SUPREME COURT COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, **v.** **DANIEL SANCHEZ COVARRUBIAS,** Defendant and Appellant.	**CAPITAL CASE** S075136

Monterey County Superior Court No. SC942212(C)
The Honorable Robert F. Moody, Judge

RESPONDENT'S BRIEF

EDMUND G. BROWN JR.
Attorney General of the State of California

DANE R. GILLETTE
Chief Assistant Attorney General

GERALD A. ENGLER
Senior Assistant Attorney General

ALICE B. LUSTRE
Supervising Deputy Attorney General

BRIDGET BILLETER
Deputy Attorney General
State Bar No. 183758

455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
Telephone: (415) 703-1340
Fax: (415) 703-1234
Email: bridget.billeter@doj.ca.gov

Attorneys for Respondent

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STATEMENT OF THE CASE

On February 27, 1996, the Monterey County District Attorney filed an information charging appellant with three counts of murder (Pen. Code, § 187; counts one through three), attempted murder (Pen. Code, §§ 187, 664; count four), assault with a firearm (Pen. Code, § 245, subd. (a)(2); count five), three counts of residential robbery (Pen. Code, § 212.5, subd. (a); counts six through eight), residential burglary (Pen. Code, § 459; count nine), and conspiracy (Pen. Code, § 182, subd. (a)(1); count ten). (1 CT 119-135.) As to counts one through nine, the information alleged that appellant was personally armed with a firearm (Pen. Code, § 12022.5, subd. (a)), that appellant was personally armed with a knife (Pen. Code, § 12022, subd. (b)), and that a principal was armed with a firearm and an assault weapon (Pen. Code, §§ 12022, subd. (a)(1), (a)(2)). (1 CT 119-135.) As to the murder counts, the information charged four special circumstances: multiple murders (Pen. Code, § 190.2, subd. (a)(3)), robbery felony murder (Pen. Code, § 190.2, subd. (a)(17)), burglary felony murder (Pen. Code, § 190.2, subd. (a)(15)), and murder by lying-in-wait (Pen. Code, § 190.2, subd. (a)(3)). (1 CT 119-124.)

On June 3, 1996, pursuant to appellant's motion, the court struck the lying-in-wait special circumstances. (3 CT 561.)

On March 4, 1997, jury selection commenced. (3 CT 698.) On March 5, 1997, appellant filed a petition for writ of mandate and prohibition in the Sixth District Court of Appeal. (3 CT 711.) The Court of Appeal ordered the proceedings stayed. (3 CT 711.)

On January 15, 1998, the Court of Appeal issued a peremptory writ of mandate, ordering the trial court to exercise its discretion "to decide whether it is practicable in petitioner's case to conduct voir dire in the presence of other jurors." (4 CT 775.)

On August 11, 1998, a second jury selection commenced. (4 CT 887.) On September 8, 1998, the jury found appellant guilty of all ten counts, and found the charged special circumstances to be true. (4 CT 962-964.) It found, as to all counts, that a principal had been armed with a firearm and with an automatic weapon. (4 CT 963-966.) It found the allegation that appellant was personally armed with a knife to be not true. (4 CT 963-966.) The jury was unable to reach a verdict on whether appellant personally used a firearm during the commission of the crimes. (4 CT 970-997.)

On September 14, 1998, the penalty phase commenced. (5 CT 1052.) On September 22, 1998, the jury fixed the penalty as death. (5 CT 1067.) On October 27, 1998, the court denied appellant's motion to modify the verdict and imposed the death penalty on counts one through three. (5 CT 1147-1149.) On the other counts, the court imposed a determinate sentence of 32 years, four months, which it ordered to be stayed pending service and finality of judgment as to the murder counts. (5 CT 1161-1163.)

Appellant's appeal is automatic.

STATEMENT OF FACTS

On November 16, 1994, appellant, along with his cousins, Antonio Sanchez and Joaquin Nunez, and his 16-year-old nephew, Jose Luis Ramirez, entered the

converted garage/apartment behind the home at 1022 East Market Street in Salinas. After robbing them at gunpoint, the men shot all the occupants: Ramon Morales, his wife, Martha Morales, his brother-in-law, Fernando Martinez, and his 11-month-old daughter, Alejandra Morales. Ramon, Martha, and Martinez were killed; Alejandra survived.[1/]

Jose Luis Ramirez testified against appellant in exchange for an eleven-year, eight-month prison sentence.

Background/Motive

In mid-1994, Amy Arrendondo moved out of her rental house on Toro Street in Salinas. (43 RT 8449.) She allowed her daughter, Jackie, Jackie's husband, Arturo Perez, and their baby to live in the house. (43 RT 8449.) Lorenzo Nunez, Arredondo's cousin, also lived in the house. (43 RT 8452-8453.) Subsequently, Ramon and Martha Morales moved in with their baby, Alejandra, and Martha's brother, Fernando Martinez. (43 RT 8450.)

By August 1994, Arrendondo's half-brother, Antonio Sanchez, had also moved into the house. (43 RT 8451.) Arturo and Jackie Perez shared one bedroom in the house, the Moraleses shared another bedroom, and Martinez, Sanchez, and Nunez shared the third bedroom. (44 RT 8620.)

Jose Luis Ramirez was Jackie's cousin, and visited the house on Toro Street often. (44 RT 8612-8613.) According to Ramirez, Antonio Sanchez and Ramon Morales were "good friends." (42 RT 8208.) Sanchez sold drugs with Ramon. (41 RT 8061.) At some point, Ramon and Sanchez had a falling out; Sanchez told Ramirez that, because of a dispute over drug money, he wanted to kill Ramon, and Ramon wanted to kill him. (42 RT 8208.) According to

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1. Most individuals are referred to by their last names; individuals are only referred to by first name where one or more individuals share the same last name.

Arturo Perez, who lived with both men, Ramon and Sanchez had argued about money Ramon owed Sanchez for fixing his car. (44 RT 8621.)

In August or September 1994, Arredondo was concerned about the number of people living in the house, and, because her name was on the lease, she asked everyone to move out. (43 RT 8452.) The Moraleses, along with Lorenzo Nunez and Fernando Martinez, moved into the converted garage at 1022 East Market Street in Salinas. (39 RT 7622, 44 RT 8622-8623.)[2/] Arturo and Jackie Perez moved in with Jackie's sister, Amy Trejo. (44 RT 8622.) Sanchez left town and went to Mexicali for about a month. (44 RT 8623.)

The apartment at 1022 East Market Street consisted of a living room/kitchen combination room and a bedroom/bathroom combination room. (38 RT 7427, 7434.) The living area and the kitchen were each approximately ten feet by ten feet. (38 RT 7428.)

In November 1994, Bertha Sanchez, appellant's older sister, was living on Argentine Drive in Salinas. (43 RT 8410.) At that time, appellant lived in Southern California. (43 RT 8411.) On the evening of November 11 or 12, appellant arrived at her house with their cousins, Antonio Sanchez and Joaquin Nunez. (43 RT 8412.) They arrived in appellant's car and stayed overnight. (43 RT 8412.) Appellant intended to return to Southern California the following day, but Bertha asked him to wait for her. (43 RT 8414, 8425.) She was planning to drive to Mexicali to pick up her husband, and she wanted appellant to accompany her in case she had car trouble or needed assistance. (43 RT 8413-8414, 8425.) Appellant agreed and they planned to leave on Thursday, November 17. (43 RT 8413-8414.)[3/]

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2. Ramon rented the apartment using the name Ruperto Diaz-Rodriguez. (39 RT 7664.)

3. Bertha and appellant did not end up driving together, because she never saw appellant after the murders on the night of November 16. (43 RT

Appellant and the other men stayed with Bertha until November 16. (43 RT 8428.) On November 15, another cousin, Lorenzo Nunez, visited appellant, Sanchez, and Joaquin Nunez. (43 RT 8415.) During the visit, Lorenzo pulled some guns out from underneath the sofa. (43 RT 8416.) Bertha told them to take the guns out of the house. (43 RT 8417.) According to Bertha, the guns could have been an AR-15 and a .30/.30 rifle. (43 RT 8417.) The men took the guns and left. (43 RT 8418.)

Amy Trejo was Antonio Sanchez's niece and lived at 222 Toro Street. (44 RT 8669, 8681-8682, 8666-8667.) In August or September 1994, Amy Trejo's husband, David, accompanied Sanchez to Mexicali. (44 RT 8684.) When Sanchez returned from Mexicali, Joaquin Nunez was with him. (44 RT 8685.) Amy recalled Sanchez visiting her house three times in November—the last time was November 16, the day of the murders. (44 RT 8693.) The first two times Sanchez was at her house, he was accompanied by Nunez and appellant. (44 RT 8686-8687.) On November 12, the second time they were at her house, her husband David returned from Watsonville late at night and was upset that there were so many people in his home. (44 R T8670-8673, 8688.) According to Amy, she knew there had been problems between Sanchez and Ramon and had heard that Sanchez "wanted to get" Ramon, and Ramon "wanted to get" Sanchez. (44 RT 8697.)

In November 1994, 16-year-old Jose Luis Ramirez was living with his mother. (40 RT 7805, 7825.) His mother's sister, Amy Arredondo, and her brother, Antonio Sanchez, also lived in Salinas. (40 RT 7805.) Bertha Sanchez and appellant are his mother's cousins. (40 RT 7806.) Ramirez called appellant "uncle" when he was young and living in Mexicali. (40 RT 7806-

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8414, 8422.)

7807.)[4] Joaquin Nunez is also related to Ramirez's mother, but Ramirez did not meet him until about a week before the murders. (40 RT 7807-7808.)

Ramirez was interviewed by the police three times after the murders. (40 RT 7810-7811.) He admitted that he lied during the first two interviews to minimize his involvement. (40 RT 7811-7812.) Ramirez told the truth during the third interview and received a plea bargain in exchange for his truthful testimony. (40 RT 7812-7814.)[5]

The Day Of The Murders

On November 16, 1994, Ramirez awoke at 8:00 or 9:00 a.m. (40 RT 7821.) About 10:00 a.m., appellant, Nunez, and Sanchez arrived at his home in appellant's vehicle. (40 RT 7821-7822.) The four men ate, played dominoes, and drank beer for an hour or two. (40 RT 7823.)

At some point Amy Arredondo called appellant looking for Antonio and asked the men to help her move some things from storage. (40 RT 7823, 8453.) The four men got into appellant's vehicle and drove to Arredondo's house. (40 RT 7824-7825, 43 RT 8456.) Appellant was driving, Sanchez was in the front passenger seat, and Ramirez was behind appellant. (40 RT 7824-7825.)

After arriving at Arredondo's house, Ramirez and Nunez drove Arredondo's truck to the storage unit. (40 RT 7825, 43 RT 8458.) Appellant and Sanchez drove in appellant's car. (40 RT 7826.) When they arrived at the storage facility, they were not allowed into the unit without Arredondo so they returned to Arredondo's house and brought her back to the business. (40 RT 7826-7827,

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4. Ramirez lived in Mexicali until he was 12. (RT 7807.)

5. Ramirez pleaded guilty to three counts of robbery and one count of burglary and was sentenced to eight years and eleven months in prison. (40 RT 7802-7804.)

43 RT 8458.) The men loaded the items onto the truck and returned to Arredondo's house. (40 RT 7827, 43 RT 8459.)

Shortly after arriving at Arredondo's house, the four men went to pick up Arredondo's daughter, Renee, from school and get some beer. (40 RT 7829, 43 RT 8460.) Renee gave Sanchez some money for helping move. (40 RT 7829.)

The Trailer Park

After taking Renee home, the men went to a trailer park to get $100 that was owed to Sanchez. (40 RT 7831-7832.) They parked in front of a trailer; Sanchez got out and went to the door. The other men were drinking beer in the car. (40 RT 7832, 7835.)

While they were waiting for Sanchez, appellant got out of the car and was looking at a rifle in the truck parked in front of the trailer. (40 RT 7833.) Appellant said that if Sanchez was not paid his $100, he would steal the rifle. (40 RT 7833.) However, appellant returned to the car without stealing the rifle. (40 RT 7834.) Sanchez eventually returned to the car.

Ramirez told District Attorney investigator Richard Moore that Sanchez was collecting money related to a vehicle arson that had occurred the night before. (43 RT 8496.) Ramirez pointed out trailer number 35 as the one Sanchez had entered. (43 RT 8497.)

Juan Martinez Avalos had been business partners with Angel Martinez, who lived in trailer number 35. (43 RT 8487, 8492-8493, 8499-8500.) Avalos and Martinez had had a business disagreement, and, during the early morning hours of November 16, Avalos awoke to find his truck had been burned. (43 RT 8488, 8490.) He found an empty gallon bottle near the truck. (43 RT 8490.)

According to Ramirez, he had previously visited that trailer park with his cousin, Arturo Perez, because Perez's mother lived near the trailer where

Sanchez got the money. (40 RT 7834-7835.) Perez testified that he was acquainted with Angel Martinez, who lived in the trailer park near Perez's mother. Perez admitted that he introduced Sanchez to Angel Martinez. (44 RT 8639-8640.)

The Firearm Store

After leaving the trailer park, the four men drove to JKD Shooting Sports. (40 RT 7836-7837.) Ramirez, Sanchez, and Nunez went into the store, and appellant stayed in the car. (40 RT 7837.) Appellant and Sanchez had previously told Ramirez that they were going deer hunting. (40 RT 7837.) Inside the store, Sanchez purchased bullets and a magazine for an AR-15. (40 RT 7838-7839.) Ramirez believed that the magazine held 20 bullets, and the box of bullets contained 50 rounds. (40 RT 7840.)

Mario Rios, a clerk at JKD, sold Sanchez a box of .223 ammunition, which would fit an AR-15 semiautomatic rifle. (42 RT 8278, 8279.) The box of ammunition contained 50 rounds. (40 RT 8279.) Sanchez was also interested in a high-capacity magazine, and purchased a magazine that could hold 40 rounds. (42 RT 8279.) Sanchez also bought .30/.30 ammunition. (42 RT 8281.) Sanchez paid for the items with the $100 bill he received at the trailer park. (40 RT 7840-7841, 42 RT 8268, 8280; People's Exh. 12 [register receipt from JKD Shooting Sports].)[6/]

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6. The register receipt indicated that the purchase was made on November 15, 1994. James Fletcher, another clerk at the firearms store, stated that he was sure that the date on the receipt was correct because "we do one of these every day, and there was one the day before for the 14th, and there was one the next day for the 16th, and there was an on [*sic*] infinitum in both directions with no break in the sequence." (42 RT 8273-8274.)

Arredondo's House

After leaving the firearms store, the men bought some more beer and returned to Arredondo's home. (40 RT 7841-7842, 43 RT 8461.) They ate dinner with Arredondo. (40 RT 7842, 43 RT 8461.) Arredondo noticed that Sanchez and Nunez had two big rifles in their possession; they stated that one was an "R-15" and the other was an "M-16." (43 RT 8462.) Arredondo told them that she did not want guns in her house, and the men left about 5:30 p.m. (40 RT 7843, 43 RT 8463.)

Trejo's House

After leaving Arredondo's house, the men drove to Amy Trejo's house. (40 RT 7843, 44 RT 8689.) While at Trejo's house, Sanchez went out to a Datsun or Nissan that he had been storing there. (40 RT 7844-7847, 44 RT 8691.) Both Trejo and Ramirez believed that Sanchez got some guns out of the trunk and put them in appellant's car. (40 RT 7847, 44 RT 8691.) After about 15 minutes, the four men left in appellant's car. (40 RT 7848, 44 RT 8693.)

Bertha's House

After leaving Trejo's house, the men drove to a tire store to purchase a tire for Bertha Sanchez's car. (40 RT 7849.) They drove to Bertha's house and fixed the tire. (40 RT 7851-7852, 43 RT 8421.) After fixing the tire, the four men and Bertha's son, Jorge, sat in appellant's car drinking beer. (40 RT 7853.) Ramirez told Jorge that they were going to kill some deer. (40 RT 7853.)

Bertha arrived home from the laundromat between 7:00 and 8:00 p.m., and got upset that the men were drinking in the car in front of her house. (40 RT 7853, 43 RT 8421-8422.) She told Jorge to get out of the car, and Jorge and

Bertha went into the house. (40 RT 7853, 43 RT 8421.) When she came back outside, the four men were gone. (43 RT 8422.)

Shooting Practice

After leaving Bertha's, Sanchez started talking about Ramon Morales. (40 RT 7854.) Sanchez said that they were going to go to Ramon's house to rob and kill him. (40 RT 7854.) Appellant drove up to the mountains outside of Salinas. (40 RT 7856.) While driving, Ramirez and Sanchez put some bullets in the clip they had purchased at the firearms store. (40 RT 7858.)

In the mountains, the four men got out of the car, and appellant opened the trunk. (40 RT 7857.) Inside there was a bag of bullets, different from the bullets purchased at the firearms store. (40 RT 7857-7858.) Nunez and Sanchez took two guns out of the trunk; Nunez had a .30/.30 rifle, and Sanchez had an AR-15 machine gun. (40 RT 7860-7861.) Everyone got back into the car, and appellant started driving around very slowly. (40 RT 7861.) Sanchez and Nunez were testing the guns by shooting them out the window into the air. (40 RT 7862.) Ramirez test fired the .30/.30 one time. (40 RT 7863.)

Robert Falcon lived on Old Stage Road in the foothills three miles outside of Salinas. (42 RT 8256.) On November 16, he heard three or four shots fired near his house and called 911. (42 RT 8257.) Monterey County Sheriff's Deputy Greg Uskey responded to the report. (44 RT 8604.) He arrived on scene at 8:41 p.m., about 40 minutes after the initial 911 call, and found nothing in the area at the time. (44 RT 8604-8606.)

Heading To The Morales House

After testing the weapons, the four men left the area and planned to go to Guillermo Morales's home. (40 RT 7863.) Guillermo Morales was Ramon

Morales's brother. (40 RT 7863.) Sanchez said that they wanted to kill Guillermo. (40 RT 7864.)

On the way to Guillermo's house, appellant stated that he wanted a smaller weapon. (40 RT 7864.) Ramirez said that he had friends who had guns. (40 RT 7864.) Ramirez told appellant how to get to his friend's house. (40 RT 7864.) However, when they got there, Ramirez's friend was not home. (40 RT 7864-7865.)

When they arrived at Guillermo's house, appellant parked around the corner. (40 RT 7865.) According to Ramirez, the plan was that appellant would go to Guillermo's door, because Guillermo did not know appellant. (40 RT 7865.) Appellant got out of the car and went to the door. (40 RT 7866.) He returned two to three minutes later and drove away. (40 RT 7866-7867.) Ramirez did not recall what appellant said when he got back into the car. (40 RT 7867.)

After leaving Guillermo's house, the men drove to a hotel where "Frank" was staying. (40 RT 7867.) Sanchez said that he wanted to kill "Frank" because he owed him $100 or $200. (40 RT 7867.) Appellant parked at the hotel, but no one got out of the car. (41 RT 8004.)

The Murders

After leaving the hotel, appellant drove to the Moraleses' house. (41 RT 8004-8005.)[7/] He parked around the corner on Poplar Street. (41 RT 8005-8006.) The plan, according to Sanchez and appellant, was to go in the house, get some drugs, steal stuff, and kill whoever was inside so that there were no witnesses. (41 RT 8007-8008.) Appellant said that he would go to the door first, because no one in the house knew him. (41 RT 8007.)

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7. According to Ramirez, appellant did not need directions to either Guillermo or Ramon's houses. (40 RT 7866, 41 RT 8005.)

When they got out of the car, Nunez was holding the .30/.30, Sanchez was holding the AR-15, and appellant was holding a seven or eight-inch knife. (41 RT 8009-8011.) As they were getting out of the car, Sanchez hesitated, appearing nervous, but appellant told him to go ahead to the house. (41 RT 8012-8013.) Appellant knocked on the front door, but no one answered. (41 RT 8013-8014.) Appellant opened the door. (41 RT 8014.) Fernando Martinez was sleeping on the living room floor. (41 RT 8015.) Appellant grabbed Martinez's forehead, put the knife to his neck, and told him not to look at anyone. (41 RT 8016-8017.) Sanchez was pointing his gun at Martinez. (41 RT 8017.)

Ramirez and Nunez started searching the bedroom, while Sanchez and appellant were in the living room. (41 RT 8019.) Sanchez told Ramirez to take whatever he could. (41 RT 8020.) Ramirez found a VCR, a neck chain, and stereo components. (41 RT 8019.) Ramirez took the stolen items to the car; he made about three trips. (41 RT 8019-8020.) At one point, as Ramirez was coming out of the bedroom, Sanchez gave him a .32 caliber gun, and Ramirez put it in his pocket. (41 RT 8022.) On one of his return trips from the car, he saw appellant searching some boxes. (41 RT 8021.)

On Ramirez's last trip to the car, he saw Ramon's car pull into the driveway. (41 RT 8024-8025.) Ramirez went inside and told Sanchez that the Moraleses were coming. (41 RT 8025.) Appellant, using the knife, took Martinez into the bedroom. (41 RT 8026.)

When Martha entered the home, holding Alejandra, Nunez pointed his gun at her and forced her into the bedroom. (41 RT 8028-8030.) When Ramon entered, Sanchez pointed his gun at him and told him to kneel down. (41 RT 8030.) At that point, appellant had returned to the living room from the bedroom. (41 RT 8032.)

Sanchez asked Ramon where the drugs, money, and guns were. (41 RT 8032.) Ramon said he had $5000 in the bank and the drugs were his brother's. (41 RT 8032.) Ramirez did not recall if Ramon said anything about guns. (41 RT 8033.)

Appellant began searching for guns in the apartment. (41 RT 8033.) On the side of the refrigerator, appellant found two handguns; one was a revolver. (41 RT 8033.) Appellant put one of the guns in Sanchez's jacket and kept the other one. (41 RT 8033.)

Ramon was on his knees, asking them not to hurt him, when Ramirez heard what sounded like a .30/.30 gunshot from the bedroom. (41 RT 8034-8036.) When he heard the gunshot, Ramirez walked out the front door. (41 RT 8037.) He then heard a machine gun and a total of about 20 shots. (41 RT 8038-8039.) Ramirez, scared, ran away to the corner of East Market and Poplar Streets. (41 RT 8038-8039.) He turned and saw appellant, Nunez, and Sanchez running to the car. (41 RT 8039.) They got in the car and drove away fast, without turning on the headlights. (41 RT8040-8041.)

Glenn Evans lived near the corner of East Market and Poplar Streets. (39 RT 7643.) At about 9:00 p.m., he heard automatic gunfire coming from the area of Poplar Street, through his open front door. (39 RT 7644-7646, 7650.) He saw a male in black pants, a black jacket, and a white T-shirt, running from the Morales residence. (39 RT 7646-7647.) The male got into a big, dark colored car and drove away without turning on the headlights. (39 RT 7647-7648.)[8/]

Della Longoria lived in the main residence at 1022 East Market Street. (39 RT 7662.) She rented her converted garage to the Morales family. (39 RT 7662-7664.) Not long before the murders, Longoria had seen a suspicious man

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8. Appellant drove a four-door, blue Buick or Oldsmobile. (40 RT 7819.)

around the apartment. (39 RT 7704.) When she told Ramon, he said, "Don't worry. I have something to love them with." (39 RT 7704.) Longoria understood that phrase to mean that Ramon had a weapon or a gun. (39 RT 7704.)

On November 16, Longoria got home a little after 7:00 p.m. and heard a lot of noise coming from the garage. (39 RT 7666-7667.)[9/] She yelled out her kitchen door, asking for quiet, when she saw the front door of the apartment open. (39 RT 7668-7669.) She heard six or seven gunshots and saw gun powder coming through the front door. (39 RT 7669-7670, 7678.) After she heard more gun shots, Longoria got down on the floor and called 911. (39 RT 7670.)

Longoria looked out the window again and saw men run out of the apartment and to a car parked on Poplar Street. (39 RT 7671-7672.) Longoria identified appellant as the first man to run from the apartment and believed that he was carrying a rifle. (39 RT 7676, 7710.)

After The Murders

Salinas police officer Dagoberto Zubiate was dispatched to the scene at approximately 9:00 p.m. (38 RT 7410.) He arrived at 1022 East Market Street and, along with Detective Schloss, spoke to Longoria. (38 RT 7413-7414.) Longoria pointed to the converted garage. (38 RT 7414-7415.) The front door was partially open. (38 RT 7415.) After waiting for Officers Crabill and Guzman to arrive, Officer Zubiate approached the garage. (38 RT 7417.) He noticed shell casings on the sidewalk leading to the front door. (38 RT 7421.) He also smelled gunpowder and heard a baby crying. (38 RT 7420.)

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9. Although Longoria believed it was closer to 7:00 p.m., the 911 call was actually made at 8:54 p.m. (38 RT 7446.)

Officer Zubiate pushed the front door open and discovered the body of Ramon Morales. (38 RT 7426, 7455.) There were shell casings on the floor near his body and blood and brain matter on the wall behind him. (38 RT 7429-7431.) Officer Zubiate found Martinez's body in the doorway between the bedroom and the bathroom, and found Martha's body at the foot of the bed in the bedroom. (38 RT 7433-7435, 7455.) Officer Zubiate found Alejandra lying near her mother's knees, crying and covered in blood. (38 RT 7436.)

While paramedic Doug Perry was confirming that the adult victims were dead, paramedic Jeff Horner was caring for Alejandra. (38 RT 7490-7492, 7498.) He noticed one gunshot in her back left shoulder, one in her middle left back area, two in her right thigh, and two in her lower leg. (38 RT 7499-7501.)

Dr. Edgar Castellanos treated Alejandra at the emergency room. (39 RT 7619.) He believed the gunshot wound to her shoulder was an entrance wound and the wound in her back was the exit wound. (39 RT 7627-7628.) He also believed that the leg wounds appeared to be in and out wounds—in that one wound was an entrance wound and the other was an exit wound. (39 RT 7629.)

Appellant's Request For Money

On November 16, at approximately 9:00 p.m, appellant showed up at the home of his sister, Elvia Covarrubias, and his brother-in-law, Jesus Hernandez. (43 RT 8436, 8438, 8443.) Appellant asked for gas money, and Hernandez gave appellant $50. (43 RT 8437, 8443.) Appellant left immediately. (43 RT 8437-8438, 8444.)

Ramirez's Actions

After Ramirez saw appellant, Sanchez, and Nunez drive away from the crime scene, he ran to Amy Trejo's house. (41 RT 8042.) He had in his possession the gun that he had put in his pocket, a neck chain, and some hair

oil. (41 RT 8042.) He arrived at the Trejo house between 9:00 and 10:00 p.m. (44 RT 8630-8631.) Amy Trejo, David Trejo, and Arturo Perez were watching television. (41 RT 8043, 44 RT 8631, 8676, 8695.) Ramirez told them to turn the channel to the Ten O'Clock news. (41 RT 8043-8044, 44 RT 8631-8632, 8696.) On the news, they saw a report about the shooting at the Morales residence. (44 RT 8632, 8696.)

Ramirez showed Perez the gun, the necklace, and the hair oil. (44 RT 8633-8634.) He gave the items to Perez and left the house. (44 RT 8634.) The next day, Ramirez returned with his friend, Daniel Barba. (41 RT 8046-8047, 44 RT 8636.) Ramirez took the gun and gave it to Barba, but the gun did not work. (41 RT 8046-8047.) Ramirez also tried to sell the necklace at a pawn shop. (41 RT 8045-8046.) However, he could not sell the chain without identification, so Ramirez asked Perez to help him. (41 R T8045-8046, 44 RT 8637.) Perez went to the pawn shop, presented his identification to the shop owner, and got $60 for the necklace. (44 RT 8637-8638.) Ramirez gave Perez $10 and kept the rest of the money. (44 RT 8638.)

Physical Evidence

Upon searching the crime scene, Salinas police detectives found a box of .38 caliber ammunition and a box of .380 caliber ammunition on the bed in the bedroom. (45 RT 8828.) Four bullets were missing from the .38 caliber box. (45 RT 8831.) Detectives also found a cash box and a Huggies box on the bed. (45 RT 9045-9047.) Appellant's fingerprints were found on both boxes of ammunition, and on the Huggies box. (45 RT 9051-9053.) Fernando Martinez's fingerprints were also found on the Huggies box, and Ramirez's fingerprints were found on the cash box. (45 RT 9053.)

During the search, officers found bullet holes in the south wall of the bedroom, and in the southwest wall of the living room, behind Ramon

Morales's body. (46 RT 9019, 9025.) Inside a box in the living room, officers found a .22 caliber intact bullet, and a spent casing. (46 RT 9062-9063.) In another box, they found a .380 automatic firearm. (46 RT 9073.) In the kitchen trash can, officers found a vinyl bag containing a box of .22 caliber bullets. (46 RT 9067-9068.) Officers found a box of .32 caliber bullets on top of the refrigerator, and another box of .22 caliber bullets on the floor in the bedroom. (46 RT 9069.) Officers also found a taser gun on the floor in the bedroom. (46 RT 9071.) Officers found a small amount of hashish on the bedroom floor, and a triple beam scale in the chicken coop outside the apartment. (46 RT 9077-9079.) Finally, the search revealed two .380 caliber pistols in cardboard boxes in the bedroom, and a .22 caliber rifle in the chicken coop. (46 RT 9870-9871.)

Officer John DiCarlo transported the victims' bodies to the coroner's office. (46 RT 9106-9107.) He found $204.37 in Ramon's pocket, $123 in Martinez's pocket, and $53 in Martha's purse. (46 RT 9108-9109.)

The Wounds

Dr. John Hain performed autopsies on the victims. Fernando Martinez died from a bullet wound to the back of the head. (48 RT 9426, 9434.) There was a corresponding exit wound on his face. (48 RT 9426.) There was stippling on his skin, indicating that the gun was fired within a couple of inches from his head. (48 RT 9427.) Martinez also had a through-and-through bullet wound on his left middle finger. (48 RT 9431.) That injury was most likely the result of the bullet to his head, passing through his hand when he had his hands in front of his face. (48 RT 9432.) Martinez had an entrance wound on his back, which probably occurred post-mortem. (48 RT 9429, 9433.) Dr. Hain found a .38 caliber slug near Martinez's collarbone, which was most likely associated with the back wound, but found no bullet associated with Martinez's head wound. (48 RT 9433.)

Ramon Morales died from multiple gunshot wounds. (48 RT 9450.) There were seven entrance wounds in the back of his forearm. (48 RT 9446.) There were corresponding exit wounds on the front of his forearm, as well "massive" wounds to the face "in that there was a 4-by-5 inch area of the face that was just torn apart." (48 RT 9440.) The injuries were consistent with Morales being shot while his arm was in front of his face. (48 RT 9441-9442.) There was one entrance wound in the left armpit, and three entrance wounds in the lower chest, which "tore apart" Morales's heart. (48 RT 9441-9442.) There were four entrance wounds to the lower left abdomen; the bullets passed through the intestines and ended up in the right chest area. (48 RT 9442.) There was one wound in the center of the chest which went upward and exited in the neck area; Morales had to be laying down when the shot was fired. (48 RT 9443.) There was a second wound in the center of the chest, which probably went through the forearm first. (48 RT 9443.) There was an entrance wound in Morales's left thigh, which exited in the groin area, passed through the scrotum, and lodged in the right thigh. (48 RT 9449.)

