court asked if each prospective juror could disregard what he or she knew about the case and render a verdict based solely on the evidence presented during the trial and the law as instructed by the court. (6 CT 1375.) The court explained to the jurors that all of their answers to questions (on both the questionnaire and in court) were under oath and it was critically important that they give honest answers. (4 RT 482.)

Of the 12 seated jurors, two had no prior knowledge of the case. (11 CT 2874-2875 [Juror 8]; 13 CT 3522-3523 [Juror 10].) The other 10 jurors had seen news coverage, but did not have detailed knowledge of the case. Five of those 10 who had heard about the case indicated their only exposure was at the time of the fire, more than two years before trial commenced. (11 CT 2778-2779 [Juror 3]; 9 CT 2191-2192 [Juror 4]; 12 CT 3210-3211 [Juror 6]; 10 CT 2634-2635 [Juror 9]; 6 CT 1495-1496 [Juror 12].) All 12 jurors indicated they had no opinion about Oyler's guilt or innocence; and all 12 confirmed they could and would decide the case based on the evidence presented during trial and the law, as instructed by the court. (13

CT 3354-3355 [Juror 1]; 6 CT 1447-1448 [Juror 2]; 11 CT 2778-2779 [Juror 3]; 9 CT 2191-2192 [Juror 4]; 12 CT 2994-2995 [Juror 5[23]]; 12 CT 3210-3211 [Juror 6]; 11 CT 2946-2947 [Juror 7]; 11 CT 2874-2875 [Juror 8]; 10 CT 2634-2635 [Juror 9]; 13 CT 3522-3523 [Juror 10]; 14 CT 3594-3595 [Juror 11]; 6 CT 1495-1496 [Juror 12].)

The court conducted follow-up questioning with jurors 1, 2, 3, 4, 5, 8, 9, 10, 11, and 12, and confirmed they believed in the presumption of innocence and believed it applied to Oyler in this case. (4 RT 596 [Juror 9], 598 [Juror 2], 601 [Juror 3], 614 [Juror 12]; 5 RT 702-703 [Juror 10], 712 [Juror 4], 714-715 [Juror 8], 716-717 [Juror 11], 719 [Juror 1]; 5 RT 722-723 [Juror 5].) During defense counsel's questioning, he specifically asked several prospective jurors about media coverage and whether they had any preconceived notions of Oyler's guilt based on what they knew about the case. (4 RT 620, 623, 630.) He then followed up with Jurors 6, 12 and 7 and asked if, based on what he had discussed with the other prospective jurors, they had anything to add. Jurors 6 and 12 indicated they had nothing to add. (4 RT 631, 638.) Juror 6 thought he could fairly decide the case, Juror 12 confirmed that the only media coverage he saw was of the fires at the time they happened, and he had never seen Oyler before. (*Ibid.*) Juror 7 said, "I pretty much agree with everything that's been said and the statements that have been made. I feel I can be unbiased, and we should listen to the evidence." (4 RT 641.) Juror 10 confirmed he had formed no opinion about Oyler's guilt. (5 RT 752.)

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[23] The juror initially identified as Juror 5 was excused on January 28, 2009, and replaced with Alternate Juror No. 1. (8 RT 1082-1085; 9 RT 1271-1274.) Alternate Juror No. 1 was then identified as Juror No. 5. (9 RT 1274.) The questionnaire for Alternate Juror No. 1, eventually Juror No. 5, is at 12 CT 2979-3002, and he was questioned by the court at 5 RT 722-723.

At the end of the first day of voir dire, the court reminded all of the prospective jurors that any media coverage was not evidence, and that the case had to be decided on the evidence presented in court and the instructions given to the jury. (4 RT 643.) The court asked the prospective jurors to "always keep that in mind," and told the prospective jurors it was a "big thing." (4 RT 643-644.)

This court has held nearly identical circumstances are insufficient to show prejudice. "Among the 12 seated jurors at defendant's trial, two knew nothing about his case and the remaining 10 recognized the case but remembered few specifics. That most of the seated jurors had some prior knowledge of the case does not compel a change of venue." (*Harris*, *supra*, 57 Cal.4th at p. 830; see also *Famalaro*, *supra*, 52 Cal.4th at p. 31 ["'The relevant question is not whether the community remembered the case, but whether the jurors ... had such fixed opinions that they could not judge impartially the guilt of the defendant.' [Citation.]"]; *Rountree*, *supra*, 56 Cal.4th at p. 840 [eight of the 12 jurors had heard something about the case].) Here too, the fact that most of the jurors had heard about the case did not establish that they were biased, and the answers from the jurors all indicated they had formed no opinion about Oyler's guilt, which is the "relevant question." All confirmed they could be fair and impartial. Oyler offers no compelling reason to discount the jurors' answers given under oath. (*Harris*, *supra*, 57 Cal.4th at pp. 830-831 [independent review of the record disclosed no evidence that any of the seated jurors harbored a bias that was not detected during voir dire].)

All of the seated jurors' exposure was minimal and, importantly, each assured the court, to the court's (and apparently Oyler's) satisfaction, that "they could put aside any pretrial publicity and decide the case solely on the evidence at trial." (*Johnson, supra*, 60 Cal.4th 966, citing *People v. Hensley* (2014) 59 Cal.4th 788, 796.) Oyler did not exhaust his peremptory

challenges and did not object to the seated jury's composition. He had 20 available peremptory challenges, and he exercised only eight. (Code Civ. Proc., § 231, subd. (a); 5 RT 675-677, 778 [exercising eight peremptories]; 5 RT 779 [defense accepts panel as constituted].) This suggests that he believed the jury was fair and impartial. (See *People v. Beames* (2007) 40 Cal.4th 907, 922; *People v. Prince* (2007) 40 Cal.4th 1179, 1216, citing *People v. Dennis, supra*, 17 Cal.4th at p. 524 [failure to exhaust peremptories is a "strong indication jurors were fair and defense itself so concluded"].) Moreover, the jury did not convict Oyler of all of the charged offenses. It could not reach verdicts on counts 9, 10, and 11. This fact "tends to show that [the jury] was not prejudiced against [the defendant], but rather was able to fairly evaluate the evidence before it." (*Harris, supra,* 57 Cal.4th at pp. 830-831.)

For all of these reasons, Oyler has not shown a reasonable likelihood that he was tried by a biased jury and received an unfair trial. Without this showing, any error by the trial court in denying his motion for a change of venue was harmless.

IV. THE TRIAL COURT PROPERLY DISMISSED JUROR E.W. FOR CAUSE

Next, Oyler argues his right to a fair and impartial jury was violated when the trial court dismissed Juror E.W. for cause. (AOB 135-154.) Juror E.W. was dismissed for cause because she indicated she was biased against imposing the death penalty, and thus was incapable of following the law. Because the trial court's adequate questioning revealed that E.W.'s views on capital punishment would substantially impair her ability to return a death sentence, Oyler's rights were not violated by the trial court's excusal of E.W. for cause.

A. Additional Background

On the juror questionnaire, Juror E.W. described her "general feelings" regarding the death penalty as follows: "I feel it is a necessary penalty to have. I feel that it should be reserved for those who are cruel and unusual with their crimes, especially serial killers, rapists and criminals against children." (14 CT 3627, 3646.) When asked "Do you feel the death penalty is used too often? Too seldom? Please explain." E.W. answered, "No. Most people who get it sit for long periods of time and don't actually get executed. I feel in most cases it is a waste of time." (14 CT 3646.) She indicated she would not refuse to find the defendant guilty of first degree murder or the special circumstance simply to prevent a penalty phase, and thus a death judgment. (14 CT 3648.) She similarly indicated she would not automatically refuse to impose death or automatically vote in favor of life in prison, and vice versa. (14 CT 3649.) Finally, E.W. indicated she could set aside her own views and follow the law as instructed. (14 CT 3650.)

On the second day of voir dire, Juror E.W. was the eighth juror questioned by the court, (4 RT 490-535), and the fifth to be asked specifically about whether or not they could impose a death sentence. (4 RT 500, 509, 522-523, 530-531.) In reference to question 42 from the questionnaire regarding "general feelings" on the death penalty, Juror E.W. indicated she understood it was the District Attorney's decision to seek a death sentence in a particular case. (4 RT 539.) The court then asked E.W., "Are you, by virtue of your answer here on 42, locked into a certain punishment for crimes, and in this case, would you be locked into a certain position?" E.W. said, "I don't know." And then followed up with, "I've been struggling with, you know, while we were gone, thinking about that in particular. And not knowing what the special circumstances are, I think also --." The court interrupted her and reminded E.W. that the two special

circumstances were arson causing death and multiple murders. (4 RT 539-540.) Then, the court asked,

> If someone is convicted of multiple murders, first degree, one of them has to be first degree, and if someone 's convicted of an arson that causes the death, then those special circumstances could be found true. Now, we don't know if that's going to happen.... Please keep that in mind... We have to know your attitude, and everyone else's that sits on this jury, if we do get to that point. And my question to you is, are both options open to you, and real particularly, open to you if we were to get there?

(4 RT 540.) E.W. answered, "No." The court followed up with, "Okay. You believe that you would favor one position over the other?" And E.W. said, "I honestly do, yes." (4 RT 540.) The court said, "And that's all we need—your honest evaluation...," and excused juror E.W. (4 RT 540-541.)

B. The trial court correctly excused Juror E.W. for cause

A prospective juror may be excused in a capital case if the juror's views would, "prevent or substantially impair the performance of [her] duties as a juror in accordance with [the] instructions and [her] oath." (*People v. Vines* (2011) 51 Cal.4th 830, 852–53, citing *Wainwright v. Witt* (1985) 469 U.S. 412, 424 [105 S.Ct. 844, 83 L.Ed.2d 841]; see also *People v. Gray* (2005) 37 Cal.4th 168, 192 [applying same standard under California Constitution].) "[A] prospective juror is biased and disqualified to serve only if his state of mind will prevent him from acting impartially and without prejudice to any party." (*People v. Carasi* (2008) 44 Cal.4th 1263, 1290.) A trial court can properly excuse a juror if, "he or she is unable to conscientiously consider all of the sentencing alternatives, including the death penalty where appropriate. [Citations.]" (*People v. Winbush* (2017) 2 Cal.5th 402, 429 (*Winbush*), citing *People v. Jones* (2003) 29 Cal.4th 1229, 1246.)

"There is no requirement that a prospective juror's bias against the death penalty be proven with unmistakable clarity... It is sufficient that the

trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law in the case before the juror." (*People v. Vines* (2011) 51 Cal.4th 830, 853 (*Vines*), citing *People v. Gray, supra*, 37 Cal.4th at pp. 192–193.) On review, if the juror's statements are equivocal or conflicting, the trial court's determination of the juror's state of mind is binding. (*Vines, supra,* 51 Cal.4th at p. 853; see also *People v. Carpenter* (1997) 15 Cal.4th 312, 357, citing *People v. Mayfield* (1997) 14 Cal.4th 668, 727.) This is because the trial court is in the best position to assess the juror's true state of mind since it, "can observe demeanor and tone, and decide credibility firsthand." (*People v. Carasi* (2008) 44 Cal.4th 1263, 1290, citing *People v. McPeters* (1992) 2 Cal.4th 1148, 1175.) "Even if a prospective juror's questionnaire responses express a willingness to consider the death penalty, an excusal for cause is appropriate if oral questioning establishes that the juror's views on capital punishment would, in fact, substantially impair her ability to return a death sentence." (*Winbush*, *supra*, 2 Cal.5th at p. 429, citing *People v. Virgil*, *supra*, 51 Cal.4th at p. 1244.)

Juror E.W.'s answers to the questions regarding her ability to impose the death penalty demonstrated she was substantially impaired, and incapable of following the law without prejudice to either side. On her questionnaire, she indicated she thought the death penalty was a necessary punishment to have, but that it should be reserved for, "those who are cruel and unusual with their crimes, especially serial killers, rapists and criminals against children." (14 CT 3646.) Oyler's crimes and death eligibility would not fit into any of those categories. E.W.'s view was confirmed during the voir dire when she asked what the special circumstances were, and the court explained the special circumstances were arson causing death and multiple murders. (4 RT 539-540.) The court then asked E.W. if, assuming they got to a penalty phase, both penalty options – the death

penalty and life in prison – were open to E.W. (4 RT 540.) She said "No," both options were not open to her, and that she honestly believed she would favor one position over the other. (4 RT 540.) This was an explicit indication from E.W. that she could not follow the law and act impartially without prejudice to either party. (*Carasi, supra*, 44 Cal.4th at p. 1290; see also *Winbush, supra*, 2 Cal.5th at p. 429, emphasis original [the relevant question is "whether the Juror's views on capital punishment would prevent or impair the juror's ability to return a verdict of death *in the case before the juror*."].) The trial court was not required to delve any further. (See *Vines, supra*, 51 Cal.4th at p. 853 [Juror's bias need not be proven with unmistakable clarity].) The trial court appropriately took E.W. at her word and excused her.

To the extent E.W.'s answers were equivocal because her questionnaire indicated she could put her personal views aside and follow the law (14 CT 3650), this court must defer to the trial court's determination that E.W. could not faithfully apply the law in an unbiased manner. (*Vines, supra*, 51 Cal.4th at p. 853.) The trial court's determination is supported by E.W.'s direct and honest answers during voir dire, and further supported by the context of the colloquy. E.W. was the eighth juror questioned that day, and the fifth questioned about his or her ability to impose the death penalty. As she sat in court and listened to the voir dire of the jurors that preceded her, she had additional opportunity to reflect on whether she could follow the law and impose a death sentence if the evidence warranted such a finding. She indicated to the court that she had been struggling with that very question. (4 RT 539-540.) This court has recognized that such a "refinement of views often occurs during voir dire." (*Winbush, supra*, 2 Cal.5th at p. 432.) After the additional reflection, she gave the court her honest answer, which was that she would favor one side. The court took her at her word, and excused her. (*Ibid.* ["It falls to

the discerning trial judge to carefully evaluate each panelist's state of mind on these weighty issues."].) The trial court's determination of her state of mind is binding on appeal. (*Carasi*, *supra*, 44 Cal.4th at p. 1290.)

Finally, this court upheld the excusal of jurors in nearly identical factual circumstances in *Winbush, supra*, 2 Cal.5th 402, and *People v. Martinez* (2009) 47 Cal.4th 399 (*Martinez*). In *Winbush*, the defendant complained that the trial court, "ignored questionnaire responses showing support for the death penalty in favor of [the juror's] ambiguous statements in voir dire that did not clearly show she was unqualified to serve." (*Winbush*, *supra*, 2 Cal.5th at p. 429.) In rejecting the defendant's claim, this court noted that even where "a prospective juror's questionnaire responses express a willingness to consider the death penalty, an excusal for cause is appropriate if oral questioning establishes that the juror's views on capital punishment would, in fact, substantially impair her ability to return a death sentence." (*Ibid.*) The excused juror in *Winbush* indicated tepid support for the death penalty on her questionnaire, noting that it was appropriate for "some crimes." (*Ibid.*) During voir dire, she clarified her beliefs and, "consistently express[ed] the view that only the most violent kinds of killings warrant death." (*Ibid.*) The fact that the juror in *Winbush* left some room for the possibility she could impose a death sentence in the most brutal murder case did not demonstrate an ability to follow the law "*in the case before [her].*" (*Id.*, at pp. 430-431, citing *People v. Cash* (2002) 28 Cal.4th 703, 719–720.) The exact same can be said about E.W. Her questionnaire responses indicated reserved support for the death penalty, and an ability to impose it in certain types of cases—none of which described the case before her. And her answers during voir dire confirmed that in certain types of cases she may have been able to impose a death sentence, but this case was not among those types of cases, and thus E.W.'s ability to follow the law *in the case before her* was substantially impaired.

Similarly, in *Martinez, supra*, 47 Cal.4th 399, a prospective juror stated that a crime would have to be "'particularly heinous'" or involve other circumstances like recidivism to warrant the death penalty. (*Id.* at p. 428.) The mere fact that the juror conceded there may be theoretical cases severe enough that she would be able to vote for a death sentence did not establish her qualification to serve as a juror *in the case before her*. (*Id.*, at p. 432.)

Accordingly, E.W. was properly excused for cause and Oyler's claim of error must be rejected. Even if the trial court erred in excluding Juror E.W., such error does not require the reversal of Oyler's convictions or the special circumstance findings, it only requires reversal of his death sentence. (*People v. Pearson* (2012) 53 Cal.4th 306, 333; and see AOB 140-141 [Oyler does not argue otherwise].)

V. SUFFICIENT EVIDENCE SUPPORTED ALL OF OYLER'S CONVICTIONS

Next, Oyler makes a series of insufficient evidence claims. (AOB 157-239.) Essentially, he attacks the sufficiency of the evidence with respect to all of the fires where the state was unable to produce DNA evidence connecting him to the crime. He also leaves unchallenged the June 3 fire started adjacent to his apartment complex. (AOB 169, fn. 37.) Because sufficient evidence supported all of Oyler's convictions, his claims fail. In large part, his arguments are misplaced because he misconstrues the standard of review and argues inferences should be drawn in his own favor. Oyler also ignores the impact of the totality of the evidence in this case. When the evidence of the string of fires is considered as a whole, ample evidence showed a single arsonist committed all of the charged fires and Oyler was that arsonist.

A. The court must review the entire record in the light most favorable to the judgment

The standard of review for sufficiency claims is well familiar. In assessing the sufficiency of the evidence, the appellate court reviews the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Cole* (2004) 33 Cal.4th 1158, 1212; *People v. Johnson* (1980) 26 Cal.3d 557, 578; see also *Jackson v. Virginia* (1979) 443 U.S. 307, 319–320 [99 S.Ct. 2781, 61 L.Ed.2d 560].) A court may not reverse a conviction for insufficient evidence unless it finds "that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction]." (*People v. Redmond* (1969) 71 Cal.2d 745, 755.) "In applying this test, [the court] review[s] the evidence in the light most favorable to the prosecution and presume[s] in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence. [Citation.]" (*People v. Sandoval* (2015) 62 Cal.4th 394, 423, citing *People v. Zamudio* (2008) 43 Cal.4th 327, 357.)

The same standard of review applies to cases in which the prosecution relies primarily on circumstantial evidence. (*People v. Story* (2009) 45 Cal.4th 1282, 1296, citing *People v. Stanley* (1995) 10 Cal.4th 764, 792, see also *People v. Prince* (2007) 40 Cal.4th 1179, 1260 ["[T]he jury may rely upon circumstantial evidence to find that a felony murder occurred."].) And, "if the circumstances reasonably justify the jury's findings, the judgment may not be reversed simply because the circumstances might also reasonably be reconciled with a contrary finding." [Citation.] [The reviewing court does] not reweigh evidence or reevaluate a witness's credibility." (*People v. Hajek* (2014) 58 Cal.4th 1144, 1183 (*Hajek*), citing *People v. Watkins* (2012) 55 Cal.4th 999, 1019–1020.)

Further, the focus of the inquiry must be on the evidence presented, and not on evidence Oyler claims was "*lacking* in the prosecution's case." (*People v. Rodriguez* (1999) 20 Cal.4th 1, 12, emphasis original.) In *People v. Story* (2009) 45 Cal.4th 1282, this court reversed a lower court's finding of insufficient evidence because the lower court, "erred in focusing on evidence that did not exist rather than on the evidence that did exist." (*Id.*, at p. 1299.)

Several of the most powerful inferences the jury could draw in this case were a result of the evidence that all 23 charged fires were part of a common plan or scheme. Multiple similar incidents can support an inference that the disparate offenses were part of a broader common plan or scheme. (*People v. Catlin* (2001) 26 Cal.4th 81, 112 (*Catlin*).) The circumstances demonstrated common features amongst the fires which gave rise to the inference that a single arsonist was responsible for all of the fires. When two crimes are committed with distinctive characteristics, it can support an inference that the same person committed both offenses. (*People v. Edwards* (2013) 57 Cal.4th 658, 711.) "The strength of the inference in any case depends upon two factors: (1) the degree of distinctiveness of individual shared marks, and (2) the number of minimally distinctive shared marks." (*People v. Thornton* (1974) 11 Cal.3d 738, 756.) "The inference of identity, however, 'need not depend on one or more unique or nearly unique common features; features of substantial but lesser distinctiveness may yield a distinctive combination when considered together.'" (*People v. Lynch* (2010) 50 Cal.4th 693, 736.)

Similarly, "[m]odus operandi[24] is generally a means of proving the identity of the perpetrator of the crime charged, by demonstrating that the

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[24] Here, the issue is what the permissible, reasonable inferences were that the jury could draw from the evidence of the *charged* offenses. The (continued...)

defendant had committed in the past other crimes sharing with the present offense features sufficiently unique to make it likely that the same person committed the several crimes." (*People v. Sam* (1969) 71 Cal.2d 194, 204 (*Sam*).) "A modus operandi gives rise to a reasonable inference that the charged and uncharged offenses were committed by the same person when the marks common to those offenses set them apart from other offenses of the same general variety." (*People v. Matson* (1974) 13 Cal.3d 35, 40, see also *People v. Prince* (2007) 40 Cal.4th 1179, 1254, 1256 [evidence defendant had a modus operandi supported substantial evidence finding for crimes committed with his modus operandi].) Obviously, the same inference could be drawn for multiple *charged* offenses, where the various charges share common features making them "sufficiently unique to make it likely that the same person committed the several crimes." (*Sam*, *supra*, 71 Cal.2d at p. 204.)

The evidence also demonstrated the reasonable inferences that can be drawn through the doctrine of chances. With each successive occurrence of an unlikely event tied in the same manner to the defendant, the inference that the defendant is the common denominator gets stronger. (See e.g. *Catlin, supra,* 26 Cal.4th at p. 112, and cases cited therein.) "The doctrine of chances tells us it is extremely unlikely that, through bad luck or coincidence, an innocent person would live near so many arson fires,

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(...continued)
prosecutor sought admission of the *uncharged* fires under the theory that they showed identity, intent, and a common plan or scheme, but did not specifically argue the *uncharged* fires demonstrated a modus operandi. (6 CT 1327-1353[in limine motion to admit 23 uncharged acts]; 24 RT 3729 [Instruction on uncharged conduct].) Any argument by Oyler that the evidence could not be considered for modus operandi purposes would conflate the issue of admissibility of *uncharged* conduct with the issue regarding the reasonable inferences the jury could draw from evidence properly admitted as to *charged* offenses.

occurring so frequently, in so many different neighborhoods." (*People v. Erving* (1998) 63 Cal.App.4th 652, 663.)

Finally, the United States Supreme Court has recognized that, "individual pieces of evidence, insufficient in themselves to prove a point, may in cumulation prove it. The sum of an evidentiary presentation may well be greater than its constituent parts." (*Bourjaily v. U.S.* (1987) 483 U.S. 171, 179–80 [107 S.Ct. 2775, 97 L.Ed.2d 144].)

Oyler was charged with five counts of first degree murder. To prove Oyler was guilty of first degree murder, the people had to present evidence that, 1) Oyler committed arson, 2) Oyler intended to commit arson, and 3) while committing arson, Oyler did an act that caused the death of another person. (CALCRIM 540A; 24 RT 3729; see also § 189.)

For the felony-murder special circumstance, the jury had to find 1) Oyler set fire to or burned forest land, 2) Oyler acted willfully and maliciously, 3) the fire burned an inhabited structure, 4) Oyler intended to commit an arson, 5) Oyler did an act that caused the death of another person, and 6) the act causing the death and the arson of an inhabited structure were part of a continuous transaction. (24 RT 3732-3733; 16 CT 4288, CALCRIM 730.)

Oyler was also charged with a multiple murder special circumstance, which required the jury to find Oyler had been convicted of more than one offense of murder in the first or second degree in the instant proceeding. (See § 190.2, subd. (a)(3); and see *People v. Miller* (1990) 50 Cal.3d 954, 995.)

Counts 6 through 28[25] charged Oyler with arson in violation of section 451, subdivision (c). To prove these charges, the People had to prove, 1)

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[25] Oyler does not challenge the sufficiency of the evidence for Counts 12, 14, and 15.

Oyler set fire to or burned forest land, and 2) Oyler acted willfully and maliciously. (24 RT 3733; CALCRIM 1515.)

Counts 29 through 45[26] charged Oyler with possession of an incendiary device in violation of section 453, subdivision (a). To prove these counts, the People had to prove 1) Oyler possessed an incendiary device in an arrangement or preparation, and 2) Oyler willfully and maliciously intended to use the material or device to set a fire or burn forest land. (24 RT 3733-3734; see also § 453, subd. (a).)

As explained below, the evidence was sufficient as to all convictions and special circumstance findings.

B. Sufficient evidence supported the theory that a single arsonist committed all of the charged fires

Oyler contends the evidence was insufficient to support his convictions because the People failed to prove that all of the fires were committed by a single arsonist. (AOB 215-240.) As the argument goes, because the People failed to prove all of the fires were committed by one person, the evidence that Oyler committed 17 of the fires of which he was convicted was insufficient because there was no evidence of his presence at the scene. (AOB 172-196.) But, the People did prove a single arsonist was responsible for all of the fires, and that Oyler was that arsonist, thus, mostly through circumstantial evidence, the People proved Oyler was present to start all of the fires for which he was convicted.

Sufficient evidence showed a single arsonist committed all of the charged fires. Battalion Chief James Engel, an arson and incendiary device expert, testified all of the fires were started by a single arsonist. (14 RT 2351.) Engel explained that the series of fires showed the evolution of the

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[26] Oyler does not challenge the sufficiency of the evidence for counts 32, 34, and 35.

arsonist and his device. The early remote devices (from May 16) showed signs of inexperience, in that the use of 30 matches was overkill, and would not have increased the likelihood of success of the device. (14 RT 2323-2324.) The devices were clumsy and would have been difficult to ignite. (14 RT 2324.) In addition, the remote devices had the disadvantage that the arsonist could not select the location for ignition. All three May 16 fires were relatively small, and extinguished quickly. The next three fires, the match fires from May 28, 29, and 31, were started with single matches. The switch to individual matches addressed the issue of selection of ignition location, but it did not give the arsonist any delay time to escape detection. (14 RT 2331, 2398-2399.) The late May fires were relatively larger than the May 16 fires (two burned an acre of land (8 RT 1247, 1264)), demonstrating to the arsonist that the selection of ignition location was important to achieving success. So, the arsonist adjusted, and switched to the lay-over device, which had both a delay time, and the advantage that the arsonist could select the point of ignition. The inclusion of the blue paper towel in the June 3 device supported Engle's opinion that the arsonist was experimenting with different types of devices and accelerants. (14 RT 2332.)

Several signature characteristics tied all of these fires together – the May 16 fires all involved a Marlboro Light cigarette, and the first lay-over device (June 3), also involved a Marlboro Light cigarette. It is worth noting that Oyler does not contest the sufficiency of the evidence as to the June 3 fire, which was started immediately adjacent to his apartment complex. (AOB 169, fn. 37.) In addition, wooden matches were used in the remote devices from May 16, the matchstick fires on May 28, 29, and 31, and in all of the lay over devices. This was an unusual characteristic that most of the experts had never seen, despite years of experience and thousands of arson investigations.

The lay-over device worked. The first such fire on June 3, burned two acres—twice as large as any of the fires set previously. So the arsonist stuck with it, and set at least nine additional fires using essentially an identical device. The device nearly always involved a Marlboro cigarette with five to seven wooden matches laid across the lit cigarette. And the arsonist had some success—the June 14 fire at Broadway and Esperanza burned 10 acres, and the Old Banning/Idyllwild fire later that same day burned three acres.

The arsonist switched back to a remote device on July 9—something Engle said was likely reflective of a concern over getting caught. But, importantly, the remote device from July 9 combined characteristics from the May 16 remote devices and the intervening lay-over devices, used throughout June. The July 9 device involved a cigarette and wooden matches, but this time, it involved only six matches, instead of the 30 matches involved in the May 16 devices. The arsonist had learned with the lay-over devices what Engle pointed out—that 30 matches was unnecessary. The July 9 device showed the arsonist was evolving and changing the device to better achieve his desired results.

Then came a six week break in the fires—a fact that, at the time, was unexplained. When the arsonist started setting fires again, he was still concerned with getting caught, and thus stuck with the remote device construction. Of the three fires on September 16 and 17, the investigators found two remote devices – both were constructed of a cigarette and six paper matches wrapped around the cigarette with some form of adhesive. Again, the number of matches was consistent with the lay-over devices and the July 9 remote device. And, the manner of construction was similar to all of the other remote devices (the three on May 16 and July 9)—the arsonist did not simply attach the cigarette to a paper matchbook—as investigators had seen other arsonists do—this arsonist deliberately

removed the six matches and "wrapped" them around the cigarette. (14 RT 2342-2344.)

The September 16 Orchard Fire and the September 17 Ranch Fire were the arsonists most successful up to that point—burning 1,580 acres and 1,658 acres respectively. September 16 also marked the first day of Santa Ana conditions in 2006, and the hot, dry, windy weather contributed to the success of these fires. This confirmed that the remote device could work, as long as he selected the right terrain, and weather conditions.

The large fires on September 16 and 17 were also contained and extinguished because of air support. Without the air tankers, both would have burned much larger. (11 RT 1896-1897; 12 RT 2015.) The October 22 fire also required the assistance of air support, and the fire was extinguished after it burned 40 acres. (12 RT 2027.) The arsonist set out to select not just the right device, location and weather conditions, but also the right time.

October 25 was a "perfect storm" day for the Banning Pass arsonist. It was hot and dry, and Santa Ana winds were blowing; fire officials had issued a red flag warning. (6 RT 949-950.) The arsonist waited for an opportunity after nightfall when air tankers could not respond, and set the fire around 1:00 a.m. on October 26. Again, he used a time delay device—this time sticking with the basic construction he used for the September 16 and 17 fires, but returning to the wooden matches he had used in the lay-over device fires, and the May 16 devices. Like the May 16 devices, he used a rubber band to attach the matches to the cigarette.

Several other similarities supported the inference that the same person was responsible for the string of fires. All of these fires were set within 50 feet of the roadway—again, not a common characteristic for wild land fires. And, several devices had another commonality—they had matches placed in a manner that would destroy the device. The remote devices from the

May 16 fires, the July 9 fire, the September 17 Ranch Fire, and Esperanza, all had matches placed facing away from the lit cigarette head. (14 RT 2325-2326, 2342, 2344, 2347; 23 RT 2649, 3655.) The June 7 device, a lay-over device, had a match placed on the filter of the cigarette for the same reason. (14 RT 2335.)

The commonalities amongst the devices, the materials used, the locations burned, and the evolving nature of the arsonist and his device supported Engel's opinion that all of the fires were started by the same person.

David Allen, another arson expert, confirmed Engel's testimony, and also concluded all of the fires were started by the same arsonist. (23 RT 3597-3598, 3647.) Like Engel, he relied on the locations of the fires and the commonalities amongst the devices. (23 RT 3598.) Allen also testified that the choice of terrain showed the evolution of a single arsonist, growing in proficiency and learning to adjust his arsonist behavior to achieve higher degrees of success. The first fires were set on relatively flat grass lands. As the series progressed, the arsonist learned that fire burns faster and hotter uphill, and started selecting sloped terrain. He also observed the impact of the natural drainages in helping a fire to grow quickly, so he sought out terrain that included natural drainage washes. (23 RT 3601.) Allen also observed a "shotgun" pattern to the fire locations. In his experience, an arsonist will return to an area they want to burn and try a second or third time to start a fire. (23 RT 3604-3605.) The arsonist is likely to return to an area where they have had success, and started a large fire in hopes of starting another large fire. (23 RT 3606.) With this series, there were three to four examples of the shotgun pattern – two fires were set at 6th and Xenia (June 3 (counts 12 and 32) & June 18 (Uncharged B), two fires were set at Ramon Road and Chino Road (June 10 (counts 15 and 35, and June 14 (counts 17 and 37)), three fires abutted Highway 243 (June

11 (Uncharged A), June 16 (count 20), and July 2 (counts 22 and 41)), and two fires were set off of Esperanza Road (June 14 (counts 18 and 38) and October 26 (the Esperanza Fire (counts 1-5, 28, and 45.) This "shotgun" pattern supported an inference that the arsonist responsible for the June 14 Broadway/Esperanza fire (a lay-over device) was also responsible for the Esperanza fire on October 26 (a remote device fire)

The physical evidence also supported the experts' conclusions that a single arsonist was responsible. The fires all clustered around the same area, and all were started in the relatively small communities along the Banning Pass. The area is not densely populated, and two serial arsonists working in such a small community at the same time would be highly unlikely. The matches from the June 3, June 14, June 16, and July 2 fires (all lay-over devices) had similar elemental and molecular composition. (14 RT 2412-2415.) The matches from the May 16 and July 9 (both remote devices) fire had similar elemental and molecular composition. (14 RT 2416-2418.) This corroborated the expert's opinion that the remote devices may have been built ahead of time (i.e. in a different location, with access to different matches), and the lay-over devices were all built on site (i.e. with access to the same matches).

The defense expert, David Smith, testified that serial arsonists do not vary their devices. Smith conceded all of the lay-over device fires were likely started by the same person, (22 RT 3407), but he concluded the remote device fires were started by at least one other arsonist. (22 RT 3392.) He looked at the differences in the construction of the devices, and concluded an arsonist would not change the design of the device so substantially, because the device served as his signature and gave him credit for having started the fire. (22 RT 3394, 3396, 3403, 3413.)

Oyler argues this court should accept the testimony of Smith, and reject the testimony of Engel and Allen. He attacks the sufficiency of the

evidence by attacking the strength of the prosecution's experts' opinions. (AOB 232-239.) This approach evinces a misunderstanding or misapplication of the appropriate standard of review for sufficiency of the evidence claims. The reviewing court will not reweigh the evidence. (*Hajek, supra*, 58 Cal.4th at 1183.) The People presented experts that opined the fires were all started by a single arsonist, as detailed above, and the defense presented an expert who opined the fires were set by multiple arsonists. All of these witnesses were subject to direct questioning and cross-examination concerning the bases for their opinions. Which opinions ultimately carried more weight or were more credible were matters for the jury to decide. "Resolution of conflicts and inconsistencies in the testimony is the *exclusive province of the trier of fact.* Moreover, unless the testimony is physically impossible or inherently improbable, testimony of a single witness is sufficient to support a conviction." (*People v. Brown* (2014) 59 Cal.4th 86, 106 (emphasis added), citing *People v. Young* (2005) 34 Cal.4th 1149, 1181; see *People v. Elliott* (2012) 53 Cal.4th 535, 585.) On appeal, the court must accept that the jury afforded more weight to the testimony of the prosecution's experts because that is the inference that supports the judgment. (*Sandoval, supra*, 62 Cal.4th at p. 423.)

In addition to asking this court to reweigh the experts' conflicting opinions, Oyler attacks the credibility of the People's arson experts. He specifically calls into question the testimony of the prosecution witnesses because of their close ties to the Riverside firefighting community. (AOB 158, 218.) Such a claim could only be relevant as to the witnesses' biases and thus their credibility. Accordingly, it is not a proper basis for a claim that insufficient evidence supported the convictions because again, reviewing courts do not reweigh evidence or reevaluate the credibility of witnesses. (*Hajek, supra*, 58 Cal.4th at p. 1183; see also *People v. Houston* (2012) 54 Cal.4th 1186, 1215.)

Oyler also points out all of the distinctions between the various fires as supportive of his argument that insufficient evidence was presented to show a single arsonist was responsible for all of the charged fires. (AOB 231-232.) But, Oyler sinks his own ship when he cites CALCRIM 224[27] and argues the distinctions amongst the fires make it "equally, if not more plausible" that the fires were started by multiple arsonists. (AOB 232.) For sufficiency claims, the standard of review is not whether alternative inferences could have been drawn from the evidence, but whether, any rational jury could draw the inferences necessary to reach the judgment. (*Hajek*, *supra*, 58 Cal.4th at p. 1183, and see *Sandoval*, *supra*, 62 Cal.4th at p. 423.) "Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence, it is the jury, *not the appellate court* which must be convinced of the defendant's guilt beyond a reasonable doubt." (*People v. Bean* (1988) 46 Cal.3d 919, 932–933 (*Bean*) (internal citations and quotations omitted); accord, *People v. Jones* (2013) 57 Cal.4th 899, 960–961.) Oyler's contention that the evidence could reasonably be reconciled with a contrary finding is of no moment, as such a conclusion (even if true) "does not warrant reversal." (*Bean*, *supra*, 46 Cal.3d at p. 933, see also *People v. Towler* (1982) 31 Cal.3d 105, 117–118 [holding that the circumstantial evidence instruction is simply for the guidance of the trier of fact; whether the evidence is direct or circumstantial, the relevant standard of review on appeal is the sufficiency of the evidence standard].)

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[27] The portion of CALCRIM 224 relied on by Oyler reads as follows: "If you can draw two or more reasonable conclusions from the circumstantial evidence, and one of those reasonable conclusions points to innocence and another to guilt, you must accept the one that points to innocence."

For all of these reasons, sufficient evidence supported an inference that a single arsonist was responsible for all of the charged fires.

C. Sufficient evidence demonstrated that Oyler was the responsible arsonist, and that he committed all of the non-capital fires

Further, sufficient evidence tied Oyler to the charged fires such that the jury could reasonably conclude he was the responsible single arsonist. Oyler was a known arsonist, and admitted setting fires in the Banning Pass area when his fiancé, Breazile, found the newspaper clippings in the apartment. (16 RT 2544-2547.) He also told Jill Frame that he was frustrated when someone set a fire that burned larger than fires he had set. (16 RT 2635.)

At the beginning of the series, Oyler had a motive to set the May 16 fires near the Anderson home – he was trying to frame Matt Anderson as an arsonist because he and the Andersons were embroiled in a custody dispute over Oyler's daughter. (16 RT 2540, 2536-2538, 2658.) Oyler argues this evidence is insufficient[28] because there was no evidence he made any attempt to blame the fires on Anderson. (AOB 173.) First, he is wrong. Oyler told Breazile that he planned to set a fire to frame Anderson and undermine Anderson's ability to seek custody of Samantha. Then, at the height of the custody dispute, a fire was set near Anderson's home. This is evidence that Oyler did exactly what he said he was going to do – set a fire to frame Anderson. Second, evidence that Oyler reported the incident or in some other fashion publicly connected the fire to Anderson was unnecessary. The People were not required to prove, beyond a reasonable

[28] In support of his assertion that the motive evidence was insufficient, Oyler cites case law concerning the limitations on the admissibility of third party culpability evidence. (AOB 173.) But, the law regarding the admissibility of third party culpability evidence is irrelevant here as Oyler was not a third party, but the charged defendant.

doubt, *why* Oyler set the fire. The People only had to prove that he *did* set the fire. The evidence regarding his motive was helpful to the extent it tended to support the inference that Oyler did in fact set the May 16 fires. Evidence of motive, while not required, is relevant and admissible because a motive makes criminal conduct more understandable. (*People v. Roldan* (2005) 35 Cal.4th 646, 707.) Oyler does not argue otherwise. Coupled with the evidence concerning the incendiary devices, and the experts' opinions that a single arsonist started all of the charged fires, the evidence was sufficient to show Oyler started the May 16 fires.

As to the lay-over device fires, Oyler's DNA was found on the cigarettes used to start the June 9 and June 10 fires. Given the experts' agreement (including the defense expert) that all of the lay-over device fires were started by the same arsonist – it is beyond meaningful dispute that once Oyler's DNA was found on one of the lay-over devices, sufficient evidence supported Oyler's convictions for all the lay-over device fires. This necessitates rejection of Oyler's claims of insufficient evidence as to counts 13, 16, 17, 18, 19, 21, and 22. For the same reason, his challenges to the attendant possession of an incendiary device counts (counts 33, 36, 37, 38, 39, and 40) should be rejected.

Additional evidence tied Oyler to the series of fires. On June 11, Oyler was spotted near the point of origin for Uncharged A. He was seen again at the scene of the June 14 fire on Old Banning/Idyllwild Road, and a third time on June 28 at the scene of the Winesap and Orchard fire in Cherry Valley. (9 RT 1403; 10 RT 1551-1552; 11 RT 1808-1812.) Oyler's reactions on June 11 and June 28 evidenced he was aware he had been seen. (9 RT 1398-1399; 11 RT 1801-1811.) Oyler had no way to know whether the witnesses would be able to identify him or his distinctive car. He had to be getting nervous that he could be caught.

On July 5, Oyler got into an argument with Breazile about his arsonist behavior and Breazile threatened to leave him. (16 RT 2533-2534.) The next fire, July 9, was the first return to the remote device since May 16—a change the experts explained would have been made to reduce the chances of getting caught. Oyler's concern over getting caught was heightened because he knew he had been seen at least twice and he knew if we were to get caught, Breazile would leave him and take his daughter with her.

The tire treads found at the June 14, June 28, and July 9 fires had similar tread design to Oyler's Taurus tires. The June 14 and 28 fires were lay-over device fires, but the July 9 fire was a remote device fire—connecting both device types to Oyler.

For six weeks, the fires stopped, a bizarre fact which at the time, could not be explained. But Oyler's fight with Breazile and her ultimatum that she would leave unless he stopped starting fires explains his six-week hiatus. September 16, the first day of Santa Ana conditions proved too tempting, and Oyler started two fires that day. Again, he used the remote devices to avoid getting caught.

Oyler admitted to Breazile that he started the September 16 Orchard Fire. (16 RT 2632[29].) Breazile herself had suspected as much since she had been with Oyler at her parents' house that day when Oyler disappeared for approximately 30 minutes, and upon his return, they noticed a fire burning within blocks of Breazile's parents' house. (16 RT 2621, 2553.) He was in the car later with Jill Frame, watching the fire through his

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[29] Oyler's admission came in through Jill Frame's testimony. (16 RT 2632.) She testified that Breazile told her she (Breazile) had confronted Oyler about The Orchard Fire, and he admitted starting the fire. (*Ibid.*) Oyler's statement to Breazile was admissible as a party admission (Evid. Code, § 1220), and Breazile's statement to Frame was admissible as an inconsistent statement (Evid. Code, § 1235), since Breazile denied Oyler admitted starting the fire. (16 RT 2554.)

binoculars[30]. (16 RT 2634.) And despite the fact that Frame could barely see the fire, Oyler knew precisely where to look. (16 RT 2634.) This evidence directly tied Oyler to The Orchard Fire, and puts Oyler's claim of insufficient evidence on Count 25 to rest.

Oyler argues the magistrate's refusal to hold him to answer on count 25 after the preliminary hearing, and the trial court's initial tentative ruling granting a section 1118.1 motion as to count 25 are of some relevant import to this inquiry. (AOB 193-194.) Neither ruling has any bearing on the legal claim raised by Oyler—whether sufficient evidence supported his conviction on Count 25. But, even so, Oyler takes both rulings out of context. Frame's testimony at the preliminary hearing was different from her trial testimony—she did testify that Oyler admitted starting the fire, but said his admission was, "sarcastic." (2 CT 441-442.) At trial, her testimony was not so qualified. (16 RT 2632.) More importantly, count 25 was included in the information filed on April 3, 2007, immediately after the preliminary hearing, and defense counsel never filed a section 995 motion to challenge its inclusion. A section 995 motion would have been the appropriate opportunity and proceeding by which to raise any claim regarding the sufficiency of the evidence on count 25 to justify *charging* Oyler with The Orchard Fire. The proper avenue to challenge his *conviction* on Count 25 for insufficient evidence, is the sufficiency claim

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[30] Oyler contends Frame's testimony is inconsistent because she testified both that Oyler was at Breazile's parents' house for The Orchard fire, and that she was in the car with him while he watched the fire. (AOB 191.) This testimony is not inconsistent because he could have been in both places—at Breazile's parents' house immediately before and after the fire started at 2:30 in the afternoon, and in the car with Frame that night as the fire continued to burn. The responding fire fighters testified they fought The Orchard Fire for 16 straight hours. (11 RT 1893, 1896.) Thus, it started around 2:30 p.m. on September 16, but burned through the night and into the morning hours of September 17.

raised here. The magistrate's ruling that insufficient evidence was presented at the *preliminary hearing* to bind over on that count is of no relevant import to whether sufficient evidence was presented at the *trial* to support the conviction. Further, in ruling on the 1118.1 motion, the trial court did initially indicate he intended to grant the motion as to Count 25, but reversed course when the prosecutor reminded him of Frame's testimony that Oyler admitted starting the fire. (20 RT 3097.) In contrast to Oyler's claim that the trial court "compliantly reversed himself," (AOB 194), the record shows that the trial court's tentative ruling failed to take into consideration the totality of the evidence. The trial court noted, "I will say that I didn't make the connection. What I did – should be careful doing this – that when you moved on from that count that I thought it was insufficient evidence. But I had not made that connection in later testimony, which is persuasive." (20 RT 3097.) Once he considered all of the evidence, he denied the motion. (20 RT 3097-3098.) Nothing about either ruling shows the evidence was insufficient on Count 25, and as explained above, the evidence was sufficient. Oyler's claim to the contrary must be rejected.

On October 22, Oyler's Taurus was seen again—this time by the pole camera—traveling to and from a remote area just before the Mias Canyon fire was reported. (13 RT 2120, 2123-2124.) Later that day, Oyler asked Frame if she had heard anything over the police scanner about fires because he had set some fires that day. (16 RT 2623-2624.) He also fought with Breazile about not coming home the night of October 21, because he was casing the area for ideal fire locations. (16 RT 2625-2626.)

Looking to the entire series, all of the fires set in May and early June occurred at various times of the day, and on different days of the week. This fact was consistent with Oyler's part-time work schedule during that time frame. Then, on June 20, Oyler started working full time. (12 RT

1967-1969.) From that point on, the fires diminished in frequency and only occurred on Oyler's days off, or before he had clocked in to work. (12 RT 1977-1998, 2002-2003; Exhibits 236-243.) On June 28, Oyler did not clock in to work until 10:24 a.m., almost two and a half hours late, and three minutes after the first report of the June 28 fire in Cherry Valley. Oyler was very rarely this late for work[31]. The fact that on June 28, Oyler was unusually late for work and a fire was started at the same time further supports an inference that he was available and responsible for the June 28 fire in Cherry Valley.

In the various searches conducted pursuant to the investigation, detectives found, in Oyler's possession, all of the instrumentalities necessary to commit these crimes. He was a smoker who preferred Marlboro Reds, but was known to smoke Marlboro Lights as well, the cigarettes most commonly used in the incendiary devices. (16 RT 2517; 21 RT 3266.) He was known to clip the filters off his cigarettes (an unusual and distinctive habit), and one of the devices involved a cigarette with a clipped filter. (13 RT 2192-2192; 21 RT 3268.) He had access to blue mechanic's shop paper towels. (12 RT 1963.) His car, the Taurus, was identified at the scene of three of the fires. Inside his car, he had both a wooden stick match, paper matches, items that could be used to conceal his identity (wig, knit cap, latex gloves, women's clothing), a grocery list with burn marks on it (again an unusual find inside someone's car), and a

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[31] Oyler typically clocked in around 8:00 a.m., and between June 20 and October 31, he only clocked into work after 9:00 a.m. on five occasions. Two of those days (August 18 and September 10) were days he was putting in extra hours on what would otherwise have been a day off. (Exhibits 241 & 242; and see 12 RT 1974-1976 [testimony from Oyler's manager that Oyler had Sundays and one other day of the week off].) On July 21, Oyler clocked in at 11:36 a.m., and on July 27, Oyler clocked in at 9:58 a.m. (Exhibit 240.)

slingshot with burn marks on it which could have been used to deliver lit remote devices from inside the car. (13 RT 2138-2139.) At his house, investigators found binoculars, and rubber bands, and Oyler had a police scanner hooked up to speakers so he could constantly monitor the activities of the fire fighters responding to his fires. At his parents' home, Oyler had another police scanner, and it appeared Oyler had concealed some of his possessions in an outdoor shed. Among those items, investigators found more wooden stick matches and the chapters from *The Anarchist's Cookbook.* (13 RT 2217-2218, 2220, 2225.) Detective's also found wooden stick matches at Breazile's parents' home. (13 RT 2187.) Oyler had possession of or access to all of the instrumentalities necessary to commit these offenses.

Essentially, Oyler's argument that insufficient evidence supported his convictions for the non-capital fires can be reduced to a single assertion – there was no evidence he was at or near the scene of the fires, and thus, the People failed to prove he started the fires. (AOB 172 [counts 6-8 & 29-31; May 16 fires], AOB 174-175 [counts 13 & 33; June 7 fire], AOB 175-176 [counts 16 & 36; June 11 fire]; AOB 176-177 [counts 17 & 37; June 14 fire at Chino/Ramon], AOB 178-179 [counts 18 & 38; June 14 fire at Broadway/Esperanza], AOB 179-181 [counts 19 & 39; June 14 fire at Old Banning/Idyllwild], AOB 181-182 [count 20 [June 16 fire], AOB 182-185 [counts 21 & 40; June 28 fire], AOB 185-186 [counts 22 & 41; July 2 fire], AOB 186-187 [counts 23 & 42; July 9 fire], AOB 187-189 [counts 24 & 43; September 16 fire at Cherry Valley/Roberts], AOB 189-194 [count 25; September 16 fire at Taylor/Orchard], AOB 194-196 [counts 26 & 44; September 17 fire], AOB 196-198 [count 27; October 22 fire].) .) His challenge to the possession of incendiary device counts is a direct off-shoot of his initial assertion—he claims if insufficient evidence supports a finding

that he was present when the fire was started, insufficient evidence supports a finding that he possessed the devices used to start the fires. (*Ibid.*)

The fatal flaw in Oyler's argument is that it entirely ignores the impact of the totality of the circumstantial evidence. He is correct that for many of the fires there was no *direct* evidence of his presence at the scene, but direct evidence of presence at the scene of a crime is not legally (or logically) required. If every criminal conviction required direct evidence of presence at the scene of the crime, the most sophisticated criminals (those who manage to avoid detection) would be handed a free pass to commit as many crimes as they pleased. This is not the law. As noted above, "circumstantial evidence is as sufficient as direct evidence to support a conviction." (*People v. Lam Thanh Nguyen* (2015) 61 Cal.4th 1015, 1055, citing *People v. Bloom* (1989) 48 Cal.3d 1194, 1208.)

The experts explained the connections between the different devices, and the commonalities that linked all of the fires together, and proved that a single evolving arsonist was responsible for the series. The repetition of those distinctive characteristics supports an inference that the same person committed all of the offenses. (*People v. Edwards* (2013) 57 Cal.4th 658, 711.) This is particularly true in a case like this one, that involves the repeated commission of a relatively rare crime—arson. If the inference were being drawn in a drug possession, or theft case, it may be less persuasive because those crimes are so common that the likelihood of two people committing them in a similar manner is high. Arson is different. It is not a common offense, and it would be highly unlikely that two arsonists were setting multiple fires in the same small community using similar devices, materials, and methodology. There was a strong inference that the same person committed all of the charged crimes.

The evidence also created a strong inference that Oyler was that person. Oyler had a motive to set the May 16 fires, and was witnessed at

the June 11, 24, and 28 fires. He admitted starting the September 16 Orchard Fire, admitted starting a fire on October 22, and announced an intention to "set the mountain on fire" in the days immediately before the Esperanza Fire burned the mountain to which he was referring. The remote devices were all constructed with a cigarette and matches that were "wrapped" around the cigarette—a characteristic that was consistent with the description Oyler gave Breazile of the devices he used when setting his fires.