Dr. Hain found two .223 caliber bullets in Morales's left shoulder, one .223 caliber bullet in his right chest area, one .223 caliber bullet in his throat, one .223 caliber bullet in his right thigh, and at least two .223 caliber bullets in the back of his head. (48 RT 9412-9414, 9449-9450; see People's Exh No. 40.) Dr. Hain also found one .38 caliber bullet in the back of Morales's head. (48 RT 9414-9415, 9449-9450; see People's Exh. No. 40 (18DL).)

Martha Morales suffered two "devastating" gunshots to her forehead. (48 RT 9451, 9453.) She also suffered two reentry wounds to her right shoulder most likely caused by the two shots to her face. (48 RT 9454.) She also had a bullet wound in her lip that exited through the neck, and a small caliber bullet wound that entered her upper arm and passed through both lungs. (48 RT 9459-9460.) Dr. Hain found a .38 bullet in her right shoulder and a .30/.30

bullet in her right armpit, both of which corresponded with her head wounds. (48 RT 9417-9418, 9456-9457; see People's Exh No. 42 (21DL), (22DL).) He also found a .223 bullet in her left side. (48 RT 9418.)

Dr. Hain believed that none of Martha Morales's injuries were instantly fatal, and she probably survived for several minutes after being shot. (48 RT 9460.)

The Casings

Criminalist Larry Waller collected a total of 18 .223 caliber casings from the crime scene. (45 RT 8891.) He found four casings outside the front door of the residence. (45 RT 8893-8895; see People's Exh. No. 38 (1LW-4LW).) Most of the remaining .223 caliber casings were found in the living room and kitchen area. (45 RT 8895-8902.)

Senior Criminalist Scott Armstrong analyzed 16 of the .223 caliber casings and determined that all but one were fired from the same weapon, most likely an AR-15. (47 RT 9257.) He could not conclusively determine if the remaining casing had been fired from the same weapon. (47 RT 9257.) A casing from an AR-15 is typically expended 5 to 20 feet to the right of the weapon. (47 RT 9261.)

Waller also found four .30/.30 caliber casings—one in the living room, one at the junction of the living room and the kitchen, and two next to Fernando Martinez's body. (45 RT 8905.) When the detectives rolled Martinez's body over, they found a .30/.30 bullet between his eyes. (45 RT 8827, 8909.)

Armstrong examined the four .30/.30 caliber casings and concluded that all four were fired from the same rifle. (47 RT 9262.) Armstrong also examined two .30/.30 bullets—one recovered from Fernando Martinez's body and one recovered from Martha Morales's body. (47 RT 9266-9268, 48 RT 9404,

9417; see People's Exh Nos. 41, 42.) Both were consistent with being fired from a Martin Lever Action .30/.30 rifle. (47 RT 9271.)

Detectives did not find any .38 caliber casings. However, because .38 caliber bullets are typically used in a revolver, which does not automatically eject a casing, it is not unusual to find no .38 caliber bullets. (47 RT 9281-9282.) Five expended .38 caliber rounds were found—two under the bed and one in each victim's body. (46 RT 9014-9017, 47 RT 9283-84, 9291; 9306, 48 RT 9414-9417; see People's 82 (1), (2), 40(18DL), 41(19DL), 42(21DL).) Armstrong concluded that the same weapon fired the three bullets found in the victims, and one of the bullets found under the bed. (47 RT 9285A.)

Criminalist Julie Doerr examined the infant jacket and onesie that Alejandra was wearing when she was shot. (49 RT 9604; People's Exh. Nos. 67-B, 67-G.) There were holes in the jacket that corresponded with similar holes in the onesie. (49 RT 9605.) Doerr also examined one of the .38 caliber bullets that was recovered under the bed. (49 RT 9606A; People's Exh.. No. 82.) In the nose of the bullet, Doerr discovered green fibers. (49 RT 9607.) The fibers on the bullet were consistent with the fibers on the infant jacket, and Doerr believed it was "highly likely" that the bullet passed through the jacket. (49 RT 9613.)

Appellant's Statement

After these crimes occurred, appellant, Sanchez, and Nunez fled to Mexico. (50 RT 9803-9804, 9828; 4 Supp. CT 1038.) Lorenzo Nunez was arrested and charged with the homicides. (50 RT 9802-9803, 9828.) Nunez's defense investigator contacted Nunez's sister, Yolanda, and asked her to contact appellant in Mexico for help in proving Nunez's innocence. (50 RT 9803-9804, 9828.) He subsequently received a videotape from Bertha Sanchez. (50 RT 9805, 9828.) In the videotape, appellant indicated that he was making a

statement "in the hopes it will be of some use to Lorenzo Nunez Martinez because on the 16th day of November of 1994 we committed a—a crime but one in which Lorenzo Nunez did not—did not participate at all . . . ." (4 Supp. CT 1036.) Appellant admitted that he was at Ramon's house with Antonio Sanchez and Joaquin Nunez, but that they only went to the house because Sanchez "wanted to pick up some things that were left in the house." (4 Supp CT 1037.) According to appellant, they only took the guns because Ramon had previously threatened to kill Sanchez. (4 Supp. CT 1037.) Appellant claimed that when Ramon was lying on the floor, he pulled out a weapon, and "out of fear, we all shot . . . we shot really like crazy." (4 Supp. CT 1037-1038.)

Defense Case–Guilt Phase

Appellant's defense was that Ramirez was unbelievable, and, absent his testimony, there was no evidence that appellant was aware of any plan to burglarize, rob, or murder the Morales family. (See 52 RT 10265-10267, 10272-10275, 10281.) Appellant also disputed Ramirez's testimony that he was in possession of the .38 caliber gun Ramirez found in the kitchen, however, even if appellant had the gun, he did not have time, based on Ramirez's testimony, to go into the bedroom and load it before the shooting started. (See 52 RT 10277-10278.)

Ramirez admitted that he lied to the police, when he originally told them that appellant gave him one of the guns he found in the kitchen and gave the other one to Sanchez. (52 RT 8219, 8227.) Ramirez also admitted that he lied, when he first told the police that he was looking in the window, when he saw appellant with a gun in his hand. (42 RT 8217-8218.) He said that he did see appellant with a gun in his hand, but Ramirez was standing inside the doorway at the time. (42 RT 8217.)

Salinas police detective Joseph Gunter interviewed Ramirez on November 18, 1994. (50 RT 9852.) During that interview, Ramirez never said that they went to his friend's house on the night of the murders to get a weapon for appellant. (50 RT 9852-9853.) Nor did Ramirez state that they went to Guillermo Morales's house to kill him. (50 RT 9853.) District Attorney investigator Richard Moore interviewed Ramirez on October 31, 1995. (50 RT 9869.) As with Detective Gunter, Ramirez never told Moore that they went to a friend's house to get a gun for appellant, or that they went to Guillermo Morales's house to kill him. (50 RT 9869.) Ramirez did state that he was drunk at the time of the murders, and that no one intended to shoot the baby. (50 RT 9874.)[10/]

Jorge Acosta, the son of Bertha Sanchez, recalled the evening a few days before the murders when appellant, Sanchez, Joaquin Nunez, Lorenzo Nunez, and Ramirez were at his house. (50 RT 9835.) He recalled seeing Sanchez handling a rifle but did not see appellant handling any weapons that evening. (50 RT 9839-9840.)

On the evening of the murders, Acosta saw Sanchez, Joaquin Nunez, Ramirez, and appellant parked in appellant's car in front of his house. (50 RT 9886.) The men were drinking. (50 RT 9886.) Acosta asked if he could go along with them, although he did not hear any conversation about what they were going to do that night. (50 RT 9837-9838.) Acosta wanted to drive, because he was worried about how much the men, including appellant, had had

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10. Ramirez testified that he had three beers before noon. (41 RT 8065.) Sanchez and appellant bought two 12-packs of beer in the afternoon, and Ramirez had about six beers by the time they went to the firearms store. (41 RT 8065-8066.) He believed that everyone else in the car had consumed about the same amount of beer. (41 RT 8065-8066.)

to drink. (50 RT 9837.)[11] Acosta went inside to help his mother with the laundry, and when he came back outside, the men were gone. (50 RT 9838-9839.)

In Acosta's experience, when appellant got drunk, he was very friendly. (50 RT 9837.) Bertha Sanchez stated that when appellant got drunk, he was "[v]ery happy, a dancer." (43 RT 8429.) Appellant's sister, Elvia, stated that he was "happy" when he was drunk. (43 RT 8447.) Defense counsel argued that appellant's demeanor when he was drunk conflicted with the prosecutor's claim that appellant would intentionally harm anyone. (52 RT 10269, 10271)

Penalty Phase–Prosecution Evidence

Circumstances Of The Crime

Greg Avilez, an expert in crime scene reconstruction, examined the photographs, autopsy reports, and various items of evidence taken from the Moraleses' residence. (62 RT 12210, 12213.)

Based on the blood spatter and the bullet found in the two walls of the apartment, Avilez believed that Ramon Morales was lying flat on his back when he was shot. (62 RT 12221-12222.) His head was on the floor, and his left arm was covering his face. (62 RT 12225.) The shooter was located between the living room and kitchen, which was consistent with the location of multiple spent cartridges. (62 RT 12226.) Avilez believed, based on the location of other spent cartridges, that another shooter was standing near the front door. (62 RT 12227.)

Avilez believed that, at the time he was shot, Fernando Martinez was lying prone on the floor, resting his head on his hands. (62 RT 12235.) He had two

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11. Bertha Sanchez and Amy Arredondo also believed that appellant was drunk on the day of the murders. (43 RT 8429-8430, 8463.)

shots to the back of his head; one passed through and exited between his eyes, and one passed through the middle finger of his left hand. (62 RT 12231.) Martinez's pants were riding up at the ankles, leading Avilez to believe that he had been kneeling at some point before he was shot. (62 RT 12232.) There was stippling around a third bullet hole in Martinez's back, evidencing that the shot was close range. (62 RT 12237.) Avilez believed the person who shot Martinez in the back was standing between the living room and the kitchen. (62 RT 12239-12240.)

Avilez examined the comforter from the bed where Martha was found, the gunshot wounds to Martha's face and head, the infant's clothing, and the location of the mother and child when found by the police. (62 RT 12241-12243.) Avilez determined that Martha was likely holding Alejandra in her right arm when the shooting started. (62 RT 12253-12254.) Martha sustained a gun shot wound to her right shoulder, which passed into her chest, at the same time as the child was shot, which caused Martha to drop the child to the floor at her feet. (62 RT 12253-12254.) Alejandra's wounds were consistent with being held on her mother's hip; there was nothing to suggest that Alejandra was shot while she was on the floor. (62 RT 12254.)

Martha had an entrance wound on her forehead, with a corresponding exit wound in her chin, an entrance wound in her teeth, with a corresponding exit wound in her lower jaw, and an entrance wound in her right arm, in which the bullet passed into the chest cavity and lodged in the spine. (62 RT 12244.) At the time of the shooting, Avilez believed that Martha was crouching position, with her head leaning toward the shooter, holding Alejandra in her right arm, with Alejandra's head perpendicular to the floor. (62 RT 12246, 12267.)

Other Acts Of Violence Or Threat Of Violence

While awaiting trial, appellant was while housed in the isolation cells at the Monterey County jail. (59 RT 11671.) Upon being booked into the jail, each inmate is issued personal toiletry items, including a disposable razor for shaving. (59 RT 11650.)

On June 30, 1996, during a random search of appellant's cell, deputies found a dismantled razor blade, two pieces of wire, three buttons, and a string hidden in his jail-issued deodorant stick. (59 RT 11672.) They also found a second dismantled razor blade and a cut open toothbrush stuck under appellant's bed frame. (59 RT 11686.) On July 13, 1996, in another random search, deputies found a dismantled razor in a brown paper bag in appellant's cell. (59 RT 11693-11694.)

Deputy Fernando White explained that inmates often use altered razor blades to attack other people. According to Deputy White, the wires found in the deodorant stick could be used to melt his toothbrush to the razor blade for use as a weapon. (59 RT 11674-11675.)

Isolation inmates receive three hours of outside yard time per week. (59 RT 11657.) Isolation inmates are typically allowed in the yard individually, or with one other isolation inmate with whom they have no conflict. (59 RT 11701.)

On August 18, 1996, appellant was scheduled to go to the yard with prisoner Hernandez. (59 RT 11706.) Deputy Aaron Urquidez escorted Hernandez and appellant to the door leading to the yard. (59 RT 11709.) Urquidez raised his hand to the control room and Deputy Steve Sinor unlocked the door. (60 RT 11803.) Hernandez opened the door and went through, followed by appellant. (60 RT 11804.) Urquidez came through the door and turned around to make sure it latched behind him. (60 RT 11806.) As he turned, Urquidez was punched in the head. (60 RT 11806-11807.) He raised his arm to protect himself, and felt two more blows to the back of his head and

neck area. (60 RT 11807.) Before the second blow, Urquidez saw appellant in front of him with his fists raised. (60 RT 11807-11080.)

Urquidez called for help on his radio, and he saw appellant scaling a partition which led to the Work Alternative Program office. (60 RT 11810-11811, 11816-11818, 11859.) The office had access to the outside. (60 RT 11816-11818.) Urquidez and two other deputies entered the Work Alternative office and found appellant next to a desk near the back wall. (60 RT 11822, 11871.) Appellant did not resist as deputies apprehended him. (60 RT 11822.)

Deputies discovered a sheet wrapped around appellant's stomach. (60 RT 11872.) Inside the sheet was a blue watch cap and a pencil. (60 RT 11872.) Appellant also had a piece of paper in his pocket, which was written in Spanish and/or code. (60 RT 11875.)

Victim Impact Evidence

The parents of Martha and Fernando Martinez, Josephina Vasquez and Juan Martinez Gonzales, lived in Mexico at the time of the murders. (60 RT 11885.) They had seven children; Martha was the third child, and Fernando was the fourth child and second son. (60 RT 11886, 61 RT 12017, 12018.) Martha and Fernando were twenty-one and twenty years old, respectively, at the time of their deaths. (60 RT 11887.) Martha and Fernando both finished junior high school and then got jobs to help support the family. (60 RT 11889, 11916.)

Fernando was the "joker" in the family. (60 RT 11915-11916.) He had a playful personality. (61 RT 12019.) But he was very loving and worked hard to take care of his three-year-old daughter. (60 RT 11913, 61 RT 12030-12031.) Martha was a bit more serious; she was neat and orderly and would scold the other children if necessary. (61 RT 12020.) However, according to Martha's closest sister, Patricia Martinez Becerra, Martha was fun and generous. (61 RT 12026.)

Martha was working in a shoe factory when she met Ramon Morales. (60 RT 11893-11894, 61 RT 12027.) She started dating him in 1992. (60 RT 11897.) Martha confided in her sister, Patricia, but told no one else about her relationship. (61 RT 12027-12028.)

One Friday in early 1993, Martha did not come home from work. (60 RT 11897-11898.) She called her mother the next day, and told her not to worry. (60 RT 11898.) Eight days later, Martha returned home with Ramon and Ramon's mother. (60 RT 11899.) Martha and Ramon said that they were going to get married. (60 RT 11899.) Ramon and Martha seemed very happy together. (61 RT 12029.) A month or two later, on March 26, 1993, Martha and Ramon were married in a civil ceremony. (60 RT 11902.)

Martha became pregnant, and she and Ramon moved to California. (60 RT 11904, 61 RT 12032-12033.) They planned to work and save money to return to Mexico to buy a house. (60 RT 11909-11910.) Alejandra was born in California on December 29, 1993. (60 RT 11910.)

Martha called her family regularly from California. Her parents did not have a telephone, so she called the neighborhood store and someone would find her parents or siblings. (60 RT 11909.) When Martha spoke to Patricia after arriving in California, she told Patricia she was not comfortable in California. (61 RT 12033.) However, after Alejandra was born, Martha seemed much happier. (61 RT 12033.)

In November 1994, Martha told her mother that she and Ramon planned to return to Mexico in December. (60 RT 11911.) Martha wanted to have a double church wedding with her brother Sergio. (60 RT 11911, 61 RT 12021, 12034.)

Fernando moved to California in the summer of 1994, about four months before the murders. (60 RT 11913, 61 RT 12031-12032.) Fernando planned to work and save money to build a workshop and buy a truck. (60 RT 11913.)

Fernando's daughter stayed with his mother when Fernando moved to California. (60 RT 11913-11914.)

On November 17, the day after the murders, Martha's sister, Patricia went to the neighborhood store to answer a telephone call. (61 RT 12034-12035.) Patricia expected to talk to Martha or Fernando. (61 RT 12034-12035.) However, Ramon's sister-in-law, Erma, was on the phone and told Patricia that her brother and sister had been in an accident and they were in critical condition. (61 RT 12035-12036.) Patricia returned to her home to get her mother and father. (61 RT 12007, 12037.) They went to the store, and her father spoke to Erma. (61 RT 12007-12008.) Erma told Juan that Fernando and Martha had been killed. (61 RT 12010.)

Fernando and Martha's bodies were returned to Guadalajara for the funeral. (61 RT 12011.) However, the caskets had to be closed because the bodies were "deformed." (61 RT 12037.) Martha's father took the deaths the hardest. (61 RT 12037.) Since the murders, he started drinking a lot and had said that he wanted to kill himself. (61 RT 12013.)

After the murders, Alejandra was placed in foster care. Josephina and Juan tried to get custody of Alejandra, but they had been unsuccessful. (61 RT 12004-12005.) Josephina met her granddaughter for the first time when she came to California to testify in the trial. (60 RT 11918.)

At the time of the trial, Alejandra Morales was almost five years old. (64 RT 12705.) She was living in a special medical care foster placement, because she suffered from Rett's Syndrome. (64 RT 12706-12708.) Rett's Syndrome is a genetic condition in which Alejandra has little to no control over her muscles. (64 RT 12708.) She could not talk, chew, or control her hand movements. (64 RT 12708-12709.) She was unable to care for herself, and was self-abusive. (64 RT 12711.)

Patricia was pregnant at the time of the murders. (61 RT 12037.) She named her child, born February 26, 1995, Martha Fernanda, in honor of her brother and sister. (61 RT 12038.)

Ramon's mother, Magdalena Diaz, lived in Guadalajara, and had ten children. (61 RT 12038.) Ramon was her oldest child, and Guillermo was her second child. (61 RT 12039.) Both boys had the same father. (61 RT 12039.) When they were young, she and the boys lived together in Durango for approximately five years. (61 RT 12040.) Diaz got remarried and had eight girls with her second husband. (61 RT 12039-12040.) Diaz had a special relationship with Ramon. (61 RT 12044-12045.)

When Ramon was 13 years old, he stopped going to school and started working with his stepfather in his meat market. (61 RT 12040-12041.) Ramon was always generous and gave his mother the money he earned. (61 RT 12041.)

When he was 18, Ramon left home and moved to California. (61 RT 12042.) Ramon's uncles lived in San Jose. (61 RT 12042.) Ramon stayed in California for four or five years before returning to Guadalajara. (61 RT 12042-12043.) Diaz was sick, and Ramon stayed with her for four or five months. (61 RT 12043.) He returned to California for another four years. (61 RT 12044.) Finally, he returned to Guadalajara in October 1992, and planned to stay for his sister's wedding in December. (61 RT 12045-12047.)

While he was staying in Guadalajara, Ramon met Martha. (61 RT 12047.) Martha and Ramon came to stay with Diaz and Ramon was very happy. (61 RT 12047-12048.) After getting married, Martha and Ramon moved to California so they could make money to buy a house in Guadalajara. (61 RT 12050.)

Ramon seemed happy in California with Martha and Alejandra. (61 RT 12051.) He sent Diaz baby pictures not long before he died. (61 RT 12060.) She last spoke to Ramon the Monday before the murders. (61 RT 12054.)

Diaz learned about the murders from Martha's father. (61 RT 12056.) After Martha's father visited, her oldest daughter called Guillermo in California and he told her what happened. (61 RT 12057.)

Diaz could not see her son's body at the funeral because the injuries were too extensive. (61 RT 12059.)

Penalty Phase–Defense Evidence

Appellant's brother-in-law, Robert Reynoso, his brother, Luis Covarrubias, his sisters, Bertha Sanchez and Elvia Covarrubias, and his friend, Moises Diaz, testified that appellant was a good brother and friend. (63 RT 12403, 12408, 12412A, 12421A, 12430A.) He was friendly, respectful, loving, and a hard worker. (63 RT 12403, 12408-12409, 12413A, 12421A-12422A, 12431.) During the Loma Prieta earthquake, he volunteered his time and his truck to take food and clothing to displaced individuals. (63 RT 12404, 12408-12409.) When Reynoso had a kidney transplant, appellant helped during his recovery. (63 RT 12405.)

Appellant was married with four children. (63 RT 12424A-12425A.) He was a loving husband and father. (63 RT 12409, 12415A, 12423A, 12432-12433.) His friends and relatives indicated that if he were sentenced to life in prison, they would continue to support him. (63 RT 12405, 12410, 12426, 12434.)

Appellant presented transcriptions of the sworn questioning of four individuals in Mexico. The interviews were conducted by an attorney in Mexico, in front of a Mexican government official. (59 RT 11602-11604.)

Juan Manuel Avila Sanchez grew up with appellant in Mexico and last saw him in 1995. (4 Supp. CT 1002-1003.) Sanchez was unable to travel from Mexico to the trial because of work commitments. (4 Supp. CT 1002.) According to Sanchez, appellant was a calm, friendly, caring, and helpful

person. (4 Supp. CT 1003.) Appellant was unselfish and helped Sanchez when he needed money or had other problems. (4 Supp. CT 1003.) Appellant was loving, proper, and communicative with his children. (4 Supp. CT 1004.) Appellant never had problems with drugs or alcohol. (4 Supp. CT 1005.)

Juan Guadalupe Espinoza Flores was a neighbor of appellant's in Mexico and had known appellant for over 20 years. (4 Supp. CT 1006.) Flores was unable to travel to the United States in person because of a medical condition. (4 Supp. CT 1006.) Flores stated that he saw appellant every day when he lived in Mexicali, and appellant was well-behaved, helpful, educated, and friendly. (4 Supp. CT 1006-1007.) Appellant was unselfish, and was willing to help his friends. (4 Supp. CT 1007.) Appellant never hurt anyone or got into fights. (4 Supp. CT 1007.) Appellant's mother and brothers were good people. (4 Supp. CT 1008.) Flores saw appellant one Christmas with his children, and saw that he was caring toward his family. (4 Supp. CT 1008.) Flores never saw appellant using alcohol or drugs. (4 Supp. CT 1009.)

Martha Dominguez de Castro was another one of appellant's neighbors in Mexicali, and was also unable to travel due to health problems. (4 Supp. CT 1009-1010.) She had known appellant for over 15 years; he went to school with her children, and lived across the street. (4 Supp. CT 1010.) According to Castro, appellant was a calm, respectful, caring, and friendly boy. (4 Supp. CT 1010.) He was not selfish, helped his friends, and never hurt anyone. (4 Supp. CT 1010-1011.)

Maria Guadalupe Castro de Gonzalez was appellant's neighbor when they were both children. (4 Supp. CT 1014.) She was unable to travel because of her work and child care issues. (4 Supp. CT 1013.) Gonzalez saw appellant every day when they were growing up. (4 Supp. CT 1014.) Appellant was a normal, calm, friendly, caring, respectful person. (4 Supp. CT 1014-1015.) He was not selfish, helped his friends, and did not hurt anyone. (4 Supp. CT 1014-

1015.) On one occasion, Gonzalez saw appellant with his children. (4 Supp. CT 1015.) She saw him acting very lovingly toward his children. (4 Supp. CT 1015.)

Dr. Thomas Reidy, a forensic psychologist, examined appellant. (64 RT 12602-12609-12610.) He studied the adverse life factors in appellant's upbringing: he lived in poverty; he had no father figure; his mother was often absent because she was working to support the family; his older brother was murdered when he was seven or eight years old; his mother had a drinking problem; and his mother committed suicide when he was a young adult. (64 RT 12614-12615.) In addition, appellant first drank alcohol at age 14 with his mother and siblings, causing alcohol problems throughout his life. (64 RT 12616, 12618.) All these factors set the stage for disrupted attachments in appellant's early life. (64 RT 12615, 12617.)

Despite those disrupted attachments, however, appellant was compliant and responsible in school; he earned good grades and went to secondary education. (64 RT 12621-12622.) He never had any juvenile arrests, and had no significant adult criminal history beyond DUI's and suspended license violations. (64 RT 12623.) He established a long-term marriage, which was marred only by appellant's alcohol abuse. (64 RT 12622-12623.) Appellant had a pattern of helping people and volunteering. (64 RT 12624.) For example, he worked as a coyote bringing people across the border from Mexico, but he did not do it for profit. (64 RT 12625.) He did it only as a favor for family and friends. (64 RT 12625.)

Dr. Reidy tested appellant and concluded that he did not suffer from anti-social personality disorder and was not a psychopath. (64 RT 12626-12629.) Appellant had been able to hold a steady job as a seasonal laborer, and was able to display empathy, remorse, and sorrow. (64 RT 12629-12630.) Dr. Reidy believed that appellant's adverse life influences played a role in his drinking

problem, and his alcohol abuse, in turn, led to problems in his decision-making and judgment. (64 RT 12635.)

ARGUMENT

I.

THE COURT PROPERLY EXCUSED JURORS 11, 12, 16, 39, AND 50 FOR CAUSE (APPELLANT'S CLAIMS 1-3)[12/]

During jury voir dire, the court excused five jurors for cause, based solely on their written responses to the death-qualification questions on the jury questionnaire. Appellant contends that the court erred in failing to conduct oral voir dire of those five jurors. (AOB 51, 67, 78.) We disagree.

A. Jury Questionnaire

The court provided a 16-page questionnaire to the prospective jury. The relevant questions regarding death-qualification asked about the prospective jurors' views on the death penalty. (Questions 50-58; see 6 CT 1487-1488.) Question number 59 explained the difference between the guilt phase and penalty phase, described the meaning of "special circumstance," and explained the jury's duty in weighing aggravating and mitigating factors. The question continued:

> (A) Assume for the sake of this question only that, in the guilt phase, the prosecution has proved first degree murder beyond a reasonable doubt and you believe the defendant is guilty of first degree murder. Would you, because of any views that you may have concerning capital punishment, refuse to find the defendant guilty of first degree murder, even though you personally believed the defendant to be guilt [*sic*] of first degree murder, just to prevent the penalty phase from taking place?
>
> (B) Assume for the sake of this question only that, in the guilt phase, the prosecution has proven one or more special circumstances to be true beyond a reasonable doubt, and you personally believe the special circumstance(s) to be true. Would you, because of any views that you

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12. To the extent possible, we have consolidated our responsive arguments to appellant's issues. For ease of reference, we identify the corresponding argument number in the AOB.

may have concerning capital punishment, refuse to find the special circumstance(s) true, even though you personally believed it (them) to be true, just to prevent the penalty phase from taking place?

(C) Assume for the sake of this question only that the jury has found the defendant guilty of first degree murder and has found one or more special circumstances to be true and that you are in the penalty phase. Would you, because of any views that you may have concerning capital punishment, automatically refuse to vote in favor of the penalty of death and automatically vote for a penalty of life imprisonment without the possibility of parole, without considering any of the evidence of any of the aggravating and mitigating factors (about which you will be instructed) regarding the facts of the crime and the background and character of the defendant?

(D) Assume for the sake of this question only that the jury has found the defendant guilty of first degree murder and has found one or more of the special circumstances true and that you are in the penalty phase. Would you, because of any views that you may have concerning capital punishment, automatically refuse to vote in favor of the penalty of life imprisonment without the possibility of parole and automatically vote for a penalty of death, without considering any of the evidence, or any of the aggravating and mitigating factors (to which you will be instructed) regarding the facts of the crime and the background and character of the defendant?

(E) If your answer to either question C) or question D) was yes, would you change your answer if you are instructed and ordered by the court that you must consider and weigh the evidence and the above-mentioned aggravating and mitigating factors regarding the facts of the crime and the background and character of the defendant, before voting on the issue of penalty?

(F) Could you set aside your own personal feelings regarding what the law ought to be and follow the law as the court explains it to you?

(See 6 CT 1489-1491.)

Question 61 explained that "there is wide spectrum of possible evidence," and that "[i]t is important that you have the ability to approach this case with an open mind." The question continued:

Considering the above, assume a defendant was convicted of multiple premeditated murder during the course of a robbery and burglary as special circumstances which of the following would you do?

___ (a) No matter what the evidence was, always vote for the death penalty.

___ (b) Always vote for life without the possibility of parole.

___ (c) I would not automatically vote for either life without possibility of parole or the death penalty. I would consider all the evidence and vote my conscience.

(See 6 CT 1490.)

Question 62 stated:

If this case has a penalty phase, you will be instructed that you may consider factors in the defendant's background, such as his upbringing, emotional difficulties and possible substance abuse in deciding whether to impose the death penalty or life in prison without the possibility of parole.

A. Do you feel that those factors would be helpful to you in reaching a decision as to whether the death penalty or life in prison without the possibility of parole is the appropriate sentence?

B. Would you reject any of those factors automatically in deciding on a sentence?

(See 6 CT 1491.)

B. Applicable Law

Decisions of the United States Supreme Court establish the circumstances under which a prospective juror's views on the death penalty properly may serve as the basis for a challenge for cause. In *Witherspoon v. Illinois* (1968) 391 U.S. 510, 522 [20 L. Ed. 2d 776, 88 S. Ct. 1770], the United States Supreme Court held that a defendant cannot be sentenced to death if the jury that imposed the penalty was chosen by excluding prospective jurors for cause "simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." In *Wainwright*

> *v. Witt* (1985) 469 U.S. 412, 424 [83 L. Ed. 2d 841, 105 S. Ct. 844], the high court clarified its decision in *Witherspoon* and held that a prospective juror may be excluded for cause because of his or her views on capital punishment if those views would "'prevent or substantially impair'" the performance of his or her duties as a juror in accordance with the trial court's instructions and his or her oath. (Accord, *People v. Cunningham* (2001) 25 Cal.4th 926, 975 [108 Cal. Rptr. 2d 291, 25 P.3d 519].) But neither *Witherspoon* nor *Witt* requires that a prospective juror automatically be excused if he or she expresses a personal opposition to the death penalty. Those who firmly oppose the death penalty may nevertheless serve as jurors in a capital case as long as they state clearly that they are willing to temporarily set aside their own beliefs and follow the law. (*Lockhart v. McCree* (1986) 476 U.S. 162, 176 [90 L. Ed. 2d 137, 106 S. Ct. 1758]; accord, *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1146 [36 Cal. Rptr. 2d 235, 885 P.2d 1].)

(*People v. Avila* (2006) 38 Cal.4th 491, 529.)

The trial court is permitted to excuse a juror for cause, without oral voir dire, if the "prospective juror's answers to a jury questionnaire leave no doubt that his or her views on capital punishment would prevent or substantially impair the performance of his or her duties in accordance with the court's instructions and juror's oath." (*Id.* at p. 531.) A trial court's decision to exclude prospective jurors based solely on questionnaire answers is reviewed by this Court de novo. (*Id.* at p. 529.)