All of the fires happened within 15 miles of Oyler's apartment, and always at a time when he was not clocked into work. These facts touch on the doctrine of chances, and create a reasonable inference that Oyler is the common denominator amongst all of the charges. "The doctrine of chances tells us it is extremely unlikely that, through bad luck or coincidence, an innocent person would live near so many arson fires, occurring so frequently, in so many different neighborhoods." (*People v. Erving* (1998) 63 Cal.App.4th 652, 663.) In *Erving*, this inference was supported by the occurrence of the fires in different neighborhoods, always a neighborhood to which the defendant had moved. (*Ibid.*) Here, the inference is supported by the close proximity to Oyler's apartment, Oyler's work schedule and what was happening in his personal life, all of which showed, 1) that the fires diminished in frequency substantially after Oyler started working full-time, 2) that after beginning full-time work, the fires still only happened on his days off, or when he was not clocked in to work, and 3) that the six-week hiatus between July 9 and September 16 was in response to Breazile's ultimatum. It is extremely unlikely, through bad luck or coincidence, that Oyler is innocent, but his proximity, work schedule and personal life, happened to align perfectly with the commission of these crimes. The doctrine of chances permitted the jury to reasonably infer Oyler was guilty of setting the fires in part because of the extremely unlikely chance that his

work schedule and life events would align perfectly with the fires despite his innocence.

Oyler also compares this case to other cases where courts have found *sufficient* evidence to support an arson conviction. (AOB 161- 164, citing *U.S. v. Newman* (9th Cir. 1993) 6 F.3d 623, 628-629, *U.S. v. Lundy* (7th Cir. 1987) 809 F.2d 392, 293-294, *U.S. v. Patel* (1st Cir. 2004) 370 F.3d 108, 112-114, *People v. Beagle* (1972) 6 Cal.3d 441, 449-450, *People v. Solis* (2001) 90 Cal.App.4th 1002, 1010-1011, *People v. Clagg* (1961) 197 Cal.App.2d 209, 212, *People v. Belton* (1980) 105 Cal.App.3d 376, 379-380, *People v. Maler* (1972) 23 Cal.App.2d 973, 983; cf. *People v. Abrams* (1917) 174 Cal. 172, 173-174 [court found insufficient evidence to support conviction of husband, when evidence that wife committed arson equally strong].) He relies on these cases to demonstrate that evidence of presence at the scene is necessary to sustain an arson conviction. (AOB 161-164, see also AOB 172-196.) However, none of the cases cited concluded such a litmus test was required in arson cases. The cited cases only relied on evidence of the defendant's presence at the scene as supportive of a substantial evidence finding in that specific case. That such evidence existed in those cases does not create a requirement that it exist in every case. As this court has explained, sufficiency of the evidence claims necessarily turn on the specific evidence presented in the case at hand, and comparisons to the presentation of evidence in other cases is of little value. "'When we decide issues of sufficiency of evidence, comparison with other cases is of limited utility, since each case necessarily depends on its own facts.'" (*People v. Casares* (2016) 62 Cal.4th 808, 828, citing *People v. Thomas* (1992) 2 Cal.4th 489, 516.)

Oyler makes one additional claim regarding counts 20, 25, and 27—the three fires for which no incendiary device was found. (AOB 171.) Oyler contends insufficient evidence supports these convictions because

without an incendiary device, there is no evidence "the burning of anything was a 'direct, natural, and highly probable consequence[]' of an unknown act." (AOB 171.) Count 20 was the June 16 fire at Highway 243/San Gorgoinio. (11 RT 1709.) The investigator testified the fire was started by arson, and located a wooden stick match at the point of origin. (11 RT 1730-1732.) Heavy winds and water suppression damage to the point of origin explained why the investigator did not find a cigarette, or other matches indicative of an incendiary device. (11 RT 1731.) Count 25 was the Orchard Fire started on September 16. Again, an investigator testified that the cause was arson, although he could not locate an incendiary device because suppression efforts had destroyed the point of origin. (12 RT 1925-1929, 1930.) Count 27 was the Mias Canyon fire started on October 22. (12 RT 2021.) An investigator determined the fire was started by arson, but could not locate an incendiary device. (12 RT 2051.) From the investigators' conclusions that these fires were started by arson, the jury could reasonably infer the fires were started by arson. Stated differently, the evidence established that the fires were started by someone who set out to start a fire and committed some act to accomplish that purpose.

All three counts were further supported by the totality of the evidence regarding the series of fires, and Oyler's intent with respect to each incident, as laid out above. Count 25, the Orchard Fire, was also supported by evidence Oyler was at Breazile's parents' house (within blocks of the point of origin) immediately before the fire started, disappeared for 30 minutes, and the fire was noticeable shortly after his return. Oyler also admitted starting the Orchard Fire, and he watched the fire through binoculars while in the car with Jill Frame later that night. Count 27 was also supported by evidence of Oyler's presence in the remote location of the Mias Canyon fire – his car was captured by the pole camera travelling to and from the point of origin at the time of the fire. Oyler also later asked Frame if she had

heard anything over the police scanner regarding fires because he had set fires that day (October 22), and he fought with Beazile that evening about staying out all night the night before casing the area for good fire locations.

Further, despite the inability to locate incendiary devices for these fires, the evidence of Oyler's guilt was sufficient and the convictions should be affirmed. At the outset, Oyler's argument regarding insufficiency of the evidence rests on a misconstruction of the elements of arson. He contends the evidence must show he committed an act, "the direct, natural and highly probable consequences" of which was the burning of the relevant property—here, forest land. For support, he relies on this court's discussion of the mens rea required for arson in *In re V.V.* (2011) 51 Cal.4th 1020 (*V.V.*) and *People v. Atkins* (2001) 25 Cal.4th 76 (*Atkins*). (AOB 170-171.) But, his reliance is misplaced because both cases addressed the meaning of "maliciously" as required by section 451 ("A person is guilty of arson when he or she willfully and *maliciously* sets fire to or burns or causes to be burned or who aids, counsels, or procures the burning of, any structure, forest land, or property."). This court's use of the "direct, natural, and highly probable consequence" language is relevant only to acts committed which were not intended to start a fire, but did so nonetheless. (*V.V., supra*, 51 Cal.4th at p. 1029; *Atkins, supra*, 25 Cal.4th at p. 89.) Where such an act is at issue, it is "malicious" within the meaning of section 451 if the "direct, natural and highly probable consequences" of the act included the starting of a fire. (*Ibid.*)

In this case, there is no dispute that the act was malicious because Oyler intended to commit arson, i.e. he intended to start a fire. This court explained in *V.V., supra*, 51 Cal.4th 1020, the "intentional ignition or act of setting a fire" would certainly be sufficient to show the defendant acted maliciously, i.e. with an intent to do a wrongful act. (*Id.*, at p. 1028, citing *Atkins, supra*, 25 Cal.4th at pp. 88–89, accord, *U.S. v. Doe* (9th Cir.1998)

136 F.3d 631, 635 [common law arson]; cf. *People v. Hayes* (2004) 120 Cal.App.4th 796, 803, fn. 3 [malice will be presumed from types of injuries (maiming) resulting from intentional acts]; *People v. Nunes* (1920) 47 Cal.App. 346, 349 [same].)

In *V.V.*, even the dissenting justices agreed the intentional setting of a fire is sufficient to show malice for purposes of arson. (*V.V.*, *supra*, 51 Cal.4th at pp. 1034 (dissn. op. J. Kennard), 1035-1039 (dissn. op. J. Werdergar).) Where a defendant does not intend to set a fire, but commits an act which causes a fire, the question becomes whether his act was malicious within the meaning of the arson statute. In *V.V.*, the juveniles did not intend to set the hillside on fire, but instead, intended to light a cherry bomb and throw it onto the hillside. The majority in *V.V.* concluded this was sufficient to establish arson because the defendants acted "with awareness of facts that would lead a reasonable person to realize that the direct, natural, and highly probable consequence of igniting and throwing a firecracker into dry brush would be the burning of the hillside." (*Id.*, at p. 1030.) Such evidence establishes the maliciousness required for proof of arson, and operates to distinguish between intentional fires and accidental or unintentional fires. (*Atkins*, *supra*, 25 Cal.4th at p. 88, internal citations omitted ["Arson's malice requirement ensures that the act is 'done with a design to do an intentional wrongful act ... without any legal justification, excuse or claim of right.' Its willful and malice requirement ensures that the setting of the fire must be a deliberate and intentional act, as distinguished from an accidental or unintentional ignition or act of setting a fire; in short, a fire of incendiary origin."].)

Where a defendant intends to start a fire, and commits an act to accomplish that purpose, proof that the act was malicious is indisputable. "'An intentional act creating an *obvious fire hazard* ... done without justification ... would certainly be malicious....'" (*V.V.*, *supra*, 51 Cal.4th at

p. 1028, citing *U.S. v. Doe*, *supra*, 136 F.3d at p. 635, fn. 4 (emphasis original to *In re V.V.*).) The act at issue in this case was the intentional setting of a fire, not the accidental or unintentional setting of a fire under circumstances that would lead a reasonable person to realize the direct, natural, and probable consequence of the act would be starting a fire. For this reason, Oyler's reliance on the "direct, natural, and highly probable consequence" language misconstrues the elements in the arson statute.

Even if Oyler is correct, as explained above, the evidence was sufficient to establish the three fires were started by arson, and the "direct, natural and highly probable consequences" of intentionally setting a fire would necessarily include the starting of a fire. For these reasons, Oyler's claims that the evidence was insufficient to support counts 20, 25, and 27 must be rejected.

As noted above, the United States Supreme Court has recognized that, "individual pieces of evidence, insufficient in themselves to prove a point, may in cumulation prove it. The sum of an evidentiary presentation may well be greater than its constituent parts." (*Bourjaily v. U.S.*, *supra*, 483 U.S. at pp. 179–80.) Many of the inferences permitted by the evidence in this case may not be sufficient by themselves to support a conviction, but the totality of the evidentiary picture is greater than its constituent parts. When viewed as a whole, the evidence demonstrates Oyler's convictions are supported by more than sufficient evidence. For all of the reasons cited, this court should not hesitate to find all of Oyler's convictions for the non-capital fires and the attendant possession counts are supported by sufficient evidence.

D. Sufficient evidence supported Oyler's convictions for five counts of capital murder and the special circumstances (counts 1-5, 28, & 45)

Oyler also attacks the sufficiency of the evidence regarding the Esperanza Fire. (AOB 199-214.) Again, Oyler's argument regarding insufficiency rests almost entirely on inferences drawn in his own favor, and his personal disagreement with the credibility determinations made by the jury. (AOB 203-211.)

As explained above, sufficient evidence demonstrated a single arsonist started all of the fires set in the Banning Pass in the Summer and Fall of 2006, including the Esperanza Fire. In addition, there was ample evidence Oyler specifically started the Esperanza Fire.

Once Joanna's dog was taken to the animal shelter, and impounded, Oyler announced an intention to set the mountain on fire. (16 RT 2626-2628, 2656-2657.) The animal shelter and the point of origin for the Esperanza Fire both abut the same mountain—Cabazon Peak, albeit on opposite sides. (16 RT 2597, 2656; and see Exhibit 136.) Oyler went out on October 21 to case ideal locations to start this fire, and ultimately selected a location near the site of one of his more "successful" fires – the June 14 Broadway/Esperanza fire which had burned 10 acres. Oyler was "amped up" and excited about setting the fire, and he asked Frame for a ride so he could set the fire. (16 RT 2627.) When she declined, he confirmed he would get a ride from someone else. (16 RT 2628-2629.)

Oyler takes issue with this "motive" evidence because the dog was released on the morning of October 25, before the Esperanza Fire was started. (AOB 200-201.) More reasonably, as the prosecutor argued, the jury could have viewed this evidence as Oyler's pretense for starting a fire. The evidence showed he was a serial arsonist who liked to start large fires. (16 RT 2546, 2635.) The evidence also showed his fiancé, Breazile, had

given him an ultimatum and threatened to leave him if he continued setting fires. (16 RT 2534.) The jury could have inferred that Oyler used the fact of his sister's dog's impoundment as an excuse to set a fire he wanted to set anyway. He needed an excuse to set a fire to justify his actions to his fiancé, and to discuss setting a fire in front of her, something he had to know would upset her and may cause her to leave. Presumably, this is why Breazile provided the money to get the dog released—she hoped it would stop Oyler from setting a fire. The dog's release from the shelter on October 25 did not stop Oyler from setting the fire because the dog's impoundment was a pretextual motive. It was a convenient excuse Oyler used to justify setting a fire he already wanted to set—as demonstrated by the 21 fires he set leading up to October 26.

Oyler made good on his promise to find a ride from someone else—he called his sister, who in turn borrowed her friend's car (Nunez's Saturn) so she could go, "talk to her brother." (17 RT 2692-2693.) When Joanna left the house, she was wearing slippers because she did not intend to be outside walking around—she intended to be inside Oyler's apartment watching his daughter, while he took the car to go set the mountain on fire. The Esperanza Fire was started during the only window of opportunity for Oyler—the hour and a half when Breazile was not watching him, but instead was shopping at Wal-Mart. (16 RT 2565-2566.) At 2:30 a.m., Oyler was at the Shell gas station, but was not getting gas. Instead, he was doing what he liked to do after setting a fire—he was watching it burn. Oyler spoke with James Carney and explained the fire was burning in exactly the manner he expected. (17 RT 2673, 2674, 2681-2683, 2674-2675.)

The phone records corroborate the events of October 25-26. The records show a call from Nunez's cell phone to Oyler's apartment at 11:26 p.m. on October 25, about the time Joanna borrowed Nunez's car with

Nunez's cell phone inside. Then, in the early morning hours of October 26, Nunez's cell phone placed seven phone calls to Oyler's apartment – at 12:34 a.m., 1:52 a.m., 2:02 a.m., 2:23 a.m., 2:48 a.m., 2:50 a.m., and 2:54 a.m. (Exhibits 429 and 430.) If Oyler and Joanna were together at those times, there would be no need for phone calls between them. Instead, the jury reasonably could have inferred the phone calls indicated the two were not together, and one had access to Oyler's apartment phone while the other had access to Nunez's cell phone. The jury also could reasonably infer from the seven phone calls between them that whatever Oyler was doing, Joanna knew about it. In addition, Joanna testified she was at Oyler's apartment when her daughter called from her parents' house around 2:00 a.m. (20 RT 3117.) She later tried to claim she may have been wrong as to the timing, but the phone records show only one phone call between Oyler's apartment and his parents' house that night[32] – at 2:03 a.m., consistent with Joanna's initial statement. (20 RT 3118-3119, Exhibit 430.) The problem was, if Joanna was at Oyler's apartment at 2:03 a.m. to place the call to her daughter, she was the one at Oyler's apartment with access to Oyler's apartment phone, and Oyler was the one in Nunez's car with access to Nunez's cell phone.

In her first conversations with investigators, Joanna told them she drove directly to Oyler's apartment at 11:30 p.m. on October 25. (20 RT 3112-3113.) Then, after the media reported the start time of the Esperanza Fire, (20 RT 3126), Joanna changed her story and said Oyler called her between 12:00 a.m. and 1:00 a.m., (20 RT 3125-3126), and then she borrowed the car and drove to his apartment. But no such phone call is reflected in the phone records. The jury could reasonably infer Joanna

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[32] The phone call was from Oyler's apartment to the parents' house, not the other way around, as Joanna testified.

changed the time to cover for Oyler. Because the jury could also conclude from the phone calls that Joanna had to know what Oyler was doing, the fact that she lied to create an alibi for him which covered the start time of the Esperanza Fire supports an inference that Joanna knew Oyler started the fire. The only way she could have known that was because he told her.

Joanna's changing story and attempts to explain the phone records further support the convictions. For the first time at trial, Joanna testified that she was in fact out looking for drugs and did not get to Oyler's apartment until 3:00 a.m. on October 26. (19 RT 3061, 3079.) In the ten days following the Esperanza Fire, Joanna spoke with detectives four times, including two lengthy interviews on November 1 and 2, and she never mentioned being out on October 26 looking for drugs. (20 RT 3108-3110, 3111-3112.) Joanna also testified at the preliminary hearing. (20 RT 3110.) Despite all of these opportunities, she gave the story about looking for drugs on October 26 for the first time at Oyler's trial in 2009. (20 RT 3107.) She knew her brother was guilty and she lied repeatedly to try to cover for him, always changing her story when other evidence contradicted her previous account.

From 12:00 a.m. to 12:36 a.m. on October 26, 10 phone calls were made from Nunez's cell phone. And from 1:49 a.m. to 3:36 a.m., 26 phone calls were made from Nunez's cell phone, but between 12:36 a.m. and 1:49 a.m., the time when Oyler was starting the Esperanza Fire, not a single phone call was made from the cell phone. (See Exhibit 430.) The cell phone was in near constant use in the 40 minutes before the Esperanza Fire was set, and in the two hours immediately after, but at the time the arsonist had to be selecting a location and setting the fire, the cell phone was dormant. The reasonable inferences drawn from these records and Joanna's changing statements is that she drove to Oyler's apartment at 11:30 p.m., wearing slippers because she knew she would be in the apartment

babysitting Oyler's daughter. She let him take Nunez's car while Breazile was out, and he left to go do exactly what he said he wanted to do – set the mountain on fire. With Nunez's cell phone, Oyler kept Joanna updated on what was happening. He took a break from the phone calls to select the location and set the fire, and then drove to the Shell station to watch it burn.

Oyler's interview with Detective Michaels was also incriminating. At the time he was interviewed, detectives had not discovered how he got to the fire, and thought he had driven the Taurus. (15 CT 4055.) Employing a common interviewing technique, Detective Michaels told Oyler his tire tread marks were found at the scene, even though they had not been found at the scene. Detective Michaels kept asking Oyler how his tire tread marks were left at the scene if he did not drive over there. Oyler was insistent that that was impossible. (15 CT 4055, 4057, 4066.) What detectives did not know at the time was that Oyler had borrowed Nunez's green Saturn from his sister to drive to Esperanza and start the fire. He knew his Taurus tire tread marks could not be at the scene because he had not driven that car to start the fire. In addition, he told Detective Michaels he smoked Kool cigarettes (15 CT 4009-1010), when every other witness and the DNA testing from the cigarettes at his apartment confirmed his preferred cigarettes were Marlboros. (13 RT 2130, 2146, 2253-2255; 16 RT 2517; 21 RT 3266.) There would be no reason to lie about his preferred cigarette brand unless he knew that admitting he smoked Marlboros could implicate him in some manner. Oyler knew to lie about the brand of cigarettes, because he knew that Marlboro cigarettes were used in the fires. He also told Detective Michaels that he had gone to the casino that night, but he did not appear on any of the surveillance videos from the casino. (19 RT 2918-2920.) Oyler also lied about the car he was driving. He told Detective Michaels he drove the Malibu to the casino (15 CT 4039), but that was

demonstrably false because Breazile testified she drove the Malibu to Wal-Mart, and was there from around 1:00 a.m. to 2:30 a.m. (16 RT 2565-2567.)

Oyler contends the evidence was insufficient because the People never presented any evidence that he was at or near the scene of the Esperanza Fire[33]. (AOB 203-207.) As explained above, the circumstantial evidence demonstrated he was the single arsonist responsible for the string of fires, so no direct evidence of his presence at the scene was required. Even still, there was evidence putting Oyler near the scene within an hour of the start of the Esperanza Fire. Oyler acknowledges that James Carney testified Oyler was at the Shell station on Seminole (roughly 2 miles from the origin of Esperanza) around 2:00 a.m. on October 26, but contends Carney's testimony was not credible in light of the contradicting testimony from Shawn Martin, the Shell station attendee. (AOB 203-207, 213.) As explained above, a reviewing court "does not reweigh evidence or reevaluate a witness's credibility." (*Hajek, supra,* 58 Cal.4th at p. 1183.) Thus, when viewed in the light most favorable to the People, Carney puts Oyler within two miles of the origin of Esperanza fire at 2:00 a.m., approximately 50 minutes after the fire started. Further, Oyler himself admitted in his interview with Detective Michaels that he went to the Shell station that night and saw the fire burning. (15 CT 4033.) His contention now, on appeal, that there was no evidence he was at or near the scene of the origin of the Esperanza Fire is without merit.

Oyler also seems to argue the testimony of Breazile (his fiancé) and Joanna (his sister) must be taken as true. (AOB 208, 209-210.) But, the

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[33] With respect to the Esperanza Fire, the jury was explicitly instructed that the People had to prove "the defendant was present and committed the crimes in which he is charged..." and that if the jury had "a reasonable doubt whether defendant was present when the crime was committed, you must find him not guilty." (24 RT 3734-3735.)

jury was free to reject all or any portion of their testimony that was not credible. (CALCRIM No. 226; 24 RT 3721-3722.) Both had a significant bias in favor of Oyler because of their relationships to him, and their testimony was different at trial than the statements they had given at earlier points of the investigation. The jury was tasked with making the relevant credibility determinations, and this court may not revisit the jury's decisions in this regard. (*Hajek, supra*, 58 Cal.4th at 1183.)

It is important to reiterate that the sufficiency of the evidence demonstrating Oyler's guilt as to the Esperanza Fire includes the evidence specific to that fire, explained immediately above, but also includes all of the evidence described in sections V(B) and V(C) above, detailing the proof that a single arsonist was responsible for all of the charged fires, including Esperanza, and that Oyler was that arsonist. When viewed in this manner (the manner most favorable to the judgment), the evidence amply supports Oyler's convictions on counts 1 through 5, 28, and 45. It also supports the jury's true findings on the special circumstances. For all of these reasons, this court should reject his claims of insufficient evidence and affirm his convictions and the special circumstance findings.

VI. THE TRIAL COURT PROPERLY ADMITTED THE CHALLENGED PIECES OF EVIDENCE, AND ANY ERROR WAS HARMLESS

Oyler next challenges the admission of three pieces of evidence: 1) the "contraption" found in his apartment (a homemade ignition device), 2) excerpts from *The Anarchist's Cookbook* found in Oyler's parents' home, and 3) testimony from the forensic pathologist regarding the condition of the bodies of the victims. (AOB 249-285.)

At the outset, Oyler failed to object to the admission of the evidence regarding *The Anarchist's Cookbook*, and the testimony concerning the condition of the victims' bodies. He has forfeited these claims. His claims also fail on the merits because the evidence was relevant, admissible, and

not unduly prejudicial. Finally, even if erroneously admitted, the error was harmless because it is not reasonably probable Oyler would have received a different outcome had the trial court excluded the evidence. He also fails to show a violation of his federal right to due process. The trial was fundamentally fair, and the routine application of the familiar rules of evidence do not establish a constitutional violation.

A. Additional Background

1. *The Anarchist's Cookbook* and the ignition device[34]

The prosecutor asked a Riverside Sheriff's detective about the items recovered during a search of Oyler's parents' house. Amongst those items was a bag that belonged to Oyler, and inside the bag was a folder that contained a print out of chapters 3 and 4 of *The Anarchist's Cookbook*. (13 RT 2217-2218, 2225.) After identifying the portions of the book that were found, the prosecutor asked the detective if he had read the chapters found in Oyler's bag. (13 RT 2219.) When asked to relay the contents of the chapters, defense counsel objected for the first time, and cited "hearsay" as the basis for his objection. (13 RT 2219.) That objection was overruled. (13 RT 2219.) The detective explained the chapters covered how to make explosive and booby trap devices. (13 RT 2219.) On cross-examination, the detective explained he read the chapters and they did not contain any information regarding setting fires. (13 RT 2221-2220.)

The issue of admissibility of the ignition device was first raised on February 3, 2009, during the People's case-in-chief. (12 RT 2107.) At that time, the prosecutor mentioned that the device was similar to ones found in

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[34] Although these two issues are treated separately in Oyler's Opening Brief, respondent has combined them because they are interrelated.

The Anarchist's Cookbook, and could be used to start a fire. (12 RT 2108.) Defense counsel objected to the admission of the evidence as irrelevant and unduly prejudicial under Evidence Code section 352. (12 RT 2109.) He noted the device could not readily be used to start a wild land fire, which was all Oyler had been charged with. (12 RT 2109.) The trial court agreed with defense counsel and excluded the evidence regarding the ignition device. (12 RT 2113.)

But later, during the defense case, David Smith, the defense arson expert testified that some serial arsonists target both wild land and structures. He further testified that arsonists do not change the device used because the device is their signature, and use of the same device means the arsonist can take credit for having started the fire. (22 RT 3394-3395.) Smith testified during cross-examination that it was unreasonable to assume an arsonist varied his incendiary device or experimented with different devices, because serial arsonists are always committed to their signature device. (22 RT 3404-3405.)

At a break, the prosecutor asked for permission to question Smith about the ignition switch device found in Oyler's apartment. Because Smith had opined that arsonists never experiment and never vary the device used, the existence of the ignition switch in Oyler's apartment directly undermined Smith's opinion. (22 RT 3422-3425.) The court agreed and noted it had earlier excluded the evidence under section 352 because the relevance of it was limited since Oyler was only charged with starting wild land fires, and the device found in his apartment would have required access to a power source to start a fire. (22 RT 3423-3424.) But, once Smith testified that serial arsonists are known to set fire to both wild land and structures, and further testified that arsonists do not vary their ignition devices, the existence of a different ignition device in Oyler's home became relevant to rebut Smith's opinion. (22 RT 3424-3425.) Accordingly, the

trial court permitted the prosecutor to ask Smith about the ignition switch found in Oyler's apartment. (22 RT 3444-3445.)

Smith explained the device was a home-built "on/off switch." It had a toggle switch and a directional switch which could be used to direct electrical current. (22 RT 3444-3446.) Smith was asked if he was familiar with *The Anarchist's Cookbook*, to which he said he was. He was then asked if he had seen a similar device in the book, but Smith could not recall. (22 RT 3445-3446.) The prosecutor asked Smith if the existence of the device would change his opinion regarding whether serial arsonists experiment with different types of devices. Smith never gave a direct answer, but indicated that the switch device was not built for the purpose of starting a fire. (22 RT 3448-3449.) On redirect, Smith explained the switch was basically a rudimentary on/off switch which could be used to power anything that was hooked up to it. (22 RT 3460.) He testified it would not be useful to start a fire. (22 RT 3455, 3456-3457.)

In rebuttal, the prosecutor was permitted to present additional evidence regarding the ignition switch device. A Riverside County Sherriff's detective testified that they recovered the "improvised initiating" system from Oyler's apartment. (23 RT 3558.) A bomb technician with the Riverside County Sheriff's Office testified regarding how the device functioned. (23 RT 3561-3563.) He explained the device was a black plastic cylinder with two switches on top, a toggle switch and a four position chrome switch. (23 RT 3564.) Based on the way the wires were connected, the toggle switch served as a safety switch—meaning it either brought power to the device, or shut it off. (23 RT 3565.) The power could then be diverted to the four-position chrome switch. (23 RT 3565.) The wires had been stripped, as though the creator was preparing to hook the device up to a power source. (23 RT 3568, 3571.) The Sheriff's officer experimented with this type of device and was able to start a fire using a

similar switch-type device. (23 RT 3569.) In the expert's opinion, the device was an improvised initiating system, or incendiary device. (23 RT 3571.)

2. Evidence regarding the condition of the victims' bodies

Prior to the testimony from the forensic pathologist, defense counsel objected, under Evidence Code section 352, to the People's proposed use of the autopsy photographs of the victims. (18 RT 2808.) Defense counsel handed the court five folders, each labeled with the name of a victim. Inside each folder was the death certificate for that victim and the autopsy photographs the People sought to admit. (18 RT 2808.) Defense counsel objected to admission of all of the photographs, but not the death certificates. (18 RT 2808.) The trial court *excluded* all of the autopsy photographs. (18 RT 2810-2812.)

Dr. Joseph Cohen, a forensic pathologist, then testified about the cause of death for the five victims. (18 RT 2816-2853.) Defense counsel did not make any objection during his testimony. (18 RT 2816-2853.)

Dr. Cohen explained the distinctions between the levels of burn injuries, and how the body reacts to burn injuries. (18 RT 2829-2834.) Dr. Cohen was also asked about the pugilistic posture, where a victim's hands involuntarily raise into a "boxer's stance." (18 RT 2834.) He explained that it is a common finding with burn victims and all five victims in this case were found in the pugilistic posture. (18 RT 2834.) The pugilistic posture is caused by the shrinking of the skin and muscles, which causes the body to tense up. (18 RT 2835.)

Dr. Cohen explained that Mark Loutzenhiser's body had evidence of therapeutic interventions, including a breathing tube and two escharatomies. (18 RT 2829.) Escharatomies are incisions on the body to relax swollen tissues. (18 RT 2829.) Loutzenhiser had second and third degree burns

over 80 percent of his body. (18 RT 2829.) He also had severe inhalation injuries from inhaling the smoke and superheated air. (18 RT 2835.) Dr. Cohen concluded Loutzenhiser's cause of death was thermal burns with smoke inhalation. (18 RT 2836.)

As to Jess McLean, Dr. Cohen testified the condition of his body was "horrific" and the "entire body was charred." (18 RT 2838.) McLean had third and fourth degree burns to his entire body. He also was found in the pugilistic stance. (18 RT 2838.) In addition, "there was a large defect of the torso from expansion of gases due to the heat, where the torso popped out and the – the internal organs, the intestines came out." (18 RT 2838.) This was caused by the intense heat of the air that filled McLean's body. (18 RT 2840.) Dr. Cohen described McLean's injuries as "about as bad as you can get, short of being cremated." (18 RT 2838.) McLean also suffered heat fractures, where the bones pop or break under extreme heat. (18 RT 2838.) Dr. Cohen analogized the injuries McLean suffered to what one would see if they put a steak on the grill, and forgot about it—his body was charred black. (18 RT 2839.) Dr. Cohen testified McLean's cause of death was "total body thermal injury and inhalation of products of combustion." (18 RT 2840.)

Dr. Cohen indicated the cause of death and condition of the bodies for Daniel Hoover-Najera and Jason McKay were similar to McLean. (18 RT 2840, 2843, 2845-2846.) Like McLean, Hoover-Najera and McKay suffered "full-body charring, fourth-degree burns, pugilistic stance," and were unidentifiable. (18 RT 2842.) All three required dental comparisons for identification. (18 RT 2842.) McLean, Hoover-Najera, and McKay all died within seconds of being burned. (18 RT 2840-2841.)

As to Pablo Cerda, Dr. Cohen testified Cerda survived for five days after his injuries, and died on October 31, 2006. (18 RT 2846.) He had severe burns over 90 percent of his body, and his body was very swollen.

(18 RT 2846-2847.) Dr. Cohen described Cerda as unrecognizable due to the swelling, and he too required dental comparisons for identification. (18 RT 2847.) Dr. Cohen testified, "It was a horrific sight... it was just terrible." (18 RT 2847.) Dr. Cohen also described some of the therapeutic interventions that were taken in the five days Cerda survived. Like Loutzenhiser, he had multiple escharatomies. (18 RT 2847.) Cerda was conscious for a portion of the time and was communicative with caregivers. (18 RT 2848.) Dr. Cohen explained that that is not uncommon, and given the severity of Cerda's burns, he was likely not experiencing much pain because the burns went through to the underlying tissue. (18 RT 2848-2849.) Cerda's cause of death was complications from severe thermal burn injury over 90 percent of his body. (18 RT 2849.) Dr. Cohen explained that the complications included electrolyte abnormalities, bacterial infections, sepsis and septic-shock, and the inhalation injuries from the heat and smoke. (18 RT 2849-2850.)

Dr. Cohen explained that a complete autopsy ia always performed to identify any natural disease process that may have caused or contributed to the death. (18 RT 2839.) The internal examinations of the victims revealed that, "[n]atural disease did not cause or contribute to the death of any of these fire fighters." (18 RT 2839-2840.) Dr. Cohen also explained that people can die from carbon monoxide poisoning due to smoke inhalation, but that the tests performed on four of the five victims showed levels of carbon monoxide in their blood that would not have been fatal, and thus, in his opinion, smoke inhalation did not contribute to their deaths. (18 RT 2851-2853.)

B. Oyler's claims of erroneous admission of *The Anarchist's Cookbook* and testimony regarding the victims' cause of death have been forfeited because he failed to object below

Oyler's claims of error as to the admission of *The Anarchist's Cookbook* and the testimony concerning the cause of the victims' death have been forfeited because no timely and specific objections were made below.

Evidence Code section 353 provides, as relevant, "A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless: [¶] (a) There appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear *the specific ground of the objection or motion* ...." (Italics added.) "A party desiring to preserve for appeal a challenge to the admission of evidence must comply with the provisions of Evidence Code section 353, which precludes reversal for erroneous admission of evidence unless: 'There appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated to make clear the specific ground of the objection or motion.'" (*People v. Ramos* (1997) 15 Cal.4th 1133, 1171.) This rule applies with equal force to capital cases. (*People v. Cain* (1995) 10 Cal.4th 1, 28.)

This court has held consistently that the "'failure to make a timely and specific objection on the ground asserted on appeal makes that ground not cognizable.'" (*People v. Partida* (2005) 37 Cal.4th 428, 433–34, quoting *People v. Seijas* (2005) 36 Cal.4th 291, 302.) In *Partida*, this court explained the rule requiring a specific objection below was critical to the fairness and justice of the proceedings, and allowed trial courts an opportunity to pass on the objection posed by the party and prevent error. (*Partida, supra*, 36 Cal.4th at p. 434.) "[A] 'contrary rule would deprive

the People of the opportunity to cure the defect at trial and would permit the defendant to gamble on an acquittal at his trial secure in the knowledge that a conviction would be reversed on appeal.'" (*Ibid.*, quoting *People v. Rogers* (1978) 21 Cal.3d 542, 548.)

Oyler's only objection to the admission of the portions of *The Anarchist's Cookbook* was made on hearsay grounds *after* the detective had already testified as to what was found. (13 RT 2219.) His claim of error on appeal is that the evidence was inadmissible because it was irrelevant and prejudicial. (AOB 250.) He never lodged this objection below. And, the only objection he did lodge was made after the existence of the pages of *The Anarchist's Cookbook* had been testified to. The pages were later admitted as an exhibit (again without objection), and thus, the jury was free to review them for their contents. (People's Exhibit No. 359; 24 RT 3702-3705.) Even if construed as being an objection to the relevance or prejudice of the evidence, it was untimely because it was not lodged until after the detective had testified to what was found in the search. Accordingly, this claim has been forfeited.

Oyler's claim that the trial court erred in admitting the testimony from Dr. Cohen regarding the condition of the victims' bodies has also been forfeited. At trial, Oyler objected to the admission of the autopsy *photographs*. (18 RT 2807-2808.) That objection was sustained, and the photographs were excluded. (18 RT 2810.) But Oyler never objected to the *testimony* of Dr. Cohen regarding the manner and cause of death. In fact, he did not lodge any objection at all during Dr. Cohen's testimony, and asked him no questions on cross-examination. (18 RT 2816-2853.) His objection to the admission of the photographs is insufficient to preserve a claim as to any testimony regarding the cause of death. And given the trial court's exclusion of all of the autopsy photographs, Oyler cannot claim that any objection would have been futile, as the trial court was

demonstrably sensitive to the issue. Had Oyler objected to the testimony below, the trial court could have limited the testimony to reduce any prejudicial impact. Oyler's failure to object deprived the trial court of an opportunity to prevent any error in the first instance, or to cure it once it occurred. (*Partida*, *supra*, 36 Cal.4th at p. 434.) Accordingly, this claim has been forfeited.

Further, to the extent Oyler is arguing the trial court had a duty to exclude the evidence on its own motion, (AOB 241, 254-255, 283-284), he may not make such a claim on appeal. While the trial court may exercise authority under Evidence Code section 352 without an objection by trial counsel, the failure to do so cannot be urged on appeal as error. (*People v. Cain* (1995) 10 Cal.4th 1, 28.)

C. Even if the claims had been preserved, all three items of evidence were properly admitted

Even assuming these claims were preserved, they should be denied because they are meritless. Oyler contends the trial court abused its discretion in admitting these items of evidence because they were not relevant to any material facts. (AOB 246-247, 250.) Because the evidence was relevant, the trial court did not abuse its discretion in determining all three items were relevant and admissible.

All relevant evidence is admissible. (Evid. Code § 351; see also Cal. Const., art. I, § 28, subd. (d).) Relevant evidence is evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code § 210.) "The test of relevance is whether the evidence tends 'logically, naturally, and by reasonable inference' to establish material facts such as identity, intent, or motive." (*People v. Bivert* (2011) 52 Cal.4th 96, 116–117.)

A trial court has broad discretion to determine the relevance of evidence. (*People v. Tully* (2012) 54 Cal.4th 952, 1010, citing *People v.*

Cash, *supra*, 28 Cal.4th at p. 727.) This discretion extends to evidentiary rulings made pursuant to Evidence Code section 352. (*People v. Zambrano* (2007) 41 Cal.4th 1082, 1149.) A trial court's evidentiary rulings are reviewed for an abuse of discretion. (*People v. Peoples* (2016) 62 Cal.4th 718, 748.) The trial court's exercise of its discretion on evidentiary matters will not be disturbed on appeal without a showing that "the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice." (*People v. Lewis* (2009) 46 Cal.4th 1255, 1286.)

Prior to admission of the ignition device, the portions of *The Anarchist Cookbook* were relevant and admissible as evidence of motive. Evidence of motive, while not required, is relevant and admissible because a motive makes criminal conduct more understandable. (*People v. Roldan* (2005) 35 Cal.4th 646, 707.) The People's theory of the case was that Oyler was a serial arsonist bent on destruction. The evidence showed he changed the construction of his incendiary devices, and the time and locations of his fires in order to achieve the maximum possible level of destruction. His possession of *The Anarchist's Cookbook*, and specifically the portions which discussed destructive devices, tended to support the People's theory that Oyler was motivated by destruction. It gave the jury insight into why Oyler chose arson, and continued to set fires. Accordingly, even without the subsequently admitted evidence of the ignition device, the portions of *The Anarchist's Cookbook* found in Oyler's bag were relevant and admissible.

The probative value of the admitted portions of *The Anarchist's Cookbook* increased when the evidence of the improvised ignition device was admitted. Together, these pieces of evidence were relevant to show Oyler was reading about and experimenting with different incendiary devices. This evidence went to the heart of the conflict between the arson

experts, and the opposing theories of the case. The People's theory of the case was that the fires were all started by a single arsonist who was evolving over time and experimenting with different types of incendiary devices to accomplish differing goals; this explained why investigators found both remote devices and lay-over devices. In contrast, the defense expert testified that the fires were started by at least two arsonists because of the different devices and the fact that serial arsonists do not change their incendiary devices, or experiment with different types of devices as the device constitutes their signature. Oyler's possession of *The Anarchist's Cookbook* and the improvised ignition switch device tended to show he was experimenting with different types of incendiary devices, even if he had not yet used the ignition device to start a fire. This directly rebutted the defense expert's testimony and undermined his opinion. It also corroborated the People's arson experts and their opinions that a single *experimenting* arsonist was responsible for all of the charged fires. Because the issue was highly material, and the evidence was relevant on that issue, the trial court did not abuse its discretion in admitting the evidence.

As to the testimony concerning the conditions of the victims' bodies. Again, Oyler argues the testimony was inadmissible because it was irrelevant. (AOB 266.) Not so. For first-degree felony murder, the People had to prove Oyler did an act that caused the victims' deaths (CALCRIM 540A; 24 RT 3729; see also § 189), and for purposes of the arson special circumstance, the People had to prove Oyler's commission of the arson and the death of the victims were part of a continuous transaction. (24 RT 3732-3733; 16 CT 4288, CALCRIM 730.) The condition of the victims' bodies was relevant to show Oyler's fire caused their death, and the two were part of a continuous transaction. Dr. Cohen's testimony proved the men died because they were burned to death by fire, and thus his testimony

established that Oyler's act of setting the fire caused the victims' deaths and that the two events were part of a continuous transaction.

The evidence of the condition of the victims' bodies was relevant and necessary for the People to meet their burden on the charged offenses. To that end, Dr. Cohen offered an opinion as to the cause of death for the five victims – which was that they all died from thermal injuries and the resulting complications. He also supported his opinion about the cause of death by explaining the basis for the opinion. The Evidence Code expressly permits an expert to testify about "the reasons for his opinion and the matter... upon which it is based." (Evid. Code, § 802.) Dr. Cohen's opinion about the cause of death was based on his observations of the injuries and his expertise in the field, i.e. his familiarity with how the body responds to burn injuries. His opinion about the cause of death was also based on his ability to rule out other causes like natural disease progression and smoke inhalation.

This evidence was particularly relevant as to victims Loutzenhiser and Cerda, who survived the initial burn over. The People had to prove that their deaths resulted from the injuries they suffered from the fire, and not negligent medical care, disease, or some other cause. Accordingly, the evidence was relevant and admissible.

Oyler contends the trial court erred in admitting the testimony because the issue of how the fire fighters died was not disputed (AOB 274), but he "placed all material issues in dispute by pleading not guilty." (*People v. Bivert* (2011) 52 Cal.4th 96, 116–117.) Even if cause of death was not contested, the prosecution still had to prove each element of the offense. That Oyler's defense focused on disputing other elements "would not eliminate the prosecution's burden" to establish every element of the charged offenses. (*People v. Soper* (2009) 45 Cal.4th 759, 777.) The relevance of evidence as to how the crime was committed is not lessened

because the cause of death was undisputed. (*Carey, supra*, 41 Cal.4th at p. 128, citing *People v. Stitely* (2005) 35 Cal.4th 514, 545.) Neither the prosecutor nor the trial court is required to accept a defense stipulation in order to avoid the admission of evidence being challenged as unduly prejudicial. (*People v. McCurdy* (2014) 59 Cal.4th 1063, 1100.) And, the prosecutor is not required "to present its case in the manner preferred by the defense." (*People v. Clark* (2011) 52 Cal.4th 856, 894, quoting *People v. Salcido* (2008) 44 Cal.4th 93, 150.) To the extent Dr. Cohen's testimony relayed gruesome details of the way these men died, it did so "because the charged offenses were gruesome, but [the evidence] did no more than accurately portray the shocking nature of the crimes. The jury can, and must, be shielded from depictions that sensationalize an alleged crime, or are unnecessarily gruesome, but the jury cannot be shielded from an accurate depiction of the charged crimes that does not unnecessarily play upon the emotions of the jurors." (*People v. Gonzales* (2012) 54 Cal.4th 1234, 1272.)

Finally, to the extent Oyler argues the testimony should have been excluded under section 352, he is wrong. As noted above, while a trial court has the authority to exclude evidence under section 352 on its own motion, its failure to exercise its authority cannot constitute error on appeal. (*Cain, supra,* 10 Cal.4th at p. 28.) In addition, as explained above, the testimony was relevant as to at least two elements of the charged offenses and attendant circumstances. In addition, because the photographs had been excluded, Dr. Cohen's testimony was the *only* evidence presented on these issues, and thus was necessary, and not cumulative. And, while the trial court agreed the prejudicial impact of the photographs warranted exclusion, the same cannot be said of witness testimony. The prejudicial impact of photographs—graphic visual depictions of the victims' dead bodies—was undoubtedly more severe than the testimony concerning their

injuries and cause of death. Accordingly, the evidence was properly admitted.

D. Any error was harmless

Even if the trial court abused its discretion in admitting any of the items of evidence, the error is harmless. The erroneous admission of evidence is reviewed under the *Watson* standard. (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 76.) Accordingly, Oyler must show a reasonable likelihood that absent the admission of the contested evidence, he would have received a more favorable result. He has not made such a showing.

The testimony regarding *The Anarchist's Cookbook* and the ignition device was brief, and while material, its admission was not prejudicial under *Watson*. This case turned on the devices used to set the fires, and the evidence directly connecting Oyler to several of the fires including the Esperanza Fire. This evidence was relevant, as explained above, to rebut the defense expert's testimony, but in reality, the defense expert's opinion was not supported by simple common sense. He claimed arsonists never vary their incendiary device to achieve better results. He painted serial arsonists as almost robotic, in that once they have committed to a device, they are stuck with it, and will not alter the device even if it proves to be unsuccessful. This is not a reasonable opinion, and it conflicts with basic human nature. To the extent the evidence helped to demonstrate that the specific arsonist at issue here—Oyler—did experiment with different devices, that inference was already apparent from the testimony of the prosecution's experts, and common sense. Further, to the extent this evidence showed experimentation with different devices, it showed experimentation with a device unlike any of the charged devices. Thus, the weight of the evidence was not highly significant. More importantly, there was ample evidence connecting Oyler with both the lay-over device fires

(namely, his DNA), and the remote device fires (his motives and admissions). Even if this evidence about his experimentation with a different type of ignition device had been excluded, the outcome would have been the same because there was considerable other evidence that showed he was the arsonist responsible for the string of fires.

The testimony regarding the victims' cause of death was also not prejudicial under the *Watson* standard. Without that testimony (and assuming a stipulation sufficient to meet the People's burden on those elements), the jury would still have convicted Oyler of the offenses charged because there was no real dispute about the cause of death. Further, the jury did not return verdicts on counts 9, 10, and 11. This tends to show the jury meaningfully deliberated on the charged offenses and considered the evidence as to each individual charge. The failure to return verdicts on three counts demonstrates the jury was not returning verdicts based on prejudice or bias against the defendant, and thus the evidence did not "inflame [their] emotions" in a way that rendered their verdicts unreliable.

Accordingly, even if erroneous, the admission of these items of evidence was harmless.

E. Oyler has not demonstrated a violation of his federal constitutional rights

Finally, Oyler contends the allegedly erroneous evidentiary rulings violated his federal right to due process and resulted in a trial that was fundamentally unfair. (AOB 247, 251.) As explained above, the rulings were not erroneous. Even if erroneous, Oyler has not established a due process violation under the federal constitution. The "routine application of state evidentiary law does not implicate a defendant's constitutional rights." (*People v. Hovarter* (2008) 44 Cal.4th 983, 1010; *People v. Brown* (2003) 31 Cal.4th 518, 545.) This court has explained that a defendant's federal due process right is violated by the admission of evidence only, "'when

evidence is so extremely unfair that its admission violates fundamental conceptions of justice.'" (*People v. Fuiava* (2012) 53 Cal.4th 622, 696, quoting *Perry v. New Hampshire* (2012) 565 U.S. 228, 237 [132 S.Ct. 716, 181 L.Ed.2d 694].) In *Jammal v. Van de Kamp* (9th Cir.1991) 926 F.2d 918, 920, the Ninth Circuit explained that admission of evidence can only violate due process where, "there are no permissible inferences the jury may draw from the evidence... [And, e]ven then, the evidence must be of such quality as necessarily prevents a fair trial." For all of the reasons explained above, this evidence was relevant and probative of the issues. The trial court's rulings, even if erroneous as Oyler contends, do not rise to the level of a due process violation. Oyler's constitutional claims should be rejected.

VII. THERE WERE NO CHARGING OR INSTRUCTIONAL ERRORS

Oyler next claims his five murder convictions and the arson-special circumstance finding as to each must be overturned because he was improperly charged with premeditated murder, not felony murder, and because the court misinstructed the jury regarding the elements of the special circumstance. Both claims should be rejected. Oyler was properly charged with first-degree murder because the information does not need to specify the theory on which he will be tried, and the court properly instructed the jury as to the elements of the felony-murder special circumstance.

A. There was no error in the manner by which Oyler was charged with first-degree murder in counts 1-5

First, Oyler argues that he was improperly charged with five counts of first-degree premeditated murder, instead of five counts of first-degree felony murder. (AOB 291-294.) Oyler argues the charges in the information were defective because they did not explicitly reference section 189, and the felony-murder theory on which he was to be tried. (AOB 292.)

But, this court has rejected similar arguments. In *People v. Thomas* (1987) 43 Cal.3d 818, this court explained,

> it has long been the law in this state that an accusatory pleading charging murder need not specify degree or the manner in which the murder was committed. (Citations.) Thus, even where the People intend to rely on a felony-murder theory, the underlying felony need not be pleaded in the information. (Citation.) ... So long as the information adequately alleges murder, the evidence adduced at the preliminary hearing will adequately inform the defendant of the prosecution's theory regarding the manner and degree of killing. (Citation.)

(*Id.*, at p. 829, fn. 5.) Further, it is well-settled that felony-murder and premeditated murder are not distinct crimes, but merely two different theories by which a defendant can commit the single crime of first-degree murder. (*People v. Taylor* (2010) 48 Cal.4th 574, 626; see also *People v. Johnson* (1991) 233 Cal.App.3d 425, 455.) Oyler explicitly notes he is not challenging his notice of the charges because he was fully aware (based on the discovery and the preliminary hearing) that he was to be tried for murder on a felony-murder theory. (AOB 292 ["Oyler does not argue that his right to notice was violated."].) Instead, he simply argues the charges should have referenced section 189 and the felony-murder theory. Based on this court's previous holdings, charging Oyler with five counts of first-degree murder in the language of section 187 did not render the charges "defective," and there is no requirement that the information identify the applicable theory for first-degree murder charges.

To the extent Oyler is contesting the reading of the information to the prospective jurors because the charging language included the phrase "willfully, unlawfully, and with deliberation, premeditation, and malice aforethought," (AOB 292-293), he has forfeited this claim by failing to object below. In *People v. Wader* (1993) 5 Cal.4th 610, the trial court read the information to prospective jurors, including several counts of robbery

which were later severed from the trial. (*Id.*, at p. 646.) This court held any claim of error regarding the trial court's reading of the information was forfeited by the defendant's failure to object. (*Ibid.*)

The forfeiture is even more persuasive in this case. In *Wader*, it is not clear whether defense counsel knew the robbery counts would be severed at some point in the future, but the failure to object was still sufficient to find the claim had been forfeited. Here, as Oyler concedes, he knew he was being prosecuted on a felony-murder theory based on the preliminary hearing testimony. (AOB 292.) In addition, he knew the information would be read to the prospective jurors because such a reading is required by statute. Section 1093 delineates the necessary stages of a criminal trial and requires, under subdivision (a), that once a jury is empaneled, "If the accusatory pleading be for a felony, the clerk shall read it, and state the plea of the defendant to the jury." Oyler was also told explicitly that the prosecutor would read the information to the jury panel when the parties discussed it prior to the panel coming into court. (4 RT 474.) Oyler objected to the prosecutor reading the portion of the information that charged his prior conviction, and that portion was not read to the panel. (4 RT 475, 483-485.) He never objected to the language of the five murder charges. Because Oyler knew he was facing first-degree murder charges, and knew the jurors would be informed of the content of the information, he should have objected to the reading of the information in the trial court. His failure to do so forfeits the challenge. (*Wader, supra,* 5 Cal.4th at p. 646.)

Further, Oyler argues the jury was "subtly biased by the improper suggestion that the murders of the five fire fighters had been deliberate, premeditated and committed with malice aforethought." (AOB 294.) The record and the instructions given to the empaneled jurors before deliberations demonstrate otherwise. The information was read to all

prospective jurors on January 20, 2009. (4 RT 474.) The seated jurors were instructed on the elements of the charged offenses on February 26, 2009. (24 RT 3713.) By the time the jury was instructed on the law, it is unlikely any of the jurors remembered the specific language read to them some five weeks earlier before they knew they would be selected to hear the case.