C. The Court Properly Excused Jurors 11, 12, 16, 39, And 50

Each of the challenged jurors' questionnaire answers expressed opposition to the death penalty and evidenced an intent to disregard the law due to such opposition. Their answers left "no doubt" that their opposition to the death penalty would impair their ability to effectively serve as jurors. (*People v. Avila, supra*, 38 Cal.4th at p. 531.)

1. Juror No. 11

Juror number 11 stated that she strongly opposed the death penalty, explaining, "I can't give life so why should I take it." (6 CT 1487.) She left question 59, (A) through (F), blank. In question 61, she indicated that she would not automatically vote for life or death, however in question 62(A), she wrote, "I could not vote to kill someone." (6 CT 1490.)

When the parties were discussing challenges for cause, the court stated, regarding juror number 11, "There were some inconsistent responses, but the juror said that they could not vote under any circumstances for the death penalty." (32 RT 6203.) The prosecutor agreed that the juror should be challenged for cause, and defense counsel submitted the issue. (32 RT 6204.) The court excused juror number 11 for cause. (32 RT 6204.)

The court properly excused juror number 11. Although she checked the box indicating that she would not automatically vote for the death penalty or for LWOP, she specifically wrote, in the next question, that she could not vote to kill someone. Appellant contends that these answers "created ambiguity and left doubt as to the juror's true feelings." (AOB 73.) However, Juror 11 also indicated that she strongly opposed the death penalty, that she could not give life so she could not take a life, and that she could only "judge" herself. (6 CT 1487, 1488.) Moreover, defense counsel's submission of the issue "does suggest counsel concurred in the assessment that the jury was excusable." (*People v. Schmeck* (2005) 37 Cal.4th 240, 262.) In failing to answer question 59, Juror 11 did not, at any point, profess an ability to set aside her personal feelings and follow the law. Juror 11's answers "when taken together . . . professed an opposition to the death penalty that would prevent [her] from performing [her] duties as a juror." (*People v. Avila*, *supra*, 38 Cal.4th at p. 532.)

2. Juror No. 12

Juror number 12 indicated that she opposed the death penalty and could not "actively make the decision to take a life." (6 CT 1508.) To question 59(C), she responded "yes"—indicating that she would automatically vote for life imprisonment because of her views on the death penalty. (6 CT 1510.) To question 59(E), she indicated that she would not change her answer even if instructed by the court on the proper weighing of aggravating and mitigating factors. (6 CT 1511.) In question 61, she stated that she would always vote for life without the possibility of parole. (6 CT 1511.) In question 62(B), she wrote "I can't support the death penalty," and subsequently indicated that she would not vote for it. (6 CT 1512.)

The court challenged juror number 12 for cause. Defense counsel objected to the challenge. (32 RT 6204.) The court stated, "The objection is noted. The Court will, nonetheless, excuse juror number 12 for cause based upon those responses." (32 RT 6204.)

The court properly excused juror number 12. She specifically indicated in two separate questions (59(c), 61), that she would always vote for life imprisonment regardless of the evidence. She similarly indicated that she could not actively make a decision to take a life and that she would not vote for the death penalty. She maintained her position even if instructed by the court to weigh the aggravating and mitigating factors. Her unequivocal answers demonstrated her inability to perform her duties as a juror.

Despite juror number 12's answers to those very specific death-qualification questions, appellant points out that she said that she could put aside her personal feelings and follow the law, and that she knew of no reason she could not be impartial to both sides. While in the abstract, juror number 12 might have felt that she could follow the law and be fair to both sides, her answers to the specific questions regarding her ability to impose a death sentence made it

clear that her ability to perform her duties would be substantially impaired. "Any juror who 'automatically' would vote in ways that precluded the death penalty would clearly be disqualified under *Witt*." (*People v. Avila*, *supra*, 38 Cal.4th at p. 531.)

3. Juror No. 16

Juror number 16, a correctional officer at Soledad state prison, stated that he strongly opposed the death penalty: "I believe that the death penalty should be abolished as there is no assurance that the state may not be killing an innocent person. . . . In addition to the above I feel the state does not have the right to take a life in revenge for the crime the person commits. I also feel it is not a deterrent to crime." (6 CT 1571.) Juror number 16 indicated that he would not automatically vote not guilty (59(A)), that he would not automatically find the special circumstances not true (59(B)), but that he would "probably" automatically vote for life imprisonment (59(C)). (6 CT 1573.) When asked in 59(E) whether he would change his answer to question 59(C) if the court instructed and ordered him to consider the aggravating and mitigating evidence, he responded, "possibly." (6 CT 1574.) When asked in question 59(F) whether he could put aside his own personal feeling, he said, "Yes–most probably." (6 CT 1574.) In question 61, he responded that he would "most probably vote for LWOP." (6 CT 1574.)

During challenges for cause, the following colloquy occurred:

> THE COURT: Juror number 16 states that he is a CTF captain; strongly opposes the death penalty; probably would disregard the evidence and vote for life without the possibility of parole under any circumstances, although the other questions were sufficiently within the ballpark of rationality and responsibility. But I can't say that it's a Court challenge for cause.
>
> MS. LOMBARDO: I would challenge him for cause, Your Honor. The potential juror says that his feeling is that the death penalty should be

abolished, that the State does not have the right to take a life. I oppose it completely. And he indicates that he would "possibly" follow the law; not even a commitment to follow the law in deciding this case. I would challenge him for cause.

MR. WEST: Well, I would—in his—in his 61, question 61, he says, "I would most probably vote for LWOP." I think that's an equivocation. I think a voir dire of this person needs to be done, because it seems to me to somewhat equivocate.

THE COURT: The request to challenge the juror for cause is granted. Number 16 is excused. Juror number 16 is excused for cause.

(32 RT 6205.)

The court properly excused Juror number 16. He consistently indicated that he was likely to vote for life imprisonment regardless of the evidence, and could not commit to following the law even if instructed by the court. While juror 16 could not say definitively that he would "always" vote for life imprisonment, he was adamant in his opposition to the death penalty. He "strongly opposed" the death penalty, believed that it should be abolished because there was no assurance that an innocent person would not be executed, because the state had no right to take a life, and because it was not a deterrent to crime. He stated that the death penalty was used too often and he "opposed it completely." (6 CT 1572.) When read in context of his very strong opinions against capital punishment, Juror 16's indications that he would very likely vote for life imprisonment regardless of the evidence demonstrated an inability to perform his duty as a juror. "Accordingly, the trial court did not err in excusing him for cause based solely on his responses to the jury questionnaire." (*People v. Avila*, *supra*, 38 Cal.4th at p. 533.)

4. Juror No. 39

Juror number 39 indicated that she was strongly opposed to the death penalty, stating, "In my opinion, man do [*sic*] not have the right to end a person

life." (7 CT 1844.) In response to question 59, she indicated that she would automatically vote for not guilty and for life imprisonment (59(A) & 59(C)), and had "mixed emotions," about finding the special circumstances to be true (59(B)). (7 CT 1846.) She had no opinion as to whether she would change her answers if instructed by the court. In response to question 61, she stated she would not automatically vote for either life without the possibility of parole or the death penalty. (7 CT 1847.) However, in response to question 62(A), she wrote, "I really don't feel that I am the right person for this case." (7 CT 1847.)

During challenges for cause, the court asked about Juror number 39. The prosecutor indicated that she would stipulate to a challenge for cause. (34 RT 6601.) Defense counsel submitted the issue, and the court excused Juror number 39. (34 RT 6601.)

The court properly excused Juror number 39. She stated that she would automatically vote not guilty and for LWOP because of her opposition to the death penalty. Although she subsequently checked the box indicating that she would not automatically vote for LWOP or the death penalty, she also expressly wrote that she did not have the right to end a life, and that she was not the right person for the case at bar. Again, defense counsel's submission of the issue demonstrates counsel's concurrence with the excusal. (*People v. Schmeck*, *supra*, 37 Cal.4th at p. 262.) When taken together, her answers unequivocally demonstrated that she would not be able to "put aside her pro-life bias," when voting on guilt or penalty. (*People v. Avila*, *supra*, 38 Cal.4th at p. 533.)

5. Juror No. 50

Juror number 50 stated that she strongly opposed the death penalty, based primarily on her religious beliefs. (8 CT 1991-1992.) She said that she would not automatically find a defendant not guilty or the special circumstances not true (59(A), 59(B)), but that she would automatically vote for life imprisonment

(59(C)). (8 CT 1993.) Her answer would not change even if instructed by the judge to consider the aggravating and mitigating factors, but she could set aside her own personal feelings and follow the law (59(E), 59(F)). (8 CT 1994.) In response to question 61, she indicated she would always vote for life without the possibility of parole. (8 CT 1994.)

> The following colloquy took place in discussing a challenge the cause:
>
> THE COURT: Juror Number 50, five zero, states unequivocally for religious reasons won't ever impose the death penalty.
>
> MS. LOMBARDO: Also says "Death penalty should not be used at all and would always vote for LWOP."
>
> MR. WEST: I would submit it.
>
> MR. LANDRETH: I would object to excuse—I'm sorry to contradict you, Mr. West. Page 13 of the questionnaire, he [*sic*] says he could set aside his personal feelings and follow the law as the Court explains it. And I think this entitles us to explore the possibility of rehabilitation.
>
> THE COURT: Based on the responses in the questionnaire, the Court is convinced that this juror would not, for religious reasons, ever impose the death penalty. The challenge for cause is granted over objection. Juror number 50 is excused for cause.

(34 RT 6207-6208.)

The court properly excused juror number 50. She consistently maintained that no matter what evidence was presented, she would automatically vote for LWOP based on her opposition to the death penalty. She indicated that she would not consider the death penalty even if instructed by the judge to weigh the aggravating and mitigating factors, and that, in her opinion, the death penalty should not be used "at all." (8 CT 1992.) As with juror number 12, she did indicate that *generally* she could put aside her own personal feeling and follow the law, and that she believed she could be fair to both sides. However, her answers to those questions which *specifically* inquired into her ability to

follow the law as it related to the death penalty demonstrated her inability to perform her duties as a juror. (*People v. Avila*, *supra*, 38 Cal.4th at p. 532.)

In sum, the court properly excused jurors 11, 12, 16, 39, and 50 without conducting oral voir dire. Appellant's claim should be denied.

II.

THE JURY QUESTIONNAIRE WAS SUFFICIENTLY SPECIFIC TO DETERMINE WHETHER THE JURORS COULD PERFORM THEIR DUTIES (APPELLANT'S CLAIM 4)

Appellant contends that the questionnaire used by the court was deficient because it failed to specifically ask whether a juror would adhere to his or her "oath." (AOB 90.) Despite the fact that, as discussed above, the questionnaire specifically asked the jurors if they would automatically vote for not guilty, not true, or for LWOP (Question 59; see 6 CT 1489-1491), appellant claims that the questionnaire was deficient. "This is so because a juror who is not willing to vote for a death sentence in the abstract may feel a civic or moral duty to faithfully follow the judge's instructions after taking an oath to do so." (AOB 90.)

The questionnaire, however, did not simply question the jurors about their willingness to impose a death sentence. The questionnaire also asked whether a juror might change his or her answer if "instructed and ordered" by the court to consider and weigh the evidence, and whether the juror could set aside his or her own personal feelings and follow the law "as the court explains it to you." The questionnaire sufficiently explored the juror's ability to perform his or her duties. (See *Wainright v. Witt* (1985) 469 U.S. 412, 424.)

Appellant apparently suggests that the questionnaire should have explained the content of the juror's "oath," in relation to the juror's ability to weigh the guilt and penalty phase evidence. However, appellant has cited no case in

which the word "oath," possesses some talismanic significance. Indeed, the oath given to the jury is not particularly informative regarding a juror's duties in a death penalty case. (See 8/18/98 RT 3 ["You and each of you do solemnly swear that you will well and truly try the matter in the issue between the People and the defendant and a true verdict rendered according to the evidence and instructions of the Court, so help you God"].) The concern in *Witt* was not the ability of the prospective jurors to affirm a particular "oath," but the ability of the prospective jurors to put aside their personal feelings and render a "verdict according to the evidence and instructions." (See 8/18/98 RT 3; *People v. Avila, supra*, 38 Cal.4th at p. 529 ["Those who firmly oppose the death penalty may nevertheless serve as jurors *as long as* they state clearly that they are willing to temporarily set aside their own beliefs and follow the law"], italics added.) Based on the questionnaire provided, the jurors understood that they were required to follow the law as instructed by the court, and were specifically asked if they could put aside their feelings and do so. The questionnaire was sufficient to determine whether a particular juror was death-qualified.

III.

THE COURT PROPERLY EXCUSED THE JURORS WITHOUT CONDUCTING ORAL VOIR DIRE (APPELLANT'S CLAIM 5)

Appellant contends that the court's failure to allow oral voir dire on juror numbers 11, 12, 16, 39, and 50 was error "even if the jurors' responses had been clear and unambiguous." (AOB 94.) Appellant apparently claims in any case where the defendant does not stipulate to excusal of the juror, the trial court is not permitted to excuse the juror based solely on the answers on the questionnaire. (AOB 94-95.) However, as discussed above, this Court has found that such a procedure is permissible. (*People v. Avila, supra,* 38 Cal.4th

at pp. 529, 531 [excusal of jurors, over defense objection, "based solely on questionnaire responses" was "correct"]; *People v. Stewart* (2004) 33 Cal.4th 425, 449 ["we need not and do not hold that a trial court never may properly grant a motion for excusal for cause over defense objection based solely upon a prospective juror's checked answers and written responses contained in a juror questionnaire"].) Further, as previously noted, in those cases where defense counsel "submits" the issue, appellant can be considered to have acquiesced in the excusals. Appellant provides no compelling reason for revisiting this Court's holdings.

IV.

THE COURT'S JURY SELECTION METHOD WAS PROPER (APPELLANT'S CLAIM 6)

The court outlined the procedure for jury selection: "[W]e'll be talking to groups of 18, basically, with the last six changing in the usual way. Cause challenges and peremptory challenges for those people will be done as we go. And cause challenges and peremptory challenges will be . . . begin bringing up new panels, so that we'll proceed in that manner." (27 RT 5218.) Defense counsel clarified: "[F]or the peremptory challenges, the Court is going to be asking us to exercise our peremptory challenges as each panel is questioned, . . . rather than waiting until we finish going over the entire panel for cause, is that right?" (27 RT 5220.) The court responded, "Right. It's a form of jury selection that we're all very familiar with." (27 RT 5220.) Defense counsel objected that he could not effectively exercise his peremptory challenges until the entire panel had been passed for cause. (27 RT 5221-5224.) The court overruled defense counsel's objection, noting, "I think you're confusing your ability to pick a jury of people who can give you a fair trial with your desire to hand pick a jury that is going to do what you want it to do." (27 RT 5223.)

Appellant subsequently filed a written objection to the procedure, which the court denied. (28 RT 5429.)

After the challenges for cause to the first panel of 18 jurors were completed, and the court was ready to begin peremptory challenges to the panel of 18, defense counsel objected, stating:

> Your Honor, there are approximately 15 members of this panel still out there who have not been examined for cause which—members of this particular panel, and from looking at those and reading the questionnaires that we have got, it makes—puts me, us in the impossible position of having to adequately judge these jurors and I would request that at the very least we be able to get the rest of these through with cause before we are required to exercise peremptory challenges.

(33 RT6537-6538.) The court denied appellant's request. (33 RT 6538.)

Appellant claims that the court's use of a variation of the "jury box" system of jury selection violated his federal constitutional right to a fair and impartial jury. (AOB 101.) As this Court has explained:

> Peremptory challenges generally are exercised under either of two methods. Under the "jury box" method, which is the system utilized in California, 12 prospective jurors are questioned, subjected to challenges for cause, and replaced until 12 qualified jurors remain. Both sides then exercise peremptory challenges. A juror removed by peremptory challenges is replaced by another juror, who is then questioned and challenged for both cause and peremptorily. This process continues until peremptory challenges have been exhausted or waived. [Citations.] Under the "struck jury" method, a large initial panel of prospective jurors is drawn and subjected to challenges for cause before peremptory challenges are exercised. If, after each side exercises its peremptory challenges, there remain more than 12 jurors, the court decides which 12 will constitute the jury. [Citations.]

(*People v. Avila*, *supra*, 38 Cal.4th at p. 537.)

Appellant recognizes that this Court has approved of the "jury box" system of jury selection (*ibid.*), but claims that even if a judge's ruling is "technically in compliance with state law, if the procedure effectively impairs counsel's ability to intelligently exercise peremptory challenges then there has been a

violation of the federal constitution." (AOB 101.) However, in *Avila*, this Court held that the jury box system complied with *both* the Code of Civil Procedure, *and* the Federal Constitution. (38 Cal.4th at p. 536.)

Moreover, appellant has not demonstrated that the trial court's variation on the jury box system prevented him "effectively" exercising his peremptory challenges. Appellant suggests that the method employed by the court made counsel's exercise of peremptory challenges "less informed" than it would have been under the "struck jury" method of selection. However, as this Court has explained, "[T]he fact that a particular procedure used may have made exercising initial peremptory challenges less informed does not in itself require reversal. [Citation.] A court commits reversible error if its procedures deny a party's right of peremptory challenge. [Citations.] But defendant here was not prohibited from exercising all of his allotted peremptory challenges; indeed, he exercised them all." (*People v. Avila*, *supra*, 38 Cal.4th at p. 538.)

Appellant's argument improperly equates "less informed" with "ineffective." Appellant was not denied the effective use of his peremptory challenges simply because another system might have been more advantageous. As early as 1894, the United States Supreme Court rejected a defendant's claim that his rights were violated because his ability to exercise his peremptory challenges was not as fully informed as it might have been under another system:

> The right of peremptory challenge . . . is not of itself a right to select, but a right to reject, jurors. . . . [I]n our opinion, the essential right of challenge to which the defendant was entitled was fully recognized. And there is no reason to suppose that he was not tried by an impartial jury. The objection that the government should have tendered to him the twelve jurors whom it wished to try the case, or that he was entitled to know before making his challenges the names of the jurors by whom it was proposed to try him, must mean that the government should have been required to exhaust all of its peremptory challenges before he peremptorily challenged any juror. This objection is unsupported by the authorities, and cannot be sustained upon any sound principle.

(*Pointer v. United States* (1894) 151 U.S. 396, 412; see also *United States v. Blouin* (2nd Cir. 1981) 666 F.2d 796, 798-799 ["Blouin cannot succeed in his claim simply by showing that he could, under some procedure, have made more effective use of his peremptories. If that were the test, the 'struck jury' system would be required, for it affords a more 'effective' opportunity for the use of peremptories than the 'jury box' system. The 'struck jury' system, however, is not required. Indeed, on balance it is not necessarily preferable to the 'jury box' system; it is merely different"].)

Here, the court did not prevent counsel from "rejecting" those particular jurors he did not feel would be appropriate for appellant's case; it simply prevented him from "selecting" his preferred jurors from the entire venire. (See *Pointer v. United States*, *supra*, 151 U.S. at p. 412; cf. *Knox v. Collins* (5th Cir. 1991) 928 F.2d 657, 661 ["Knox's *voir dire* affirmed his concern that several jurors misperceived the implications of Texas parole law on life sentences in a way that made them more likely to impose the death penalty. The trial court stated that it now could -- and would -- instruct on this law. Jurors Jacques and Smith declared that they would follow the law as instructed. Based on this, Knox forewent his right to strike them peremptorily. The unkept promise to instruct thus deprived Knox of a fair exercise of the peremptory challenges he was accorded by Texas law"], italics in original.) Appellant has not demonstrated that the court's jury selection procedure violated his constitutional rights and his claim should be denied.

V.

THE COURT PROPERLY REFUSED TO CONDUCT INDIVIDUAL VOIR DIRE (APPELLANT'S CLAIM 7)

Before jury selection, the court denied a request, by both the prosecutor and appellant, to conduct individual and sequestered voir dire for purposes of death

qualification. (26 RT 5006-5014.) Appellant contends that the court erred because group death qualification is unconstitutional. (AOB 105.) However, as appellant recognizes, this Court has previously rejected his claim. (*People v. Carter* (2005) 36 Cal.4th 1215, 1247-1248; see also *People v. San Nicolas* (2004) 34 Cal.4th 614, 633-634; *People v. Slaughter* (2002) 27 Cal.4th 1187, 1199; *People v. Waidla* (2000) 22 Cal.4th 690, 713.)

VI.

DEATH QUALIFICATION OF THE JURY IS CONSTITUTIONAL (APPELLANT'S CLAIM 8)

Appellant contends that the "death qualification" process of selecting a jury violates his federal and state constitutional rights to a trial by an impartial jury. (AOB 107.) As appellant recognizes, however, this Court has repeatedly rejected his claim. (*People v. Lenart* (2004) 32 Cal.4th 1107, 1120; see also *Lockhart v. McCree* (1986) 476 U.S. 162, 182-183; *People v. Steele* (2002) 27 Cal.4th 1230, 1242-1243; *People v. Jackson* (1996) 13 Cal.4th 1164, 1198-1199.)

VII.

THE COURT PROPERLY DETERMINED THAT APPELLANT SHOULD WEAR A STUN BELT (APPELLANT'S CLAIM 9)

Before the first jury selection, a sheriff's deputy submitted a memorandum to the court, indicating that he intended to use the R.E.A.C.T. (Remote Electronically Activated Control Technology) belt security system on appellant during the trial. The belt contained 50,000 volts of electricity, which could be used to stun the wearer if he or she were to make aggressive or violent movements during the trial. The sheriff provided, as Court Exhibit 1, a packet

of materials detailing appellant's disciplinary reports from the jail, as well as explanatory material regarding the stun belt system. (3 Supp. CT 823-851.)

According to the disciplinary reports, on December 13, 1995, appellant yelled at Jose Luis Ramirez in the booking area. (3 Supp. CT 824.) On February 11, 1996, appellant became argumentative and hostile, kicking and banging on his cell door, when he was told he could not be moved to another cell. (3 Supp. CT 830.) On June 30, 1996, deputies found, in appellant's cell, "a broken toothbrush, with a groove cut into one end about the width of a razor blade, and a blade portion of a dismantled razor." (3 Supp. CT 825.) Deputies also found a second blade portion of a razor, three pieces of wire, and a broken jumpsuit button. (3 Supp. CT 825.) On July 13, 1996, deputies found several more dismantled razors in appellant's cell. (3 Supp. CT 826.)

On August 18, 1996, appellant "assaulted a deputy and escaped while being escorted to yard." (3 Supp. CT 834.)

On January 14, 1997, appellant was discovered acting suspiciously near a day room door, and was in possession of a straightened paper clip. Appellant admitted that he was trying to pick the lock of the day room door. (3 Supp. CT 828.)

After the court reviewed the disciplinary reports and the information about the stun belt, defense counsel objected to the use of the stun belt, pointing out that there had been no trial on the incidents at the jail, and that, even if the incidents were true, appellant had posed no security risks during his many court appearances. (10 RT 1816-1817.)

The court responded:

> I understand that, in addition to the written material and that description of the system, that the bailiff staff has procured clothing to include a number of different blazers and jackets that will cover this belt and that it will not be apparent to the jury.

With respect to previous appearances in court and lack of problems, Mr. Covarrubias has always been shackled, hand and foot, when he's been brought to court. The problem we face with a jury format is that, in order to avoid any untoward appearance of dangerousness or likelihood of fleeing, we will not be having Mr. Covarrubias restrained. He will be dressed in civilian clothes, and we will make every effort to remove any aura of a custody defendant from his appearance in court. It seems to me that the use of the belt is legitimate and reasonable insurance policy against him taking action towards escape or towards assaulting anybody or anything of that nature.

I will specifically instruct the bailiff that the—and of course the bailiff knows this already—that the system is not to be activated unless there's some kind of emergency going on. If he scratches his nose or makes a sudden movement, if it doesn't amount to something really serious of course, there will be no problem and no action will be taken.

But subject to clothing being supplied that will make this thing innocuous, I don't see any prejudicial effect to its use. It actually will serve as a benefit I think in the sense that it will dissuade the defendant from any thoughts of taking actions that might jeopardize his own position with respect to the jury.

So tentatively at this point the Court intends, based upon the indications of the previous incidents, the indications of previous actions that this defendant has taken raise a serious concern as to the viability of having him completely unrestrained in the courtroom. And normally we would have to go through the usual balancing process between the implication of the Court's concerns about his dangerousness balanced against that actual dangerousness itself, but with this system we may be able to avoid that by having the system be innocuous. If that's the situation, I don't really see any reason not to use it. If it appears that we can't put the system on without having it be obvious, than at least that issue is raised and we'll have to deal with it. But my understanding is that we can clothe this man so that the belt is not apparent.

(10 RT 1817-1820.)

Defense counsel indicated that, if the stun belt becomes a problem, he wished to reserve the right to raise the issue again. The court agreed. (10 RT 1820-1821.)

Before the second jury selection, defense counsel once again raised the issue for the record: "I have no doubts about this Court's judgment about the use of the react system; however, I just again want to note for the record again that I think there are less invasive ways to do it, and I'm just noting my objection for the record." (27 RT 5211-5212.)

In *People v. Mar* (2002) 28 Cal.4th 1201, this Court held that the legal principles articulated in *People v. Duran* (1976) 16 Cal.3d 282, govern "the trial court's decision to compel a defendant in a criminal case to wear a stun belt." (28 Cal.4th at p. 1219.) Pursuant to *Duran*, in order to require any type of restraints in the courtroom, there must be a showing on the record that there is a "manifest need" for the restraints. (*Id.* at pp. 1217, 1219.) "The requirement is satisfied by evidence that the defendant has threatened jail deputies, possessed weapons in custody, threatened or assaulted other inmates, and/or engaged in violent outbursts in court." (*People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1031.) The court must make an independent determination of the need for the restraints, and its determination shall be upheld absent a manifest abuse of discretion. (*People v. Mar, supra*, 28 Cal.4th at pp. 1217, 1219.)

Here, the record demonstrates that, shortly before trial, appellant was involved in two escape attempts, one of which resulted in violence to a deputy. Appellant also engaged in defiant behavior and hid homemade weapons in this cell. Based on this evidence, the court did not abuse its discretion in finding that appellant posed a security risk demonstrating a manifest need for some type of restraints.

Appellant contends that the court made no express, on-the-record finding of "manifest need" for restraints. (AOB 115.) However, the court considered the disciplinary reports and expressed, on the record, its "serious concern as to the viability of having [appellant] completely unrestrained in the courtroom."

(10 RT 1819.) The court found that, based on appellant's prior escape attempts and violence toward deputies, "the use of the belt is legitimate and reasonable insurance policy against him taking action towards escape or towards assaulting anybody or anything of that nature." Even if the court failed to make an express finding of "manifest need," the use of some type of restraint was justified by the circumstances appearing on the record.

Appellant complains that the court's determination that restraints were warranted was based on hearsay. (AOB 118-119.) However, while a "trial court's decision to physically restrain a defendant cannot be based on rumor or innuendo . . . a formal evidentiary hearing is not required." (*People v. Lewis and Oliver*, *supra*, 39 Cal.4th at p. 1032.) The court read and considered documentary evidence describing appellant's behavior while in custody. The documents were relied upon by the jail in taking disciplinary action against appellant. Appellant was provided with a board review of the most serious infractions, and found to be guilty. (3 Supp. CT 824-828.) After being found guilty, he was advised of his appellate rights. (3 Supp. CT 824-828.) At no time did defense counsel indicate that appellant had appealed the findings, or provide any evidence which contradicted the board findings. Indeed, appellant admitted that he was trying to pick the day room lock with a paper clip. (3 Supp. CT 828.) The record provided reliable evidence from which the court could determine the need for restraints. (See *People v. Medina* (1995) 11 Cal.4th 694, 731 [court properly relied on prosecutor's uncontradicted description of defendant's prior escape attempts and courtroom outbursts]; cf. *People v. Cox* (1991) 53 Cal. 3d 618, 652 [error to base shackling order on "rumor and innuendo," including defense counsel's vague reference to a possible escape attempt].)

Finally, appellant contends that the court failed to consider whether the stun belt was the least restrictive method of shackling him. The court found that

there was a manifest need for restraints, and further found that because the stun belt would not be visible, it was the least intrusive means of restraint. Notably, while defense counsel objected to the use of the stun belt, he did not suggest that he would prefer visible shackles. Defense counsel primarily argued that there was no need to shackle appellant at all.

Appellant, citing *Mar*, points out that the court failed to consider the "potential adverse psychological consequences" of wearing a stun belt (28 Cal.4th at p. 1228) and failed to do a "careful evaluation of [the belt's] design (28 Cal.4th at p. 1230). However, appellant's trial took place before this Court's decision in *Mar*. It was only after that decision that it became clear that trial courts should not simply assume that the stun belt, because it was not visible, was the least intrusive means of restraint. As the *Mar* court indicated, its direction to the trial courts to take into account "a number of distinct features and risks concerning the use of a stun belt," was provided for courts that "may be faced with a question regarding the use of a stun belt in *future* trials. . . ." (28 Cal.4th at pp. 1225-1226, italics added; see also *id.* at p. 1230 ["Before a trial court approves the use of such a device in the *future*, the court must consider the foregoing factors and may approve the use of a stun belt only if it determines that the use of the belt is safe and appropriate under the particular circumstances"], italics added.) The trial court here cannot be faulted for failing to anticipate the promulgation of new considerations for future trials.

In any event, any error by the court in failing to consider the adverse psychological consequences or the necessary design of the belt was harmless. In *Mar*, this Court left open the question of whether such error was subject to state law harmless error analysis (*People v. Watson* (1956) 46 Cal.2d 818, 836), or federal constitutional harmless error analysis (*Chapman v. California* (1967) 386 U.S. 18, 24). (28 Cal.4th at p. 1225, fn. 7.) Under either standard, however, there is nothing in the record to suggest that the use of the stun belt

had any effect on the trial. Appellant was not shocked, inadvertently or otherwise, the jury did not see the device, appellant did not testify, and the evidence was not close. (Cf. *People v. Mar*, *supra*, 28 Cal.4th at p. 1225 [error found to be prejudicial based on "the relative closeness of the evidence, the crucial nature of defendant's demeanor while testifying, and the likelihood that the stun belt had at least some effect on defendant's demeanor while testifying"].)

The guilt phase evidence was overwhelming. There was no dispute that appellant, at the very least, aided and abetted the murders. Ramirez's testimony demonstrated that appellant was part of the plan to enter the Morales home, rob the occupants, and kill any witnesses. Ramirez's testimony was corroborated by the physical evidence, and by appellant's own admissions. The only substantial dispute was whether appellant was actually aware of his companions' plans, and whether he actually used a weapon.

Appellant did not testify regarding any of the events, or provide a plausible alternate version of any disputed facts. (Cf. *People v. Mar*, *supra*, 28 Cal.4th at p. 1224 [defendant's demeanor was crucial to case because his testimony provided an alternate scenario that was "not absurd or inherently implausible"].)[13/] Unlike the situation in *Mar*, where the case was based on the credibility of the prosecution witnesses versus the credibility of the defendant, the case here was not based solely on one prosecution witness's testimony. While Ramirez's testimony was the main prosecution evidence, it was supported by substantial physical and testimonial corroborative evidence.

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13. Appellant contends that he denied intending to kill the Moraleses in his video statement. (AOB 131.) However, appellant never disavowed any intent to shoot the victims; he claimed that "we all shot" because Ramon had a gun. Someone who kills in self-defense often harbors an intent to kill, but also has an actual and reasonable fear of imminent death or great bodily injury, which justifies the homicide. (See CALJIC No. 5.12.)

Appellant contends that "the jurors will observe and consider the defendant's demeanor during the trial even if the defendant does not testify," and the stun belt "adversely affected appellant's ability to 'maintain a positive demeanor before the jury.'" (AOB 131.) However, appellant has not suggested how, if at all, his demeanor during the guilt phase was affected by the stun belt. There is nothing the in record to suggest that appellant did not have a "positive" attitude during the trial.

Nor is there anything in the record which suggests that appellant was not able to "concentrate on the testimony," or was prevented from exercising his right to confront the witnesses against him. (AOB 130, 132.) While this Court recognized that the use of a stun belt might "impair the defendant's ability to think clearly, concentrate on the testimony, communicate with counsel at trial, and maintain a positive demeanor before the jury" (*People v. Mar*, *supra*, 28 Cal.4th at p. 1226), there must appear on the record some evidence that those impairments actually occurred in this case. As this Court noted, "the psychological effect" of wearing a stun belt "may vary greatly depending upon the personality and attitude of the particular defendant . . . ." (*Ibid.*) Indeed, the defendant in *Mar*, "in objecting to being required to testify while wearing a stun belt, clearly stated that the device made it difficult for him to think clearly and that it added significantly to his anxiety. . . ." (*Id.* at p. 1224.) Here, aside from counsel's general objections before the start of jury selection, appellant never raised the issue again or provided the court with any specific impairments he was suffering as a result of wearing the stun belt.

The court properly found, based on appellant's violent behavior and escape attempts in jail, a manifest need for some kind of restraint during trial. The court's determination that the non-visible nature of the stun belt was preferable to visible shackles was not an abuse of discretion. Appellant's claim should be denied.

VIII.

THE COURT PROPERLY INSTRUCTED THE JURY ON THE ELEMENTS OF ROBBERY (APPELLANT'S CLAIMS 10-12)

Appellant makes three claims of instructional error based on the theory that he had a "claim of right" defense to the robbery charges. (AOB 152-154, 180, 195.) The court instructed the jury with CALJIC No. 9.40 as follows:

> The defendant is accused in Counts 6, 7, 8 of having committed the crime of robbery, a violation of Section 212 of the Penal Code.
>
> Every person who takes personal property in the possession of another against the will and from the person or immediate presence of that person accomplished by means of force or fear and with the specific intent to permanently deprive that person of the property is guilty of the crime of robbery in violation of Section Penal Code Section 212.
>
> Immediate presence means an area within the alleged victim's reach, observation or control, so that he or she could, if not overcome by violence or prevented by fear, retain possession of the subject property.
>
> Against the will means without consent.
>
> In order to prove this crime, each of the following elements must be proved:
>
> One, a person had possession of property of some value, however slight;
>
> Two, the property was taken from that person or from his or her immediate presence.
>
> Three, the property was taken against the will of that person.
>
> Four, the taking was accomplished either by force or fear.
>
> And five, the property was taken with the specific intent permanently to deprive that person of the property.

(53 RT 10464-10465; 5 CT 1307-1308.)

According to appellant, the evidence demonstrated that he and the others went to the Morales home in order to get some items that belonged to Sanchez. Thus, because Sanchez was merely trying to regain his own possessions, the jury should have been informed that the felonious intent required for robbery could be negated where the property belongs to the perpetrator. Specifically, appellant claims that CALJIC No. 9.40, as given, was erroneous because it did not require the jury to find that appellant took the property "with the specific intent permanently to deprive *the owner* of the property." (AOB 153-154.) Second, appellant claims that CALJIC No. 9.40 should have included a requirement that a robber must take property that "was not his own." (AOB 185.) Finally, appellant contends that the court had a sua sponte duty to instruct the jury with an affirmative claim of right defense. (AOB 195.)[14/]

Appellant's first two claims regarding the propriety of CALJIC No. 9.40 fail because they incorrectly elevate the claim of right *defense* to the level of an element of the offense itself. To the contrary, absence of a claim of right is not an element, and the courts have indicated as much by consistently ruling that a trial court need not instruct on the claim of right defense unless there is substantial evidence suggesting that the defense may be applicable. As this

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14. CALJIC No. 9.44, which was added in 2000, provides:

> An essential element of the crime of robbery is a specific intent permanently to deprive the alleged victim of his or her property. That specific intent does not exist if the alleged perpetrator had a good faith claim of right to title or ownership of the specific property taken from the alleged victim. In other words, if a perpetrator seeks to regain possession of property in which he honestly believes he has a good faith claim of ownership or title, then he does not have the required criminal intent.
>
> If, after a consideration of all the evidence, you have a reasonable doubt that defendant possessed the required specific intent, you must find him not guilty of the crime of robbery.

Court explained in *People v. Tufunga* (1999) 21 Cal.4th 935, 944, "'[A] trial court is not required to instruct on a claim-of-right defense unless there is evidence to support an inference that [the defendant] acted with a subjective belief he or she had a lawful claim on the property.' [Citation.]" (See also *People v. Barnett* (1998) 17 Cal.4th 1044, 1145; *People v. Romo* (1990) 220 Cal.App.3d 514, 519; *People v. Hendricks* (1988) 44 Cal.3d 635, 642 [holding that defendant was not entitled to instruction on a claim of right defense]; *People v. Gates* (1987) 43 Cal.3d 1168, 1182 [same]; *People v. Johnson* (1991) 233 Cal.App.3d 425, 457-458 [same]; *People v. Alvarado* (1982) 133 Cal.App.3d 1003, 1020-1022 [finding insufficient evidence to support instructing on claim of right defense].)

For purposes of robbery, the claim of right defense effectively serves as a mitigation or justification for the defendant's resort to self help; even though the defendant may have the requisite intent to permanently deprive, we deem that the taking is not culpable if the defendant successfully asserts that he or she was acting in good faith under a claim of right. (See, e.g., *State v. Mejia* (N.J. 1995) 662 A.2d 308, 318, overruled on another ground in *State v. Cooper* (1997) 700 A.2d 306, [noting that in fact "claim of right is not premised on a failure of proof, but on justification."].)[15/]

Indeed, appellant's suggestion that the robbery elements should include a specific intent to permanently deprive "the owner" of property is an incorrect

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15. The *Mejia* Court clears up the confusion inherent in most claim of right cases as to whether the defense is negating an element or presenting a justification. The *Mejia* Court notes that in jurisdictions in which the robbery statute requires as an element that the property taken must be the property "of another," actual ownership by the defendant serves to negate an element of the offense, namely that he took the property "of another." By contrast an assertion that the defendant had a good faith belief that he had a claim to the property is presented as a justification for his actions (essentially a request that society find his actions non-culpable). (*State v. Mejia, supra*, 662 A.2d at p. 318.)

statement of the law. Penal Code section 211, enacted by the Legislature in 1872, provides that robbery is the felonious taking of "personal property *in the possession of another* . . ." rather than "personal property of another." (Compare Pen. Code, § 484 [theft is the taking of "the personal property of another]; see also *People v. Butler* (1967) 65 Cal.2d 569, 577, overruled in part by *People v. Tufunga*, *supra*, 21 Cal.4th 935, (dis. opn. of Mosk, J.) ["It is significant that the section requires the taking be from the *possession* of another, and makes no reference whatever to *ownership* of the property"]; *People v. Hamilton* (1995) 40 Cal.App.4th 1137, 1143 ["As a rule, robbery may be committed against a person who is not the owner of property—indeed, it may be committed against a thief"].)[16/]

Similarly, even if the jury had been instructed, as appellant suggests, that a person must take property "not his own," the jury would have found that element to have been met. The alleged property was not appellant's "own," it was Sanchez's. Even if appellant believed that *Sanchez* had the right to take back his own property, appellant intended to take the "personal property of another," from the "possession of another." (See Pen. Code, §§ 484, 211.)

Thus, because a claim-of-right is an affirmative defense to robbery, and because appellant's suggested modifications to the elements of the crime were incorrect and unnecessary, the trial court had no sua sponte duty to modify the

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16. In *In re Andre R.* (1984) 158 Cal.App.3d 336, 341-342, the court discussed the difference between elements of an offense and mitigating defenses. (See also *ibid.* [discussing the rule of necessity and convenience which notes that burden of establishing an exonerating fact is properly placed on the defendant when the existence of that fact is "'peculiarly' within his personal knowledge"]; *People v. George* (1994) 30 Cal.App.4th 262, 275-276 [discussing defenses]; see generally *Patterson v. New York* (1977) 432 U.S. 197, 202 [addressing distinction between statutory elements and affirmative defenses and noting that at common law, "'all . . . circumstances of justification, excuse or alleviation'--rested on the defendant"]; *Martin v. Ohio* (1987) 480 U.S. 228 235-236 [discussing *Patterson*].)

standardized jury instructions. (See *People v. Daya* (1994) 29 Cal.App.4th 697, 714 ["defendant is not entitled to remain mute at trial and scream foul on appeal for the court's failure to expand, modify, and refine standardized jury instructions"].)

Appellant's third claim—that the court was required to instruct on the affirmative claim of right defense—fails because there was no evidence supporting a claim-of-right defense. As discussed above a "'trial court is not required to instruct on a claim-of-right defense unless there is evidence to support an inference that [the defendant] acted with a subjective belief he or she had a lawful claim on the property.'" (*People v. Tufunga*, *supra*, 21 Cal.4th at p. 944, citing *People v. Romo*, *supra*, 220 Cal.App.3d at p. 519.)

Here, although there was evidence, according to appellant, that he went to the Morales house to get some items that belonged to Sanchez, there was no evidence that the property that was *actually stolen* from the Moraleses' home was the property that belonged to Sanchez. Indeed, appellant stated that Sanchez was looking for his belongings, but "didn't find them." (4 Supp. CT 1037.) According to appellant, Ramirez was "looting the house . . . grabbing the things and leaving with them. . . ." (4 Supp. CT 1037.) There is absolutely no evidence that the various pieces of property taken from the house—the VCR, the stereo equipment, the necklace, the handguns, and the hair oil—were Sanchez's missing property. Nor is there any evidence that Sanchez instructed Ramirez to take the items as repayment for his missing things. (Cf. *People v. Butler*, *supra*, 65 Cal.2d at pp. 573-574.)[17/]

Thus, even if the jury believed that Sanchez was intending to find and take his own belongings, the items that were actually taken did not belong to

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17. See *People v. Sakarias* (2000) 22 Cal.4th 596, 622 [the rule announced in *Tufunga*, overruling *Butler,* is not to be given retroactive application].)

Sanchez. For that reason, appellant was not entitled to have the jury instructed on the claim of right defense as to the robbery, burglary, or murder charges—whether by a modification of CALJIC 9.40 or the giving of a special defense instruction.[18/]

The only possible charge for which a claim-of-right could have been a defense was the conspiracy charge. For example, if the jury believed that appellant's only plan, before entering the house, was to recover Sanchez's property, it could have found that appellant did not enter into a conspiracy to rob or burglarize the Moraleses.

However, appellant has not demonstrated that a claim-of-right defense would apply to a third party who recovers property for the owner. *Tufunga* did not specifically address whether the claim-of-right defense applies to individuals other than the property's owner. However, this Court in *Tufunga* recognized the "strong public policy considerations" of "discouraging the use of forcible self-help," and strictly and narrowly construed the claim-of-right defense. (21 Cal.4th at pp. 950, 953.) Here, there is no suggestion that appellant was the owner of the property, and Sanchez's request for assistance in regaining his property did not equate to granting appellant an ownership interest in the property. Society's interest in deterring violent self-help dictates that the defense should not be extended beyond the person who claims ownership of the property to the one who aids and abets that owner. (See *People v. Barnett*, *supra*, 17 Cal.4th at p. 1144 ["As several courts have

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18. The fact that the jury could have found that appellant formed the intent to aid and abet Ramirez's robbery only *after* entering the house does not provide a defense to the burglary charge. "[A] person who, with the requisite knowledge and intent, aids the perpetrator, may be found liable on a theory of aiding and abetting if he or she formed the intent to commit, encourage, or facilitate the commission of a burglary prior to the time the perpetrator finally departed from the structure." (*People v. Montoya* (1994) 7 Cal.4th 1027, 1050-1051.)

observed, the proposition that a claim of right negates the felonious intent in robbery '"not only is lacking in sound reason and logic, but it is utterly incompatible with and has no place in an ordered and orderly society such as ours, which eschews self-help through violence . . . ."'[Citations.]"].) To hold otherwise is to condone the situation that occurred here: a group of four armed individuals enter another's home, uninvited, resulting in three deaths, based on one individual's belief that certain property is allegedly in the victim's possession.

Finally, any error in failing to give claim-of-right instructions as to the conspiracy charge was harmless beyond a reasonable doubt. (*Chapman v. California, supra*, 386 U.S. at p. 24.) There was substantial evidence, as testified to by Ramirez, that appellant, along with the others, planned to rob and kill the Moraleses. Moreover, there was physical and testimonial evidence corroborating Ramirez's testimony. Appellant attacks Ramirez's testimony as being unreliable, however, the guilt verdicts on the robbery charges demonstrate that the jury believed Ramirez to the extent that appellant had the intent, at the very least, to aid and abet him in his robbery of the VCR, stereo equipment, handgun, necklace, and hair oil. More importantly, the guilt verdicts on the robbery charges indicated that the jury necessarily disbelieved appellant's self-serving, uncross-examined, and uncorroborated statement that "we didn't know what was going to happen." (52 RT 10270.)[19]

Appellant claims that his "disavowal of intent to steal was corroborated" by the fact that items of value—"3 handguns, a Taser gun, five boxes of

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19. Appellant apparently contends that the prosecutor did not dispute the fact that appellant had no intent to steal because she "acknowledged" that the videotape was "accurate and complete." (50 RT 9820; AOB 162-163.) However, the prosecution was arguing that the videotape (and its translation) was "accurate and complete," for foundational purposes (50 RT 9818-9823.) She never conceded that the contents of appellant's statements were true.

ammunition, jewelry, a television set, and $378 in cash"—were left in the house. (AOB 163.) However, the fact that, because the shooting began, Ramirez had no opportunity to steal additional items does not contradict any intent to steal. Indeed, Ramirez never claimed that they intended to take *all* of Ramon's valuable items—just that they were going to get some drugs and steal "stuff." (41 RT 8007.)

Finally, the prosecutor did not argue that if the jury believed appellant's story, it could still find him guilty of conspiracy. The prosecutor simply argued that appellant's statement regarding his knowledge and intent was not worthy of belief. (See *People v. Demetrulias* (2006) 39 Cal.4th 1, 23.) Based on the substantial evidence demonstrating appellant's guilt, and the scant evidence supporting his claim-of-right defense, "any error in failing to give the requested claim-of-right instruction was harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.)" (*People v. Demetrulias*, *supra*, 39 Cal.4th at p. 24.)

IX.

THE COURT WAS NOT REQUIRED TO GIVE A UNANIMITY INSTRUCTION (APPELLANT'S CLAIM 13)

Appellant claims that, although he was charged with one robbery for each victim, there were four distinct takings alleged as to each victim: (1) the VCR and stereo equipment taken by Ramirez and put in appellant's car; (2) the .32 handgun that Ramirez took with him when he fled, (3) the necklace and hair oil that Ramirez took with him when he fled; and (4) the two handguns that appellant took out of the locked box in the kitchen. (AOB 207-208). Appellant claims that the court erred in failing to instruct the jury that it had to

unanimously agree on the specific taking which constituted the robberies alleged in counts six, seven, and eight. (AOB 206-207.)[20/]

"[W]hen the evidence suggests more than one discrete crime, either the prosecution must elect among the crimes or the court must require the jury to agree on the same criminal act. [Citations.]" (*People v. Russo* (2001) 25 Cal.4th 1124, 1132.) However, the "unanimity instruction is not required when the acts alleged are so closely connected as to form part of one transaction." (*People v. Stankewitz* (1990) 51 Cal.3d 72, 100.) "The 'continuous conduct' rule applies when the defendant offers essentially the same defense to each of the acts, and there is no reasonable basis for the jury to distinguish between them." (*Ibid.*)

Here, the evidence demonstrated that, although multiple items were taken, there was but one robbery at the Moraleses' home. (See *People v. Brito* (1991) 232 Cal. App. 3d 316, 326, fn. 8 ["When a defendant steals multiple items during the course of an indivisible transaction involving a single victim, he commits only one robbery or theft notwithstanding the number of items he steals"]; *People v. Turner* (1983) 145 Cal.App.3d 658, 681, overruled on other grounds in *People v. Newman* (1999) 21 Cal.4th 413 and *People v. Majors* (1998) 18 Cal.4th 385, ["Robbery is not confined to a limited period since it

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20. CALJIC No. 17.01 provides:

> The defendant is accused of having committed the crime of [crime] in Count [___]. The prosecution has introduced evidence for the purpose of showing that there is more than one [act] [or] [omission] upon which a conviction [on Count [___]] may be based. Defendant may be found guilty if the proof shows beyond a reasonable doubt that [he] [she] committed any one or more of the [acts] [or] [omissions]. However, in order to return a verdict of guilty [to Count [___]], all jurors must agree that [he] [she] committed the same [act] [or] [omission] [or] [acts] [or] [omissions]. It is not necessary that the particular [act] [or] [omission] agreed upon be stated in your verdict.

continues until the perpetrator reaches a place of temporary safety and is in unchallenged possession of . . . the stolen property"].) Moreover, appellant's only defense to the robbery was that he was intoxicated and had no knowledge about what was going to happen in the house. (See 52 RT 10270 ["He didn't know what was going to happen that evening"].) He claimed that Ramirez was unworthy of belief and suggested that Ramirez acted alone in taking the items from the house. (See 52 RT 10271; 4 Supp. CT 1037 [The "light complected guy was—was looting the house. He was grabbing things and leaving with them and—but we didn't go there for that purpose either"].) The stealing of the VCR, stereo equipment, guns, necklace, and hair oil were part of the same robbery, and defense counsel's closing argument did not suggest different defenses for each stolen item. Thus, an unanimity instruction was not required.

Appellant contends that the evidence and defenses were different for each taking. However, as to three of the four separate "takings" alleged by appellant, he has not demonstrated a separate defense or a difference in evidence. The hair oil, necklace, the .32 caliber gun, and the electronic equipment were all stolen by Ramirez. Ramirez was seen in possession of the hair oil, necklace, and gun shortly after the murders. Although there is no evidence that the VCR and stereo equipment were ever recovered, appellant did not dispute that Ramirez took those items. As discussed above, appellant merely claimed that Ramirez acted on his own when he started "looting" the house. The jury disbelieved appellant's defense, and found that appellant conspired to commit a burglary, and aided and abetted Ramirez in stealing those items. No juror would have believed that appellant aided and abetted the stealing of the necklace, hair oil, and gun, while disbelieving that appellant similarly aided and abetted the stealing of the VCR and stereo equipment.

The only "taking" which differed from the other three was appellant's alleged taking of the handguns from a box in the kitchen. According to

appellant, "some jurors could have rejected the alleged taking of the handguns as a basis for robbery and instead relied on the taking of the VCR etc, and/or the taking of the necklace and hair oil." (AOB 209.) It is true that some jurors might have found Ramirez's testimony about appellant's actions to be an "embellishment on [Ramirez's] part. These jurors might have found [appellant] guilty based on [the VCR, .32 handgun, necklace, and hair oil] but not [the two handguns from the kitchen]. But the reverse is not true." (*People v. Riel* (2000) 22 Cal.4th 1153, 1200.) If the jury believed appellant's claim that he had no intent to aid and abet Ramirez's taking of the necklace, hair oil, gun, and VCR, then it would have also believed that he had no intent to steal the two handguns. It is "inconceivable that a juror would believed [Ramirez's] testimony" that appellant stole two handguns from the kitchen, but "somehow find" he had no intent to aid and abet Ramirez's robbery of the other items. (*Ibid.*)

Appellant relies on *People v. Davis* (2005) 36 Cal.4th 510, to support his claim. In *Davis*, the defendant, along with several others, stole a vehicle containing a driver and passenger. (*Id.* at p. 519.) The men drove around for a while with the driver in the trunk and the passenger in the back seat. (*Ibid.*) At some point, the men stopped the car and the defendant walked into the woods with the passenger. (*Ibid.*) Two other men followed with the driver. The men killed the passenger and driver. (*Ibid.*) The passenger's rings were later found in the possession of one of the participants. (*Id.* at p. 520.)

The prosecution presented evidence of two distinct acts of robbery of the passenger—the taking of the car and the taking of the rings. (*Id.* at p. 560.) The defendant presented two distinct *legal* defenses to each robbery—he claimed that he was not guilty of robbing the car because the passenger did not have actual or constructive possession of it, and that he was not guilty of robbing the rings because there was insufficient evidence that he took the rings

before the passenger was killed. (*Id.* at p. 560-561.) The failure to give a unanimity instruction was prejudicial "because we cannot ascertain from the record whether some jurors found defendant guilty of robbery based on the taking of the rings while others relied solely on the defendant's taking of the Honda. On the facts of this case, some jurors may have had a reasonable doubt as to whether [the passenger] was still alive when the intent to take her rings was formed while other jurors may have had a doubt about whether [the passenger] was in possession of [the driver's] car." (*Id.* at p. 561.)

Appellant's case is distinguishable because, as discussed above, he did not present "entirely different" defenses. (*Id.* at p. 562.) Appellant's defense was that he did not intend to commit any crime when he went to the Moraleses' home. He claimed that Ramirez was lying and acted on his own. Unlike the defendant in *Davis*, "'there was no evidence . . . from which the jury could have found defendant was guilty of' the crime base on one act but not the other. [Citation.]" (*Ibid.*)

Even if the court should have given a unanimity instruction, any error was harmless beyond a reasonable doubt. (*People v. Davis*, *supra*, 36 Cal.4th at p. 563; *People v. Stankewitz, supra*, 51 Cal.3d at p. 100.) There was no real dispute that there was a robbery on November 16, 1994, and that the robbery resulted in the murders of three individuals. Appellant's defense was that he did not plan to rob anyone, and that Ramirez acted on his own. Supporting that defense, appellant relied primarily on the inconsistencies in Ramirez's testimony, Ramirez's motives to lie, and appellant's videotaped statement. "Whatever slight differences inhered in the defenses offered" by appellant to the takings "were thus without significance." (*People v. Stankewitz*, *supra*, 51 Cal.3d at p. 100.) Appellant's claim should be rejected.

X.

ANY *IRELAND* INSTRUCTIONAL ERROR WAS HARMLESS (APPELLANT'S CLAIM 14)

The jury was instructed on the elements of burglary as follows:

> One, a person entered a building.
>
> And two, at the time of the entry that person had the specific intent to steal and take away someone else's property. Or at the time of the entry, that person had the specific intent to commit the crime of robbery or murder.

(53 RT 10466; 5 CT 1311-1312.)

Appellant correctly contends that the instructions erroneously permitted the jury to find him guilty of felony murder based on an entry with the intent to kill. "[A]n entry with the specific intent to commit murder cannot support a felony-murder conviction under the doctrine of merger explained in *People v. Ireland* [1969] 70 Cal.2d 522 and *People v. Wilson* (1969) 1 Cal.3d 431." (*People v. Garrison* (1989) 47 Cal.3d 746, 778.)

However, while the error requires the reversal of the burglary special circumstance (*id.* at pp. 788-789), it does not, as appellant contends, require reversal of appellant's burglary or murder convictions. (See AOB 219-221.)

The instructions as given were "a proper statement of the mental element in burglary." (*Id.* at p. 778.) A burglary can be committed when the defendant enters with the intent to commit "any felony," including murder. (Pen. Code, § 459.) The *Ireland* merger doctrine is only relevant to the determination of the murder charges, because "if the jury relied on entry with intent to kill as the basis for its burglary verdict, the burglary could not provide a basis for application of the felony-murder rule, for the burglary was an integral part of and included in fact with the homicide." (*People v. Garrison*, *supra*, 47 Cal.3d at p. 778.) Thus, any *Ireland* instructional error had no bearing on the burglary charge.

Moreover, even though the jury was instructed with an erroneous theory of felony murder, reversal of the murder charges is not required because the "conviction can be upheld on the alternative basis of felony murder premised on the robbery of the [Moraleses]." (*Ibid.*) The jury found the robbery special circumstance to be true. (4 CT 968, 972, 976.) "Since the jury necessarily found the killing in the course of a robbery, the burglary instruction, as given, is of no consequence." (*Id.* at p. 779.)[21/]

The instructional error, however, does require the reversal of the burglary felony-murder special circumstances as to each victim. (*People v. Garrison*, *supra*, 47 Cal.3d at pp. 788-789.) Nevertheless, because the remaining special circumstances are valid, the error does not require reversal of the murder charges or the penalty verdict. (*Ibid.*)

XI.

THE COURT DID NOT ERR IN ADMITTING INVESTIGATOR'S MOORE'S TESTIMONY (APPELLANT'S CLAIM 15)

Appellant contends that the court improperly admitted hearsay evidence regarding the trailer from which Sanchez reportedly received the $100 bill that he and the others later used at JKD Shooting Sports to buy ammunition. We disagree.

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21. Appellant contends that the error was prejudicial because the failure to give claim-of-right instructions rendered the robbery theory of felony-murder invalid as well. (AOB 219.) However, as discussed above, appellant was not entitled to claim-of-right instructions to the robbery or murder charges.

A. Factual Background

Jose Luis Ramirez testified that, on the day of the murder, he, Sanchez, Nunez, and appellant went to a trailer park to pick up some money. Ramirez believed the trailer park was on North Main Street but he was not sure. (40 RT 7831.) Ramirez testified that he took an investigator to the trailer park, and showed the investigator the exact trailer from which Sanchez received the money. (40 RT 7831-7832.) Ramirez also testified he had been to that trailer park with Arturo Perez on previous occasions, and that he believed that Arturo's mother lived near the trailer from which Sanchez received the money. (40 RT 7834-7835.)

Juan Avalos testified that, on November 1994, he was business partners with a man named Angel, who lived in a trailer park on North Main Street. (43 RT 8486-8487.) He had a business disagreement with Angel, and in the early morning hours of November 16, his truck was set on fire. (43 RT 8488, 8490-8491.)

After the arson, Avalos was contacted by Investigator Moore. (43 RT 8492.) Investigator Moore asked Avalos if he knew anyone who lived in the trailer park in North Main Street. (43 RT 8492.) Avalos told Investigator Moore about his business partner and the business disagreement between them. (43 RT 8492.) Avalos testified that he took Investigator Moore to the trailer park and showed him Angel's trailer. (43 RT 8492-8493.)

Arturo Perez testified that he was acquainted with Angel Martinez, who lived in the trailer park near Perez's mother, and that he introduced Sanchez to Angel Martinez. (44 RT 8639-8640.)

Investigator Moore testified that, during his follow up investigation into the murders, he took Ramirez to the trailer park on North Main Street. Ramirez was able to point out the location where Sanchez had collected $100. Over a

hearsay objection, Investigator Moore testified that Ramirez pointed to trailer number 35. (43 RT 8497.)

Investigator Moore also testified that when he spoke to Avalos, Avalos told him that he knew someone who lived in the North Main trailer park, and Investigator Moore took Avalos to the trailer park where Avalos pointed out the trailer. Over a hearsay objection, Investigator Moore testified that Avalos pointed to trailer number 35. (43 RT 8499-8500.)

The prosecutor then asked Investigator Moore: "Was this the same one that Jose Luis Ramirez had pointed out to you as being where they collected the $100?" Over a hearsay objection, Investigator Moore responded, "That's correct." (43 RT 8500.)

B. The Evidence Was Admitted For A Nonhearsay Purpose

Appellant contends that Investigator Moore's testimony regarding the witnesses' identification of trailer number 35 was inadmissible because "[a]cts such as . . . pointing to an object for identification . . . are equivalent to verbal statements and are equally subject to the hearsay rule. . . ." (AOB 226.) However, while pointing for identification is indeed assertive conduct, that identification is only hearsay if it is offered to prove the truth of the matter asserted. (Evid. Code, § 1200.) Here, the evidence was not offered to prove the truth of the witnesses's identification—i.e., that Angel actually lived in trailer number 35, or that Sanchez actually collected money from trailer number 35. The evidence was relevant only to prove that both witnesses identified the same trailer, and that Investigator Moore observed each witness point at the same trailer. The fact of the consistent identification was relevant, not the underlying truth or falsity of the identification.

"There is a well-established exception or departure from the hearsay rule applying to cases in which the very fact in controversy is whether certain things

were said or done and not as to whether these things were true or false, and in these cases the words or acts are admissible not as hearsay, but as original evidence. In these situations, the words themselves, written or oral, are operative facts, and an issue in the case is whether they were uttered or written." (*People v. Fields* (1998) 61 Cal.App.4th 1063,1069, internal quotations and citations omitted.) The fact that both witnesses pointed at the same trailer is circumstantial evidence from which the jury could infer that Sanchez was hired to commit an arson, and received $100 as payment. (See *ibid.* [display of pay phone number on defendant's pager was non assertive conduct relevant to prove the drug buying relationship and the purpose for which the pager was used]; *Ernst v. Municipal Court* (1980) 104 Cal.App.3d 710, 718-719 [evidence of the fact that an arrestee identified himself by a specific name was a verbal act, not hearsay]; *People v. Harris* (1978) 85 Cal.App.3d 954, 958 [witness could properly testify about hearing a little boy outside defendant's car saying "I don't have to get in your car, Mister, to show you where it's at," because statement was circumstantial evidence that he was rejecting an invitation into defendant's car].) The court properly overruled appellant's hearsay objections, and the evidence was properly admitted.

C. Any Error Was Harmless

Even if the court should have excluded the challenged evidence, there was no reasonable probability of a different outcome. (*People v. Watson*, *supra*, 46 Cal.2d at p. 836; *People v Duarte* (2000) 24 Cal.4th 603, 619 [*Watson* standard applicable to state law error in the admission of hearsay].) The evidence about the arson was primarily relevant to establish two of the six overt acts charged in the conspiracy:

> OVERT ACT No. 3: On or about November 15, 1994, Francisco Antonio Sanchez, Daniel Sanchez Covarrubias, and Joaquin Nunez

committed an arson for hire and received $100 for committing the arson.

OVERT ACT No. 4: On or about November 16, 1994 Francisco Antonio Sanchez, Daniel Sanchez Covarrubias, Joaquin Nunez, and Jose Luis Ramirez drove to JKD Shooting Sports in the City of Salinas to purchase (with the $100 received from the arson) ammunition and supplies for the rifles to be used in the residential robbery, burglary and killing at the Morales residence at 1022 East Market Street in the City of Salinas.

(6 CT 1329)

If Investgator Moore had been prohibited from testifying that both Ramirez and Avalos pointed to trailer number 35, the jury still would have heard: (1) Sanchez received $100 from a trailer on North Main as payment for committing an arson; (2) Ramirez believed the occupants of the North Main trailer lived near relatives of Arturo Perez; (3) Avalos's car had been burned the night before Sanchez received the money; (4) Avalos recently had a business disagreement with his partner, Angel, who lives in a trailer on North Main; and (5) Perez was acquainted with Angel, who lived in a trailer near his mother, and had introduced Angel to Sanchez. While not as conclusive without the consistent identification, the jury could still have inferred from this evidence that the $100 was payment for the burning of the car. Appellant presented no evidence that Sanchez did not receive the $100, or that Angel did not live in the trailer park, nor did he significantly dispute that he, Nunez, and/or Sanchez committed the arson. As discussed above, appellant's defense was merely that he did not know that what was going to happen at the Moraleses' house. There was no reasonable probability that the jury would have found overt acts 3 and 4 to be not true even had the court excluded Investigator Moore's testimony.