More importantly, the instructions more than compensated for any possible residual prejudice. The jury was told that, "[n]othing the attorneys [had said was] evidence." (24 RT 3719.) This would have included the prosecutor's reading of the information. The jury was also told that if anything the attorneys had said conflicted with the court's instructions, the jury was to follow the court's instructions. (24 RT 3717; CALCRIM 200.) Further, the jury was told it had to decide the facts of the case based exclusively on the evidence presented during the trial, which included the sworn testimony of witnesses, the exhibits admitted into evidence and anything else the court told the jury it could consider, and as noted, explicitly excluded statements and comments from the attorneys. (24 RT 3719; CALCRIM 222.) Finally, the jury was instructed that, "The fact that a criminal charge has been filed against the defendant is not evidence that the charge is true. You must not be biased against the defendant because he has been arrested, charged with a crime, or brought to trial. A defendant in a criminal case is presumed to be innocent." (24 RT 3718; CALCRIM 220.) Accordingly, even if some jurors remembered the charges against Oyler as read at the beginning of the trial, they were fully aware that those charges could not be used against him, and could not be considered evidence of his guilt. On appeal, it is presumed that jurors understood and followed the court's instructions. (*People v. Wilson* (2008) 44 Cal.4th 758, 803.) For all of these reasons, Oyler has failed to demonstrate any error in the manner he was charged and any resulting prejudice.

B. The trial court properly instructed the jury on the elements of the felony-murder special circumstance allegations

Next, Oyler contends the instructions on the arson special circumstance were erroneous, and thus the true findings must be reversed. (AOB 295-305.) Oyler contends the instructions were wrong because they failed to require the jury find he *intended* to burn an inhabited structure. (AOB 299-303.) A finding of intent to burn an inhabited structure is not required by the law, and thus, was not necessary to secure a true finding on the special circumstance. Oyler's argument seeks a change in the law, not its faithful application.

Oyler was charged with five counts of first degree murder. The jury was instructed that Oyler was being charged under a theory of felony murder —i.e., arson. (24 RT 3730 ["The defendant is charged in Counts 1 through 5 with murder, under a theory of felony murder."].) To prove Oyler was guilty of first degree murder, the jury had to find, 1) Oyler committed arson, 2) Oyler intended to commit arson, and 3) while committing arson, Oyler did an act that caused the death of another person. (CALCRIM 540A; 24 RT 3729; see also § 189.)

To decide whether Oyler committed an arson (element 1), the jury was referred to the separate instruction on arson, given in connection with the arson charged in counts 6 through 28[35]. (24 RT 3730, 3733.) The jury

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[35] The court instructed the jury that Oyler was charged in counts 6 through 28 with arson in violation of section 451, subdivision (b), (24 RT 3733), when Oyler was actually charged with violating section 451, subdivision (c). The elements given for the arson counts align with the elements of subdivision (c), not subdivision (b). As explained in the argument, because the special circumstance instruction included the necessary elements for a violation of subdivision (b), as required by section 190.2, subdivision (17)(h), the erroneous reference to subdivision (b) in the arson instruction was clerical, and not prejudicial.

was instructed that to find Oyler guilty of arson, it had to find, 1) Oyler set fire to or burned forest land, and 2) Oyler acted willfully and maliciously. (24 RT 3733.)

As to the felony-murder special circumstance, the jury was instructed that Oyler was charged with a special circumstance of "murder committed while engaged in the commission of an arson of an inhabited structure, in violation of Penal Code section 190.2(a)(17)." (24 RT 3732.) To find the special circumstance true, the jury was told it had to find 1) Oyler set fire to or burned forest land, 2) Oyler acted willfully and maliciously, 3) the fire burned an inhabited structure, 4) Oyler intended to commit an arson, 5) Oyler did an act that caused the death of another person, and 6) the act causing the death and the arson of an inhabited structure were part of a continuous transaction. (24 RT 3732-3733; 16 CT 4288, CALCRIM 730.)

As noted, in order to find the special circumstance true, the jury had to find that the arson Oyler committed burned an inhabited structure. (§ 451, subd. (b); CALCRIM 1502.) The instruction given by the court explicitly identified this element and required this finding. (24 RT 3732 ["the fire burned an inhabited structure"].) Oyler argues this instruction was insufficient because the jury had to find he *intended* to burn an inhabited structure, not just that he intended to commit arson which did burn an inhabited structure. (AOB 301-305.)

This court has already held that the necessary mens rea for commission of arson is general criminal intent[36]. "[A]rson requires only a

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[36] In 1872, when California adopted the Penal Code, arson was defined in section 447, and included a specific intent element, i.e. the specific intent to destroy a building. That specific intent element was dropped from the statute in 1929, and arson of an inhabited structure was renumbered as section 447a. (*People v. Atkins* (2001) 25 Cal.4th 76, 86-87.) Arson was added to the felony-murder special circumstance in 1978,

(continued...)

general criminal intent and ... the specific intent to set fire to or burn or cause to be burned the relevant structure or forest land is not an element of arson." (*Atkins, supra*, 25 Cal.4th at p. 84.) This court reiterated that holding in *V.V.*, explaining that "the arson statute does not require the intent to cause the resulting harm, but 'rather requires only [a general] intent to do the act that causes the harm.'" (*V.V., supra*, 51 Cal.4th at p. 1027, citing *Atkins*, *supra*, 25 Cal.4th at p. 86; see also *Mason v. Superior Court* (2015) 242 Cal.App.4th 773, 784 ["*Atkins* and *In re V.V.* make clear that a defendant need not intend to burn the relevant property."].)

Oyler acknowledges these cases and the relevant holdings regarding the necessary mens rea for arson (AOB 297), but argues that the felony-murder special circumstance includes an independent specific intent element—namely the defendant must have the specific intent to commit the underlying felony. (AOB 302.) For arson, section 190.2, subdivision (a)(17)(H), identifies the underlying felony as "[a]rson in violation of subdivision (b) of section 451." Thus, as Oyler's argument goes, the jury had to find that he specifically intended to commit arson in violation of

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(...continued)
as part of the newly adopted death penalty law. When it was added, the specific section read, "[a]rson in violation of Section 447." (Former § 190.2, subd. (a)(17)(H).) The 1978 law's reference, in former section 190.2, subdivision (a)(17)(H), to "arson in violation of section 447," is of no moment. First, section 447 had been repealed and replaced in 1929 with section 447a, specifically eliminating the specific intent element. (*Atkins*, *supra*, 25 Cal.4th at pp. 86-87.) Thus, the reference to section 447 in the 1978 law appears to have been an error, as that statute no longer existed. (See e.g. *People v. Oliver* (1985) 168 Cal.App.3d 920, 926.) Second, any question as to what the voters intended in 1978 is immaterial now, because in 1990, the voters chose to change section 190.2, subdivision (a)(17)(H), to identify section 451, subdivision (b) (which was adopted by the Legislature in 1979 with elements functionally equivalent to 447a (*Atkins*, *supra*, 25 Cal.4th at p. 87, 90)) as the relevant felony for the felony-murder arson special circumstance.

section 451, subdivision (b), which is arson of an inhabited structure. So while an intent to burn the structure is not normally required for an arson conviction, Oyler contends such an intent is required for death eligibility for an arson-murder under the felony-murder special circumstance. In support of this argument, Oyler relies exclusively on CALCRIM 730. But Oyler's argument really seeks a change in the law, not its faithful application. Because CALCRIM 730 misstates the elements of the felony-murder special circumstance, Oyler's argument fails. While first-degree felony-murder contains a specific intent element (i.e. the defendant must specifically intend to commit the underlying felony), the felony-murder special circumstance has no similar intent requirement.

As is true with all questions of statutory interpretation, the beginning point for the analysis is the text of the statute itself. (*People v. Anderson* (1987) 43 Cal.3d 1104, 1141(*Anderson*), superseded by statute as stated in *People v. Mil* (2012) 53 Cal.4th 400, 408-409.) Section 190.2, subdivision (a)(17) defines the felony-murder special circumstance as follows: "The murder was committed while the defendant was engaged in, or was an accomplice in, the commission of, attempted commission of, or the immediate flight after committing or attempting to commit," one of the enumerated felonies. (§ 190.2, subd. (a)(17)(A)-(M); see also *People v. Letner* (2010) 50 Cal.4th 99, 162–63 ["The felony-murder special circumstance, section 190.2, subdivision (a)(17), requires that '[t]he murder was committed while the defendant was engaged in ... the commission of,' one or more of the enumerated felonies."].) The text of the statute makes no explicit or implicit reference to a requisite intent. The plain language offers no support for the inclusion of a specific intent element.

Further, while language defining a necessary specific intent is absent in the felony-murder special circumstance, such language is present in other special circumstances included in section 190.2. Under subdivision (a)(10),

the murder of a witness is a capital offense only if the defendant intentionally killed the witness for the purpose of preventing the witness's testimony in a criminal proceeding, or in retaliation for such testimony. Similarly, under subdivisions (a)(11), (a)(12), (a)(13), and (a)(20), the murder of a prosecutor, judge, elected official, or juror (respectively), must have been "intentionally carried out in retaliation for, or to prevent the performance of, the victim's official duties." Subdivisions (a)(1) [murder for financial gain], (a)(7) [murder of a peace officer], (a)(8) [murder of a federal law enforcement officer], (a)(9) [murder of a fire fighter], (a)(15) [lying in wait], (a)(16) [hate crime murder], (a)(18) [murder by torture], (a)(19) [murder by poison], and (a)(22) [gang murder], all reference an intentional killing, or a "specific intent to kill." (§ 190.2.) Subdivision (a)(21) makes death eligible those defendants who murdered by "intentionally [discharging a firearm] at another person or persons outside the vehicle *with the intent* to inflict death." (§ 190.2, subd. (a)(21), emphasis added.)

"It is a settled rule of statutory construction that where a statute, with reference to one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject is significant to show that a different legislative intent existed with reference to the different statutes." (*In re Jennings* (2004) 34 Cal.4th 254, 273, citing *People v. Norwood* (1972) 26 Cal.App.3d 148, 156; *People v. Valenzuela* (2001) 92 Cal.App.4th 768, 775 ["When a particular provision appears in one statute but is omitted from a related statute, the most obvious conclusion from the omission is that a different legislative intent existed."]; and see *People v. Park* (2013) 56 Cal.4th 782, 796 [The interpretation of a ballot initiative is governed by the same rules that apply in construing a statute enacted by the Legislature.].) The numerous other subdivisions of section 190.2 that specifically identify a requisite intent, or reference an "intentional" killing

demonstrate that where the voters sought to include a specific intent element in a given special circumstance, such an intent was written in explicitly. Thus, the absence of any such language in subdivision (a)(17) [felony-murder] is a powerful indication that the voters did not aim to include a specific intent requirement for the felony-murder special circumstance. (See *People v. Arriaga* (2014) 58 Cal.4th 950, 960 [inclusion of express requirement that defendant obtain a certificate of probable cause under one subdivision of section 1237, and omission of express requirement under another subdivision of same statute was indicative of Legislature's intent not to require a certificate of probable cause under the latter subdivision].)

In addition, this court has previously addressed whether the felony-murder special circumstance includes an intent element and concluded it does not. Following the passage of the 1978 death penalty law, this court initially held that the felony-murder special circumstance did include an "intent to kill" requirement. (*Carlos v. Superior Court* (1983) 35 Cal.3d 131, 153 (*Carlos*) ["[T]he felony murder special circumstance of the 1978 initiative requires proof that the defendant intended to kill."].) But, four years later, the court revisited this issue and overruled *Carlos*. In doing so, the *Anderson* court looked to the express language of the special circumstance and concluded it contained no intent element. (*Anderson*, *supra*, 43 Cal.3d at pp. 1141–42.) The *Anderson* court overruled *Carlos* and held, "on further reflection we now believe that premise was mistaken: given a fair reading, section 190.2(a)(17) provides that *intent is not an element of the felony-murder special circumstance*." (*Id.*, at p. 1143, emphasis added; see also *Id.*, at p. 1146 ["Here—even when we factor into our analysis our traditional disfavor of the felony-murder rule—we no longer have any realistic doubt as to the meaning of section 190.2(a)(17): the fair import of the provision is that *intent is not an element of the felony-*

murder special circumstance."].) *Anderson* makes clear that no intent element was included in the felony-murder special circumstance.

In contrast to the special circumstance, first-degree felony murder does include, as an element, a specific intent to commit the underlying felony. "Under the felony-murder doctrine, the perpetrator must have the specific intent to commit the underlying felony." (*People v. Jones* (2003) 29 Cal.4th 1229, 1256–57, citing *Berryman, supra*, 6 Cal.4th at p. 1085; see also *People v. Cavitt* (2004) 33 Cal.4th 187, 197 ["The mental state required is simply the specific intent to commit the underlying felony..."].)

Courts have explained that this is required to accomplish the legislative purpose in holding felonious actors responsible for any killing which occurs during the commission of an inherently dangerous felony. (*People v. Cavitt* (2004) 33 Cal.4th 187, 197, citing *People v. Roberts* (1992) 2 Cal.4th 271, 316 ["the consequences of the evil act are so natural or probable that liability is established as a matter of policy"]; *People v. Washington* (1965) 62 Cal.2d 777, 780; 2 La Fave, Substantive Criminal Law (2d ed.2003) § 14.5(b), p. 449.) "Once a person has embarked upon a course of conduct for one of the enumerated felonious purposes, he comes directly within a clear legislative warning—if a death results from his commission of that felony it will be first degree murder, regardless of the circumstances." (*People v. Burton* (1971) 6 Cal.3d 375, 387–388.) The intentional commission of the underlying felony is the conduct which carries the requisite culpability for first-degree murder.

As early as 1864, this court explained that the Legislature's classification of felony-murder as first-degree murder represented a legislative determination that murder committed during the commission of an enumerated felony was "conclusive evidence of premeditation," such that all such murders were classified as first-degree through section 189. (*People v. Sanchez* (1864) 24 Cal. 17, 28–30.) The *Sanchez* court noted

that premeditation distinguished all first-degree murders from second-degree murders, but that with felony-murder, the Legislature simply made the determination as to premeditation by virtue of the "occasion" (i.e. the commission of the felony), which brought the death about. (*Ibid.*) The Legislature, through the statute, found sufficient premeditation existed in all such cases. (*Ibid*; see also *People v. Milton* (1904) 145 Cal. 169, 172 [Felony-murder is considered first-degree because "the malice of the abandoned and malignant heart is shown from the very nature of the crime you are attempting to commit"].) Similarly, in *People v. Murphy* (1934) 1 Cal.2d 37, this court explained, if a murder is committed during the commission of an enumerated felony, "the statute (§ 189) determines that the killing is willful, deliberate, and premeditated and the trier of the facts has no alternative but to find the offender guilty of murder in the first degree." (*Id.*, at p. 41.)

Because of the original legislative intent in classifying felony-murder as first-degree murder, it would be inherently inconsistent with that intent to hold a defendant accountable for first-degree murder where he had no intent to commit the underlying felony. Courts have resisted expanding the felony-murder rule beyond its original purpose. "Although it is the law in this state (Pen.Code, s 189), it should not be extended beyond any rational function that it is designed to serve." (*People v. Washington* (1965) 62 Cal.2d 777, 783 [refusing to hold defendants liable for murders committed by victims during their felonies]; see also *People v. Pulido* (1997) 15 Cal.4th 713, 724-726 [refusing to extend first degree felony-murder liability to aiders and abettors who join in the crime *after* the homicide has already occurred].) This court's prior decisions in *Washington* and *Pulido* suggest that expanding the felony-murder rule to deaths that occur during the course of an enumerated felony, but where the defendant did not intend to commit the underlying felony, would similarly extend the rule "beyond

any rational function that it is designed to serve." (*Washington, supra*, 62 Cal.2d at p. 783.) Accordingly, courts have consistently held that the requisite mental state for first-degree felony murder "is simply the specific intent to commit the underlying felony because only felonies which are inherently dangerous to life or pose a significant prospect of violence are listed in section 189." (*People v. Cavitt* (2004) 33 Cal.4th 187, 197.) Among those enumerated felonies, section 189 lists "arson," generally. Thus, a murder committed during the intentional commission of any felony arson would suffice for first-degree murder.

Looking to murder committed during the commission of rape is a helpful analogy because rape, like arson, is a general intent crime. There, this court has explained that "although rape itself is a general intent crime, the jury here was required to find that defendant had the specific intent to rape in order to find him guilty of *first-degree felony murder*." (*People v. Jones* (2003) 29 Cal.4th 1229, 1257 (emphasis added), citing *People v. Osband* (1996) 13 Cal.4th 622, 685–686.) "Under the instructions, if the jury found that defendant did not act with the specific intent to rape, it could have found him guilty of rape but not of rape-felony-murder. If the jury found that defendant did act with the specific intent to rape, it could have found him guilty of both rape and rape-felony-murder." (*Jones*, *supra*, 29 Cal.4th at p. 1257.)

Similarly, the jury here had to find that Oyler intended to commit *arson* before it could find him guilty of first-degree felony murder. (See § 189 ["All murder which ... is committed in the perpetration of... , arson, rape, carjacking, robbery, burglary, mayhem, kidnapping, train wrecking, or any act punishable under Section 206, 286, 288, 288a, or 289 ..., is murder of the first degree."].) Arson, like rape, can be committed where a defendant commits an act willfully and maliciously, but does not specifically intend to commit arson. (See e.g. *In re V.V.* (2011) 51 Cal.4th

1020, 1028 [juveniles willful and intentional act of ignited and throwing large firecracker onto brush-covered hillside was sufficient to establish general intent required for arson, even if there was no intent to start a fire].) In such situations, the defendant would be guilty of arson, but he could not be found guilty of first-degree murder on a felony-murder theory because he did not intend to commit the underlying felony. (*Jones*, *supra*, 29 Cal.4th at p. 1257.)

In this case, the jury was instructed that it must find Oyler intended to commit arson pursuant to the first-degree felony-murder instructions[37]. (24 RT 3729; CALCRIM 540A). This court must presume the jury followed these instructions and found Oyler intended to commit arson. (See *People v. Holt* (1997) 15 Cal.4th 619, 662 ["Jurors are presumed to understand and follow the court's instructions.].) Thus, he was guilty of the five counts of first-degree murder. The felony-murder *special circumstance* does not reiterate the specific intent requirement, and none should be read into the statute.

Relying on CALCRIM 730, Oyler argues intent is an element of the special circumstance. He is correct that the pattern jury instruction includes, as element two, "The defendant intended to commit ... [one of the enumerated felonies from section 190.2(a)(17)." (CALCRIM 730.) But, published or pattern jury instructions, "are not themselves the law, and are not authority to establish legal propositions or precedent. They should not be cited as authority for legal principles in appellate opinions. At most, when they are accurate ... they restate the law." (*People v. Morales* (2001) 25 Cal.4th 34, 48, fn. 7.) Here, the inclusion of a specific intent

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[37] The jury was actually required to make this finding twice, once pursuant to the first-degree felony murder instructions, and again with respect to the special circumstance, which repeated the intent requirement from the first-degree murder instructions. (24 RT 3729, 3732-3733.)

requirement in CALCRIM 730 misstates the law because, as this court explained in *Anderson*, the felony-murder special circumstance has no intent element. (*Anderson*, *supra*, 43 Cal.3d at pp. 1141–1143.)

Under the "authority" section included for CALCRIM 730, the notes cite to *People v. Valdez* (2004) 32 Cal.4th 73, 105, as the authority for the specific intent requirement. But the opinion in *Valdez* does not support a finding that the felony-murder special circumstance has a specific intent requirement. The defendant in *Valdez* argued there was insufficient evidence to support the true finding on his felony-murder special circumstance because the prosecution failed to prove the robbery was not "merely incidental to the killing." (*Id.*, at p. 105, citing *People v. Green* (1980) 27 Cal.3d 1, 62, overruled on other grounds in *People v. Hall* (1986) 41 Cal.3d 826, 834, fn. 3.) Thus, the insufficiency claim in *Valdez* challenged a different element of the felony-murder special circumstance, i.e. that the murder was committed "while the defendant was engaged in 'the commission of, or the attempted commission of'" an enumerated felony. (§ 190.2, subd. (a)(17)(A).) This court has already concluded that the commission of a felony that is "merely incidental to the murder" is insufficient under the express language of section 190.2, subdivision (a)(17)(A). (*People v. Marshall* (1997) 15 Cal.4th 1, 40–41 ["The robbery-murder special circumstance applies to a murder in the commission of a robbery, not to a robbery committed in the course of a murder."].) *Valdez* does not stand for or provide support for the inclusion in CALCRIM 730 of a specific intent requirement for the felony-murder special circumstance.

Oyler's argument that specific intent is an element of the felony-murder special circumstance would also have absurd consequences for other crimes, which supports the notion voters did not intend to include a specific intent element in the felony-murder special circumstance. "In construing legislative intent, it is fundamental that a statute should not be

interpreted in a manner that would lead to absurd results." (*Central Pathology Service Medical Clinic, Inc. v. Superior Court* (1992) 3 Cal.4th 181, 191; see also *People v. Canty* (2004) 32 Cal.4th 1266, 1277 ["We therefore apply the principles that pertain where statutory ambiguity exists, adopting the interpretation that leads to a more reasonable result."]; *People v. Moore* (2004) 118 Cal.App.4th 74, 78 [consideration should be given to the consequences that will flow from a particular interpretation].) Courts reject statutory interpretations that, "would inevitably frustrate the manifest purposes of the legislation as a whole or lead to absurd results." (*In re Ge M.* (1991) 226 Cal.App.3d 1519, 1523.)

Here, Oyler's proposed addition of a specific intent requirement would pave the way for defendants to argue they are not death eligible because, although they intended to commit the underlying felony for purposes of first-degree murder, they had a *more sinister* intent that was not carried out which *exempts* them from death eligibility. This is an absurd result the voters could not have intended. For example, rape is also a felony enumerated under the first-degree felony murder statute. (§ 189.) Notably, section 189 uses the general term, "rape" and does not identify a specific Penal Code provision. Accordingly, a murder committed during the intentional commission of any rape would qualify as first-degree murder under section 189. But, the special circumstance enumerates rape in more specific terms, and makes death-eligible, any defendant who murders while committing "[r]ape in violation of Section 261." (§ 190.2, subd. (a)(17)(C).) If this court were to adopt Oyler's position that specific intent to commit the underlying felony is an element of the special circumstance, a defendant could exclude himself from death eligibility by proving he intended to commit rape, but not rape in violation of section 261. As an example, a defendant who intended to rape his ex-wife, and killed her during the commission of that rape, could argue he is not eligible for the

death penalty because he mistakenly believed the two were still married, so while he intended to rape her, he intended to violate section 262 (spousal rape), not section 261. Similarly, a defendant who intended to commit rape and killed the victim during the course of the rape could argue he is excluded from death eligibility because he intended to act in concert with others, but his cohorts did not follow through so he raped (and killed) the victim by himself. Thus, that defendant could argue he is not eligible for the death penalty because while he intended to rape the victim, he intended to violate section 264.1 (rape in concert), not section 261.

Similarly, a defendant who commits a first-degree felony murder during the commission of a robbery could argue he intended to commit the robbery with other cohorts, and thus, he is not death eligible because he intended to violate section 213 (robbery in concert), and not section 211 or 212.5, the robbery provisions identified in the special circumstance statute. (§ 190.2, subd. (a)(17)(A).) Kidnapping presents another problematic example. A defendant is guilty of first-degree felony murder if he commits a murder during the course of any kidnapping. (§ 189.) But, the special circumstance indicates that defendants who kill during a kidnapping in violation of sections 207, 209, and 209.5 are eligible for the death penalty. Section 208 defines kidnapping of a child under age 14. If Oyler's interpretation of the special circumstance were adopted, a defendant could argue he was not death eligible because while he intended to and did kidnap the victim, and the victim was killed during the commission of the kidnapping, he intended to kidnap a child under age 14, and the victim was not as young as he thought. Thus, he had the specific intent to commit a kidnap in violation of section 208, not 207, 209, or 209.5. These examples demonstrate the absurdity of reading a specific intent element into the special circumstance, and demonstrate that the voters did not intend such a reading.

Further, Oyler argues the voters could not have intended to make arson defendants death eligible based on something the defendant did not intend—i.e. to burn an inhabited structure. (AOB 303.) But, the voters can reasonably draw such a distinction, and apparently did draw that distinction. In general, criminal culpability turns on two things—the defendant's intent, and the outcomes of the criminal acts. The most obvious example of this is the Legislature's selection of differing punishments for murder and attempted murder. (Compare § 190, subd. (a) with § 664, subdivision (a).) An attempted murderer and an actual murderer have the same mental intent—to kill, but the murderer is still punished more harshly because his actions actually resulted in a killing. (*Ibid.*; and see *People v. Floyd* (1970) 1 Cal.3d 694, 728, disapproved of on other grounds in *People v. Wheeler* (1978) 22 Cal.3d 258, [rejecting defendant's claim that punishing murder and attempted murder differently violated equal protection].) This is true even where the attempted murderer takes all the same steps as the murderer, but is unsuccessful in killing the victim for reasons that do not mitigate his mental intent, e.g. he was not as accurate in shooting the victim.

With respect to the felony-murder special circumstance, the voters reasonably determined that the risk to human life is greatest when an arsonist sets a fire that burns an inhabited structure. A fire that burns an inhabited structure is more likely to kill the occupants of that structure, as well as the fire fighters responding to the fire, who will necessarily take more substantial risks to protect the homes, and any possible occupants of the homes, than they might to protect open land or uninhabited structures. Thus, defendants who set a fire that burns an inhabited structure are more culpable not because their intent was necessarily more egregious than other defendants, but because the result of their conduct was more egregious, and posed a greater threat to human life. (See e.g. *People v. Ochoa* (2001) 26 Cal.4th 398, 461 [presence of additional occupant in vehicle renders

defendant's shooting into the vehicle more culpable even if defendant did not know another person was inside]; see also *In re Tameka C.* (2000) 22 Cal.4th 190, 199-200 ["[T]he number of victims *exposed* to the use of a firearm is relevant to the defendant's culpability."].)