Moreover, even if the jury had found overt acts 3 and 4 to be not true, there is no reasonable probability that it would have acquitted appellant of conspiracy. Only one overt act is necessary to support a conspiracy conviction, and the jury need not unanimously agree on the same overt act to convict for

conspiracy. (*People v. Russo*, *supra*, 25 Cal.4th at p. 1128.) There was substantial evidence to prove the other overt acts, and it is not reasonably probable that the jury found overt acts 3 and 4 to be the only overt acts supporting the conspiracy conviction. Appellant has not demonstrated that he was prejudiced by any erroneous admission of evidence.

Appellant contends that the erroneous admission of the hearsay evidence was prejudicial because it "exposed the jury to inflammatory evidence of an uncharged crime," and because it corroborated Ramirez's testimony. (AOB 239.) However, "all evidence which tends to prove guilt is prejudicial or damaging to the defendant's case. The stronger the evidence, the more it is 'prejudicial.' The 'prejudice' referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against defendant as an individual and which has very little effect on the issues. In applying section 352, 'prejudicial' is not synonymous with 'damaging.'" (*People v. Yu* (1983) 143 Cal.App.3d 358, 377.)[22/] Notably, appellant did not object to the evidence under section 352, nor does he dispute the relevancy of the arson allegation. "The prejudice which exclusion of evidence under Evidence Code section 352 is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence." (*People v. Karis* (1988) 46 Cal.3d 612, 638.) The fact that the hearsay evidence was damaging to appellant's case does not, in and of itself, demonstrate prejudice. The issue is whether, had the jury not heard the hearsay evidence, it would have acquitted

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22. Evidence Code section 352 protects a defendant from the admission of highly inflammatory evidence: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issue, or of misleading the jury."

appellant. As discussed above, there is no reasonable probability of a different outcome.

D. The *Green/Guiton* Rule Is Not Applicable To The Instant Harmless Error Analysis

In *People v. Guiton* (1993) 4 Cal.4th 1116, this Court harmonized the holdings in *People v. Green* (1980) 27 Cal.3d 1 and *Griffin v. United States* (1991) 502 U.S. 46, as to whether a failure of proof requires reversal:

> If the inadequacy of proof is purely factual, of a kind the jury is fully equipped to detect, reversal is not required whenever a valid ground for the verdict remains, absent an affirmative indication in the record that the verdict actually did rest on the inadequate ground. But if the inadequacy is legal, not merely factual, that is, when the facts do not state a crime under the applicable statute, as in *Green*, the *Green* rule requiring reversal applies, absent a basis in the record to find that the verdict was actually based on a valid ground.

(4 Cal.4th at p. 1129.)

Appellant contends that under *Green*, the conspiracy count must be reversed because there is no "'principled way . . . to determine which [overt act or acts] the jury adopted . . . .'" (AOB 230.) According to appellant, because there were "legally erroneous" overt acts, the error cannot be found harmless unless this Court can determine "from the record which theory the jury in fact adopted." (*People v. Green*, *supra*, 27 Cal.3d at p. 74.)

However, none of the cases cited by appellant involve the application of *Green* or *Guiton* to the overt acts of a conspiracy charge. Indeed, this Court has found that failing to properly instruct on one overt act does not require reversal where there is substantial evidence of the other overt acts. (*People v. Hoyos* (2007) 41 Cal.4th 872, 915 ["Even assuming the trial court erred in not instructing on the meaning of the word 'torture' as an overt act, any error was harmless under any standard . . . . Substantial evidence supported the other nine

overt acts, any one of which also supported the jury's guilty verdict on the conspiracy count"].)

As suggested by the holding *Hoyos*, the *Green/Guiton* rules do not apply to errors involving overt acts of a conspiracy. The overt acts are not underlying theories of proving a conspiracy. An overt act is an element of a conspiracy, but "that element consists of an overt act, not a *specific* overt act." (*People v. Russo*, *supra*, 25 Cal.4th at p. 1134, italics added.) "If only one agreement existed, only one conspiracy occurred, whatever the precise overt act or acts may have been." (*Id.* at p. 1135.) Thus, even where one overt act is legally or factually erroneous, the theory underlying the conspiracy itself would not be either legally or factually erroneous and neither *Green* nor *Guiton* would apply.

In any event, neither the *Guiton* nor the *Green* rule would apply to this case, because any erroneous admission of evidence did not render the charged overt act either factually or legally erroneous. Neither overt act required proof that Sanchez was paid $100 by a person *in trailer number 35*. The overt acts, as charged, required proof only that Sanchez, Nunez, or appellant committed an arson for hire, were paid $100, and used that $100 at JKD Shooting Sports. As discussed above, even without Investigator Moore's testimony regarding the specific trailer, the jury could have inferred, based on the testimony of Ramirez, Avalos, and Perez, that Sanchez, Nunez, or appellant had burned Avalos's car for Angel and had been paid $100. Even without the disputed evidence, the jury could have found the overt acts to be true.

Finally, even assuming application the *Green/Guiton* rules, appellant's reliance on the *Green* rule is misplaced because the erroneous admission of hearsay evidence would result only in a "factual" inadequacy, and would be analyzed under the standard of *Guiton*. Without the testimony of Investigator Moore, there would only be an insufficient *factual* basis to demonstrate that Sanchez, Nunez, and appellant committed an arson and were paid $100. There

would be no *legal* error unless, as a matter of law, the arson or the $100 payment could not qualify as an overt act. (See *Guiton*, *supra*, 4 Cal.4th at p. 1131 [insufficient evidence to prove that defendant sold cocaine, but sufficient evidence that defendant transported cocaine, no reasonable probability that the jury found defendant guilty solely on the sale theory]; compare *Green*, 27 Cal.3d at p. 67 [distance of 90 feet, even if proven by the evidence, was "legally insufficient" to prove asportation for kidnapping].) As discussed above, that was not the case here. Thus, appellant's reliance on *Green* is misplaced.

XII.

THERE WAS SUFFICIENT EVIDENCE OF ATTEMPTED MURDER AND ASSAULT (APPELLANT'S CLAIM 16)

Appellant contends that there was insufficient evidence to support the attempted murder and assault convictions against the infant, Alejandra Morales. (AOB 241.) When a judgment is challenged as lacking evidentiary support, the reviewing court must, "review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence . . . such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) The test is not whether the evidence proves guilt beyond a reasonable doubt, but whether there is substantial evidence to support the verdict. (See *People v. Reilly* (1970) 3 Cal.3d 421, 425.)

Here, the evidence demonstrated that Alejandra Morales suffered two gunshot wounds; at least one was caused by the .38 bullet found underneath the bed. Martha's body was slumped against the bed, and Alejandra was found near Martha's feet. Based on this evidence it was reasonable to believe that Martha was holding Alejandra when they were both shot. According to

Ramirez, the plan upon entering the house was to kill everyone inside, and, just before the shooting began, appellant was holding the .38 handgun. Ramirez's testimony that appellant had the .38 handgun was corroborated by appellant's fingerprints on the .38 caliber ammunition box. Additionally, there was no dispute that three guns were shot at each victim, and the evidence suggested that Sanchez was using the AR-15, and that Nunez was using the .30/.30. Based on the totality of the evidence, the jury could have reasonably believed that appellant, using the .38 caliber handgun, intentionally shot Alejandra as part of the plan to kill all the individuals in the house.

Appellant contends that a "personal shooting theory cannot be used to uphold the conviction," because the jury could not reach a verdict on the personal use enhancement. (AOB 243.) Thus, appellant contends, the evidence is insufficient, as a matter of law, to prove that appellant personally shot Alejandra, and the sufficiency of the evidence can be assessed only under the aider and abettor and coconspirator theories of liability. However, it is not proper to address a sufficiency of the evidence claim under such narrow theories as proposed by appellant. "Just as inconsistent verdicts will not usually defeat a conviction [citation], there is no prohibition against considering *all of the evidence* on one count merely because the jury did not reach a unanimous verdict on a count to which the evidence may have related." (*People v. Consuegra* (1994) 26 Cal.App.4th 1726, 1735, fn. 6, italics added; see *United States v. Powell* (1984) 469 U.S. 57, 67 ["a criminal defendant . . . is afforded protection against jury irrationality or error by the independent review of the sufficiency of the evidence undertaken by the trial and appellate courts. This review should not be confused with the problems caused by inconsistent verdicts. Sufficiency-of-the-evidence review involves assessment by the courts of whether the evidence adduced at trial could support any rational determination of guilty beyond a reasonable doubt. [Citations.] . . . *This review*

should be independent of the jury's determination that evidence on another count was insufficient"], italics added.) The fact that the jury was unable to reach a verdict on the personal use enhancement "may show no more than jury lenity, compromise, or mistake . . . ." (*People v. Lewis* (2001) 25 Cal.4th 610, 656.) It does not mean that the prosecution presented insufficient evidence to prove that appellant intentionally shot, and attempted to kill, Alejandra Morales with a .38 caliber handgun.

In any event, even assuming appellant's conviction cannot be upheld on the basis of his personal liability, there was sufficient evidence to prove that he aided and abetted the attempted murder and assault of Alejandra by Sanchez or Nunez. Appellant suggests that the only way he could have been convicted of the attempted murder and assault actually committed by Sanchez or Nunez, was if the attempted murder and assault were natural and probable consequences of the burglary and robbery. (AOB 246.) However, appellant could also be guilty as an aider and abettor to attempted murder and assault as the "target crimes."

As discussed above, Ramirez testified that Sanchez, Nunez, and appellant intended to enter the Morales home and to kill the people inside. Whether it was Sanchez or Nunez who actually attempted to murder Alejandra, appellant aided and abetted that crime by driving them to the house, entering the house, and helping them subdue the other individuals in the house.[23] There was ample evidence from which the jury could find that appellant, with knowledge of

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23. The fact that the jury could not reach a decision on whether appellant conspired to commit murder is not relevant. "One may aid or abet in the commission of a crime without having previously entered into a conspiracy to commit it." (*People v. Nguyen* (1993) 21 Cal.App.4th 518, 530, internal quotations and citations omitted.) Indeed, "[a]iding and abetting may be committed 'on the spur of the moment,' that is, as instantaneously as the criminal act itself. [Citation.]" (*Id.* at p. 532.) Thus, appellant may not have conspired to commit murder before entering the Morales home, but once there could have formed the intent to aid and abet Sanchez and Nunez in the murders of Ramon, Martha, and Fernando, and the attempted murder of Alejandra.

Sanchez's or Nunez's plan to kill, and with the intent to facilitate their plan to kill, aided Sanchez or Nunez in the commission of the attempted murder of Alejandra. (See CALJIC No. 3.01.)

Finally, even under the natural and probable consequences theory of liability, there was sufficient evidence to find that attempted murder was a natural and probable consequence the planned crimes of robbery and burglary. "A person who knowingly aids and abets criminal conduct is guilty of not only the intended crime but also of any other crime the perpetrator actually commits that is a natural and probable consequence of the intended crime. The latter question is not whether the aided and abettor actually foresaw the additional crime, but whether, judged objectively, it was reasonably foreseeable." (*People v. Mendoza* (1998) 18 Cal.4th 1114, 1133, citing *People v. Prettyman* (1996) 14 Cal.4th 248, 260-262.) "This does not mean that the issue is to be considered in the abstract as a question of law. [Citation.] Rather, the issue is a factual question to be resolved by the jury in light of all the circumstances surrounding the incident. [Citations.]" (*People v. Nguyen*, *supra*, 21 Cal.App.4th at p. 531.)

Here, appellant, along with Sanchez and Nunez, entered another's home, intending to commit robbery and burglary. There is no dispute that Sanchez and Nunez were carrying weapons and used those weapons to subdue the victims. It was certainly foreseeable that Sanchez and Nunez might intentionally shoot any of the individuals in the house. Indeed, "murder is generally found to be a reasonably foreseeable result of a plan to commit robbery and/or burglary despite its contingent and less than certain potential." (*Id.* at p. 530.)

Appellant apparently suggests that the attempted murder was not a foreseeable consequence in this particular case because an infant could not have been an impediment to the robbery, nor a witness that could testify against

them. (AOB 246.) However the fact that "the evidence could be consistent with other possible scenarios is irrelevant . . . so long as there was substantial evidence from which a rational trier of fact could have found" the attempted murder to be an objectively foreseeable consequence of robbery and burglary. (*People v. Hill* (1998) 17 Cal.4th 800, 850.)

In support of his claim, appellant cites only *United States v. Andrews* (9th Cir. 1996) 75 F.3d 552. However, aside from the fact that federal cases are not binding on this Court (*People v. Williams* (1997) 16 Cal.4th 153, 190), "the theory under federal law is that a 'defendant is presumed to have intended the natural and probable consequences of his or her acts.' [Citation.] This, of course, is different from our doctrine which makes the aider and abettor liable for the acts of another." (*People v. Medina* (2007) 153 Cal.App.4th 610, 617.)

In fact, if it would have been objectively foreseeable (as appellant apparently concedes) that an armed individual committing burglary or robbery would murder or attempt to murder all witnesses or impediments to those target crimes, it would equally foreseeable that the armed individual might attempt to murder someone for some other reason. Maybe the infant was in the way of his attempt to subdue Martha. Or maybe the infant was crying, and he wanted to quiet her permanently. Or maybe Sanchez or Nunez simply decided to cold bloodedly kill the baby for no reason at all. An attempted murder under any of these scenarios would be objectively foreseeable to an individual who commits a home invasion robbery with armed individuals.

There was sufficient evidence to support appellant's convictions for attempted murder and assault. Appellant's claim should be rejected.

XIII.

THERE WAS NO PROSECUTORIAL MISCONDUCT (APPELLANT'S CLAIM 17)

At the beginning of the prosecutor's closing argument, she stated:

> We have laws, criminal laws, that we've set up in our country, and they are basically the norms, the standards that we, as a civilized society, live by. They're rules that apply, not only to you and me, but they also apply to him, to the defendant. And your job as jurors in this case is to conduct that litmus test to apply the laws that we, as a civilized society, have and determine whether or not the defendant has broken any of those laws. Determine whether or not we, as a civilized society—you, as the jurors who are making this decision—will tolerate the conduct of this man.

(52 RT 10217.) At the conclusion of her closing argument, the prosecutor stated:

> You need to look at this evidence. You need to sift through it. Every item there tells a story, every item of evidence. And, you know, things like that little jumper, that little sleeper that Alejandra was wearing, doesn't lie. All it can do is tell you the truth. It is as it is.
>
> That green jacket, look at it. It doesn't lie. The bullets that went through each of these victims, each of them, tells a story. It is incumbent upon you. You are responsible to determine that story, to use the evidence that you've received in this case and determine the charges.
>
> Again, as I mentioned, your job and your responsibility as jurors is to act as the litmus test, to apply the laws of our society, and to determine what our community will and will not tolerate.

(52 RT 10258-10259.)

Defense counsel objected on the ground that the prosecutor misstated the law. The court admonished the jury:

> Well, counsel is permitted to present to you, as I've said, their theory of the case. They're permitted to comment on the facts. They're permitted to comment on the law.
>
> What they say is not evidence. And what they say about the law is not the law. Your have to follow my instructions on that.

> They're permitted to comment on both of those areas. This particular comment is somewhat beyond the law. But it is still within the realm of permissible conduct.
>
> So proceed.

(52 RT 10259-10260.)

Appellant contends that the prosecutor's final comments about what the community "will and will not tolerate" constituted misconduct. (AOB 248.) Prosecutorial misconduct consists of "'"the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury."' [Citations.]" (*People v. Hill, supra*, 17 Cal.4th at p. 819; *People v. Espinoza* (1992) 3 Cal.4th 806, 820.) However, "'[a] prosecutor may vigorously argue his case, marshalling the facts and arguing inferences to be drawn therefrom.' [Citation.]" (*People v. Sandoval* (1992) 4 Cal.4th 155, 183.)

> The applicable federal and state standards regarding prosecutorial misconduct are well established. A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process. Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury. . . . Additionally, when the claim focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion.

(*People v. Samayoa* (1997) 15 Cal.4th 795, 841, citations and internal quotation marks omitted.)

Appellant contends that the comment constituted misconduct because a "prosecutor may not urge jurors to convict a criminal defendant in order to protect community values, preserve civil order, or deter future lawbreaking." (*United States v. Monaghan* (D.C. App. 1984) 741 F.2d 1434, 1441; see AOB 249.) However, "[a]n appeal to the jury to be the conscience of the community

is not impermissible unless it is 'specifically designed to inflame the jury.' [Citation.]." (*United States v. Koon* (9th Cir. 1994) 34 F.3d 1416, 1444.) Similarly, "a request that the jury 'condemn' an accused for engaging in illegal activity is not constitutionally infirm, so long as it is not calculated to excite prejudice or passion." (*United States v. Monaghan*, *supra*, 741 F.2d at p. 1442.)

Here, the prosecutor was simply reiterating her original explanation of the duties of the jurors—to determine whether appellant has broken any laws. In context, the prosecutor's use of the term "tolerate" simply referred to the fact that, by making certain activities criminal, society has determined that it would not condone or "tolerate" the murdering, robbing, and burglarizing of innocent victims. She was merely explaining that it was the jury's duty to make sure that those laws, as determined by the community, are upheld. There was nothing in the prosecution's presentation that was likely to appeal to the jury's sympathy or arouse its fears. There is "no reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion." (*People v. Morales* (2001) 25 Cal.4th 34, 44.)

Finally, even if the prosecutor committed misconduct, reversal is not required because it is not "'reasonably probable that a result more favorable to the defendant would have occurred' absent the misconduct. [Citation.]." (*People v. Welch* (1999) 20 Cal.4th 701, 753.) As discussed above (see Arg VIII, *supra*), there was substantial evidence supporting appellant's convictions. Ramirez was present at the shootings and testified that appellant planned to rob, burglarize and kill the Morales family. Ramirez's testimony was corroborated by physical and testimonial evidence. Although appellant attacked Ramirez's testimony, pointing out that he changed his story and omitted key portions until trial, it is not unusual for a criminal to initially minimize his behavior, and slowly reveal more and more details in subsequent police interviews. Indeed,

Ramirez was only 16 years old at the time of the murders; it was not unreasonable to believe that his immaturity, combined with his fear of apprehension, led him to initially minimize the events, or to forget details of a long and ultimately stressful day. Likewise, the only evidence supporting appellant's defense was his self-serving, uncross-examined statement that "we didn't know what was going to happen." (52 RT 10270.) There was overwhelming evidence of appellant's guilt, and the jury was not likely to acquit him even if the prosecutor had not made the challenged statement.

Moreover, the challenged reference was very brief when viewed in the context of the prosecutor's 47-page closing argument and 18-page rebuttal argument. The comment also came near the end of the prosecutor's closing argument where, if anything, more latitude is allowed. (See *People v. Poggi* (1988) 45 Cal.3d 306, 340 [noting that the prosecutor's comment came "at the very close of the prosecutor's argument" and, thus, "would have been recognized by the jurors as an advocate's hyperbole and would accordingly have been discounted"].) The comments did not appeal to the jury's passion or prejudice, or suggest that the jury should convict appellant regardless of the evidence.

Finally, the trial court admonished the jurors, both during the standard instructions and at the time of the challenged statement, that the attorney's statements were not evidence to be considered in their determination. (52 RT 10259-10260; 53 RT 10420.) The jury was also instructed that it was not to be influenced by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion, or public feeling. (53 RT 10420.) These instructions, when taken together, were sufficient to obviate any error by the prosecutor.

XIV.

APPELLANT WAS NOT ENTITLED TO AN INVOLUNTARY INTOXICATION INSTRUCTION (APPELLANT'S CLAIM 18)

Appellant requested that the trial court instruct the jury with CALJIC Nos. 4.20, a modified 4.21, 4.21.1, and 4.22. The court found that the proposed voluntary intoxication instructions were not required because, although there was evidence of drinking by appellant,

> there was no quantification of the amount of alcohol that he had consumed.
>
> There was no testimony to the effect that he was inebriated to the point that his ability to form the specific intents or mental states might be affected in his own videotaped statement as to the salient portions of the events of November 16th.
>
> He makes no reference to intoxication.
>
> He seems to have recall of the events of what occurred, why they occurred.

(52 RT 10205.)

After argument by defense counsel, the court stated, "I don't believe that the instruction is required." (52 RT 10206.)

However, out of "an abundance of caution," the trial court instructed the jury as follows:

> It is the general rule that no act committed by a person while in that state of voluntary intoxication is less criminal by reason of this condition.
>
> Thus in the crimes and enhancements alleged, the fact that the defendant was voluntarily intoxicated is not a defense and does not relieve the defendant of responsibility for the crime.
>
> However, there is an exception to this general rule, namely, where a specific intent is an essential element of a crime. In that event, you should consider the defendant's voluntary intoxication in deciding

whether the defendant possessed the required specific intent at the time of the commission of the alleged crime.

Thus, in the crime and enhancements alleged, where a necessary element is the existence in the mind of the defendant of a certain specific intent, that element will be included in the definition of the crimes set forth elsewhere in these instructions.

If the evidence shows that a defendant was intoxicated at the time of the alleged crime, you should consider that fact in deciding whether or not the defendant had the required specific intent.

If from all the evidence you have a reasonable doubt whether the defendant had that specific intent, you must find that the defendant did not have that specific intent.

(53 RT 10438-10439; 5 CT 1252.)

Appellant contends that the court's instruction failed to explain to the jury that voluntary intoxication may negate a "mental state" as well as specific intent.[24/] Specifically, appellant contends that because aiding and abetting

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24. Compare CALJIC No. 4.21.1:

It is the general rule that no act committed by a person while in a state of voluntary intoxication is less criminal by reason of that condition.

Thus, in the crime[s] of ___ charged in Count[s] ___ , [or the crime of ___ which is lesser thereto,] the fact that the defendant was voluntarily intoxicated is not a defense and does not relieve defendant of responsibility for the crime. This rule applies in this case only to the crime[s] of [___.] [, and the lesser crime[s] of ___.]

However, there is an exception to this general rule, namely, where a [specific intent] [or] [mental state] is an essential element of a crime. In that event, you should consider the defendant's voluntary intoxication in deciding whether the defendant possessed the required [specific intent] [or] [mental state] at the time of the commission of the alleged crime.

liability requires knowledge of and intent to aid the perpetrator's unlawful purpose, and the instructions failed to include the term "mental state," the "only reasonable conclusion for the jurors was that intoxication could not be considered when deciding whether the prosecution had proved appellant guilty as an aider and abettor." (AOB 260.)

Appellant's instructional error claim fails at the outset, because appellant was not entitled to *any* instruction on voluntary intoxication. (*People v. Pensinger* (1991) 52 Cal.3d 1210, 1243; *People v. Payton* (1992) 3 Cal.4th 1050, 1060-1061; but see *People v. Castillo* (1997) 16 Cal.4th 1009, 1015.) "[A] defendant is entitled to an instruction on voluntary intoxication 'only when there is substantial evidence of the defendant's voluntary intoxication and the intoxication affected the defendant's "actual formation of specific intent."' [Citation.]" (*People v. Roldan* (2005) 35 Cal.4th 646, 715.) "Normally, merely showing that the defendant had consumed alcohol or used drugs before the offense, without any showing of their effect on him, is not enough to warrant an instruction on diminished capacity." (*People v. Pensinger, supra*, 52 Cal.3d at p. 1241.)

> Thus, in the crime[s] of ___ charged in Count[s] ___, [or the lesser crime[s] of ___,] a necessary element is the existence in the mind of the defendant of [a] certain [specific intent[s]] [or] [mental state[s]] which is included in the definition of the crime[s] set forth elsewhere in these instructions.
>
> If the evidence shows that a defendant was intoxicated at the time of the alleged crime, you should consider that fact in deciding whether or not [that] defendant had the required [specific intent] [or] [mental state].
>
> If from all the evidence you have a reasonable doubt whether a defendant had the required [specific intent] [or] [mental state], you must find that defendant did not have that [specific intent] [or] [mental state].

Here, there was evidence that the four men in appellant's car each drank about six to nine beers between them during the afternoon and evening before the murders. (41 RT 8065-8066.) Bertha Sanchez, Amy Arredondo, and Jorge Acosta testified that appellant was "drunk," before the murders. However, there was no evidence that the "beers affected [appellant's] ability to think in any way." (*People v. Payton*, *supra*, 3 Cal.4th at p. 1060.) Appellant "presented no evidence, expert or otherwise, regarding the intoxicating effect, if any, which his use of the . . . [the beer] may have had upon his ability to form the necessary intent" or mental state to commit the crimes. (*People v. Frierson* (1979) 25 Cal.3d 142, 156; see also *People v. Roldan*, *supra*, 35 Cal.4th at pp. 715-716; *People v. Ramirez* (1990) 50 Cal.3d 1158, 1181; *People v. Pensinger*, *supra*, 52 Cal.3d at pp. 1242-1243.) Moreover, as the trial court pointed out, appellant, in his videotaped statement, did not mention that he was too drunk to understand what was happening at the time, and did not present any inability to recall the incident. (See *People v. Ramirez*, *supra*, 50 Cal.3d at p. 1181 ["Defendant purported to give a detailed account of all of the events of the night in question, and did not suggest that his drinking had affected his memory or conduct"]; *People v. Pensinger*, *supra*, 52 Cal.3d at pp. 1241-1242 [defendant's trial testimony disputed prosecution evidence that defendant was intoxicated].)

Because the evidence of voluntary intoxication was minimal, the trial court correctly determined that appellant was not entitled to his proposed instructions, but, out of an abundance of caution, agreed to give CALJIC 4.21.1 as it related to specific intent. As the court provided appellant with a defense instruction to which he was not entitled, he cannot now complain that he was entitled to more.

In any event, any failure to specifically mention "mental state" in the voluntary intoxication instruction can be deemed erroneous only if, given all the instructions and other relevant circumstances, there was a reasonable likelihood

that the jury misinterpreted the law in a way potentially unfavorable to the defense. (*Estelle v. McGuire* (1991) 502 U.S. 62, 72; *Boyde v. California* (1990) 494 U.S. 370, 380.) Here, in order to find appellant guilty on an aiding and abetting theory, the jury had to find that appellant knew of the principal's unlawful purpose *and* intended to aid in the commission of the offense. The jury was instructed that voluntary intoxication could be a defense to a crime requiring a specific intent. Where the charged offense is a specific intent crime, the "accomplice must 'share the specific intent of the perpetrator.'" (*People v. McCoy* (2001) 25 Cal.4th 1111, 1118.) The voluntary intoxication instruction, by its own terms, applied to the specific intent requirements of burglary, robbery, and murder, and a finding of intoxication could negate that intent whether through appellant's liability as the actual perpetrator or an accomplice.

Moreover, the court did not expressly instruct the jury that it *could not* consider intoxication as it related to the "intent" element of aiding and abetting. The instruction simply explained that intoxication was not a defense to a general intent crime. Immediately prior to the voluntary intoxication instruction, the court expressly listed assault and the weapon enhancements as crimes of general intent. (53 RT 10437.) "Considering the instructions as a whole, a reasonable juror would have understood that the intent element required in order to find defendant guilty . . . under the aiding and abetting instructions was a 'specific intent or mental state' to which defendant's state of intoxication was relevant." (*People v. Ledesma* (2006) 39 Cal.4th 641, 715.) There is no reasonable likelihood that the jury understood the instructions to limit its consideration of intoxication evidence.

Finally, any error in the instructions was harmless because the jury necessarily resolved the factual issue against appellant. (See *People v. Sedeno* (1974) 10 Cal.3d 703, 721, overruled in part on other grounds in *People v. Breverman* (1998) 19 Cal.4th 142, 149, and disapproved on other grounds in

People v. Flannel (1979) 25 Cal.3d 668, 684, fn. 12 [error in omitting instruction harmless when factual question posed by that instruction was necessarily resolved adversely to the defendant under other, properly given instructions].) The jury found appellant guilty of conspiracy to commit robbery and burglary. Conspiracy requires a specific intent to agree, and the specific intent to commit the target crimes. Thus, the jury "found [appellant] was not so intoxicated as to be unable to form the required" specific intent for conspiracy; "consequently, a more favorable outcome had [the proposed instruction] been given was not reasonably probable." (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 97.)

XV.

THE COURT CORRECTLY INSTRUCTED THE JURY ON THE NATURAL AND PROBABLE CONSEQUENCES OF AIDING AND ABETTING (APPELLANT'S CLAIM 19)

The court instructed the jury that appellant could be found guilty on the murder and attempted murder charges based on accomplice liability for natural and probable consequences of the target crimes as follows:

> One who aids or abets another in the commission of a crime or crimes is not only guilty of that crime or crimes, but is also guilty of any other crime committed by a principal which is a natural and probabl[e] consequence of the crimes originally aided and abetted.
>
> In order to find the defendant guilty of the crime of murder as charged in Counts 1, 2 and 3 on this theory, you must be satisfied beyond a reasonable doubt, that:
>
> One, the crimes of burglary or robbery were committed;
>
> Two, . . . [¶] That the defendant aided and abetted in those crimes;

> That a co-principal in one of those—one or more of those crimes committed a murder.
>
> And four, that the crime of murder was a natural and probable consequence of the commission of the crimes of robbery or burglary.
>
> You are not required to unanimously agree as to which originally contemplated crime the defendant aided and abetted, so long as you are satisfied beyond a reasonable doubt and unanimously agree that the defendant aided and abetted the commission of an identified target crime and that the crime of murder was a natural and probable consequence of the commission of that target crime.
>
> . . .
>
> . . . In order to find the defendant guilty of attempted murder on an aiding and abetting theory, the attempted murder must be a natural and probable consequence of a criminal act which the defendant knowingly and intentionally encouraged.

(53 RT 10435-10436, 10451; 5 CT 1256, 1284.)

Appellant contends that the court failed to instruct the jury that in determining whether the murders or attempted murder were natural and probable consequences of robbery and burglary, it must consider all the "circumstances as they were 'known by and appeared to' the defendant." (AOB 269.) However, as this Court has recognized, "the term 'natural and probable consequences" does not have a peculiar legal meaning, and the term, therefore, need not be further defined for the jury. (*People v. Coffman and Marlow*, *supra*, 34 Cal.4th at p. 107.) Moreover, the court relied on the standard CALJIC instruction in effect at the time of trial, and appellant did not request any modifications or further definitions. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 503 [a party must request a clarifying instruction in order to argue on appeal that an instruction correct in law was too general or incomplete]; *People v. Daya*, *supra*, 29 Cal.App.4th at p. 714 ["defendant is not entitled to remain

mute at trial and scream foul on appeal for the court's failure to expand, modify, and refine standardized jury instructions"].)[25]

Indeed, as to the murder charges, the natural and probable consequences instruction was unnecessary. The jury was instructed that, if it found appellant guilty as an aider and abettor of robbery or burglary, then he would be responsible for any killing—intentional, unintentional, or accidental—that occurred during the commission of those crimes. (53 RT 10449.)[26] "The [felony-murder] doctrine is not limited to those deaths which are foreseeable. . . . Rather a felon is held strictly liable for all killings committed by him or his

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25. Appellant cites no cases in which the prior version of CALJIC 3.02, in effect at the time of his trial, was found erroneous or incomplete. Appellant cites only to the new CALCRIM instruction 4.03, which includes his proposed definition of natural and probable consequences. (AOB 269.) However, the fact that later revisions to the instructions expand the explanation of certain concepts does not automatically mean that the instruction, as given, was incomplete or misleading. If such were the case, any changes to standard jury instructions would have the effect of nullifying all prior cases on appeal. (*People v. Thomas* (2007) 150 Cal.App.4th 461, 466 ["Appellant's attempts to show the superiority of two CALCRIM instructions to their CALJIC counterparts does not demonstrate that the CALJIC instructions the trial court used incorrectly stated the law, were hopelessly confusing to the jury, or were otherwise erroneous or inadequate"].)