Accordingly, making only those arsonists whose fires burn an inhabited structure eligible for the special circumstance is rationally related to the outcomes or results of the defendant's conduct, and is an appropriate basis on which the voters and the Legislature can calibrate criminal culpability. "It is the prerogative, indeed the duty, of the Legislature to recognize degrees of culpability when drafting a Penal Code." (*Michael M. v. Superior Court* (1979) 25 Cal.3d 608, 613.) "'The decision of how long a particular term of punishment should be is left properly to the Legislature. The Legislature is responsible for determining which class of crimes deserves certain punishments and which crimes should be distinguished from others. As long as the Legislature acts rationally, such determinations should not be disturbed.'" (See *People v. Wilkinson* (2004) 33 Cal.4th 821, 840–41, quoting *People v. Flores* (1986) 178 Cal.App.3d 74, 88; see also *People v. Turnage* (2012) 55 Cal.4th 62, 75–76 [finding the distinction in how the public is likely to react to a given set of circumstances a rational basis to distinguish between two similar crimes].)

The nature of the crime of arson further supports the voters' reliance on the outcomes of the crime when determining culpability in this context. Setting a fire is a means by which a defendant unleashes a tool of catastrophic consequences. Fires are, by their very nature, unpredictable and uncontrollable. They necessitate extreme and dangerous intervention from first responders, and thus carry with them a risk that is more heightened than other types of felony-murder – plainly, setting a fire carries with it the potential for mass murder. It is also a crime that is uniquely vulnerable to the claim that the defendant did not intend the devastation he

caused. (See e.g. *Atkins*, *supra*, 25 Cal.4th at pp. 79-80 [Defendant claimed his act of pouring gasoline on a pile of weeds and lighting it on fire was not intended to cause the brush fire that resulted or any harm]; *People v. Clark* (1990) 50 Cal.3d 583, 607 ["By [defendant's] own admission, his objective in committing the arson was not to kill David Gawronski, but to drive him and his wife out of the house."]; see also *People v. Fry* (1993) 19 Cal.App.4th 1334, 1339 [defendant claimed he intended to burn the vehicles, but not the carport under which the vehicles were parked].) Because of the unpredictability of fires, defendants can easily claim they had no intention that the fire burn the specific property or people that happened to be in its path. And prosecutors would have a difficult time proving otherwise. The voters appropriately and rationally determined that because of the nature of arson, its inherent risks, and the difficulty in proving a specific intent to cause such unpredictable destruction, an arsonist who sets a fire that proves to be the most dangerous kind of fire (one that burns an inhabited structure), and kills someone in the process, is eligible for the death penalty.

The facts of the instant case bear out the reasonableness of the voters' decision to subject arsonists who burn inhabited structures (intentionally or unintentionally) to the harshest available punishment. The fire fighters who testified at trial explained that CalFire uses a hierarchy of priorities when determining how to respond to a fire, and how to allocate resources. Life is the first priority, followed by property, and then resource preservation. (6 RT 959-960.) Fire fighters are necessarily going to put themselves at more risk to protect a structure that may have people inside, and will even take more risk to protect an unoccupied home, as opposed to open land. When a fire threatens homes, the fire fighters do a house-by-house search of each home to ensure no one is inside, and evacuate anyone who needs to escape, as they did with an elderly woman during the Esperanza Fire. (28 RT

4262-4263.) Captain Fogle explained that when responding to a forest fire like the Esperanza Fire, the fire fighters will also often seek refuge at or near inhabited structures. (28 RT 4336-4338.) The structures can provide cover for the fire fighters, and may have helpful resources to aid in the suppression efforts. (28 RT 4338.)

Here, the Octagon House had a swimming pool which Captain Loutzenhiser specifically mentioned to the other captains as a reason the location was a safe place to be. (26 RT 4068; 28 RT 4265.) He assessed the building and told his fellow captains that he thought the inhabited structure could provide safety for his crew, and the crews on the other engines. (28 RT 4338-4339.) After the burn over, helicopters were needed to evacuate Captain Loutzenhiser and Pablo Cerda. The helicopters landed at the scene in 57 mile-per-hour winds, nearly 20 miles-per-hour greater than what is considered safe. The helicopter pilots put themselves at significant personal risk because they knew the victims required immediate medical attention. (27 RT 4132-4133.) All of this demonstrates the heightened likelihood of loss of life when a fire approaches and burns an inhabited structure. The voters appropriately determined that a defendant who intentionally undertakes an incredibly dangerous course of criminal conduct, can be punished more severely when that criminal conduct has catastrophic consequences, even if he did not intend to bring about the specific catastrophic consequences that resulted.

The arson situation is similar to another death eligible felony-murder—train wrecking. Under section 219, a defendant is guilty of train wrecking if he commits an act with the intention of blowing up or derailing the train. (§ 219.) If he specifically intends to wreck a train in the manner defined in section 219, and someone dies as a result, he is guilty of first-degree felony murder (§ 189), and he is eligible for the death penalty. (§ 190.2, subd. (a)(17)(I).) The defendant need not intend to kill anyone, and

need not even intend that anyone get hurt, he need only intend to derail the train. Derailing the train, like setting a wild fire, is an act that carries such an unacceptable level of risk to the lives of innocent people, that the defendant's intent to do the act is sufficient to warrant the harshest of punishments. (See *Tison v. Arizona* (1987) 481 U.S. 137, 158, fn. 12 [107 S.Ct. 1676, 95 L.Ed.2d 127] (*Tison*) [finding some felonies carry such a grave risk of death that "one could properly conclude that any major participant necessarily exhibits reckless indifference to the value of human life."], see also *People v. Contreras* (2013) 58 Cal.4th 123, 164 [citing *Tison* in support of its holding that the felony-murder special circumstance is constitutional.)

In *People v. Thompson* (1994) 24 Cal.App.4th 299, the Court of Appeal reached a similar conclusion with respect to murder committed by the use of a destructive device. There, the defendant and two friends threw a Molotov Cocktail into a bedroom window. A mother and her two-year-old son were inside the bedroom when the Molotov Cocktail landed underneath the little boy's bed, igniting the bed and the boy. The boy died ten days later from the burn injuries. (*Id.*, at p. 303.) The defendant was convicted of first-degree murder and sentenced to life in prison without the possibility of parole. He challenged imposition of the sentence as cruel and unusual under the facts of his case. The court rejected his argument, noting, "the legislative determination has been made that the crime involved in this case is a more serious crime than premeditated murder and deserves the augmented penalty associated with it. The use of destructive devices, Molotov cocktails in this instance, *which can inflict indiscriminate and multiple deaths, marks defendant as a greater danger to society than a person who premeditates the murder of a single individual.*" (*Id.*, at p. 307, emphasis added.) The Legislature's selection of a harsh punishment for use of destructive devices (the statute calls for life without the possibility of

parole even where no one is killed) was justified because this type of crime evidenced, "such a flagrant disregard for the value of human life." (*Ibid.*) The same can be said about the commission of arson that burns an inhabited dwelling. The intentional setting of a fire has the potential to "inflict indiscriminate and multiple deaths," and indeed, in this case, did just that. And the intentional commission of such a crime "marks the defendant as a greater danger to society than a person who premeditates the murder of a single individual." (*Thompson*, *supra*, 24 Cal.App.4th at p. 303.) Narrowing the class of arson-murderers eligible for the death penalty to only those that burned an inhabited structure subjects the defendants whose criminal conduct was the most dangerous to the most severe consequence.

For these reasons, there is nothing "patently unreasonable" (AOB 303) about the voters' determination that an arsonist who intentionally sets a fire that ultimately burns an inhabited structure has committed a crime with such a high likelihood of devastation and massive loss of life that his conduct warrants the ultimate penalty. "The penalty challenged herein is calculated to advance a critically important social policy for the protection of the public at large, i.e., the deterrence of a particularly egregious type of life-endangering criminal conduct." (*Thompson, supra*, 24 Cal.App.4th at p. 305.)

Oyler also contends that the absence of a specific intent element would violate the Eight Amendment because the felony-murder special circumstance would not meaningfully narrow the class of defendants eligible for the death penalty. (AOB 304.) He is wrong. The narrowing required by the Eight Amendment is from the pool of all murderers, to the pool of death-eligible murderers. Making all felony-murderers eligible for the death penalty would be sufficient to withstand an Eighth Amendment challenge. It is "generally accepted that by making the felony murderer but

not the simple murderer death-eligible, a death penalty law furnishes the 'meaningful basis [required by the Eighth Amendment] for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not.'" (*People v. Anderson* (1987) 43 Cal.3d 1104, 1147, citing *Furman v. Georgia* (1972) 408 U.S. 238, 313 [92 S.Ct. 2726, 33 L.Ed.2d 346] (conc. opn. of White, J.); accord, *Godfrey v. Georgia* (1980) 446 U.S. 420, 427 [100 S.Ct. 1759, 64 L.Ed.2d 398] (plur. opn.); see also *People v. Catlin* (2001) 26 Cal.4th 81, 158 ["[W]e have determined that first degree murder liability and special circumstance findings may be based upon common elements without offending the Eighth Amendment."].) This is particularly true for the specific type of felony-murder at issue in this case: murder by arson, because it is a relatively rare crime. If all arson-murderers were death eligible, the statute would still be constitutional because the narrowing from first-degree murder generally to first-degree felony murder by arson would suffice to meet the narrowing requirements of the Eight Amendment. (See *People v. Catlin* (2001) 26 Cal.4th 81, 159 [Holding that because murder by poison "is a relatively rare crime, ... the existence of the special circumstance of murder by poison does not have the potential of sweeping into the death-eligible category most persons who commit first degree murder."].)

But here, the arson special circumstance goes even farther, and narrows the class of death-eligible defendants beyond the minimum requirements of the Eighth Amendment. It distinguishes, and makes death eligible, only those arsonists who set the most dangerous kinds of fire—the ones that burn inhabited structures. (§ 190.2, subd. (a)(17)(H).) Again, as explained above, the voters can appropriately calibrate culpability based on results or outcomes, not just the intentions of the defendant when the crime was committed. By making arsonists who kill during their arson and who set a fire that burned an inhabited structure death eligible, the voters have

done just that—they have imposed a harsher consequence on the defendants whose actions had more devastating and dangerous results. There is nothing irrational or unconstitutional about this distinction.

Even assuming Oyler is correct that the arson special circumstance requires the jury to find he intended to burn an inhabited structure, the failure to so instruct the jury would require only that this court vacate the arson-murder special circumstance finding. Practically speaking it has no impact on the judgment or sentence because Oyler's death eligibility also rested on the multiple murder special circumstance. As this court concluded in *People v. Debose* (2014) 59 Cal.4th 177, "consideration of an invalid eligibility factor in the weighing process did not produce constitutional error... [because there was] no likelihood that the jury's consideration of the mere existence of the arson-murder special circumstance 'tipped the balance toward death.'" (*Id.*, at p. 196, quoting *People v. Mungia* (2008) 44 Cal.4th 1101, 1139.) The same is true here. The consideration by the jury of the facts and circumstances of Oyler's crimes would not have differed at all if the jury had been aware that technically speaking, Oyler was only eligible for the death penalty pursuant to the multiple murder special circumstance, and not the arson-murder special circumstance as well. For these reasons, even if Oyler is correct that the jury was misinstructed as to the elements of the special circumstance, that error had no impact on the judgment or sentence.

ARGUMENT- PENALTY PHASE CLAIMS

I. THE TRIAL COURT PROPERLY ADMITTED EVIDENCE OF UNCHARGED FIRES ON OCTOBER 26

Oyler argues the trial court erred when it agreed to admit evidence of two uncharged fires started after the ignition of the Esperanza Fire on October 26. (AOB 314, 330-342.) He contends the evidence was admitted in violation of state law, and his federal constitutional rights, and contends

the error was prejudicial. (AOB 333-342.) The evidence of the uncharged fires was properly admitted as it bore on the circumstances of the crimes. Oyler's convictions reflect not just a solitary incident of arson, but a course of conduct for which he had a continuous mental state and intent. Both uncharged fires were part of Oyler's course of criminal conduct as he started them while the Esperanza Fire was still burning out of control. In any event, if the trial court erred in admitting the evidence, any error was harmless.

A. Additional background

After the jury returned verdicts in the guilt phase, the parties met to discuss the penalty phase. The prosecutor alerted the court to a pinpoint instruction that defense counsel was requesting regarding "remorse and lack of remorse by the defendant." (25 RT 3948-3949.) The prosecutor specifically noted that he understood he could not argue lack of remorse as an aggravating factor. But, the prosecutor also noted that he was permitted to present evidence of lack of remorse to counter any mitigation evidence. (25 RT 3949.)

In light of that, the prosecutor sought to admit evidence of two uncharged fires started on October 26, while the Esperanza Fire was still burning. (25 RT 3950.) These fires had been detailed in the prosecutor's Evidence Code section 1101(b) motion brought before the guilt phase, and were referred to as uncharged V and W. (25 RT 3950.) The first fire (V) was started at 7:30 a.m., before Oyler went to work, and the second (W), was started at 5:06 p.m., after Oyler had clocked out of work. Uncharged V was started around the time of the burn over, and Uncharged W was started after news of the death of the fire fighters was widespread. In addition, the prosecutor sought admission of testimony from Oyler's co-worker to show that the news was on at his work place all day on October 26, and thus, Oyler personally knew the fire fighters had died when he set Uncharged W.

(25 RT 3949.) Again the prosecutor noted that the evidence was relevant to "put in context any mitigation." (25 RT 3949.)

Defense counsel objected to the admission of the evidence and argued uncharged offenses could not be used in aggravation. (25 RT 3950.) The court noted the evidence could be admissible as to lack of remorse, or as evidence of additional crimes of violence. (25 RT 3951.) On March 10, 2009, defense counsel provided additional authority regarding this issue. (25 RT 4022.) The trial court ultimately admitted the evidence. (26 RT 4078-4080, 4085-4087; 27 RT 4126-4127.)

Following the presentation of the penalty phase evidence, the parties discussed jury instructions. The court reiterated that the evidence of the two October 26 fires was relevant to factor (a) because it showed how the crime was carried out. (29 RT 4355-4356.) Defense counsel made "the equivalent of an 1118.1" as to the two October 26 fires, and challenged the evidence that had been presented. (29 RT 4357.) The prosecutor essentially agreed with defense counsel as to the first fire, and informed the court that he only intended to rely on the second fire in argument. (28 RT 4357.) He also noted that the second fire was admissible under 190.3, subdivision (b), as another violent crime. (28 RT 4357-4358.) The court was unsure, but reiterated the evidence was admissible under factor (a). (28 RT 4358.)

The court gave the jury the factor (b) instructions, and told the jury the People had alleged Oyler's commission of the 5:01 p.m. arson on October 26 as an aggravating circumstance. (29 RT 4379-4380.) The court instructed that in order for an individual juror to consider that arson as a circumstance in aggravation, he or she had to find Oyler committed that crime beyond a reasonable doubt. (29 RT 4379-4380.) But the court further instructed that the jury did not need to be unanimous in finding the prosecution proved the crime. (29 RT 4380.) The court also gave the

instructions on the substantive offense of arson (29 RT 4381-4382.) The court also specifically instructed the jury that it was not to consider any other alleged criminal activity as an aggravating circumstance, other than the activity identified as the 5:01 p.m. fire. (29 RT 4381.) When listing the aggravating and mitigating circumstances, the court read the factor (b) instruction regarding other violent criminal activity and then told the jury, "there is no other [violent criminal activity] alleged." (29 RT 4383.) The court reiterated at the close of its instructions that the People had to prove the 5:01 p.m. fire beyond a reasonable doubt before an individual juror could consider that fact. (29 RT 4385.)

During his closing argument, the prosecutor argued the evidence of the 5:01 p.m. fire was relevant to show Oyler's intent when he set the Esperanza Fire. (29 RT 4387-4388.) He argued Oyler setting another fire at 5:00 p.m. on October 26 showed he was bent on mass destruction, and his desire to unleash that destruction could not be satisfied. (29 RT 4388-4389.) The prosecutor further relied on the evidence to rebut any claim that Oyler was simply "reckless," and urged that the evidence showed Oyler committed the charged crimes with a, "sinister, cold-blooded, calculating mind." (29 RT 4387, 4389.) When discussing the statutory aggravating factors, the prosecutor read the factor (b) instruction regarding other violent crimes, and said, "There's nothing here. There was no evidence presented under Factor B. I read it to you just so you would know what it was. Don't be confused. Don't apply it. Disregard it. It doesn't apply." (29 RT 4411.)

B. The evidence was admissible as a "circumstance of the crime" under section 190.3, subdivision (a)

Oyler argues this evidence was inadmissible because it was "postcrime evidence of lack of remorse." (AOB 330-342.) Because the uncharged fire was evidence of Oyler's contemporaneous state of mind, and

bore directly on the callousness with which he committed the capital offenses, it was relevant and admissible. The trial court did not err.

Pursuant to section 190.3, subdivision (a), the jury can consider the circumstances of the crime and any special circumstances. This includes "all aggravating and mitigating aspects of the capital crime itself." (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1232; § 190.3, subd. (a).) "The word 'circumstances' as used in factor (a) of section 190.3 does not mean merely the immediate temporal and spatial circumstances of the crime. Rather it extends to "[t]hat which surrounds materially, morally, or logically" the crime. (3 Oxford English Dict. (2d ed. 1989) p. 240, "circumstance," first definition.)" (*People v. Edwards* (1991) 54 Cal.3d 787, 833.)

While postcrime lack of remorse is not a statutory aggravating factor, (see *People v. Collins* (2010) 49 Cal.4th 175, 227), "[e]vidence that reflects directly on the defendant's state of mind contemporaneous with the capital murder is relevant under section 190.3, factor (a), as bearing on the circumstances of the crime." (*People v. Nelson* (2011) 51 Cal.4th 198, 224; *People v. Guerra* (2006) 37 Cal.4th 1067, 1154.) Thus, the jury may consider lack of remorse when presented in the context of the "defendant's callous behavior after the killings ...." (*People v. Ramos* (1997) 15 Cal.4th 1133, 1164, citing *People v. Crittenden* (1994) 9 Cal.4th 83, 147, and *People v. Clark* (1993) 5 Cal.4th 950, 1031.) "The defendant's overt indifference or callousness toward his misdeed bears significantly on the moral decision whether a greater punishment, rather than a lesser, should be imposed." (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1232.)

Even where a defendant is convicted of a capital crime on a felony-murder theory (with no intent to kill requirement), the jury can and should consider at the penalty phase, evidence of the defendant's mental state. And under factor (a), his mental state is a "circumstance of the crime" the jury should consider when determining which punishment is appropriate.

(*People v. Catlin* (2001) 26 Cal.4th 81, 175.) This court has concluded that consideration of evidence of premeditation is appropriate even where the jury did not find the defendant guilty of a premeditated murder. (*People v. Dykes* (2009) 46 Cal.4th 731, 803; see also *People v. DePriest* (2007) 42 Cal.4th 1, 57 [in denying a motion to modify the verdict, the trial court properly weighed the sentencing factors, including the "premeditated and brutal nature" of the attack on the robbery-murder victim]; see also *People v. Sturm* (2006) 37 Cal.4th 1218, 1246, fn. 1 (dis. opn. of Baxter, J.) ["Of course, the guilt jury's failure to return a 'premeditated murder' verdict did not prevent the penalty jurors from concluding, as a circumstance of the crime [citation], that the murder was premeditated"].) Here too, it was appropriate for the jury to consider Oyler's intent or conscious disregard for life when he committed the capital crimes despite the fact that these were not elements of the charged offenses.

In addition, this court has not interpreted "contemporaneous with the capital murder" in the strictly limited manner Oyler advocates. Facts and circumstances occurring after the completion of the murder can still be relevant to show the circumstances of the offense. In *People v. Edwards* (1991) 54 Cal.3d 787, this court held that evidence of a five-day manhunt for the defendant was relevant and admissible as a circumstance of the offense because it tended to show the defendant's, "cool determination to avoid the consequences of his actions," and it was relevant to negate a defense claim that the murder was "spur-of-the-moment." (*Id.*, at p. 832.) In *Ramos*, immediately after the murders, the defendant commented that he enjoyed hearing the victims beg for their lives. This court concluded such statements were admissible under factor (a) as they reflected the defendant's state of mind contemporaneous to the murder, a circumstance of the offense. (*Ramos*, *supra*, 15 Cal.4th at p. 1163-1164.) In *People v. Clark* (1993) 5 Cal.4th 950, 1031, the evidence showed the defendant drank

a wine cooler and devised a plan to report the crime in order to cover up his involvement. This court held the prosecutor's reliance on that evidence to show the defendant's callousness after the crime was proper as the evidence constituted a circumstance of the offense. (*Ibid.*)

Furthermore, Oyler's argument regarding the admissibility of the evidence regarding the 7:30 a.m. fire on October 26 should be rejected. The evidence spanned a total of eight pages of transcript. (26 RT 4077-4084.) The investigator testified he could not determine if the fire was caused by arson or a vehicle, and did not find an incendiary device. (26 RT 4078-4079.) The fire burned a total of 10 square feet, and was extinguished before fire fighters responded. (26 RT 4078-4079.) The prosecutor essentially conceded the evidence of this fire was insufficient to demonstrate an aggravating circumstance, and did not argue or discuss this evidence at all during his closing argument. (28 RT 4357.) More importantly, the jury was specifically instructed that it could not consider this evidence as an aggravating circumstance. (29 RT 4381.) Presuming, as this court must, that the jury followed these instructions (*Holt*, *supra*, 15 Cal.4th at p. 662), it disregarded the evidence of the 7:30 a.m. fire entirely. Any error in its admission was necessarily harmless because there is no reasonable probability the error affected the jury's decision to impose the death sentence.

As to the second fire, started around 5:00 p.m. on October 26, the evidence was relevant and admissible to show Oyler's callousness and intent with respect to the Esperanza Fire. As the prosecutor pointed out, Oyler's intent in setting the Esperanza Fire had to be viewed in the context of his entire course of conduct, and his common plan or scheme. (29 RT 4387-4390.) This was not a crime where the relevant intent could be isolated to the moments immediately preceding the criminal act, as is often the case with a premeditated, deliberate murder. Oyler's criminal conduct

and his intent in carrying it out was demonstrated over a period of five months. He was an arsonist bent on destruction, and he acted in pursuit of the maximum amount of destruction he could achieve. This intent was reflected in his setting of the September 17 Ranch Fire, mere hours after fire fighters were able to contain and extinguish The Orchard Fire which burned 1,580 acres. The Orchard Fire was put out in the early morning hours of September 17, and at 11:30 a.m. that same morning, Oyler set The Ranch Fire – forcing fire fighters to the front lines again.

All of Oyler's fires were set as part of his over-arching plan to create massive chaos and destruction. Setting a fire at 5:00 p.m. on October 26 was directly relevant to show just how much destruction he sought when he set a fire. The 5:01 p.m. fire demonstrated that nothing would stop him, not even the death of (at that time) four fire fighters—no amount of devastation was enough. That was true when he set the 5:00 p.m. fire, but it was also true when he set the Esperanza Fire. Had Oyler's intent when setting the Esperanza Fire been less egregious, the fact that fire fighters had been killed would be expected to deter his continued pursuit of destruction – but it did not. The evidence shows that throughout his string of setting fires, he sought to unleash a horrific and devastating weapon. It was not just that he did not care what happened, the evidence showed that he wanted to bring about increased devastation. When he set the Esperanza Fire, he was not merely experimenting with fire, or acting out of curiosity, or even recklessness. This evidence showed Oyler acted with a "sinister, cold-blooded, calculating mind." (29 RT 4389.) Appropriately, the evidence in the penalty phase reflected his heightened culpability on account of his mental state at the time he undertook these crimes.

Even if this evidence is considered evidence of "lack of remorse" it was properly admitted and considered by the jury. The evidence showed a "circumstance" of the offense within the meaning established by this court

in *Edwards*, *supra*, 54 Cal.3d at p. 833. The circumstances of the capital offense extended to Oyler's commission of the fire in the afternoon of October 26 because the commission of that offense was a circumstance that "surround[ed] [the capital crimes] "materially, morally, or logically." (*Ibid.*) Temporally, when Oyler set the fire at 5:00 p.m. on October 26, his capital crime was still ongoing—the Esperanza Fire was still burning out of control, and thus, his commission of another arson at 5:00 p.m. was not "post-crime," it was during his capital offense. Because this arson occurred while his other crimes continued, it was relevant as a circumstance of the offense, and showed Oyler's "callous behavior after the killings," as well as his, "overt indifference ... toward his misdeed." To the extent the evidence showed lack of remorse, it did so in the context of the capital crime, and thus was appropriately admitted as evidence of the circumstances of the offense.

Further, defense counsel argued Oyler's mental state was indifference. (29 RT 4425.) And that Oyler did not expect anyone to die. (29 RT 4426.) Defense counsel stated, "This is not a case where there was an intentional killing." (29 RT 4436.) Instead, defense counsel argued Oyler was indifferent and reckless. (29 RT 4425-4426, 4436.) He urged that there was a qualitative difference between intentional killings, and reckless killings, and that death was an inappropriate punishment for the latter. (29 RT 4436.) As explained above, the evidence regarding the uncharged fires on October 26 was relevant to prove Oyler was more than reckless and indifferent. On the spectrum of culpable mental states, Oyler fell somewhere beyond simple reckless indifference, even if he did not specifically intend to kill those five fire fighters. The evidence was relevant to show Oyler intended to continue to unleash destruction, no matter the consequences, and that his indifference was to the very real fact that people were going to die. Accordingly, the evidence was also admissible to rebut

the defense argument that Oyler did not deserve the death penalty because he did not intend to kill anyone. (See *Edwards, supra*, 54 Cal.3d at p. 832.)