26. The court instructed the jury with CALJIC No. 8.27:

> If a human being is killed by any one of several persons engaged in the commission of the crime of burglary or robbery, all persons who either directly and actively commit the act constituting those crimes or who with knowledge of the unlawful purpose of the perpetrator of the crime and with the intent or purpose of committing, encouraging, or facilitating the commission of the offense, aid, promote, encourage, or instigate by act or advice its commission, are guilty of murder in the first degree whether the killing is intentional, unintentional, or accidental.

(53 RT 10449.)

accomplices in the course of a felony. [Citation.] As long as the homicide is the direct causal result of the robbery the felony-murder rule applies whether or not the death was a natural or probable consequence of the robbery." (*People v. Stamp* (1969) 2 Cal.App.3d 203, 210; *People v. Escobar* (1996) 48 Cal.App.4th 999, 1019 ["accomplices are liable for felony murder even if the killing was not a natural and probable consequence"].) If the jury found appellant to be an aider and abettor of a robbery or burglary, it was required to find him guilty of the murders, regardless of the foreseeability of the murders. The giving of an unnecessary instruction, which required the jury to find that the murder was foreseeable, could only have inured to appellant's benefit. He was not entitled to a sua sponte modification that made the unnecessary instruction even more beneficial to his case.

In any event, appellant has not demonstrated a reasonable likelihood that the jury misinterpreted the law in a way potentially unfavorable to the defense. (*Estelle v. McGuire*, *supra*, 502 U.S. at p. 72; *Boyde v. California*, *supra*, 494 U.S. at p. 380.) Appellant claims that, due to the failure to instruct the jury to consider the perspective of a reasonable person in his position, the jury was prevented from considering the defense evidence that "appellant had no knowledge of Antonio Sanchez' threats against Ramon Morales or of any plan by Antonio Sanchez to kill or rob Ramon Morales." (AOB 273.) However, regardless of the natural and probable consequences instruction, the jury, in convicting him of robbery and conspiracy to commit robbery, necessarily found that appellant *was aware* of the plan to rob Morales. (See *People v. Sedeno*, *supra*, 10 Cal.3d at p. 721.)

Moreover, even if the jury believed that appellant was unaware of any prior threats by Sanchez, and was unaware of any plan to kill Morales, those facts would not alter the foreseeability of the murders as natural and probable consequences of the robbery. As discussed above (see Arg. XII, *supra*),

murder, attempted murder, and assault are natural and probable consequences of committing an armed home invasion robbery. (See *People v. Nguyen*, *supra*, 21 Cal.App.4th at p. 530 ["murder is generally found to be a reasonably foreseeable result of a plan to commit robbery and/or burglary despite its contingent and less than certain potential"].) Thus, even assuming the jury was instructed as appellant suggested, there is no reasonable likelihood that it would have found the murders not to be natural and probable consequences of the robbery.

XVI.

THE COURT PROPERLY INSTRUCTED THE JURY WITH CALJIC 2.02 (APPELLANT'S CLAIM 20)

The court instructed the jury with CALJIC No. 2.02 as follows:

> The specific intent with which an act is done may be shown by the circumstances surrounding the commission of the act. However, you may not find the defendant guilty of the crimes charged in Counts 4, 6, 7, 8, 9 and 10 unless the proved circumstances are not only, one, consistent with the theory that the defendant had the required specific intent, but two, cannot be reconciled with any other rational conclusion.
>
> Also, if the evidence as to any specific intent permits two reasonable interpretations, one of which points to the existence of the specific intent, and the other to its absence, you must adopt that interpretation which points to its absence. If on the other hand one interpretation of the evidence as to the specific intent appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable.

(53 RT 10424; 5 CT 1231.)

Appellant contends that the court erred in omitting the "mental state" language of the instruction, and in limiting the instruction to counts four, and six through ten. Appellant claims that the modification precluded the jurors "from applying the principles of CALJIC 2.02 in resolving the mental state issues regarding aiding and abetting." (AOB 276.) Appellant's claim fails,

however, because the court also instructed the jury with CALJIC 2.01. (53 RT 10422-10423; 5 CT 1229.) This Court has held that where CALJIC 2.01 is given, any omissions in CALJIC 2.02 are rendered harmless. (*People v. Bloyd* (1987) 43 Cal.3d 333, 352; see also *People v. Marshall* (1996) 13 Cal. 4th 799, 849; *People v. Hughes* (2002) 27 Cal. 4th 287, 347.)

In *People v. Bloyd, supra*, 43 Cal.3d at p. 333, the trial court gave CALJIC 2.01 and CALJIC 2.02, but in reading CALJIC 2.02 "deleted the phrase '(or) (mental state).'" (*Id.* at p. 351.) The defendant claimed error:

> Defendant points out that malice is a separate and distinct mental state which can be established independent of the specific intent to kill, and he argues that eliminating the words "or mental state" precluded the jury from applying the principles of CALJIC No. 2.02 to the existence of the mental states of malice and premeditation and deliberation. We do not agree.
>
> First, the court was not obligated to give CALJIC No. 2.02. The use note states that the instruction is designed for use *instead of* CALJIC 2.01 in a specific intent or mental state case in which the *only element of the offense* which rests substantially or entirely on circumstantial evidence is the element of specific intent or the mental state. In this case, the specific question that would have been posed by adding "or mental state" was presented by the general circumstantial evidence instruction that was given.
>
> More importantly, defendant suffered no prejudice from the trial court's omission of the words "or mental state." The jury was twice cautioned on the inferences to be drawn from circumstantial evidence susceptible of two interpretations; it was instructed on the mental states required as elements of the charges and included offenses; it was instructed to consider all instructions as a whole and to regard each in light of others. Under the circumstances, it is not reasonably probable that the omission of the phrase in question confused or misled the jury. (*People v. Watson* (1956) 46 Cal.2d 818.)

(*Id.* at p. 352.)

Similarly, here, the appropriate instruction was CALJIC No. 2.01 because the circumstantial evidence was not limited to appellant's intent. For example,

there was circumstantial evidence suggesting that appellant loaded and used the .38 caliber handgun. Because the court was not obligated to give CALJIC No. 2.02, appellant cannot claim any error from the inclusion of the allegedly "incomplete" instruction. Moreover, instructions regarding circumstantial evidence are appropriate only where the evidence presented is "equally consistent with a conclusion of innocence" (*People v. Honig* (1996) 48 Cal.App.4th 289, 341). Thus, giving an additional instruction on circumstantial evidence served only to emphasize the fact that the evidence against appellant might support a conclusion of innocence. There is no reasonable likelihood that the jury interpreted the additional instruction in a manner unfavorable to appellant. (*Estelle v. McGuire*, *supra*, 502 U.S. at p. 72.)

Appellant contends that the giving of CALJIC No. 2.01 does not cure the alleged error because specific instructions control over general instructions. (AOB 277.) However, the cases cited by appellant involve specific instructions that are erroneous and/or conflict with the more general instructions. (See *Francis v. Franklin* (1985) 471 U.S. 307, 322-323; *People v. Kainzrants* (1996) 45 Cal.App.4th 1068, 1075; *People v. Stewart* (1983) 145 Cal.App.3d 967, 975; *People v. Westlake* (1899) 124 Cal. 452, 457.) Here, the instructions do not conflict, and neither one is, in isolation, erroneous. CALJIC No. 2.02, as given, did not suggest that the jury could not otherwise apply the general rule of CALJIC 2.01 to all other issues; it simply focused the jury on the fact, that if there were two reasonable interpretations of the evidence regarding specific intent, the jury was required to find in favor of appellant. As discussed above, the additional instruction could only have inured to appellant's benefit.

XVII.

THE COURT PROPERLY INSTRUCTED THE JURY REGARDING ACCOMPLICE LIABILITY (APPELLANT'S CLAIMS 21-22)

The court instructed the jury with CALJIC No. 3.00 as follows:

Persons who are involved in committing or attempting to commit a crime are referred to as principals in that crime. Each principal, regardless of the extent or manner of participation, is *equally guilty*. Principals include:

One, those who directly and actively commit or attempt to commit the act constituting the crime;

Or two, those who aid and abet the commission or attempted commission of a crime.

(53 RT 10434; 5 CT 1254, italics added.)

The court further instructed the jury that:

One who aids or abets another in the commission of a crime or crimes is not only guilty of that crime or crimes, but is *also guilty of any other crime committed by a principal* which is a natural and probabl[e] consequence of the crimes originally aided and abetted.

In order to find the defendant guilty of the crime of murder as charged in Counts 1, 2 and 3 on this theory, you must be satisfied beyond a reasonable doubt, that:

One, the crimes of burglary or robbery were committed;

Two, . . . [¶] That the defendant aided and abetted in those crimes;

That a co-principal in one of those—one or more of those crimes *committed a murder.*

And four, that the *crime of murder* was a natural and probable consequence of the commission of the crimes of robbery or burglary.

You are not required to unanimously agree as to which originally contemplated crime the defendant aided and abetted, so long as you are

satisfied beyond a reasonable doubt and unanimously agree that the defendant aided and abetted the commission of an identified target crime and that the crime of murder was a natural and probable consequence of the commission of that target crime.

(53 RT 10435-10436; 5 CT 1256, italics added.)

Appellant contends that the emphasized language prevented the jury from considering the possibility that appellant was guilty only of second degree murder, even if Sanchez and Nunez were guilty of first degree murder. (AOB 285-287, 292.) However, the instructions were a correct statement of the law, and the court did not err.

As to the natural and probable consequence instruction, if the jury found appellant liable as an aider and abettor to robbery or burglary, then he would be guilty of first degree felony murder. (53 RT 10449 ["If a human being is killed by any one of several persons engaged in the commission or attempted commission of the crime of burglary or robbery, all persons who either directly or actively commit the act constituting those crimes or who with knowledge of the unlawful purpose of the perpetrator of the crime and with the intent or purpose of committing, encouraging, or facilitating the commission of the offense, aid, promote encourage, or instigate by act or advice its commission, are guilty of murder in the first degree whether the killing is intentional, unintentional, or accidental"]; see Penal Code section 189.)[27/] As discussed

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27. Penal Code section 189 provides, in relevant part:

> All murder which . . . is committed in the perpetration of, or attempt to perpetrate, arson, rape, carjacking, robbery, burglary, mayhem, kidnapping, train wrecking, or any act punishable under Section 206, 286, 288, 288a, or 289, or any murder which is perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person outside of the vehicle with the intent to inflict death, is murder of the first degree. All other kinds of murders are of the second degree.

above (see Arg. XV, *supra*), the jury did not need to determine whether murder was a natural and probable consequence of robbery and burglary, because the law prescribes that individuals engaged in those felonies, whether as direct perpetrators or as aiders and abettors, are liable for any murders that occur during those felonies, and the murders are, by operation of law, of the first degree. Thus, even if the jury "could have concluded that second-degree murder was a natural and probable consequence of the robbery or burglary" (AOB 292), it was required to find appellant guilty of first degree felony murder.[28/]

Similarly, putting aside the natural and probable consequence doctrine, if the jury believed that appellant was not the actual shooter, but that he aided and abetted the murders (as the "target" crimes), the jury was correctly informed that appellant was "equally guilty" of those murders. If the jury found that Sanchez or Nunez committed first-degree murder, it could not have found appellant guilty on an aiding and abetting theory unless it found that appellant "shared the murderous intent of the actual perpetrator." (*People v. McCoy*, *supra*, 25 Cal.4th at p. 1118.)

In *McCoy*, this Court found that an aider and abettor could be convicted of murder, while the actual perpetrator could be convicted of manslaughter based

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28. Appellant cites *People v. Woods* (1992) 8 Cal.App.4th 1570, 1590, for the proposition that the jury "if given the choice, could have determined it was not reasonable foreseeable [Sanchez] would commit the premeditated, cold-blooded killing . . ., but that it was a reasonably foreseeable consequence that [Sanchez] might commit the necessarily included offense of second degree murder, i.e., kill intentionally but without premeditation and deliberation or kill as a result of an intentional act dangerous to human life performed with knowledge of the danger and conscious disregard of human life." However, in *Woods*, the target crime that the defendant aided and abetted was assault with a firearm, not one of the felonies listed in Penal Code section 189. (See *id.* at p. 1579.) Thus, because the target crimes here, robbery and burglary, are listed in Penal Code section 189 as requiring a first-degree murder finding, *Woods* is inapposite.

on the actual perpetrator's imperfect self-defense. Depending on the circumstances, if an aider and abettor's "mens rea is more culpable than another's, that person's guilt may be greater even if the other might be deemed the actual perpetrator." (*Id.* at p. 1122.)

However, while an aider and abettor may be guilty of a *greater* offense than the actual perpetrator, nothing in *McCoy* suggests that an aider and abettor can be *less* culpable than the actual perpetrator of the target crimes. Indeed, as the *McCoy* court explained:

> [O]utside of the natural and probable consequences doctrine, an aider and abettor's mental state *must be at least* that required of the direct perpetrator. "To prove that a defendant is an accomplice . . . the prosecution must show that the defendant acted 'with knowledge of the criminal purpose of the perpetrator *and* with an intent or purpose either of committing, or of encouraging or facilitating commission of, the offense.' [Citation.] When the offense charged is a specific intent crime, the accomplice must 'share the specific intent of the perpetrator'; this occurs when the accomplice 'knows the full extent of the perpetrator's criminal purpose and gives aid or encouragement with the intent or purpose of facilitating the perpetrator's commission of the crime.' [Citation.]" [Citation.] What this means here, when the charged offense and the intended offense—murder or attempted murder—are the same, i.e., when guilt does not depend on the natural and probable consequences doctrine, is that the aider and abettor *must know and share the murderous intent* of the actual perpetrator.

(*Id.* at p. 1118, some italics added.)

Thus, the court correctly instructed the jury that if it found appellant to be an aider and abettor to murder, he was "equally guilty" as the direct perpetrator. Moreover, the court correctly instructed the jury that if appellant aided and abetted a robbery or burglary, he was guilty of the first degree murder by operation of law. Appellant's claims to the contrary should be denied.

XVIII.

THE COURT PROPERLY INSTRUCTED THE JURY REGARDING ITS DUTY IN DECIDING GREATER AND LESSER CHARGES (APPELLANT'S CLAIM 23)

The court instructed the jury that it "cannot accept a verdict of guilty of second degree murder as to Counts 1, 2, or 3 unless the jury also unanimously finds and returns a signed verdict form of not guilty as to murder of the first degree in the same count." (53 RT 10455-10456; 5 CT 1291.) Appellant contends that this instruction precluded the jury from fully considering the lesser included offense of second degree murder. (AOB 298.) However, as appellant recognizes, this claim has been repeatedly rejected by this Court. (*People v. Nakahara* (2003) 30 Cal.4th 705, 715; *People v. Riel, supra*, 22 Cal.4th at pp. 1200-1201; *People v. Visciotti* (1992) 2 Cal.4th 1, 59-60.)

XIX.

THE GIVEN INSTRUCTIONS DID NOT UNFAIRLY FAVOR THE PROSECUTION (APPELLANT'S CLAIMS 24-28)

Appellant contends that the court erred in giving several standard jury instructions because the instructions were one-sided and improperly favored the prosecution. Specifically, appellant claims that the motive and confession instructions were improper because they applied only to appellant (CALJIC Nos. 2.51, 2.70; AOB 300-302); the consciousness of guilt instructions were improper because they applied only to appellant (CALJIC Nos. 2.03, 2.52; AOB 305-309); CALJIC Nos. 2.21.1 and 2.21.2 were improper because they applied only to a witness's "testimony," and not to out-of-court statements (AOB 310-312); CALJIC 2.27 was improper because it implied that appellant's out-of-court statement was not sufficient to prove any fact (AOB 314-316); and

CALJIC No. 2.13 was improper because it bolstered the credibility of Jose Luis Ramirez (AOB 317-322).

First, we note that appellant did not object to the giving of any of these standard instructions, did not request modifications to make the instructions more "balanced," and does not claim that the instructions, as written, diluted the standard of proof. (Cf. AOB 323 [Claims 29-39: Errors regarding the prosecution's burden of proof].) Thus, his failure to request modification of standard jury instructions waives his claim on appeal. (*People v. Hillhouse*, *supra*, 27 Cal.4th at p. 503 [a party must request a clarifying instruction in order to argue on appeal that an instruction correct in law was too general or incomplete]; *People v. Daya*, *supra*, 29 Cal.App.4th at p. 714 ["defendant is not entitled to remain mute at trial and scream foul on appeal for the court's failure to expand, modify, and refine standardized jury instructions"].)[29/]

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29. This Court has no obligation to address the merits of waived or forfeited claims and should, in our view, reject assignments of error on the procedural "failure to object" grounds identified by the People throughout this case, thereby upholding California's timely and specific contemporaneous objection rules and the important state interests those rules advance. For purposes of federal habeas corpus review (which is available only for persons in custody in violation of the Constitution or laws or treaties of the United States (28 U.S.C. § 2254, subd. (a)), a failure to properly object to or raise a federal constitutional issue at the state trial ordinarily constitutes a procedural default, foreclosing collateral review of the waived claim. (*Wainwright v. Sykes* (1977) 433 U.S. 72, 86-87.) The federal procedural default rule protects the interest of the state as a whole in the finality of its judgments. But a federal court is thought to do no offense to that interest by refusing to enforce a state procedural rule ignored by the state court itself. In such a case, the federal court simply accepts the state court's apparent subordination of the state's interest in finality. Accordingly, when a state appellate court reaches the merits of an issue despite the lack of a sufficient objection at trial without also or alternatively "plainly stating" that it is invoking the waiver doctrine, its failure to vindicate state procedure has been deemed to justify federal review on the merits. (*Harris v. Reed* (1989) 489 U.S. 255, 262-264, fn. 10.)

In any event, appellant's claims are meritless. As discussed above, allegedly ambiguous instructions can be deemed erroneous only if, given all the instructions and other relevant circumstances, there was a reasonable likelihood that the jury misinterpreted the law in a way potentially unfavorable to the defense. (*Estelle v. McGuire*, *supra*, 502 U.S. at p. 72; *Boyde v. California*, *supra*, 494 U.S. at p. 380.) Here, appellant has not demonstrated that any of the challenged instructions were reasonably likely to be applied in the manner he suggests. As such, his claims should be denied.

A. CALJIC Nos. 2.51 And 2.70 Were Not One-Sided

The court instructed the jury with CALJIC Nos. 2.51 and 2.70 as follows:

> Motive is not an element of the crime charged and need not be shown. However, you may consider motive or lack of motive as a circumstance in this case. Presence of motive may tend to establish the defendant's guilt. Absence of motive may tend to show the defendant's innocence.

(53 RT 10429-10430; 5 CT 1244; CALJIC No. 2.51.)

> A confession is a statement made by a defendant which he has acknowledged—in which he has acknowledged his guilt of the crimes for which he is on trial. In order to constitute a confession, the statement must acknowledge participation in the crimes as well as the required criminal intent.
>
> An admission is a statement made by a defendant which does not by itself acknowledge his guilt of the crimes for which he is on trial, but which statement tends to prove his guilt when considered with the rest of the evidence.
>
> You are the exclusive judges as to whether the defendant made a confession or admission, and if so, whether that statement is true in whole or in part.

(53 RT 10430-10431; 5 CT 1248; CALJIC No. 2.70.)

Appellant contends that these instructions improperly "bolstered the prosecution's case and undermined the defense theory that Jose Luis Ramirez

and Antonio Sanchez committed crimes which were the product of their own independent motives." (AOB 303.) However, appellant has not demonstrated a reasonable likelihood that the jury understood the instructions in the manner appellant suggests. (*Estelle v. McGuire*, *supra*, 502 U.S. at p. 72.)

Contrary to appellant's contention, the instructions did not preclude the jury from considering the evidence of the motives of the coparticipants. Indeed, CALJIC No. 2.51 specifically instructed the jury on how it was to consider the motive evidence. Because Sanchez was the only one with a grudge against Morales and because Ramirez stole his own brand of hair oil, appellant contended that Sanchez and Ramirez were acting on their own, without appellant's knowledge. In other words, appellant did not share the motives attributed to the coparticipants. However, CALJIC No. 2.51 explicitly informed the jury that appellant's "absence of motive" would tend to show that he was not guilty.

Because the existence and possible relevance of independent motives by the coparticipants was covered by the standard instruction, the court was not required to tailor the motive instruction to include Ramirez and Sanchez. They were not on trial, and the jury was not required to consider their guilt or innocence. To the extent the existence of independent motives by the coparticipants bore on *appellant's* guilt or innocence, the instruction explained how that evidence could be considered.

As to appellant's complaint about CALJIC No. 2.70, he provides no explanation as to why the instruction undermined the defense theory that Sanchez and Ramirez were working alone. CALJIC No. 2.70 is simply a definitional instruction—it defined a confession and an admission. It then explained that the members of the jury were the exclusive judges as to whether the defendant made a confession or admission—an unremarkable proposition inasmuch as the jury was already instructed that it must "determine what facts

have been proved from the evidence." (53 RT 10419; 5 CT 1223; CALJIC No. 1.00.)

Appellant's only complaint about the instruction is that it applied only "to out-of-court statements of appellant and not to those of Antonio Sanchez and Jose Luis Ramirez." (AOB 301.) However, appellant does not explain why that fact makes the instruction improper. As discussed above, Sanchez and Ramirez were not on trial; whether either individual made a confession or admission would not be relevant to *appellant's* guilt or innocence. Moreover, to the extent Ramirez and Sanchez's out-of-court (or in-court) statements constituted admissions that, in turn, implicated appellant, the jury was adequately instructed as to how to consider those statements. The jury was instructed how to consider the prior consistent or inconsistent statements of any witness (53 RT 10426; 5 CT 1236, 1237-1238; CALJIC Nos. 2.13, 2.20), how to assess the credibility of any witness, including the existence or nonexistence of motive (53 RT 10427-10428; 5 CT 1237-1238; CALJIC No. 2.20), and how to consider a coconspirator's out-of-court statement against appellant (53 RT 10444; 5 CT 1270; CALJIC No. 6.24). Appellant has not demonstrated a reasonable likelihood that the jury could have interpreted CALJIC No. 2.70 in a detrimental manner. (*Estelle v. McGuire*, *supra*, 502 U.S. at p. 72.)

B. CALJIC Nos. 2.03 And 2.52 Did Not Limit The Jury's Consideration Of The Consciousness Of Guilt Of The Coparticipants

The court instructed the jury with CALJIC Nos. 2.03 and 2.52 as follows:

> If you find before this trial the defendant made a willfully false or deliberately misleading statement concerning the crimes for which he is now being tried, you may consider that statement as a circumstance tending to prove consciousness of guilt. However, that conduct is not sufficient by itself to prove guilt and its weight and significance, if any, are for you to decide.

(53 RT 10424-10425; 5 CT 1232; CALJIC No. 2.03.)

> The flight of a person immediately after the commission of a crime or after he or she is accused of a crime is not sufficient in and of itself to establish guilt, but is a fact, which if proved, may be considered by you in the light of all the other proved facts in deciding whether a defendant is guilty or not guilty. The weight to which this circumstance is entitled is a matter for you to decide.

(53 RT 10430; 5 CT 1245; CALJIC No. 2.52.)[30/]

Appellant contends that both instructions were erroneous because they applied only to appellant and "failed to inform the jury that it could consider similar inferences about the consciousness of guilt of Antonio Sanchez and Joaquin Nunez . . . and of Jose Luis Ramirez." (AOB 305-306.) However, appellant has not demonstrated a reasonable likelihood that the jury interpreted the instructions in the manner appellant suggests. (*Estelle v. McGuire*, *supra*, 502 U.S. at p. 72.) Contrary to appellant's contention, the instructions did not prohibit the jury from considering the coparticipants' flight from the scene, or from considering Ramirez's false statements to the police. (See AOB 307.) To the extent those facts were relevant to the issues, the jury was permitted to draw reasonable conclusions from them. Indeed, the jury was specifically instructed that it could consider Ramirez's admission of untruthfulness in assessing his credibility. (53 RT 10428; 5 CT 1237-1238; CALJIC No. 2.20.)

Moreover, appellant does not explain how the fact that all of the participants fled after the shootings bears on his defense. His defense was that he did not know what Sanchez, Nunez, and/or Ramirez were planning. There was no substantial dispute that Sanchez, Nunez, and Ramirez were guilty of at least some of the alleged crimes, thus, their flight from the scene was not particularly illuminating or relevant to *appellant's* knowledge and intent. As discussed

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30. Appellant notes that the trial court gave CALJIC No. 2.52, but mistakenly quotes language from CALJIC No. 2.06. CALJIC No. 2.06 was not given in this case.

above, Sanchez, Nunez, and Ramirez were not on trial. Of course, *appellant's* flight could be relevant to his knowledge and intent, and the instruction merely informed the jury of that fact. But there is no reasonable likelihood that the jury interpreted the challenged instructions to prohibit consideration of the other participants' flight, or that the challenged instructions were detrimental to appellant.

Indeed, to the extent CALJIC Nos. 2.03 and 2.52 focus on appellant, as opposed to other witnesses, that fact benefitted the defense. "[E]ach of [these] instructions made clear to the jury that certain types of deceptive or evasive behavior on a defendant's part could indicate consciousness of guilt, while also clarifying that such activity was not of itself sufficient to prove a defendant's guilt, and allowing the jury to determine the weight and significance assigned to such behavior. The cautionary nature of the instructions benefits the defense, admonishing the jury to circumspection regarding the evidence that might otherwise be considered decisively inculpatory. [Citations.] We therefore conclude that these consciousness-of-guilt instructions did not improperly endorse the prosecution's theory or lessen its burden of proof." (*People v. Jackson, supra*, 13 Cal.4th at p. 1224; *People v. Boyette* (2002) 29 Cal.4th 381, 438-439 [CALJIC Nos. 2.03 and 2.52 are not improper pinpoint instructions].) Appellant does not demonstrate a reasonable likelihood that the jury misapplied the cautionary instructions to his detriment. His claim should be denied.

C. CALJIC Nos. 2.21.1 And 2.21.2 Did Not Improperly Limit The Jury's Consideration Of Ramirez's Admittedly False Out-Of-Court Statements

The court instructed the jury with CALJIC Nos. 2.21.1 and 2.21.2 as follows:

> Discrepancies in a witness's testimony or between one witness's testimony and that of other witnesses, if there were any, do not

necessarily mean that any witness should be discredited. Failure of recollection is common. Innocent recollection is not uncommon. Two persons witnessing an incident or a transaction often will see or hear it differently. Whether a discrepancy pertains to an important matter or only to something trivial should be considered by you.

(53 RT 10428; 5 CT 1239; CALJIC No. 2.21.1.)

A witness who is willfully false in one material part of his or her testimony is to be distrusted in others. You may reject the entire testimony of a witness who willfully has testified falsely as to a material point, unless from all the evidence you believe the probability of truth favors his or her testimony in other particulars.

(53 RT 10428; 5 CT 1240; CALJIC No. 2.21.2.)

Appellant contends that the instructions were improper because they "unfairly limited the jurors' consideration of willful[ly] false statements to testimony." (AOB 310.) According to appellant, "an important focus of [his] defense was to argue that the testimony of Jose Luis Ramirez should be distrusted because he made 'willfully false' statements to the police." (AOB 311, fn. 249.) Apparently appellant argues that because the challenged instructions referenced only willfully false "testimony," and discrepancies in a witness's "testimony," they unfairly "lessened the evidentiary weight of Jose Luis Ramirez' false statements to the police." (AOB 311, fn. 249.)

Appellant's argument is nonsensical. While CALJIC Nos. 2.21.1 and 2.21.2 provided the jury with a mechanism for evaluating discrepancies and falsities in a witness's testimony, they did not otherwise limit the jury's consideration of other false statements and prior discrepancies by witnesses. The jury was instructed to consider the instructions as a whole, and not to single out any individual point and ignore the others. (53 RT 10420; 5 CT 1225; CALJIC No. 1.01.) "CALJIC No. 2.21.2 does nothing more than explain to a jury one of the tests they may use in resolving a credibility dispute." (*People v. Maury* (2003) 30 Cal.4th 342, 429, internal quotations and citations omitted.)

Indeed, the jury was instructed on the factors to consider in assessing a witness's credibility, and was specifically told that it could consider any prior inconsistent statements made by the witness or "any admission by a witness of untruthfulness." (53 RT 10428; 5 CT 1237-1238; CALJIC No. 2.20.) There was evidence that Ramirez's statements to the police were inconsistent with his trial testimony, and, as appellant points out, Ramirez admitted, during his testimony, that he lied to the police. (AOB 311, fn. 249.) Thus, the jury was properly informed that it could consider those prior statements and his admission of untruthfulness in judging his credibility. There is no reasonable likelihood that the jury would have understood CALJIC Nos. 2.21.1 and 2.21.2 to otherwise limit the consideration of the factors listed in CALJIC No. 2.20, simply because those instructions supplied additional methods for resolving a credibility dispute. (*Estelle v. McGuire*, *supra*, 502 U.S. at p. 72.)

D. CALJIC No. 2.27 Did Not Limit The Jury's Consideration Of Out-Of-Court Statements

The court instructed the jury with CALJIC No. 2.27 as follows:

> You should give the uncorroborated testimony of a single witness whatever weight you think it deserves. Testimony by one witness which you believe concerning any fact whose testimony about that fact does not require corroboration is sufficient for proof of that fact. You should carefully review all of the evidence upon which the proof of that fact depends.

(53 RT 10429; 5 CT 1243.)

Appellant claims that because the instruction referred only to uncorroborated "testimony," as sufficient to prove any fact, it implied "that the uncorroborated out-of-court statement of a single person" was *not* sufficient to prove that fact. Specifically, appellant points to his videotaped statement during the guilt phase, and the four out-of-court statements by defense witnesses admitted at the penalty phase, and contends that the instruction told the "jury

that one class of evidence should generally be treated differently from the other." (AOB 314.)[31/]

However, appellant cannot demonstrate a reasonable likelihood that the jury interpreted CALJIC No. 2.27 in the manner he suggests. (*Estelle v. McGuire*, *supra*, 502 U.S. at p. 72.) Simply because the jury was instructed that the uncorroborated testimony of one witness was sufficient to prove a fact does not necessarily imply that the other uncorroborated evidence is insufficient. "CALJIC No. 2.27 focuses on how the jury should evaluate a fact . . . proved solely by the testimony of a single witness." (*People v. Gammage* (1992) 2 Cal.4th 693, 700.) It was crafted by this Court so as to prevent the trial court or jury from requiring a rape victim's testimony to be corroborated in order to support a conviction. (See *People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 884-885.) It does not deal with other methods of proving facts, and the jury would not have understood it to require corroboration of appellant's or other witnesses' out-of-court statements.

The court instructed that the jury that it must determine the facts from the "evidence" presented at trial and that evidence "consists of testimony of witnesses, writings, material objects or *anything presented to the senses* and offered to prove the existence or nonexistence of a fact." (53 RT 10419, 10421; 5 CT 1223, 1228, italics added.) The jury was also instructed that it was not bound to "decide an issue of fact in accordance with the testimony of a number of witnesses which does not convince you as against the testimony of a lesser number or *other evidence* which appeals to your mind with more convincing force. . . . The final test is not in the relative number of witnesses, but in the convincing force of the *evidence*." (53 RT 10428-10429; 5 CT 1241,

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31. The statements are from Juan Manuel Avila Sanchez, Jose Guadalupe Espinoza Flores, Martin Dominguez de Castro, and Maria Guadalupe Castro de Gonzalez. (65 RT 12804, 4 Supp. CT 1000-1017.)

italics added.) Nothing in the instructions suggested that any particular type of evidence was *insufficient* to prove a disputed fact, or that out-of-court statements required corroboration, or should be "treated differently" than in-court testimony. (AOB 314.)

Moreover, the court instructed the jury that Ramirez's testimony, as an accomplice, *did require* corroboration. (53 RT 10436; 5 CT 1258.) To the extent the court provided extensive instructions about the manner and type of required corroboration, and told the jury to view Ramirez's testimony with caution and care, the jury would not have understood that other types of evidence required similar corroboration. The jury was also instructed that an accomplice's "testimony" included out-of-court statements offered for the truth of the matter asserted (53 RT 10436; 5 CT 1258; CALJIC No. 3.11), and that it should consider the instructions as a whole, and in light of all the others (53 RT 10420; 5 CT 1225; CALJIC No. 1.01). To the extent the jury needed a broader definition of "testimony" to include appellant's out-of-court statements, it was provided by CALJIC No. 3.11. There is no reasonable likelihood that the jury would have believed that any evidence, other that Ramirez's testimony, required corroboration. Appellant's claim should be denied.

E. CALJIC No. 2.13 Did Not Bolster The Credibility Of The Prosecution Witnesses

The trial court instructed the jury with CALJIC No. 2.13 as follows:

> Evidence that at some other time a witness made a statement or statements that is or are consistent or inconsistent with testimony given before—with his or her testimony in this trial, may be considered by you not only for the purpose of testing the credibility of the witness, but also as evidence of the truth of the facts as stated by the witness on that former occasion.

(53 RT 10426; 5 CT 1236.)

Appellant alleges this instruction unfairly skewed the jury's credibility determination of the prosecution witnesses, specifically Jose Luis Ramirez. He contends the instruction was faulty because it instructed the jury to consider a prior consistent or inconsistent statement for testing the witness' credibility and for the "truth" of the former statement, but not its "falsity." (AOB 317.) Appellant suggests that the failure to instruct the jury to consider the "falsity" of the prior statements implied "that the prior statements were factual." (AOB 320.)

Appellant has not demonstrated a reasonable likelihood that the jury interpreted the instruction in the manner he suggests. (*Estelle v. McGuire*, *supra*, 502 U.S. at p. 72.) CALJIC No. 2.13 simply provides a correct statement of the law, i.e., that prior consistent or inconsistent statements may be considered to determine the truthfulness of testimony or for the truth of the matter asserted in the out-of-court statement. (Evid. Code, §§ 780, 1235, 1236.) Notably, for prior statements to be admissible for their truth, the person who made the prior inconsistent statement must be given an opportunity to explain or deny the statements. (See Evid. Code, §§ 770, 1235.)

Given that CALJIC No. 2.13 explains to the jury the exception to the hearsay rule that prior inconsistent statements may be considered for their "truth" (see Evid. Code, §§ 1200, 1235), appellant's contention that CALJIC No. 2.13 is erroneous because it does not refer to "falsity" is illogical. CALJIC No. 2.13 on its face gives jurors the option of rejecting the prior statements (i.e., finding them false) and further instructs the jury that it can consider the prior statements for purposes of "testing the credibility" (i.e., the truth or falsity) of the witness. There is no need to specifically instruct that the statements can be consider for their "falsity," the jury, in determining whether the statements are true would necessarily also be determining whether they were false. And the jury was correctly instructed that prior false statements by a witness can be

considered in assessing the witness's credibility. (53 RT 10427-10428; 5 CT 1237-1238; CALJIC No. 2.20.)[32]

Moreover, CALJIC No. 2.13 does not command the jurors to favor the prosecution or to find the prior statements to be true. As discussed above, the jury was instructed that it was to make the determination of what facts have been proved by the evidence, and that it should disregard any instructions "which appl[y] to facts which you determine do not exist." (53 RT 10419, 10470; 5 CT 1223, 1321.) The court also instructed the jury: "Do not conclude because an instruction has been given that I'm expressing an opinion as to the facts." (53 RT 10470; 5 CT 1321.) Thus, based on the instructions as a whole, there is no reasonable likelihood that the jury would have understood the instruction to suggest that Ramirez's prior inconsistent or consistent statements were, in fact, true.

In addition, the instruction, on its face, is content-neutral, because it applies equally to any witness, prosecution or defense, who is impeached with a prior statement. Contrary to appellant's claim, the instruction cannot be characterized as "one-sided" or somehow more favorable to the prosecution. Nothing in the instruction commanded the jury to apply it solely to the prosecution witnesses. That the evidence, when considered in light of the

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32. Indeed, as appellant acknowledges, Ramirez testified that he lied to the police on prior occasions—when he first told them that appellant did not have a gun, and subsequently that he saw appellant with the gun through the window. Likewise, appellant's attack on Ramirez's credibility was also based on his statements (or lack of statements) to the police which contradicted his trial testimony—e.g., Ramirez never told the police that they went to his friend's house on the night of the murders to get a weapon for appellant, or that they went to Guillermo Morales's house to kill him. Those prior statements or omissions, if the jury found them to be true, benefitted appellant because it supported his contention that Ramirez was fabricating his story at trial. Thus, even if the jury understood the instruction to suggest that it *must* find Ramirez's prior inconsistent statements to be the truth, such an understanding would have benefitted appellant.

content-neutral instructions, may tend to favor the prosecution is not evidence of instructional error. It is a risk all defendants run when taking a case to trial—that the law, when applied to the evidence, will demonstrate the defendant's guilt beyond a reasonable doubt.

Not surprisingly, respondent has not found any authority holding that CALJIC No. 2.13 is an improper statement of law or that it unfairly favors the prosecution. This is so, respondent submits, because the instruction is neutral and equally applicable to both the prosecution and defense. Indeed, there are cases in which defendants contend the trial court erred by *not* giving CALJIC No. 2.13 sua sponte. (See *People v. Griffin* (1988) 46 Cal.3d 1011, 1026; *People v. Snead* (1993) 20 Cal.App.4th 1088, 1097.)

Appellant's reliance on *Wardius v. Oregon* (1973) 412 U.S. 470 is misplaced. (AOB 318.) In *Wardius*, the United States Supreme Court held that an Oregon statute that prevented a defendant from introducing alibi evidence unless the prosecution was notified prior to trial violated due process, because Oregon did not provide defendants with reciprocal discovery regarding the prosecution evidence that could rebut the alibi defense. (*Id.* at pp. 473-475.) The United States Supreme Court found it to be fundamentally unfair to force a defendant to divulge the details of his or her defense while subjecting the defendant to the surprise of the prosecution's rebuttal evidence. (*Id.* at pp. 475-476.)

Appellant seizes on language from *Wardius* that, "[a]lthough the Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded, . . . it does speak to the balance of forces between the accused and the accuser." (*Id.* at p. 475.) In essence, appellant contends that CALJIC No. 2.13, like the non-reciprocal discovery statute at issue in *Wardius*, was so advantageous to the prosecution that it was fundamentally unfair. Appellant is incorrect, because the discussion in *Wardius* was limited to

reciprocal discovery obligations in the context of a statute that completely barred a defendant from presenting an alibi defense if he or she failed to comply. Thus, on its face, *Wardius* concerned a rule that went to the very heart of a fair trial (i.e., the ability of the defendant to present a defense without unfair surprise). In contrast, CALJIC No. 2.13 does not prevent defendants from presenting a defense and is equally applicable to both the prosecution and defense. Obviously, defendants, as well as prosecutors, present evidence in the form of prior inconsistent or consistent statements and often argue to the jury that it is the prior statement that is accurate. *Wardius* is inapplicable, given that CALJIC No. 2.13 is, on its face, equally applicable and beneficial to both the prosecution and defense.

Appellant's reliance on *People v. Moore* (1954) 43 Cal.2d 517, 526-529, is likewise misplaced. In *Moore*, this Court considered whether a jury instruction on manslaughter that made specific reference to the facts of the case and instructed the jury as to what would *not* be a justifiable use of force, was error because the instruction stated the law from the viewpoint of the prosecution. (*Ibid.*) The fact-specific instruction in *Moore* has no applicability to the neutral wording of CALJIC No. 2.13. Thus, appellant's claim must fail.

XX.

THE COURT CORRECTLY INSTRUCTED THE JURY ON THE BURDEN OF PROOF (APPELLANT'S CLAIMS 29-35, 39)

Appellant makes myriad attacks on the substance of CALJIC No. 2.90, claiming that each of alleged errors, separately and together, lessened the prosecution's burden of proof. Specifically, appellant claims that: (1) CALJIC No. 2.90 should have instructed that the prosecution had to prove "every element" of the charges or, in the alternative, should have contained an "application" paragraph listing the required elements (AOB 323, 345); (2) the

instruction should have stated that appellant was presumed innocent "until" the contrary is proved instead of "unless" the contrary is proved (AOB 333, 344); (3) the instruction did not affirmatively explain that appellant had no obligation to present evidence (AOB 340, 349-361); (4) the instruction did not explain that appellant's presentation of defense evidence did not shift the burden of proof (AOB 341); (5) the instruction did not affirmatively explain that a conflict in the evidence or a lack of evidence could leave them with reasonable doubt (AOB 342); (6) the instruction failed to inform the jury that the presumption of innocence continues through deliberations (AOB 343); (7) the term "burden" was a legal, technical term that should have been defined (AOB 344-345); (8) the instruction should have included "moral certainty" language (AOB 359); (9) the instruction implied that the jurors must articulate specific reasons for any reasonable doubt (AOB 362); (10) the instruction incorrectly stated that "possible" doubt could not constitute "reasonable" doubt (AOB 368-369); and (11) the instruction violated the Equal Protection clause because it "provides no adequate and uniform standard for determining" the required level of certainty for the prosecution to meet its burden of proof (AOB 391).

First, both the United States Supreme Court and this Court have rejected several of appellant's specific claims. (See *Victor v. Nebraska* (1994) 511 U.S. 1, 16-17 [the term "moral certainty" not properly used in CALJIC 2.90 and the use of term "possible doubt" does not lower the standard of proof]; *People v. Lewis*, *supra*, 25 Cal.4th at p. 652 [there is "no reasonable likelihood that the jury understood the [term 'until'] to mean it should view defendant's guilt as a foregone conclusion]; *People v. Ochoa* (2001) 26 Cal.4th 398, 444, fn. 13 ["it would be correct to instruct that the People must prove every element of the offense beyond a reasonable doubt, but a defendant is not entitled to that instruction"]; *People v. Frye* (1998) 18 Cal.4th 894, 974 [CALJIC No. 2.90 did not suggest that defendant was required to present evidence]; *People v. Osband*

(1996) 13 Cal.4th 622, 678 [CALJIC 2.90 properly informs jury that prosecution must prove "every element" beyond a reasonable doubt]; *People v. Freeman* (1994) 8 Cal.4th 450, 504 ["the terms 'moral evidence' and 'moral certainty' add nothing to the jury's understanding of reasonable doubt"].)

In addition, the standard jury instruction given in this case has been approved by this Court and the United States Supreme Court. (*Victor v. Nebraska*, *supra*, 511 U.S. at pp. 14-15 ["An instruction cast in terms of an abiding conviction as to guilt, without reference to moral certainty, correctly states the government's burden of proof"]; *People v. Turner* (1994) 8 Cal.4th 137, 203 [CALJIC No, 2.90 is "'constitutionally sound description of reasonable doubt,' and [] 'no additional instructions on reasonable doubt [are] necessary'"].) CALJIC No. 2.90, as given, does not lower the prosecution's burden of proof or violate a defendant's constitutional rights. (See *Victor v. Nebraska*, *supra*, 511 U.S. at pp. 22-23.) Thus, there is no reasonable likelihood that the jury understood the instruction in a manner detrimental to appellant. (*Estelle v. McGuire*, *supra*, 502 U.S. at p. 72.)

Moreover, appellant did not object to the instruction in the trial court or suggest any of the modifications that he now claims were required to give the jury a full understanding of its duties. His failure to suggest such modifications waives his claim on appeal. (*People v. Daya*, *supra*, 29 Cal.App.4th at p. 714 ["defendant is not entitled to remain mute at trial and scream foul on appeal for the court's failure to expand, modify, and refine standardized jury instructions"].) However, even if appellant had suggested such modifications, the trial court would have been correct to refuse his suggestions. As this Court has pointed out, "modifying the standard [reasonable doubt] instruction is perilous, and generally should not be done." (*People v. Freeman*, *supra*, 8 Cal.4th at p. 504.) "We [] continue to caution against trial court experimentation; individual courts should not otherwise modify the standard

instruction." (*Ibid.*) Appellant's attacks on CALJIC No. 2.90 should be rejected.

XXI.

CALJIC 2.01 AND 2.02 DID NOT LIGHTEN THE PROSECUTOR'S BURDEN OF PROOF (APPELLANT'S CLAIM 36)

As discussed above, the court instructed the jury with both CALJIC No. 2.01, regarding circumstantial evidence, and CALJIC No. 2.02, regarding circumstantial evidence of specific intent. (See Arg. XVI, *supra.*) Appellant contends that CALJIC Nos. 2.01 and 2.02 diluted the prosecution's burden of proof and created a mandatory presumption of guilt "upon a preliminary finding that evidence of guilt merely 'appears reasonable.'" (AOB 377.) However, as appellant acknowledges, this Court has "rejected claims that the challenged instructions, alone or in combination, somehow dilute or undermine the reasonable doubt standard and thus deprive defendants of due process." (*People v. Rogers* (2006) 39 Cal.4th 826, 888-889; *People v. Samuels* (2005) 36 Cal.4th 96, 131 [CALJIC No. 2.01 does not undermine the requirement of proof beyond a reasonable doubt]; *People v. Stewart*, *supra*, 33 Cal.4th at p. 521 [CALJIC Nos. 2.01 and 2.02 do not "operate[] to create an unconstitutional mandatory presumption and lessen the prosecution's burden of proof"]; *People v. Millwee* (1998) 18 Cal.4th 96, 160; *People v. Jennings* (1991) 53 Cal.3d 334, 385-386.)

Appellant has provided no reason for this Court to revisit its prior holdings, and his claim should therefore be rejected.

XXII.

CALJIC 2.01, AS GIVEN, WAS PROPER (APPELLANT'S CLAIM 37)

The court instructed the jury with CALJIC No. 2.01, which states that if the circumstantial evidence "permits two reasonable interpretations, one of which points to the defendant's guilt and the other to his innocence, you must adopt that interpretation that points to the defendant's innocence and reject that interpretation that points to his guilt." (53 RT 10423; 5 CT 1229.) Appellant contends that the instruction should have been "supplemented with an instruction" that applied the same principles to direct evidence. (AOB 379.) According to appellant, the failure to give such an instruction "permitted appellant to be convicted upon direct evidence despite the existence of a reasonable interpretation of that evidence pointing to his innocence." (AOB 379.)

Appellant's claim fails because he did not request a modification of the standard CALJIC instruction—an instruction that, as discussed above (see Arg. XXI, *supra*), has been consistently approved by this Court. (*People v. Daya*, *supra*, 29 Cal.App.4th at p. 714 ["defendant is not entitled to remain mute at trial and scream foul on appeal for the court's failure to expand, modify, and refine standardized jury instructions"].)

Moreover, appellant's claim makes no sense. Direct evidence is defined as "evidence that directly proves a fact, without an inference or presumption, and which in itself, if true, conclusively establishes that fact." (Evid. Code, § 410.) If evidence is susceptible to more than one interpretation by way of inference, by definition that evidence is circumstantial and not direct. There is no room for "reasonable interpretations" of direct evidence The court did not err by failing to modify CALJIC No. 2.01.

XXIII.

THE GUILT PHASE INSTRUCTIONS DID NOT DILUTE THE REASONABLE DOUBT STANDARD (APPELLANT'S CLAIM 38)

Although he recognizes that his claims have been rejected by this Court, appellant contends that several of the guilt phase instructions cumulatively diluted the prosecution's burden of proof. Once again, appellant did not request any modifications of the standard instructions, and thus, his claim is waived on appeal. (*People v. Daya*, *supra*, 29 Cal.App.4th at p. 714 ["defendant is not entitled to remain mute at trial and scream foul on appeal for the court's failure to expand, modify, and refine standardized jury instructions"].)

In any event, appellant's claims fail on the merits. Appellant contends, as he did in Argument XXI, *supra*, that CALJIC Nos. 2.01 and 2.02 lightened the burden of proof. (AOB 387.) As discussed above, this Court has consistently rejected that claim.

In addition, appellant contends that CALJIC No. 2.27 (see Arg. XIX. D. *supra*), erroneously suggested that the defense had a burden of proving facts, and that the "which you believe" language in the instruction permitted conviction based on mere "belief" as opposed to proof beyond a reasonable doubt. (AOB 387.) This Court has rejected appellant's claim that CALJIC No. 2.27 improperly shifts the burden of proof. (*People v. Carey* (2007) 41 Cal.4th 109, 131.) As to his claim that the language "which you believe" somehow dilutes the required standard of proof beyond a reasonable doubt, it is nonsensical. If the jury believed "that a single witness was telling the truth" about a particular fact (AOB 387), then its "belief" would render that fact proved beyond a reasonable doubt. Appellant does not explain how a belief that a witness is telling the truth about a fact would or could be different from finding that fact proved beyond a reasonable doubt, or how the term "belief" is

somehow a lower standard than proof beyond a reasonable doubt. Appellant certainly cannot point to any reasonable likelihood that the jury understood the instruction in such a convoluted manner. (*Estelle v. McGuire*, *supra*, 502 U.S. at p. 72.)

Appellant further contends that CALJIC No. 2.51, which instructed the jury that motive was not an element of the offense (see Arg. XIX.A.), improperly suggested to the jury that it could convict appellant of felony-murder without finding that he intended to commit a robbery or burglary. (AOB 387.) However, as this Court has explained, "[m]otive describes the reason a person chooses to commit a crime. The reason, however, is different from a required mental state such as intent or malice." (*People v. Hillhouse*, *supra*, 27 Cal.4th at p. 504.) In *People v. Guerra* (2006) 37 Cal.4th 1067, 1135, overruled on another ground in *People v. Rundle* (2008) 43 Cal.4th 76, the defendant argued that "the motive instruction relieved the prosecution of its burden of proving beyond a reasonable doubt defendant possessed the requisite intent to rape when he killed [the victim]." (*Ibid.*) This Court disagreed:

> Here, although the intent to commit rape was an element of the offense, motive was not. Moreover, the trial court instructed the jury that to find the rape-murder special circumstance, it must find the "murder was committed in order to carry out or to advance the commission of the crime of attempted rape" and the special circumstance "is not established if the attempted rape was merely incidental to the murder." Consequently, the instructions as a whole did not refer to motive and intent interchangeably. We find no reasonable likelihood that the jury understood those terms to be synonymous.

(*Ibid.*)

Similarly, here, the court instructed the jury that a finding of felony-murder required proof beyond a reasonable doubt that the defendant had the specific intent to commit burglary or robbery. (53 RT 10448; 5 CT 1278.) The instructions consistently referred to the required "intents" for all the charged crimes, and did not use "motive" and "intent" interchangeably. There is no

reasonable likelihood that the jury understood the motive instruction to suggest that it need not make a finding that appellant had the requisite specific intent to commit robbery and/or burglary. (*Estelle v. McGuire, supra*, 502 U.S. at p. 72.)

Finally, appellant argues that the language of CALJIC 8.20[33]—that premeditation and deliberation "must have been formed upon pre-existing reflection and not under a sudden heat of passion or other condition precluding the idea of deliberation"—improperly suggested to the jury that the defendant had the burden to "preclude" the possibility of premeditation, thereby shifting the burden of proof. (AOB 387-388.) This Court rejected the same claim in *People v. Crew* (2003) 31 Cal.4th 822, 848.[34]

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33. The court instructed the jury as follows:

> All murder which is prepetrated by any kind of willful deliberate and premeditated killing with express malice aforethought is murder in the first degree.
>
> The word willful as used in this instruction means intentional. The word deliberate means formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action. The word premeditated means considered beforehand.
>
> If you find that the killing was preceded and accompanied by a clear, deliberate intent on the part of the defendant to kill, which was the result of deliberation and premeditation so that it must have been formed upon preexisting reflection and not under a sudden heat of passion or other condition precluding deliberation, it is murder of the first degree.

(53 RT 10447; 5 CT 1276.)

34. Appellant also mentions CALJIC Nos. 2.21.2 and 2.22, but does not provide any substantive argument as to why the instructions were improper. (AOB 386.) "'[E]very brief should contain a legal argument with citation of authorities on the points made. If none is furnished on a particular point, the court may treat it as waived, and pass it without consideration. [Citations.]' [Citations.]" (*People v. Stanley* (1995) 10 Cal.4th 764, 793.) In any event, this

XXIV.

THE COURT PROPERLY DENIED APPELLANT'S MOTION TO AUDIOTAPE THE SPANISH-SPEAKING WITNESSES (APPELLANT'S CLAIM 40)

Prior to trial, appellant made a motion requesting that the trial court "order a full Audio Taping of his entire trial, in addition to the court reporter," based on the "possibility" that "the translation of the question and the responding answer might be inaccurate." (3 CT 671.) The court denied the motion, stating:

> The court employs certified translators in this trial and every other trial that it does concerning Spanish speaking witnesses as defendants. The reason we certify them is so we can trust their accuracy. And the reason they have a certification process is to develop and demonstrate their accuracy.
>
> And to attempt to run a totally separate track of audiotaping, for one thing, we don't have the equipment lined up to do that. But more importantly, to do that raises the unmanageable prospect of making objections after the fact that were never made at the time, and having issues cropping up that were never addressed at trial at all, that there was never any opportunity to confront and deal with.
>
> And I think it's much the better practice to function and to operate off of the translated words of the interpreter. And if you wish to employ a translator, or have your translator who is aiding the defendant note any errors, that's fine. But there are inherent possibilities for translation errors, and there may be a translation error committed by the translator who will translate for your client, and that wouldn't be recorded, even on an audiotape. So that motion is denied.

(11 RT 2031-2032.)

Appellant claims that the court's ruling denied his constitutional right to a complete and accurate record of the trial proceedings. (AOB 392-393.)

Court has consistently upheld both instructions against constitutional attacks, and appellant provides no reason to reconsider those holdings. (*People v. Crew*, *supra*, 31 Cal.4th at p. 848)

However, appellant was provided with the complete official record, which has been certified as accurate. (See Pen. Code, § 190.8.) Appellant's actual contention is that he was also entitled to an "unofficial" record of the trial, to be used on appeal to "impeach" the official, certified record. Appellant provides no authority for the proposition that he has a constitutional right to an additional record or the right to collaterally attack the certified record.

As the trial court pointed out, the state has a process for providing certified interpreters so as to ensure accuracy. (See Gov. Code, §§ 68560 et seq.) To allow collateral attacks on the translations of the certified interpreters would undermine this process. Indeed, it is misconduct for a juror to disregard an interpreter's translation and rely on his or her own personal translation. (*People v. Cabrera* (1991) 230 Cal.App.3d 300, 303-304; see 53 RT 10421; 5 CT 1227 ["When a witness has testified through a certified court interpreter, you must accept the English interpretation of that testimony even if you would have translated the foreign language differently"].) Just as a juror is bound to rely on the certified interpreter's translation, so are appellate courts and appellate attorneys bound by that translation in the official record on appeal.

In any event, even assuming some question about the accuracy of the translation, the court was prohibited from ordering an audiotaped record of the proceedings:

> Whenever an official reporter or an official reporter pro tempore is unavailable to report an action or proceeding in a court, subject to the availability of approved equipment and equipment monitors, the court may order that, in a limited civil case, or a misdemeanor or infraction case, the action or proceeding be electronically recorded, including all the testimony, the objections made, the ruling of the court, the exceptions taken, all arraignments, pleas, and sentences of defendants in criminal cases, the arguments of the attorneys to the jury, and all statements and remarks made and oral instructions given by the judge. A transcript derived from an electronic recording may be utilized whenever a transcript of court proceedings is required. The electronic recording device and appurtenant equipment shall be of a type approved

> by the Judicial Council for courtroom use and shall only be purchased for use as provided by this section. *A court shall not expend funds for electronic recording technology or equipment to make an unofficial record of an action or proceeding or to use that technology or equipment to make the official record of an action or proceeding in circumstances not authorized by this section.*

(Gov. Code, § 69957, italics added.)

The court was not permitted to order an unofficial audiotaped record of the proceedings, nor was it permitted to order an official audiotaped record of the proceedings, because it was not a civil, misdemeanor, or infraction case. Thus, the court did not err in denying appellant's motion.

XXV.

THE COURT'S READBACK PROCEDURE DID NOT VIOLATE APPELLANT'S CONSTITUTIONAL RIGHTS (APPELLANT'S CLAIMS 41-42)

During jury deliberations, the court reporter, at the direction of the court, provided readback of particular portions of testimony to the jury. Appellant contends that the readback proceeding violated his constitutional rights to be present, to be represented by counsel, to a public trial, and to an impartial jury. Appellant's claims are meritless.

A. Factual Background

During deliberations, the jury requested readback of the testimony of Bertha Sanchez, Amy Trejo, and Jose Luis Ramirez. (54 RT 10601.) In open court, the jury foreperson also requested readback of the testimony of the clerk from the ammunition store. The court responded:

> All right. Okay. Then we'll have somebody come in and read after you go back and start deliberating. The attorneys and I will satisfy ourselves that we have located the testimony that you are interested in. And we'll

provide that for you probably in the form of having the reporter join you in the jury room and read that testimony to you.

Now, please keep in mind, when the reporter comes in to read, that's all she is there to do is just to read. She cannot respond to questions.

(54 RT 10602.)

After the jury was excused, defense counsel pointed out that there were two sales clerks who testified, and the prosecutor agreed. The court indicated that it would provide readback of the testimony of both clerks. (54 RT 10604.) The following colloquy occurred:

THE COURT: Is it agreeable then between counsel that we proceed in that manner?

And would you like to review the areas of testimony that the reporter finds as bearing on the questions that the jury has asked?

[THE PROSECUTOR]: I would like to only because we may be able to help the reporter as well to locate that.

THE COURT: All right. So you, Mr. West, I understand you have a prelim to go to?

[DEFENSE COUNSEL]: . . . I can—apparently, that may not be the situation.

THE COURT: All right.

[DEFENSE COUNSEL]: I can assist in that as well.

THE COURT: Good. Then that will be the plan as to how the reporter gets to the information she needs. Okay. Court's in recess.

(54 RT 10604.)

B. Right To Public Trial

Appellant contends that he "had a constitutional right to have the testimony read back to the jury in open court pursuant to his right to a public trial." (AOB

398.)[35/] However, appellant did not object to the procedure implemented by the court, and remained silent when the court asked if the parties agreed with the proposed procedure. Appellant's failure to object on the ground that he was entitled to a public trial waives his claim on appeal. (Evid. Code, § 353.) "The right to a public trial may be waived [citations], the waiver may be implied from failure to object [citations], and the waiver may be made by defense counsel on defendant's behalf." (*People v. Lang* (1989) 49 Cal.3d 991, 1028.) "Assuming the right to public trial extends to the reading of testimony during jury deliberations, the right was effectively waived by defense counsel." (*Ibid.*; see also *People v. Ayala* (2000) 23 Cal.4th 225, 288.)

In any event, appellant has provided no authority to support his claim that the right to a public trial extends to the readback of testimony during deliberations. Every person charged with a criminal offense has a constitutional right to a public trial, that is, a trial which is open to the general public at all times. (See U.S. Const., amends. VI, XIV; Cal. Const., art. I, § 15, see also Pen. Code, § 686, subd. 1.) "It has long been recognized that [t]he trial of the action, so far as the term 'public trial' is concerned, consists in the proceedings for the impanelment of the jury, the opening statements of counsel, the presentation of evidence, the arguments, the instructions to the jury and the return of the verdict, but does not include conferences between court and counsel where the subject matter of the conferences between court and counsel

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35. Appellant seems to suggest that the court closed the readback proceeding because of concern that reporters were questioning the jurors about their deliberations. (AOB 398.) However, the court's discussion with the jurors about reporters' questions was not related to the jury's request for readback of testimony. The court was addressing a separate concern that some or all of the jurors had brought to its attention. (54 RT 10602-10603.) There was no relation between the court's decision, and the subsequent acquiescence by counsel, to conduct the readback in the jury room and the contact by reporters.

was a question or questions of law, and not matters advanced for consideration of the triers of fact." (*People v. Feagin* (1995) 34 Cal.App.4th 1427, 1438, internal quotations and citations omitted.)

Appellant contends that the readback of testimony should be encompassed in the public trial right because the rereading of testimony is a "matter[] advanced for consideration of the triers of fact." (AOB 401.) However, as this Court has held, "[t]he rereading of testimony is not a critical stage of the proceedings." (*People v. Ayala, supra*, 23 Cal.4th at p. 288.) The reading back of testimony is not an event that bears a substantial relation to a defendant's opportunity to defend against the charges. (*People v. Horton* (1995) 11 Cal.4th 1068, 1120.)

Indeed, appellant received a public trial at the time the testimony was first introduced. Spectators were permitted to observe the live witnesses, and to hear the content of their testimony. Appellant's right to a public trial was not denied as to those "matters" advanced for the consideration of the jury. The only thing that the public was not privy to was the repetition of that testimony as an aid to the jury's deliberations. Notably, it would have been proper for the court to simply have provided written transcripts of the requested testimony. (*People v. Box* (2000) 23 Cal.4th 1153, 1213 ["it is not 'improper for a court, with the consent of the accused and his counsel, to provide a transcript to the jury in lieu of rereading testimony in open court.' [Citation]"].) Certainly, it would not have been proper for the court to allow the public to observe the jury's rereading of transcripts while in the jury deliberation room. (See *People v. Engleman* (2002) 28 Cal.4th 436, 442 ["an important element of trial by jury is the conduct of deliberations in secret"]). For the same reason, the public was not entitled to observe an oral reading of prior testimony. The readback of testimony is not a proceeding to which the public must be allowed access.