C. Any error was harmless

Assuming the trial court abused its discretion in admitting the evidence of the uncharged fires, the error was harmless. State law errors at the penalty phase are reviewed for a "a determination of whether there is a 'reasonable possibility' such an error affected a verdict." (*People v. Brown* (1988) 46 Cal.3d 432, 447, citing *People v. Robertson* (1983) 33 Cal.3d 21, 63 (Conc. Op. J. Broussard).) "The assessment of prejudice should proceed on the assumption that the decision maker is reasonably, conscientiously, and impartially applying the standards that govern the decision." (*Brown, supra*, 46 Cal.3d at p. 448, citing *Strickland v. Washington* (1984) 466 U.S. 668, 695.) This court will not reverse the judgment unless it concludes 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*, 46 Cal.3d at p. 448.)

The evidence of Oyler starting the fire at 5:01 p.m. on October 26 would not have tipped the scales for any juror in favor of a death verdict. The evidence demonstrated Oyler's callous indifference to the consequences of his actions, but this was already readily apparent from the other evidence presented at the guilt phase. The record shows Oyler set these fires with a wanton disregard for human life. He engaged in this behavior over the span of five months, setting multiple fires on the same day, and setting a fire that burned over 1,600 acres within hours of fire fighters gaining control of a 1,580-acre fire. He knew from monitoring the activities of the fire fighters, having some experience with their equipment, and from watching them respond (both in person, and through media coverage) to the fires that he was putting their lives at risk. He selected times, locations and terrain all in hopes of unleashing larger fires, that

would cause more destruction. Because his wanton disregard for human life was demonstrated by other evidence, the evidence regarding his setting of the fire on October 26 would not have altered the verdict.

In addition, the other penalty phase evidence demonstrated the aggravating factors far outweighed any mitigation. It is important to remember the most egregious aggravating factor—five innocent people died. The murder of multiple first responders makes this crime among the worst crimes imaginable. In addition to the sheer loss of life, the circumstances of their deaths weighed heavily as an aggravating circumstance. The testimony of CalFire Chief Bradley Harris showed the victims suffered immensely in their final moments and died a horrific death. (26 RT 4069-4074.) This was supported by the testimony of the four fire captains and the autopsy photographs[38], all of which showed the devastating consequences of Oyler's actions. (25 RT 3973-4009, 26 RT 4036-4062.) He did not just kill the fire fighters, he also destroyed 39 homes, and caused $100 million in damages. (27 RT 4134-4136.) The impact of the loss of these victims on their families and the fire fighting community cannot be overstated.

In mitigation, Oyler did not present any evidence that explained, or otherwise mitigated his commission of these crimes. By all accounts, he set these fires for his own amusement. And while he has family members who would still find value in his life, their testimony regarding mitigation did not come close to outweighing the evidence regarding the aggravating factors. On balance, even without Oyler's commission of the final fire on October 26, there is no reasonable probability that a rational, conscientious,

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[38] The trial court admitted 18 autopsy photographs of the five victims as relevant evidence of the circumstances of Oyler's crimes. (25 RT 3953-3955; 28 RT 4225-4231.)

and impartial jury would have returned any verdict other than death. (*Brown*, *supra*, 46 Cal.3d at p. 448.) Assuming this court finds the trial court abused its discretion in admitting the evidence regarding the October 26 fires, any error was harmless.

II. THE TRIAL COURT PROPERLY ADMITTED EVIDENCE REGARDING THE GRUESOME DEATHS OF THE VICTIMS AND THE IMPACT OF THEIR DEATHS ON THEIR FAMILIES

Next, Oyler argues the trial court erred both as to the quantity and quality of the evidence regarding how the fire fighters died and the impact of their deaths on their families. (AOB 342.) Initially, he asserts that such evidence was not relevant as an aggravating circumstance because he was not charged or convicted of intentionally killing the victims. (AOB 349.) The fact that Oyler was not convicted of first-degree murder on a theory that he intended to kill the fire fighters is irrelevant. The circumstances of their deaths and the manner in which they died was not admitted to show Oyler's intent. Instead, it was admitted to show the injurious consequences of his actions—a proper consideration under aggravating factor (a) as a circumstance of the offense.

With respect to specific pieces of evidence, Oyler argues the trial court erred because it admitted the following: 1) the victim impact evidence, 2) the testimony of the four fire captains that responded to the scene of the burn over, and 3) the autopsy photographs of the victims. (AOB 352-376.) Based on the objections below, Oyler has preserved a limited argument regarding the number of victim impact witnesses. He has not preserved, at all, any claim regarding the admission of the testimony of the four fire captains. He did object to the admission of the autopsy photographs and has preserved that claim.

Further, even if all three issues had been preserved, the trial court properly admitted all three items of evidence, and thus no error occurred.

Finally, any error is harmless as it is not reasonably probable Oyler would received a more favorable sentence.

A. Additional Background

1. The victim impact evidence

At the March 9, 2009, hearing, the prosecutor sought admission of victim impact testimony. (25 RT 3955.) Specifically, the prosecutor sought admission of testimony from roughly three family members of each victim – 15 total witnesses. (25 RT 3955.) Oyler acknowledged that victim impact evidence was allowable, but noted an objection to that type of evidence "to protect the record." (25 RT 3955.) He made a more specific objection as to the quantity of this type of evidence being offered and argued that one or two witnesses per deceased victim would be more appropriate than the three per victim the prosecutor sought to introduce. (25 RT 3955.)

As the prosecutor explained, he selected three witnesses per victim to demonstrate the multi-faceted nature of the victims' lives. (25 RT 3956.) The victims were sons, brothers, and husbands or partners, and their deaths had impacted the various people in their lives differently. (25 RT 3956.) The court agreed to allow the testimony of 15 witnesses because the number of witnesses was directly correlated to the number of victims. (25 RT 3956-3957.) The court explained that in a case with a single victim, three victim-impact witnesses would not be too many, and thus, here, the fact that five people died should not operate to limit otherwise admissible victim impact testimony. (25 RT 3956-3957.)

On March 11, 12, and 16, the prosecutor presented the testimony of 14 total victim impact witnesses. Mark Loutzenhiser's wife, brother, and daughter testified. (26 RT 4100-4117; 27 RT 4120-4124.) Jason McKay's mother, sister, and fiancé testified. (27 RT 4138-4149, 4152-4157, 4191-

4195.) Jess McLean's mother, brother, and sister testified. (27 RT 4157-4177.) Daniel Najera-Hoover's mother, aunt, sister, and girlfriend testified. (27 RT 4177-4189, 4196-4202.) And Pablo Cerda's father testified. (28 RT 4215-4221.) In total, the testimony of the 14 victim impact witnesses covers 86 pages of the transcript, with an average of six pages per witness. The Clerk's Transcript indicates the start and end time for 10 of the 14 witnesses, and the average time on the stand for those 10 witnesses was under 13 minutes. (17 CT 4626, 4688-4689; 18 CT 4697; 27 RT 4149.)

2. The testimony from the four fire captains

On March 9, 2009, the People filed their witness list for the anticipated penalty phase evidence. (17 CT 4490.) The four fire captains were listed as anticipated witnesses. (17 CT 4490.) Oyler never objected to the admission of this evidence, either on March 9 during the discussion of the penalty phase evidence, or prior to the captains taking the stand.

The captains of the other four engines all testified during the penalty phase about their role that day, and responding to the scene of the burn over. (25 RT 3973-4004 [Captain Chris Fogle—Engine 52]; 25 RT 4004-4009, 26 RT 4036-4045 [Captain Richard Gearhart—Engine 51]; 26 RT 4046-4052 [Captain Anna Dinkel—Engine 54]; 26 RT 4053-4062 [Captain Freddie Espinoza – Engine 56].)

3. The autopsy photographs

At the March 9, 2009, hearing, the prosecutor sought admission of the autopsy photographs of the victims. (25 RT 3951-3952.) The court noted it had excluded the photos from the guilt phase under Evidence Code section 352, but that section 352 had a more limited application in the penalty phase. (25 RT 3954-3955.) Defense counsel objected because he did not think the photographs depicted the suffering endured by the victims, and thus they were not relevant at the penalty phase. (25 RT 3954.) The

court agreed to admit the photographs because they were relevant to show how the victims died, which was a circumstance of the offense and admissible under section 190.3, subdivision (a). (25 RT 3954-3955.)

In his opening statement before the penalty phase, the prosecutor warned the jury about the photos. He told the jury the photos were "horrible," and seeing them would be difficult, but that he was not admitting the photographs to "inflame" the jurors, but rather so the jury could understand what happened and decide the appropriate punishment. (25 RT 3969.)

Dr. Cohen testified to lay foundation for the admission of the autopsy photos. (28 RT 4222-4231.) In total, 18 autopsy photographs were admitted: four of Mark Loutzenhiser, (28 RT 4225-4226; Exhibits 405, 406, 407, and 408), four of Jason McKay (28 RT 4227-4228; Exhibits 419, 420, 421, and 422), three of Jess McLean (28 RT 4228-4229; Exhibits 410, 411, and 413), four of Daniel Hoover-Najera (28 RT 4229-4230; Exhibits 415, 416, 417, and 528), and three of Pablo Cerda (28 RT 4230-4231; Exhibits 424, 425, and 426). Dr. Cohen's testimony lasted 24 minutes. (18 CT 4697-4698, 28 RT 4232.) Which means, at most, each photo could have been displayed for the jury for an average of no more than one minute and 33 seconds. The prosecutor did not display the photos for the jury again during his closing argument. (29 RT 4419.) And during deliberations the jury only requested to see Exhibit 443, which was a poster board detailing the 2006 Banning arson series. (18 CT 4755 [jury request], 22 RT 3414, 3601 [Exhibit 443 marked for identification, and discussed], and see Exhibit List at the beginning of volume 24 of the CT.)

B. Oyler has only preserved a limited claim as to the victim impact testimony, and has not preserved his claim regarding the testimony of the fire captains

To preserve these claims, Oyler was required to make specific and timely objections below. (Evid. Code, § 353.) Regarding the victim impact witnesses, Oyler agreed below that the prosecution was allowed to present victim impact evidence, but made a general objection to "that type of evidence," to "protect the record." (25 RT 3955.) His specific objection at trial was as to the number of victim impact witnesses. As explained above, Oyler asked that the number be restricted to one or two witnesses per victim. (25 RT 3955.) The court overruled this objection, and permitted three witnesses per victim.

Based on the objections below, Oyler has forfeited any claim regarding the general admissibility of victim impact evidence, and the specific content of the testimony presented in this case. His assertion of a general objection to "protect the record" is insufficiently specific to preserve the issue. Such an objection does not fairly inform the trial court of the basis or reasons for the objection, and thus does not allow a trial court an opportunity to meaningfully rule on the objection. (See *People v. Partida* (2005) 37 Cal.4th 428, 435 ["What is important is that the objection fairly inform the trial court, as well as the party offering the evidence, of the specific reason or reasons the objecting party believes the evidence should be excluded, so the party offering the evidence can respond appropriately and the court can make a fully informed ruling."].) Accordingly, Oyler's general objection to the victim impact evidence to "protect the record" did not preserve any and all claims regarding the admission of the testimony. The only issue he preserved was his claim that fewer witnesses should have been presented.

Oyler made no objection to the testimony of the four fire captains, and thus has failed to preserve any claim regarding the admission of this evidence. (*Partida*, *supra*, 37 Cal.4th at p. 435; and see Evid. Code § 353.)

C. The victim impact evidence was properly admitted, and even if not, any error was harmless

Generally, victim impact evidence is admissible under section 190.3, subdivision (a) as a circumstance of the offense, because it "demonstrates 'the specific harm caused by the defendant, including the impact on the family of the victim...'" (*People v. Trinh* (2014) 59 Cal.4th 216, 245, quoting *People v. Edwards* (1991) 54 Cal.3d 787, 835.) "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. Romero* (2015) 62 Cal.4th 1, 45, citing *People v. Pollock* (2004) 32 Cal.4th 1153, 1180.) Further, the admission of victim impact evidence in a capital trial is not barred by the Eighth Amendment. (*Payne v. Tennessee* (1991) 501 U.S. 808, 827 [111 S.Ct. 2597, 115 L.Ed.2d 720]; *People v. Tully* (2012) 54 Cal.4th 952, 1030; *People v. Hawthorne* (2009) 46 Cal.4th 67, 101 ["In a capital trial, evidence showing the direct impact of the defendant's acts on the victims' friends and family is not barred by the Eighth or Fourteenth Amendment to the federal Constitution."].) Such evidence is precluded under the federal Constitution only, "if it is so unduly prejudicial as to render the trial fundamentally unfair." (*People v. Trinh* (2014) 59 Cal.4th 216, 245, citing *People v. Booker* (2011) 51 Cal.4th 141, 190.) A trial court's decision to admit victim impact evidence is reviewed for an abuse of discretion. (*People v. Vines* (2011) 51 Cal.4th 830, 887–888.)

This court has repeatedly declined to impose an arbitrary limit on the number of witnesses a trial court can permit to testify regarding the impact

of the victim's death. (*Trinh*, *supra*, 59 Cal.4th at pp. 245-246 [declining to impose bar of one witness per victim]; see also *People v. Montes* (2014) 58 Cal.4th 809, 883–884 [victim impact testimony need not be limited to a single witness]; *People v. McKinnon* (2011) 52 Cal.4th 610, 690 [same]; see, e.g., *People v. Pearson* (2013) 56 Cal.4th 393, 467 [concluding "[t]he overall number of victim impact witnesses was not excessive" where eight testified concerning one murder victim and five testified concerning another].) Instead, as this court explained in *Trinh*, "[t]he number of witnesses sufficient to accurately portray the effects of a defendant's actions will vary from case to case, and the trial court is vested with discretion to control any excesses by excluding cumulative as well as irrelevant testimony." (*Trinh*, *supra*, 59 Cal.4th at p. 246, citing Evid.Code, §§ 350, 352.)

The victims in this case were heroes, by any definition. They were pillars of their communities and central figures in their families. It is not surprising that their deaths were felt far and wide, and that the loss had a profound impact on their families and loved ones. This court has affirmed the admissibility, at the penalty phase, of evidence that demonstrates the 'specific harm' the defendant caused, including the "loss to society and the victim's family of a 'unique' individual." (*People v. Huggins* (2006) 38 Cal.4th 175, 238, citing *Payne*, supra, 501 U.S. at p. 825.) The testimony in this case did just that—it demonstrated the specific harm caused by Oyler's criminal conduct and the loss to society and the victims' families of these "unique" individuals. The admission of three witnesses per victim was targeted to achieve that goal. As the prosecutor explained, each victim led a multi-faceted life, and the witnesses called were intended to show the many different relationships these victims had and the different impact their loss had with respect to those relationships. This was properly taken into consideration when determining the appropriate punishment. Oyler's

repeated commission of arson posed the greatest threat to fire fighters, and in the end, that is predictably and tragically who was killed. The trial court did not abuse its discretion in admitting the testimony of 14 witnesses, as to five murder victims.

Further, the content of the testimony was not, "so inflammatory as to elicit from the jury an irrational or emotional response untethered to the facts of the case." (*Romero, supra*, 62 Cal.4th at p. 45.) The testimony was focused and short. The testimony of all 14 witnesses spans 86 pages of transcript, an average of six pages per witness. And each witness testified for an average of less than 13 minutes. (17 CT 4626, 4688-4689; 18 CT 4697; 27 RT 4149.) The family members generally answered questions on three specific topics – the kind of person their loved one was, how they found out the victim had died, and what they missed most about that person. (26 RT 4100-4147; 27 RT 4120-4124, 4138-4149, 4152-4189, 4191-4195; 28 RT 4215-4221.) The testimony did not invite a purely irrational response, instead, the victims testified quickly and honestly about the impact of the loss of their loved one. "It was traditional victim-impact evidence." (*People v. Huggins* (2006) 38 Cal.4th 175, 239.) In addition, the record demonstrates the testimony did not result in a purely irrational or emotional response from the jury. The trial court admonished the jurors to, "not let bias, prejudice, or public opinion…influence" its decision. (29 RT 4374.) Nothing suggests the jury did not follow the court's instruction. The jury did not ask for read back of any of the victim impact testimony, which suggests it did not place undue emphasis on it. (See *People v. Hawthorne* (2009) 46 Cal.4th 67, 103.) For all of these reasons, there was no error.

Even if some of the evidence was improperly admitted, there is no "reasonable (i.e., realistic) possibility that the jury would have rendered a different verdict had the error or errors not occurred." (*Brown, supra*, 46

Cal.3d at p. 448.) Thus, reversal is not warranted. Given that some victim impact evidence was certainly admissible, as Oyler conceded below, the difference between five or 10 victim impact witnesses and 14 would not have altered the jury's verdict. Even from one victim impact witness, the jury could reasonable infer the impact of the loss of the victim was much greater than the impact on the solitary witness presenting testimony. Accordingly, even if the trial court abused its discretion by admitting testimony from 14 witnesses as to five victims, the jury's verdict would have been the same, and thus reversal is not warranted.

D. The testimony from the four fire captains was properly admitted, and even if not, any error was harmless

Even had he preserved his claim regarding the admission of the testimony from the four fire captains, the claim lacks merit. Oyler contests the admission of the testimony of the four fire captains and the admission of the autopsy photographs for the same reason – he argues that the manner in which the fire fighters died was not relevant because there was no evidence that he intended to kill them, and therefore the manner in which they died had no bearing on his moral culpability. (AOB 349.) He is wrong. The manner in which the victims died was properly considered as a circumstance that aggravated the crimes for which Oyler was convicted.

This court has already concluded that, "'evidence of the specific harm caused by the defendant'" is a circumstance of the crime admissible under factor (a)." (*People v. Edwards* (1991) 54 Cal.3d 787, 833.) This holding is reflected in the applicable jury instructions. CALCRIM No. 763, which was given to the jury in this case (18 CT 4777), defines aggravating circumstances as follows: "An aggravating circumstance or factor is any fact, condition, or event relating to the commission of a crime, above and beyond the elements of the crime itself, that increases *the wrongfulness of the defendant's conduct, the enormity of the offense, or the harmful impact*

of the crime. An aggravating circumstance may support a decision to impose the death penalty." (Emphasis added.)

In *People v. Dyer* (1988) 45 Cal.3d 26, this court approved a trial court giving a substantively identical definition of aggravating circumstances. There, the trial court defined aggravating circumstances as follows: "an aggravating circumstance is any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the offense itself." (*Id.*, at p. 77.) This court concluded that the definition "provided a helpful framework within which the jury could consider the specific circumstances in aggravation and mitigation set forth in section 190.3." (*Ibid*; see also *People v. Adcox* (1988) 47 Cal.3d 207, 269 [approving same instruction].)

Accordingly, *Dyer* and *Adcox* support the definition of aggravating circumstances included in CALCRIM No. 763, and consideration of "the specific harm" caused by the defendant is appropriate under *Edwards*[39]. Under section 190.3, subdivision (a), "circumstances of the offense," includes the "enormity of the offense" and the "harmful impact of the crime." In *Dyer* and *Adcox*, this was referred to as the "injurious consequences" of the capital offenses. Plainly, the manner in which the victims died, the fact that they were burned alive and suffered greatly in their final minutes was properly considered an aggravating circumstance of Oyler's crime because it bore directly on the harmful impact, injurious consequences, and the enormity of his offense. It is also what distinguishes his crime from other arsons, even other first-degree murders by arson. A

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[39] Indeed, this is also why victim impact evidence is admissible as a circumstance of the offense. It, "demonstrates 'the *specific harm* caused by the defendant, including the impact on the family of the victim...'" (*Trinh, supra,* 59 Cal.4th at p. 245, emphasis added.)

defendant would be guilty of first-degree murder in the commission of arson if a victim died instantaneously in a car accident brought on by trying to escape the fire. That manner of death is less gruesome than five victims literally burning alive.

The testimony of the four fire captains was relevant to show how the victims died, what they experienced in their final moments of life, and to show the consequences of Oyler's crimes. The captains testified about having to respond to the scene of the burn over where they found five fellow fire fighters burned—three to death, and two still conscious. (See *People v. Brady* (2010) 50 Cal.4th 547, 578 [victim impact testimony may include the effects on law enforcement coworkers and victim's professional community].) Further, their testimony regarding the immediate aftermath of the fatal burn over was properly admitted as a circumstance of the offense. In *People v. Hawthorne* (2009) 46 Cal.4th 67, this court concluded the admission of a surviving victim's 911 call was properly admitted at the penalty phase under factor (a) because the tape "clearly showed the immediate impact and harm caused by defendant's criminal conduct on the surviving victim and was relevant because it 'could provide legitimate reasons to sway the jury to ... impose the ultimate sanction.'" (*Id.*, at p. 102, quoting *Edwards*, *supra*, 54 Cal.3d at p. 836, abrogated on other grounds in *People v. McKinnon* (2011) 52 Cal.4th 610, 637, 643.) Like the 911 call in *Hawthorne*, the testimony of the four fire captains showed the "immediate impact and harm" caused by Oyler's criminal conduct and was relevant because it could "provide legitimate reasons to sway the jury to impose the ultimate sanction." The way these men died bears directly on Oyler's culpability and makes his particular criminal conduct more egregious. His contrary suggestion that the way the victims died should not have been considered an aggravating circumstance must be rejected. The trial court

did not abuse its discretion in admitting the testimony of the four fire captains.

Oyler also argues that evidence regarding the impact of a defendant's criminal conduct should be limited to only the consequences he intended, controlled, or reasonably foresaw. (AOB 373, 375.) First, this is not the law, and as explained above, the jury can and should consider the injurious consequences brought about by the defendant's actions. (See Section II(D), *ante*.) Second, this court has repeatedly rejected similar arguments calling for a limitation on penalty phase evidence to just those consequences reasonably known to the defendant or those he should reasonably have foreseen at the time of the crimes. (*People v. Romero & Self* (2015) 62 Cal.4th 1, 47; *People v. Trinh* (2014) 59 Cal.4th 216, 246; *People v. Pollock* (2004) 32 Cal.4th 1153, 1183.)

Further, while respondent agrees the People did not have to prove, as elements of the charged offenses, that Oyler intended to kill or appreciated the risks of his criminal conduct, it strains credulity to suggest, as Oyler does, that he did not intend any of the consequences of his actions, and did not reasonably foresee the devastation he would ultimately cause. (AOB 373, 375.) The record shows a degree of wanton, utter disregard for human life that comes quite close to a specific intent to kill. From May 2006 through October 2006, Oyler engaged in a twisted game of cat and mouse with the Riverside County fire fighters. He set over two dozen arson fires, often setting multiple fires on the same day. The evidence shows that he reveled in the chaos he caused—closely watching his fires, and constantly monitoring the activities of fire fighting personnel as they responded to his fires, and attempted to extinguish them while protecting the threatened structures and lives. He knew the dangers that were inherent and, indeed, those dangers proved imminent. Oyler made a point to set fires on sloped terrain, where the incline and natural drainages would help the fire burn

farther faster, a fact he knew would expose the fire fighters to increased risk. He chose hot days with low humidity and high winds, in hopes the conditions would make his fire bigger, i.e. more "successful." The evidence showed he was frustrated when his fires did not turn out to be as destructive as he had hoped, and so he kept trying. With Esperanza, he chose the middle of the night so air tankers could not assist in suppressing the fire until the morning hours. Oyler also specifically knew he was putting the public at risk. He set several fires within feet of his own home (June 3 and June 18), the June 3 fire threatened homes, two fires drew bystanders and extinguishing efforts had to be made by witnesses (June 11(Uncharged A) and June 18 (Uncharged B)), the September 16 Orchard Fire came within 20 feet of occupied homes and burned several structures, and the September 17 Ranch Fire also threatened several homes and burned three structures. With the September 16 Orchard Fire, a responding air tanker nearly crashed after hitting power lines. Finally, in his interview with Detective Michaels, Oyler said he would not light fires because it was "cruel" and "people will get hurt." (15 CT 4066.)

But none of this deterred Oyler, and he continued on his insatiable quest for destruction. On October 21, he stayed out all night casing ideal locations to set a fire. After setting the Esperanza Fire on October 26, he confirmed to James Carney that the fire was burning exactly as he would have expected—he had chosen the right time, location, and conditions to achieve the destruction he sought. The death of the fire fighters may not have been his specific intent, but it was indisputably foreseeable, and Oyler had control over whether those men had to risk their lives that night. Even if this court concluded the evidence at the penalty phase had to be limited to the foreseeable consequences of a defendant's criminal conduct – the evidence presented here fit within such a limitation.

Even if some of the evidence was improperly admitted, there is no "reasonable (i.e., realistic) possibility that the jury would have rendered a different verdict had the error or errors not occurred." (*Brown*, *supra*, 46 Cal.3d at p. 448.) Most of what the fire captains testified to would have been apparent to the jury from reasonable inferences drawn from the evidence presented at the guilt phase. The jury could reasonably deduce that other fire engines would have responded to the scene of the burn over and would have had to discover the bodies of the men, seeing them burned severely. The jury was already aware that three of the men were dead when crews arrived on scene, and that Captain Loutzenhiser and Pablo Cerda were not just alive, but conscious. (10 RT 1629-1632; 18 RT 2836, 2840-2841, 2846.) The jury knew from the testimony that the men had been burned over at the scene of the Octagon House incredibly quickly, and had not had time to deploy their safety gear. (8 RT 1103-1105.) Further, the testimony from CalFire Chief Bradley Harris (which Oyler does not challenge) described the investigation into the burn over and the final moments of the men's lives. (26 RT 4063-4074.) And the testimony of the defense witness, CalFire Chief Jeff Brand, clarified the extreme intensity of the fire. (28 RT 4270-4271.) There is no reasonable possibility that without the testimony of the four fire captains, the jury would have reached a different verdict. Assuming this court finds the trial court abused its discretion in admitting the evidence, reversal is not warranted.

E. The autopsy photographs were properly admitted, and even if not, any error was harmless

In general, autopsy photographs of a victim are relevant and admissible at a penalty phase because they show "the circumstances of the crime of which the defendant was convicted." (See § 190.3, subd. (a); *People v. Moon* (2005) 37 Cal.4th 1, 34–35 ["The photographs demonstrated the real life consequences of defendant's crimes and

pointedly made clear the circumstances of the offenses."]; see also *People v. Jackson* (2014) 58 Cal.4th 724, 758.) A trial court's "discretion to exclude photographs under Evidence Code section 352 is much narrower at the penalty phase than at the guilt phase. This is so because the prosecution has the right to establish the circumstances of the crime, including its gruesome consequences [citation], and because the risk of an improper guilt finding based on visceral reactions is no longer present." (*People v. Cunningham* (2015) 61 Cal.4th 609, 668, quoting *Bonilla*, *supra*, 41 Cal.4th at pp. 353–354; see also *People v. Moon* (2005) 37 Cal.4th 1, 34-35.) A trial court's decision to admit photographs under Evidence Code section 352 is reviewed for an abuse of discretion and will be "upheld on appeal unless the prejudicial effect of such photographs clearly outweighs their probative value." (*Cunningham*, *supra*, 61 Cal.4th at p. 668.)

In *Cunningham*, this court upheld the admission of photographs of the victims at a murder crime scene, holding the photographs, while "unpleasant," were relevant to show, "the real-life consequences of defendant's actions. [And, t]he prosecution was entitled to have the penalty phase jury consider those consequences." (*Cunningham*, *supra*, 61 Cal.4th at p. 668.) Likewise, in *Moon*, *supra*, 37 Cal.4th at p. 35, this court held that "bloody and graphic" photographs were nonetheless properly admitted at the penalty phase because the photographs "demonstrated the real life consequences of defendant's crimes and pointedly made clear the circumstances of the offenses, the only aggravating factor on which the People relied." (*Ibid.*) And, as noted above, this court has already held that, "'evidence of the specific harm caused by the defendant'" is a circumstance of the crime admissible under factor (a)." (*Edwards, supra,* 54 Cal.3d at p. 833.) CALCRIM No. 763, specifically permits the jury to consider, "*the enormity of the offense, or the harmful impact of the crime*." (Emphasis added.)

The photographs were gruesome, and they depicted the horrific circumstances under which the victims in this case died. And respondent does not dispute that intent to kill was not an element of the offenses for which Oyler was convicted. (See AOB 349.) But these photographs, and autopsy photographs in general, are not relevant *only* as to an intent to kill. They also depict the circumstances under which a victim died and thus the specific harm and consequences of the defendant's actions, both relevant considerations at the penalty phase. Thus, to the extent Oyler argues this evidence should have been excluded because it did not bear on his moral culpability or blameworthiness, he is wrong. (AOB 343, 349, 373.) The consequences and impact of his crimes bear directly on his culpability and blameworthiness.

To the extent Oyler argues, even if relevant, the photographs were unduly prejudicial, he does so in reliance on a definition of "prejudicial" that is at odds with this court's precedent. "Prejudice," as used in Evidence Code section 352, "is not so sweeping as to include any evidence the opponent finds inconvenient. Evidence is not prejudicial, as that term is used in a section 352 context, merely because it undermines the opponent's position or shores up that of the proponent. The ability to do so is what makes evidence relevant." (*People v. Doolin* (2009) 45 Cal.4th 390, 438.) The prejudice referred to in Evidence Code section 352 is evidence that, "uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues." (*Id.*, at p. 439.) And, again, a trial court's authority to exclude otherwise relevant evidence under Evidence Code section 352 is circumscribed at the penalty phase of a capital trial because, "the sentencer is expected to subjectively weigh the evidence, and the prosecution is entitled to place the capital offense and the offender in a morally bad light." (*People v. Booker* (2011) 51 Cal.4th 141, 187.)

As explained above, the autopsy photographs, while gruesome, were relevant and highly probative as to the issue of appropriate sentence. They were not prejudicial under Evidence Code section 352 because they would not have evoked a "purely emotional bias against the defendant," in a manner that unlawfully undermined the reliability of the determination the jury was making – whether death or life in prison was the appropriate punishment. The trial court admonished the jurors to, "not let bias, prejudice, or public opinion...influence" its decision. (29 RT 4374.) Nothing suggests the jury did not follow the court's instruction. The prosecutor did not display the photographs during his closing argument, and the jury did not ask to see them during deliberations. (See *People v. Hawthorne* (2009) 46 Cal.4th 67, 103.) The record supports a finding that the photographs did not have an "unduly prejudicial" impact within the meaning of Evidence Code section 352.

Even if some or all of the autopsy photographs should have been excluded, there is no "reasonable (i.e., realistic) possibility that the jury would have rendered a different verdict." (*Brown*, *supra*, 46 Cal.3d at p. 448.) Accordingly, assuming this court finds an abuse of discretion, it should not reverse the judgment regarding Oyler's sentence. While the photographs depicted the horrific injuries to the victims, the jury already knew the victims' injuries were horrific. As a matter of common knowledge, burning to death is horrific. Further, the jury had already heard from Dr. Cohen in the guilt phase about the injuries to the victims, and their causes of death. (18 RT 2836-2849.) Multiple witnesses had testified about finding the victims in the pugilistic posture, and the captains described the state in which the victims were found – describing the level of burning to their skin, and some of their specific injuries. Even if this court concludes the trial court abused its discretion in admitting the autopsy photographs, any error was harmless because it is not reasonably probable

the jury would have returned a different verdict had it not seen the photographs.

III. THERE WAS NO CUMULATIVE ERROR

Oyler also argues that the alleged errors, even if harmless when considered on their own, were prejudicial when considered together. (AOB 383-384.) But, as explained above, "there was no error to accumulate." (*People v. Cordova* (2015) 62 Cal.4th 104, 150.) Because the trial court did not commit any errors, there was no cumulative error. Further, to the extent the trial court may have erred, any such errors were harmless as detailed above. When considered cumulatively, the errors do not become prejudicial, and Oyler has not otherwise demonstrated that he was denied a fair trial." (*People v. Romero* (2015) 62 Cal.4th 1, 58; see also *People v. Rogers* (2013) 57 Cal.4th 296, 350.) This contention should be rejected.

IV. OYLER'S SENTENCE IS CONSTITUTIONAL

In Claim XI, Oyler challenges the constitutionality of California's death penalty statute in general and as applied in his case, acknowledging that each of his claims has previously been rejected by this Court. (AOB 384-400.) As Oyler presents no new arguments or persuasive reasons to revisit these issues, respondent urges this court to reaffirm its prior holdings finding California's death penalty statute, relevant instructions and sentencing scheme constitutional.[40]

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[40] *People v. Schmeck* (2005) 37 Cal.4th 240, abrogated on another ground as stated in *People v. McKinnon, supra,* 52 Cal.4th at pp. 637-638, provides for an abbreviated form to present "routine or generic claims that [this Court] repeatedly [has] rejected and are presented to this [C]ourt primarily to preserve them for review by the federal courts. . .. when the defendant does no more than (i) identify the claim in the context of the facts, (ii) note that [this Court] previously [has] rejected the same or a similar claim in a prior decision, and (iii) ask [this Court] to reconsider that decision." (*Id.* at p. 304.) Pursuant to *Schmeck*, Oyler presents his

(continued...)

Oyler argues section 190.2 is impermissibly overbroad in violation of the Constitution. (AOB 385-386.) This court has repeatedly held that, "California's special circumstances (see § 190.2) adequately narrow the class of murderers eligible for the death penalty." (*People v. Seumanu* (2015) 61 Cal.4th 1293, 1376, see also *People v. Casares* (2016) 62 Cal.4th 808, 853, *People v. Bennett* (2009) 45 Cal.4th 577, 630, and *People v. Stanley* (1995) 10 Cal.4th 764, 842–843.)

Oyler argues the broad application of factor (a), "circumstances of the crime," of section 190.3 results in death judgments that are random and arbitrary in violation of the Constitution. (AOB 386-387.) Similar claims were previously rejected in *People v. Sattiewhite* (2014) 59 Cal.4th 446, 489, *People v. Foster, supra,* 50 Cal.4th at pp. 1362-1364, *People v. Russell* (2010) 50 Cal.4th 1228, 1274, *People v. Jennings, supra,* 50 Cal.4th at pp. 688-689, and *People v. Lomax* (2010) 49 Cal.4th 530, 593; and this claim should likewise be rejected here.

Oyler argues California's death penalty procedure is unconstitutional because it does not impose a beyond-a-reasonable-doubt standard of proof at the penalty phase, and does not require unanimity as to the aggravating factors. (AOB 387-388; 389-390.) Specifically, he relies on the recent United States Supreme Court decision in *Hurst v. Florida* (2016) __ U.S. __ [136 S.Ct. 616, 624, 193 L.Ed.2d 504]. This court rejected the same contention in *People v. Rangel* (2016) 62 Cal.4th 1192, 1235, holding, "The death penalty statute does not lack safeguards to avoid arbitrary and capricious sentencing, deprive defendant of the right to a jury trial, or constitute cruel and unusual punishment on the ground that it does not

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(...continued)
challenges to California's death penalty statute in abbreviated fashion. (See AOB 385-400.)

require either unanimity as to the truth of aggravating circumstances or findings beyond a reasonable doubt that an aggravating circumstance ... has been proved, that the aggravating factors outweighed the mitigating factors, or that death is the appropriate sentence." (*Ibid*, see also *People v. Salazar* (2016) 63 Cal.4th 214, 255.) This court also explicitly rejected the argument that *Hurst* affects this holding in any way. (*Rangel, supra*, 62 Cal.4th at p. 1235.) This court should similarly reject Oyler's claims.

In a related claim, Oyler argues that the failure to require unanimity as to the aggravating factors violates his constitutional right to equal protection. (AOB 390.) This too has been rejected. (See *People v. Burney* (2009) 47 Cal.4th 203, 268 [Lack of unanimity as to aggravating factors does not violate equal protection principles], citing *People v. Cruz, supra*, 44 Cal.4th at p. 681 ["capital defendants are not similarly situated to noncapital defendants, [so] the death penalty law does not violate equal protection by denying capital defendants certain procedural rights given to noncapital defendants"]; *People v. Valencia, supra*, 43 Cal.4th at p. 311; *People v. Johnson* (1992) 3 Cal.4th 1183, 1242–1243; *People v. Bacigalupo* (1991) 1 Cal.4th 103, 145–146.)

Oyler argues the Constitution requires the People to carry the burden of proof at the penalty phase. (AOB 388-389.) As Oyler acknowledges, this court has rejected this argument: "Neither the state nor federal Constitution requires the prosecution bear the burden of proof or persuasion at the penalty phase of a capital trial..." (*People v. Seumanu* (2015) 61 Cal.4th 1293, 1376, see also *Casares*, *supra*, 62 Cal.4th at pp. 853-854.)

Oyler argues the instructions given to the jury were unconstitutional because they did not inform the jury that the central question before it was whether death was an appropriate punishment. (AOB 391.) This court has rejected this claim, and concluded the instructions given are sufficient. (*People v. Arias* (1996) 13 Cal.4th 92, 171; see also *People v. Casares*

(2016) 62 Cal.4th 808, 853, citing *People v. Gonzales and Soliz* (2011) 52 Cal.4th 254, 333.)

Oyler claims the instructions were unconstitutional because they limited factors (d) and (g) by the use of adjectives such as "extreme" and "substantial," were impermissibly vague and ambiguous, did not delete inapplicable sentencing factors, and failed to inform the jury that evidence of mitigating circumstances could only be considered for purposes of mitigation. (AOB 391-393.) Every one of these claims has been repeatedly rejected by this court. (See *People v. Yeoman* (2003) 31 Cal.4th 93, 165 ["The adjectives 'extreme' and 'substantial' do not render vague the sentencing factors that include those words."], see also *Casares*, *supra*, 62 Cal.4th at p. 854; *Arias*, *supra*, 13 Cal.4th at p. 171 [instruction is not vague or ambiguous]; *People v. Watkins* (2012) 55 Cal.4th 999, 1036 [trial court is not obligated to delete assertedly inapplicable statutory factors]; *Casares*, *supra*, 62 Cal.4th at p. 854, citing *Hillhouse*, *supra*, 27 Cal.4th at p. 509 [trial court need not instruct jury that statutory mitigating factors are relevant solely as potential mitigators]; see also *People v. Watkins, supra,* 55 Cal.4th at p. 1036, *People v. Tully, supra,* 54 Cal.4th at p. 1069, *People v. Streeter* (2012) 54 Cal.4th 205, 268, *People v. Lomax, supra,* 49 Cal.4th at p. 595, *People v. Burney, supra,* 47 Cal.4th at pp. 260- 261, and *People v. Monterroso, supra,* 34 Cal.4th at p. 796.) Oyler's identical contentions should be rejected here.

Oyler argues the instructions on the penalty were unconstitutional because while they informed the jury it could only impose a sentence of death if the aggravating factors outweighed the mitigating factors, the instructions failed to inform the jury of the converse principle. (AOB 394-395.) Such an instruction would only serve to clarify the instructions already given, and thus, Oyler was required to request it. His failure to do so forfeits the claim. (*People v. Arias* (1996) 13 Cal.4th 92, 171.) In

addition, similar claims were rejected in *People v. Capistrano, supra,* 59 Cal.4th at p. 882, *People v. Hajek and Vo* (2014) 58 Cal.4th 1144, 1247, *People v. Suff* (2014) 58 Cal.4th 1013, 1078, *People v. Rogers* (2013) 57 Cal.4th 296, 349, and *People v. Lopez, supra,* 56 Cal.4th at pp. 1083-1084; and should be rejected here.

Oyler argues the instructions erroneously precluded the jury from considering, as a mitigating factor, the impact a death sentence would have on Oyler's family. (AOB 395-397.) This court has repeatedly rejected the same argument. (*People v. Williams* (2013) 56 Cal.4th 165, 197–198; *People v. Bennett* (2009) 45 Cal.4th 577, 601; *People v. Smith* (2005) 35 Cal.4th 334, 366–367; *People v. Smithey* (1999) 20 Cal.4th 936, 1000; *People v. Ochoa* (1998) 19 Cal.4th 353, 454–456. "Except as it may illuminate some quality of the defendant's background or character, the impact of execution on the defendant's family is simply irrelevant to the penalty determination." (*People v. Cordova* (2015) 62 Cal.4th 104, 149.) This claim should be denied.

Oyler contends the jury should have been instructed that life without parole was the presumptively appropriate sentence. (AOB 397-398.) He contends this principle is a corollary to the presumption of innocence guaranteed under the Constitution, and thus is constitutionally required. (AOB 397-398.) This court has rejected this argument, (*People v. Salazar* (2016) 63 Cal.4th 214, 256, citing *Boyce, supra*, 59 Cal.4th at p. 724; see also, e.g., *Scott, supra*, 61 Cal.4th at p. 407), and should do so here as well.

Oyler claims California's death penalty statute is unconstitutional because it does not require written findings from the jury. (AOB 398.) This claim was previously rejected by this court in *People v. Trinh, supra,* 59 Cal.4th at p. 254, *People v. Sattiewhite, supra,* 59 Cal.4th at p. 490, *People v. Howard, supra,* 51 Cal.4th at p. 39, *People v. Foster, supra,* 50

Cal.4th at pp. 1365-1366, and *People v. Russell, supra,* 50 Cal.4th at p. 1274; and should be rejected here.

Oyler claims California's capital sentencing scheme is unconstitutional because it does not allow for inter-case proportionality review. (AOB 398-399.) This argument was rejected in *People v. Salazar, supra*, 63 Cal.4th at p. 257, *People v. Trinh, supra,* 59 Cal.4th at p. 255, *People v. Sattiewhite, supra,* 59 Cal.4th at p. 490, *People v. Howard* (2010) 51 Cal.4th 15, 39, *People v. Foster, supra,* 50 Cal.4th at p. 1368, and *People v. Russell, supra,* 50 Cal.4th at p. 1274; and should be rejected here.

Oyler argues California's death penalty procedures violate the Equal Protection clause because non-capital defendants receive greater procedural protections than do capital defendants. (AOB 399.) Similar arguments were rejected in *People v. Hajek and Vo, supra,* 58 Cal.4th at p. 1252, *People v. Pearson, supra,* 56 Cal.4th at p. 478, *People v. McKinzie, supra,* 54 Cal.4th at p. 1365; *People v. Tully* (2012) 54 Cal.4th 952, 1069, *People v. Souza* (2012) 54 Cal.4th 90, 142, and *People v. Eubanks* (2011) 53 Cal.4th 110, 154; and this argument should be rejected here as well. "There is no violation of the equal protection of the laws as a result of the statutes' asserted failure to provide for capital defendants some procedural guarantees afforded to noncapital defendants.'" (*Tully, supra*, 54 Cal.4th at p. 1069, citing *People v. Letner and Tobin, supra*, 50 Cal.4th at p. 208.)

Oyler claims California employs "regular" use of the death penalty which violates or falls short of international norms and evolving standards of decency. (AOB 399-400.) This argument was rejected in *People v. Adams* (2014) 60 Cal.4th 541, 581-582, *People v. McKinzie, supra,* 54 Cal.4th at p. 1365, *People v. Booker, supra,* 51 Cal.4th at p. 197, *People v. Howard, supra,* 51 Cal.4th at pp. 39-40, and *People v. Foster, supra,* 50 Cal.4th at p. 1368; and should be rejected here.

Oyler's sentence is constitutional, and the penalty judgment should be affirmed.

CONCLUSION

For all of the reasons stated above, respondent respectfully requests this court affirm the judgment in its entirety.

Dated: June 29, 2017

Respectfully submitted,

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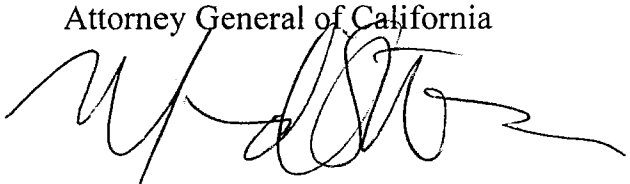
CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S BRIEF** uses a 13 point Times New Roman font and contains **72,345** words.

Dated: June 29, 2017

XAVIER BECERRA
Attorney General of California



MEREDITH S. WHITE
Deputy Attorney General
Attorneys for Respondent

APPENDIX

	Count #	Date[1] & Time	Location	Identifying Name[2]	Area Burned	Type of Incendiary Device[3]	Matches	Cigarette	Conditions	Verdict
1	6, 29	May 16 2:05 p.m.	Sunset Ave. & Wilson Banning, CA	Sunset/Wilson	20 x 10	Remote	31, wooden, Attached w/ rubber band	Marlboro Light	Humidity 30%, over 90 degrees, winds fairly calm	G, G
2	7, 30	May 16 2:21 p.m.	Sunset Ave. & Mesa Banning, CA	Sunset/Mesa	20 x 20	Remote	31, wooden, Attached w/ rubber band	Marlboro Light	Humidity 30%, over 90 degrees, winds fairly calm	G, G
3	8, 31	May 16 2:11 p.m.	Gilman Rd. & Pump House Rd. Banning, CA	Gilman/Pump House	Half acre	Remote	30, wooden, Attached w/ rubber band	Marlboro Light	Humidity 30%, over 90 degrees, winds fairly calm	G, G
4	9	May 28	Brookside Ave. & Jonathan Ave Cherry Valley, CA	Brookside/Jonathan	1 acre	Open flame	3-4 wooden safety-tip	None	Humidity was 25%, 75 degrees, 2 mph winds	Hung
5	10	May 29 5 pm	Hathaway Street & Nicolet Street Banning, CA	Hathaway/Nicolet	10 x 20	Open flame	2-3 wooden safety-tip	None	Humidity was 25%, 75 degrees, 2 mph winds	Hung
6	11	May 31 2:51 p.m.	San Timoteo & Redlands Redlands, CA	San Timoteo/ Redlands	1 acre	Open flame	4 wooden safety-tip	None	Humidity was 25%, 75 degrees, 2 mph winds	Hung
7	12, 32	June 3 5:50 p.m.	6th Street & Xenia Ave. Beaumont, CA	6th/Xenia	2 acres	Lay over	3 wooden	Marlboro Light	2-5 mph winds	G, G
8	13, 33	June 7 12:17 p.m.	Jack Rabbit Trail & Highway 60 Beaumont, CA	Jack Rabbit/Highway 60	50 x 20	Lay over	6 wooden	Marlboro Red	Humidity was 28%, 82 degrees, 2-5 mph winds	G, G
9	14, 34	June 9 2:50 p.m.	Millard Street & Maumee Banning, CA	Millard/Maumee	Half acre	Lay over	6 wooden	Marlboro Red	Humidity 27%, 86 degrees, 7-15 mph winds	G, G
10	15, 35	June 10 4:00 a.m.	Ramon Rd. & Chino Rd. Banning, CA	Ramon/Chino-1	20 x 20	Lay over	7 wooden	Marlboro Red	Humidity 60%, 65 degrees, No winds	G, G
11	16, 36	June 11 12:00 p.m.	Highland Springs Road & Circle C Banning, CA	Highland Springs/Circle C	20 x 30	Lay over	6 wooden	Couldn't ID	Humidity 33%, 77 degrees, 4-5 mph winds	G, G
12	Uncharged A	June 11 7:21 p.m.	Highway 243 & Mt. Edna Banning, CA	Uncharged A	50 x 50	None found	None found	None	Humidity 25%, 80 degrees, calm winds	Uncharged
13	17, 37	June 14 8:41 a.m.	Ramon Rd. & Chino Rd. Banning, CA	Ramon/Chino-2	Quarter acre	Lay over	5 wooden	Marlboro Red	Humidity 38 %, 75 degrees, 7-9 mph winds "High dispatch day"	G, G
14	18, 38	June 14 12:20 p.m.	Broadway & Esperanza Cabazon, CA	Broadway/Esperanza	10 acres	Lay over	5 wooden	Marlboro Red	See above	G, G
15	19, 39	June 14 6:42 p.m.	Old Banning & Idyllwild Rd. San Gorgonio, CA	Old Banning Idyllwild	3 acres	Lay over	5 wooden	Marlboro Red	See above	G, G

[1] All dates indicated are in the year 2006.
[2] The larger fires typically had a name by which people referred to them (e.g. "The Ranch Fire," "The Esperanza Fire"). Where no name developed, respondent has used the closest intersection to identify the fire.
[3] An incendiary device was not located for each fire. Where none was found, this box reads, "none found."

16	20	June 16 8:45 a.m.	Highway 243 & San Gorgonio	243/San Gorgonio	1 acre	Open flame	1 wooden	None	Humidity 20%, 77 degrees, 6 mph winds, with 20 mph gusts	G
17	Uncharged B	June 18 10:20 a.m.	6th Street & Xenia Ave. Beaumont, CA	Uncharged B	10 x 10	None found	None found	None		Uncharged
18	21, 40	June 28 10:21 a.m.	Winesap Ave. & Orchard Pl. Cherry Valley, CA	Winesap/Orchard	2 acres	Lay over	5 wooden	Marlboro Red or Light	Humidity 28%, 89 degrees	G, G
19	22, 41	July 2 10:18 a.m.	Highway 243 & Mt. Edna Banning, CA	243/Mt. Edna	25 x 30	Lay over	5 wooden	Couldn't ID	Humidity 16%, 2 mph winds, with gusts up to 9 mph	G, G
20	23, 42	July 9 2:54 p.m.	Meadowlark St. & Durward St. Banning, CA	Meadowlark/Durward	20 x 20	Remote	6 wooden, attached to cigarette with duct tape	Marlboro	Humidity 14%, 104 degrees	G, G
21	24, 43	September 16 2:27 p.m.	Cherry Valley Blvd. & Roberts Rd. Calimesa, CA	The Roberts Road Fire	8 x 8	Remote	5 paper, wrapped around cigarette	Couldn't ID	Humidity 12 %, 90 degrees, 15-20 mph winds	G, G
22	25	September 16 2:32 p.m.	Taylor & Orchard Cherry Valley, CA	The Orchard Fire	1,580 acres	None found	None found	None found	Humidity 12 %, 90 degrees, 15-20 mph winds Very windy, Santa Ana Winds which means lower humidity and hotter weather	G
23	26, 44	September 17 11:33 a.m.	1560 Gilman Street Banning, CA	The Ranch Fire	1, 658 acres	Remote	6 paper, attached to cigarette with some adhesive	Marlboro	Humidity 8 %, 85 degrees, 7-15 mph winds	G, G
24	27	October 22 3:26 p.m.	Mias Canyon Road & Bluff Street Just outside Banning	The Mias Canyon Fire	40 acres	None found	None found	None found	Humidity 12%, 79 degrees, 7-12 mph winds	G
25	1-5, 28, 45	October 26 1:10 a.m.	Esperanza Ave. & Almond Cabazon, CA	The Esperanza Fire	43,000 acres	Remote	6 wooden matches attached to it with a rubber band	Marlboro	Santa Ana Winds, Red Flag Warning	G as to all
26	Uncharged	October 26 4:10 a.m.	Seminole Rd. & Main Cabazon, CA	Seminole Road Fire	Half acre	None found	None Found	None		Uncharged

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Oyler**
No.: **S173784 - CAPITAL CASE**

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 June 29, 2017, 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 600 West Broadway, Suite 1800, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

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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 June 29, 2017, at San Diego, California.

B. Romero
Declarant


Signature

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