Finally, even assuming error, the error was harmless. Contrary to appellant's contention, exclusion of the public from a small part of a trial, does not constitute prejudice per se. (AOB 403.) A closure which lasts a few short hours, compared to the evidentiary phase of the trial which can last months, is at most a trial error and can be harmless beyond a reasonable doubt. (*People v. Feagin*, *supra*, 34 Cal.App.4th at pp. 1439-1440.) Appellant has not demonstrated that the readback procedure utilized by the court had any effect on the proceedings. The record reflects no prejudice as a result of the procedure. As discussed above, the court reporter simply reread the previously presented testimony. The jury was advised that it was not to ask any questions of the court reporter. Any failure to open the readback proceeding to the public was harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.)

C. Right To Presence

Appellant contends that his absence from the readback proceeding violated his federal and state constitutional rights, as well as his state statutory right to be present at his trial. (AOB 404-405, 411.) First, appellant failed to object on the stated grounds and make this argument in the trial court. Therefore, his argument is not reviewable on appeal. (Evid. Code, § 353; *People v. Carpenter* (1997) 15 Cal.4th 312, 385; *People v. Clark* (1993) 5 Cal.4th 950, 988, fn. 13; *People v. Rhoades* (2001) 93 Cal.App.4th 1122, 1126.)

Second, even assuming that appellant's argument is reviewable, it plainly lacks merit. "'Pursuant to section 1138, the jury has a right to rehear testimony . . . on request during deliberations'" (*People v. Ayala, supra,* 23 Cal.4th at p. 288), and a criminal defendant has the right to be present at all critical stages of trial under the federal Constitution (U.S. Const., Sixth & Fourteenth Amends.), the state Constitution (Cal. Const., art. I, § 15) and state statutes (Pen. Code, §§

977, subd. (b), 1043). However, this Court has expressly determined that readback of testimony is not a critical stage (*People v. Cox* (2003) 30 Cal.4th 916, 968), and has rejected appellant's assertions:

> As we previously have observed in rejecting similar guilt phase contentions, a "defendant is not entitled to be personally present during proceedings which bear no reasonable, substantial relation to his or her opportunity to defend the charges against him, and the burden is on defendant to demonstrate that his absence prejudiced his case or denied him a fair and impartial trial." [Citations.] The forgoing rule applies to defendants in capital homicide prosecutions as well as to those in noncapital cases. [Citations.] The reading back of testimony ordinarily is not an event that bears a substantial relation to the defendant's opportunity to defend [citations], and nothing in the present record indicates that defendant's personal presence would have assisted the defense in any way.

(*People v. Horton*, *supra*, 11 Cal.4th at pp. 1120-1121; see *People v. Fauber* (1992) 2 Cal.4th 792, 836-837; *People v. Ayala, supra,* 23 Cal.4th at p. 288 ["The rereading of testimony is not a critical stage of the proceedings"]; see also *People v. Waidla, supra,* 22 Cal.4th at p. 741.)

It is also settled that counsel has discretion to consent to a reading of testimony outside the presence of the court, counsel, and/or defendant; the defendant need not personally give consent. (*People v. Pride* (1992) 3 Cal.4th 195, 264-267; *People v. Medina* (1990) 51 Cal.3d 870, 904; *People v. Lang, supra,* 49 Cal.3d at p. 1028; *People v. Bloyd, supra*, 43 Cal.3d at p. 361; see *People v. Thompson* (1990) 50 Cal.3d 134, 175 ["When, as here, the proceeding is one in which defendant and his counsel have no significant role—the verbatim reading of testimony previously heard by the jury—we see no reason why counsel should not be able to make the waiver on his client's behalf."].)[36/]

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36. Appellant contends, citing *Illinois v. Allen* (1970) 397 U.S. 337, that even assuming his presence at readback may be waived, it must be a "knowing-and-voluntary" waiver. (AOB 412.) In other words, appellant suggests that,

Here, counsel, when provided an express opportunity, did not object to the procedure proposed by the trial court, thereby implicitly waiving appellant's right to be present. (See *People v. Bolden* (1992) 29 Cal.4th 515, 564 ["From the record's silence, we infer that counsel had no objection to the proposed procedure"]; *People v. Neufer* (1994) 30 Cal.App.4th 244, 251.) Therefore, a proper waiver was obtained and appellant has failed to demonstrate constitutional error of any kind. (AOB 574-575.)

The only possible error was a violation of Penal Code section 977, subdivision (b)(1), "because defendant did not execute in open court a written waiver of his right to be personally present." (*People v. Avila, supra*, 38 Cal.4th at p. 598.) However, "the error was 'statutory only and thus "is reversible only if it is reasonably probable the result would have been more favorable to defendant absent the error." [Citation.]' [Citation.]" (*Ibid.*) Here, appellant has presented no evidence to suggest that his personal presence during the readback would have assisted his defense in any way. (*People v. Horton, supra,* 11 Cal.4th at p. 1121; *People v. Price* (1991) 1 Cal.4th 324, 408.)

Appellant claims only that the court reporter may have given undue emphasis to certain portions of the transcript, or the selected testimony may not have been balanced. (AOB 416.) His claims are "entirely speculative" (*People v. Horton, supra,* 11 Cal.4th at p. 1121), and, as such, they are "inadequate" to demonstrate prejudicial error. (*People v. Waidla, supra,* 22 Cal.4th at p. 742; *People v. Pride, supra*, 3 Cal.4th at pp. 251, 267; see *People v. Medina, supra,*

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contrary to this Court's holdings that a defendant need not personally waive his right to presence, a defendant must make an express waiver, after voir dire by the trial court, of his right to be present at readback. However, *Allen* does not support appellant's contention. *Allen* involved the removal of a defendant, *over objection*, from his trial for disruptive behavior. It did not involve a situation, as here, where counsel acquiesced to the absence of the defendant.

51 Cal.3d at p. 904 [prejudice cannot be presumed from a silent record].) No prejudice is demonstrated.

D. Right To Counsel

According to appellant, "[e]ven assuming *arguendo* that absence of the defendant is not constitutional error, the absence of counsel is a different matter." (AOB 406.) Appellant has a right to have the assistance of counsel in his defense. (U.S. Const., 6th Amend; Calif. Const., art. I, § 15.) However, as with the waiver of appellant's presence, counsel's failure to assert his own right to be present at the readback was an implied waiver of the right to counsel. (*People v. Pride*, *supra*, 3 Cal.4th at pp. 250-251; *People v. Medina*, *supra*, 51 Cal.3d at p. 904.) This is not a situation where counsel claimed a right to be present and was denied by court. (Compare *Fisher v. Roe* (9th Cir. 2001) 263 F.3d 906.) As with appellant's right to be present, counsel's failure to object was an implied waiver of his constitutional right to counsel.

Appellant claims that a waiver of the right to counsel must be express, knowing, voluntary, and intelligent. However, the cases cited by appellant involve the waiver of representation by counsel for all purposes. (AOB 413; see e.g., *Johnson v. Zerbst* (1938) 304 U.S. 458, 460 [defendant was "tried, convicted and sentenced, without the assistance of counsel"]; *In re Smiley* (1967) 66 Cal.2d 606, 616 [petitioner "defended himself without benefit of counsel"]; *Savage v. Estelle* (9th Cir. 1988) 924 F.3d 1459, 1466 [waiver of counsel for *Faretta* purposes]; *In re Johnson* (1965) 62 Cal.2d 325, 328-329 [defendant pleaded guilty without benefit of counsel].) Here, appellant was, at all times, represented by counsel; he never waived his Sixth Amendment rights in that regard. Once appellant was represented by counsel, counsel was permitted to make tactical decisions without appellant's express consent. (See *People v. Hamilton* (1989) 48 Cal.3d 1142, 1164, fn. 14 ["If [defendant]

chooses professional representation, he waives tactical control; *counsel* is at all times in charge of the case and bears the responsibility for providing constitutionally effective assistance"], original italics.) Whether to appear at a readback proceeding is one of those decisions. (*People v. Medina*, *supra*, 51 Cal.3d at p. 904.) Thus, counsel's silence when asked if he approved the suggested readback procedure was an implicit waiver of appellant's right to presence *and* his right to counsel.

To the extent appellant contends that counsel was ineffective for failing to assert appellant's right to be represented by counsel at the readback, such a claim is meritless. To demonstrate ineffectiveness, the defendant must show that: (1) counsel's performance was deficient, i.e., it fell below an objective standard of reasonableness under prevailing professional norms, and (2) counsel's performance was prejudicial, i.e., there is a reasonable probability that, but for counsel's failings, the result would have been more favorable to the defendant. (*Strickland v. Washington* (1984) 466 U.S. 668, 687; *In re Jones* (1996) 13 Cal.4th 552, 561; *In re Cordero* (1988) 46 Cal.3d 161, 180.) Here, it was not unreasonable for counsel, plainly understanding this was not a critical stage of the proceedings, and having helped the court reporter find the appropriate testimony that would be read, to have waived his presence. Indeed, because readback is not a crucial stage of the proceedings (*People v. Ayala*, *supra*, 23 Cal.4th at p. 288; *People v. Horton*, *supra*, 11 Cal.4th at p. 1120), even if counsel had requested to be present, the court may have denied his request. (*People v. McCoy* (2005) 133 Cal.App.4th 974, 983 [court "committed no constitutional error in allowing readback over express defense objection"].) Counsel's tactical decision was not unreasonable.

Moreover, even assuming counsel should have requested to be present at the readback, appellant cannot demonstrate any prejudice. As discussed above, appellant has pointed to nothing in the record which would suggest that

counsel's presence would have had any effect on the proceedings. "It is presumed that official duty has been regularly performed." (Evid. Code, § 664.) "This presumption applies to . . . court reporters . . . ." (*People v. Wader* (1993) 5 Cal.4th 610, 661.) "Therefore we assume the reporter properly read the testimony until stopped by the jury." (*People v. Ayala*, *supra*, 23 Cal.4th at p. 289.) Accordingly, any ineffectiveness claim implicitly asserted by appellant must be rejected.

E. Right To Have The Trial Court Present

Finally, appellant further contends that the "absence of the judge during such readback proceedings violates" his federal constitutional right to an impartial jury. (AOB 410.) First, as discussed above, appellant waived the issue by failing to object in the trial court. (*People v. Rhoades, supra*, 93 Cal.App.4th at p. 1125.) Moreover, although appellant does not mention it, Penal Code section 1138.5 provides: "Except for good cause shown, the judge in his or her discretion need not be present in court while testimony previously received in evidence is read to the jury." Thus, the judge is permitted, by statute, to absent him or herself from readback proceedings. Appellant has not demonstrated that there was any "good cause" to mandate the judge's presence, nor that he was prejudiced by the judge's absence.

Indeed, this Court has found "it acceptable for a trial court to provide the jury, upon its request, with the transcripts of testimony previously received in evidence, which the jurors may read in the jury room." (*People v. Rhoades*, *supra*, 93 Cal.App.4th at p. 1126, citing *People v. Box, supra*, 23 Cal.4th at p. 1214.) Appellant provides "no persuasive reason why it should not be similarly acceptable to provide the jurors with a verbal readback of the testimony in the jury room outside the presence of the trial judge." (*People v. Rhoades*, *supra*, 93 Cal.App.4th at p. 1126.)

The "critical factor" in determining whether a defendant's right to a fair jury trial has been violated is "whether the judge abdicated judicial control over the process." (*Id.* at p. 1127.) Here, the court was available to respond to any questions by the jury, and it conferred with the parties before determining what portions of testimony should be read by the reporter.

> When a trial judge exercises control over whether and what testimony previously introduced in evidence should be read to the jurors at their request after deliberation has begun, and the judge remains available to address any questions from the jurors to the court that might arise during the readback of the testimony, nothing in logic, reason, due process of law, or the right to a trial before an impartial jury compels the judge to be present while the testimony is read to the jurors.

(*Ibid.*)

Appellant has not demonstrated that the readback procedures violated his rights to a public trial, due process, or counsel.

XXVI.

THE PROSECUTION WAS CORRECTLY REFERRED TO AS "THE PEOPLE" (APPELLANT'S CLAIM 43)

Appellant contends that the court violated his state and federal constitutional rights to a fair trial and due process in referring to the prosecution as "The People" during the trial. (AOB 419.) However, as appellant recognizes, this Court has previously rejected his claim. (*People v. Lewis and Oliver*, *supra*, 39 Cal.4th at p. 1068.)

XXVII.

THE COURT PROPERLY INSTRUCTED THE JURY REGARDING THE REQUISITE ELEMENTS FOR THE MURDER COUNTS (APPELLANT'S CLAIM 44)

Appellant contends that the court erred in giving CALJIC No. 3.31 regarding the concurrence of act and specific intent, because it limited the

instruction to the nonmurder counts. (AOB 423.) Appellant further contends that the court erred in failing to give CALJIC No. 3.31.5. (AOB 423.)

The court instructed the jury:

> In the crimes and allegations charged in Counts 4, 6, 7, 8, 9, and 10, namely, attempted murder, robbery, three counts, burglary and conspiracy, there must exist a union or joint operation of act or conduct and a certain specific intent in the mind of the perpetrator. Unless this specific intent exists, the crime to which it relates is not committed.
>
> The specific intent required is included in the definitions of the crimes set forth elsewhere in these instructions.

(53 RT 10423-10424; 5 CT 1230.)

The court did not instruct the jury that there must be a concurrence of act and mental state. (CALJIC No. 3.31.5.)[37] Appellant contends that the omission of CALJIC No. 3.31.5 was error, and the failure to include counts one, two, and three in CALJIC No. 3.31 "effectively told the jurors that concurrence of act and specific intent was *not* an element of the murder charges." (AOB 423.) However, because the jury was correctly instructed as to the elements of murder, and the murder instructions correctly described the required concurrence of specific intent and/or mental state, there was no reasonable likelihood that the jury understood the challenged instruction in a manner detrimental to appellant. (*Estelle v. McGuire*, *supra*, 502 U.S. at p. 72.)

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37. CALJIC No. 3.31.5 provides:

> In the crime[s] charged in Count[s] ___, and [or ___ which [is a] [are] lesser crime[s] thereto], [namely, ___, and ___,] there must exist a union or joint operation of act or conduct and a certain mental state in the mind of the perpetrator. Unless this mental state exists the crime to which it relates is not committed.
>
> [The mental state[s] required [is] [are] included in the definition[s] of the crime[s] set forth elsewhere in these instructions.]

The court instructed the jury with CALJIC Nos. 8.10 and 8.11 as follows:

A killing—in order to prove this crime, each of the following elements must be proved:

One, that a human being was killed.

Two, that the killing was unlawful.

And three, that the *killing was done with malice aforethought or occurred during the commission or attempted commission of burglary or robbery.*

Malice may be either express or implied.

Malice is express when there is *manifested an intention unlawfully to kill a human being.*

. . .

Malice is implied when:

One, the killing resulted from an intentional act.

Two, the natural consequence of the act are dangerous to human life.

And three, the act was *deliberately performed with knowledge of the danger to and with conscious disregard for human life.*

(53 RT 10446; 5 CT 1273-1275, italics added.)

Similarly, the jury was instructed that if it found the killing "was preceded and accompanied by a clear, deliberate intent on the part of the defendant to kill, which was the result of deliberation and premeditation so that it must have been formed upon preexisting reflection and not under a sudden heat of passion or other condition precluding the idea of deliberation, it is murder of the first degree." (53 RT 10447; 5 CT 1276.)

The instructions adequately conveyed to the jury that the charge of murder, as alleged in counts one, two, and three, required that the defendant commit the act with either express or implied malice, and that, under a theory of first degree

non-felony murder, the act must be accompanied by deliberation and premeditation. The murder instructions substantially covered the concurrence of act and specific intent and mental state. (See *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1143; *People v. Alvarez* (1996) 14 Cal.4th 155, 219-220; *People v. Rogers*, *supra*, 39 Cal.4th at p. 875.)

Likewise, appellant's contention that the omission of counts 1, 2, and 3 from CALJIC 3.31 would have led the jury to believe there was "no need to find concurrence as to the murder counts" (AOB 427), is unavailing. "The instruction given to the jury said nothing about the crimes and allegations charged in count[s] 1, [2, and 3,] and, in light of a more specific instruction that referred to count[s] 1, [2, and 3,] we presume that the jury did not draw any conclusion about count[s] 1 [2, and 3,] from the modified version of CALJIC No. 3.31." (*People v. Thornton* (2007) 41 Cal.4th 391, 440.) The jury "presumably followed the specific [murder] instructions," discussed above, which required the jury to find that a non-felony first degree murder be committed with malice aforethought, premeditation, and deliberation. (*Ibid.*) There is no reasonable likelihood that the jury convicted appellant of first degree murder without finding either express malice, premeditation, and deliberation, or the unlawful killing during a burglary or robbery—both of which were "included in the instruction on the concurrence of act and 'specific intent.'" (*People v. Alvarez*, *supra*, 14 Cal.4th at p. 220.) Appellant's claim should be rejected.

XXVIII.

THE COURT WAS NOT REQUIRED TO DEFINE THE TERM "MATERIAL" (APPELLANT'S CLAIM 45)

As discussed above (see Arg. XIX.C., *supra*), the court instructed the jury with CALJIC No. 2.21.2, which told the jury that a witness who is willfully

false in one material part of his or her testimony is to be distrusted in others. (53 RT 10428; 5 CT 1240.) Appellant contends that the trial court was required to define the term "material," because it has a technical, legal meaning. Citing *People v. Pierce* (1967) 66 Cal.2d 53, 61, he claims that "material," means that "the statement could probably have influenced the outcome of the proceedings." (AOB 430-431.)

However, *Pierce* was defining the term "material" as used in the context of a perjury charge. The unique definition of "material" for purposes of a perjury conviction does not apply to standard instructions about the credibility of witnesses. "[R]ead in the context of CALJIC No. 2.21.2, it is clear that "material" is not used in the sense described in *Pierce*, i.e., as probably influencing the outcome. It would make no sense to tell the jury that it could distrust a false witness only if the falsity influenced the outcome of the case. Rather, as used in the instruction, "material" carries its ordinary meaning of "substantial, essential, relevant or pertinent." The instruction thus tells the jury it can distrust a witness who is willfully false in giving relevant or pertinent testimony." (*People v. Wade* (1995) 39 Cal.App.4th 1487, 1496.)

Because CALJIC No. 2.21.2 uses "material" in an ordinary manner, the court had no duty to further define the term. Appellant's claim should be denied.

XXIX.

THE COURT PROPERLY INSTRUCTED THE JURY ON APPELLANT'S CONSCIOUSNESS OF GUILT (APPELLANT'S CLAIM 46)

As discussed above (see Arg. XIX.B., *supra*), the court instructed the jury with CALJIC Nos. 2.03 and 2.52.[38/] Appellant claims that those instructions were argumentative and permitted the jury to draw irrational permissive inferences about appellant's guilt. (AOB 435-439.) As appellant recognizes, this Court has repeatedly rejected appellant's claims and has repeatedly declined to reconsider those holdings. (See e.g., *People v. Jurado* (2006) 38 Cal.4th 72, 125-126; *People v. Nakahara*, *supra*, 30 Cal.4th at p. 713; *People v. Bacigalupo* (1991) 1 Cal.4th 103, 128; Pen. Code, § 1127c.)

Appellant also contends that the court should not have given CALJIC No. 2.03 because it was improperly circular. According to appellant, "for the jury to have inferred consciousness of guilt for the charged crimes from any alleged false statements in appellant's video statement, it would have first been required to find that he falsified the statements because he committed the charged offense. . . . An inference instruction is unnecessary when the inference can only be resolved by a resolution of the ultimate question of guilt itself." (AOB 442-443.)

Appellant's claim fails, however, because even if the jury found that appellant lied in his videotaped statement when he indicated that he had no criminal intent to kill, rob, or burglarize, that does not necessarily resolve the question of appellant's guilt. The jury still had to find that appellant harbored the requisite criminal intent for the charged crimes, a fact that would not necessarily follow from a disbelief of his statements. The jury could have

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38. Appellant once again quotes the language of CALJIC No. 2.06 in his opening brief, but that instruction was not given in this case. (See Fn. 29, *supra*.)

disbelieved his statement that he thought Sanchez was recovering his own property, but still could have found that appellant did not otherwise have the specific intent to aid in Sanchez's or Ramirez's criminal actions. CALJIC No. 2.03 simply required the jury to determine whether appellant lied in his videotaped statement, and if so, the jury could then determine whether that fact was relevant to its determination of appellant's mental state and specific intent. (See *People v. Mason* (1991) 52 Cal.3d 909, 943 [flight instruction proper even where identity is an issue because "'such a case [only] requires the jury to proceed logically by deciding first whether the [person who fled] was the defendant and then, if the answer is affirmative, how much weight to accord to flight in resolving the other issues bearing on guilt. The jury needs the instruction for the second step.' [Citation]"].) CALJIC No. 2.03 was not improperly given in this case.

XXX.

CALJIC NO. 3.02, AS GIVEN, WAS PROPER (APPELLANT'S CLAIM 47)

As discussed above (see Arg. XV, *supra*), the court instructed the jury with CALJIC No. 3.02 regarding the natural and probable consequences of aiding and abetting the target crimes of robbery and burglary. The instruction told the jury that in order to find appellant guilty of murder as an aider and abettor to robbery or burglary, the killings must have been natural and probable consequences of those target crimes. Appellant contends that the natural and probable consequences doctrine improperly creates a mandatory presumption that violates due process. (AOB 447-449.)

Appellant's claim fails, however, because, as discussed above, the natural and probable consequences doctrine was an unnecessary theory of liability that, when given to the jury, inured to appellant's benefit. (See Arg. XV, *supra*.) If

appellant aided and abetted a robbery or burglary, then he was liable for all killings during those felonies—whether intentional, unintentional, or accidental. (See CALJIC No. 8.21.) The prosecution was not required to prove that appellant had any knowledge of the perpetrator's murderous intent, that he had any intent to aid or encourage a murder, or that the murder was a foreseeable consequence of the target crimes. Thus, even if CALJIC No. 3.02 created a mandatory presumption that appellant knew of and/or intended to encourage the coparticipants' murders by participating in the robbery (AOB 447), such an instruction was not detrimental to appellant, because, under the felony-murder theory of liability, the prosecution need not prove *any* murderous intent or knowledge. Because CALJIC No. 3.02 provided the jury with an additional theory of liability which was unnecessary, unwarranted, and ultimately created a higher standard of proof for the prosecution, appellant cannot complain that the instruction violated his right to due process and a fair trial.

XXXI.

THE COURT HAD JURISDICTION TO TRY APPELLANT FOR FIRST DEGREE MURDER (APPELLANT'S CLAIM 48)

Appellant claims that the court lacked jurisdiction to try him for first degree felony murder, because the information alleged only "malice" murder under Penal Code section 187 and did not allege first-degree felony murder under Penal Code section 189. (AOB 451-452.) As appellant recognizes, this Court has rejected his claim:

> All of defendant's various claims rest upon the premise that under *People v. Dillon* (1983) 34 Cal. 3d 441 [194 Cal. Rptr. 390, 668 P.2d 697] (*Dillon*), felony murder and premeditated murder are separate crimes, and that *Dillon* implicitly overruled *People v. Witt* (1915) 170 Cal. 104 [148 P. 928], in which we held that a defendant may be convicted of felony murder even though the information charged only murder with malice.

> As the People observe, numerous appellate court decisions have rejected defendant's jurisdictional argument. [Citations.] We have rejected defendant's argument that felony murder and murder with malice are separate offenses [citations], and, subsequent to *Dillon*, *supra*, 34 Cal. 3d 441, we have reaffirmed the rule of *People v. Witt*, *supra*, 170 Cal. 104, that an accusatory pleading charging a defendant with murder need not specify the theory of murder upon which the prosecution intends to rely. Thus we implicitly have rejected the argument that felony murder and murder with malice are separate crimes that must be pleaded separately. (E.g., *People v. Diaz* (1992) 3 Cal. 4th 495, 557 [11 Cal. Rptr. 2d 353, 834 P.2d 1171] (*Diaz*); *People v. Gallego* (1990) 52 Cal. 3d 115, 188 [276 Cal. Rptr. 679, 802 P.2d 169] (*Gallego*).)
>
> As we observed in *Diaz*, *supra*, 3 Cal. 4th 495, "generally the accused will receive adequate notice of the prosecution's theory of the case from the testimony presented at the preliminary hearing or at the indictment proceedings." (*Id.*, at p. 557.) In the present case, defendant received adequate notice: (i) the preliminary hearing testimony made clear the prosecution's intent to establish that defendant killed during the commission of a burglary and a robbery; (ii) the information charged defendant with robbery, burglary, and sodomy, and (iii) the evidence at trial alerted defendant to the felony-murder theory. Even now, defendant does not explain in what manner he might have been prejudiced by the absence of a separate felony-murder charge. We conclude that defendant received constitutionally adequate notice of the prosecution's felony-murder theory. (*Diaz*, *supra*, 3 Cal. 4th 495, 557; *Gallego*, *supra*, 52 Cal. 3d 115, 188-189.)
>
> In summary, we reject, as contrary to our case law, the premise underlying defendant's assertion that felony murder and malice murder are two separate offenses. Accordingly, we also reject defendant's various claims that because the information charged him only with murder on a malice theory, and the trial court instructed the jury pursuant to both malice and a felony-murder theory, the general verdict convicting him of first degree murder must be reversed.

(*People v. Hughes, supra*, 27 Cal.4th at pp. 369-370; see also *People v. Nakahara, supra*, 30 Cal.4th at p. 712.)

Appellant was properly charged with a violation of Penal Code section 187. He was aware that the prosecution intended to pursue a felony-murder theory of liability, and he has not pointed to any prejudice resulting from the failure to

specifically charge him with felony-murder. Appellant's claim should be rejected.

XXXII.

THE COURT WAS NOT REQUIRED TO INSTRUCT THE JURY ON THE DUTIES AND POWERS OF THE FOREPERSON (APPELLANT'S CLAIM 49)

At the guilt phase, the court instructed the jury with a standard concluding instruction as follows:

> You shall now retire and select one of your number to act as foreperson of the jury. He or she will preside over your deliberations. In order to reach verdicts, all twelve jurors must agree to the decision and to any finding you have been instructed to include in your verdict. As soon as you have agreed upon a verdict so that when polled each of you may state truthfully that the verdict expresses his or her vote, have it dated and signed by your foreperson and then return with it or them to this courtroom.

(53 RT 10472; 5 CT 1326; CALJIC No. 17.50.)

At the penalty phase, the court instructed: "You shall now retire to deliberate on the penalty. The foreperson previously selected may preside over your deliberations, or you may choose a new foreperson." (68 RT 13457; 5 CT 1195.)

Appellant contends that the court should have specifically instructed on the duties of the foreperson, and informed the jury that the foreperson's vote carried no more weight than the vote of any other juror. (AOB 458.) Without such instructions, he argues, there was a danger that the "foreperson w[ould] have undue influence over the deliberations." (AOB 458.)

First, appellant failed to request a modification of the standard instructions. His failure to request such a modification waives his claim on appeal. (*People v. Daya, supra*, 29 Cal.App.4th at p. 714 ["defendant is not entitled to remain

mute at trial and scream foul on appeal for the court's failure to expand, modify, and refine standardized jury instructions"].)

Moreover, appellant has cited no case which requires his suggested modification of the standard instructions. The instruction, as given, did not indicate that the foreperson would have more influence than any other juror. The instruction explained that the foreperson would preside over deliberations, and the foreperson was required to sign the verdict form. But the instruction also informed the jury that "all twelve jurors" must agree on the verdict, and that each juror must be able to "state truthfully that the verdict expresses his or her vote." Nothing in the instruction would suggest that the foreperson's vote was more important than any other. (See *People v. Ledesma, supra*, 39 Cal.4th at p. 730 [court's statement to jury allowing the foreperson to take instructions home during deliberations "did not convey a message that the opinion of the foreperson was more important than that of any other juror"].)

The jury was also instructed that:

> *Both the People and the defendant are entitled to the individual opinion of each juror.*
>
> Each of you must consider the evidence for the purpose of reaching a verdict, if you can do so. *Each of you must decide the case for yourself,* but should do so only after discussing evidence and instructions with the other jurors.
>
> Do not hesitate to change your opinion if you're convinced that it's wrong. *However, do not decide any question in any particular way because a majority of the jurors or any of them favor that decision.*

(53 RT 10471; 5 CT 1322, italics added.)

The above instruction clearly informed each juror that his or her opinion should not be influenced by anyone, including the foreperson. In light of all the given instructions, there was no danger that the jury might give undue influence to the foreperson's opinion. Appellant's claim should be denied.

XXXIII.

APPELLANT'S CONSTITUTIONAL RIGHTS WERE NOT VIOLATED BY ANY DELAY IN APPOINTING APPELLATE COUNSEL (APPELLANT'S CLAIM 50)

Appellant contends that the five-and-a-half-year delay in appointing appellate counsel violated his equal protection and due process rights. Citing numerous federal cases, including *Harris v. Champion* (10th Cir. 1994) 15 F.3d 1538, *United States v. Tucker* (9th Cir. 1993) 8 F.3d 673, and *United States v. Antoine* (9th Cir. 1991) 906 F.2d 1379, appellant contends that the delay in appointing an attorney has violated his due process right to a speedy appeal, and denied him equal protection because he has been treated differently than an individual who can afford to hire his own attorney. (AOB 462-463.) This Court has previously rejected his claims:

> Defendant . . . contends that the three-year delay in appointment of appellate counsel denied him is due process right to a speedy appeal. He relies on cases such as *U.S. v. Antoine* (9th Cir. 1990) 906 F.2d 1379, 1382, *Harris v. Champion* (10th Cir. 1994) 15 F.3d 1538, 1546, and *U.S. v. Tucker* (9th Cir. 1993) 8 F.3d 673, 676, for the existence of such a right. None of those decisions address the unique demands of appellate representation in capital cases.
>
> Neither this court, nor the United States Supreme Court, has extended the Sixth Amendment right to speedy trial to appeals in the manner suggested by defendant. Assuming, but not deciding, that such a right exists, defendant fails to demonstrate that the delay inherent in the procedures by which California recruits, screens, and appoints attorneys to represent capital defendants on appeal, is not necessary to ensure that competent representation is available for indigent capital appellants. Moreover, defendant fails to suggest any impact that the delay could have on the validity of the judgment rendered before that delay occurred.

(*People v. Holt* (1997) 15 Cal.4th 619, 708-709; see also *People v. Dunkle* (2005) 36 Cal.4th 861, 942 [equal protection not violated by delay in appointment of appellate counsel for indigent defendants].)

Appellant has provided no reason for this Court to reconsider its prior holdings, and his claim should be denied.

XXXIV.

THE JURY INSTRUCTIONS WERE SUFFICIENTLY UNDERSTANDABLE (APPELLANT'S CLAIM 51)

Appellant claims that the instructions given in this case violated the federal and state constitutions because they were "confusing and difficult for lay jurors to understand." (AOB 474.) However, appellant does not point to any particular defect in any of the given instructions. He apparently suggests that because the California Judicial Council adopted new CALCRIM instructions (nearly eight years after appellant's trial), the CALJIC instructions were necessarily invalid. He relies on the preface to the new CALCRIM instructions which stated that the CALJIC instructions are, "on occasion, simply impenetrable to the ordinary juror." (AOB 470.) However, even if some CALJIC instructions are *on occasion*, confusing or misleading, that does not necessarily mean that the instructions *in this case* were confusing and misleading.

To the extent appellant suggests that all CALJIC instructions are necessarily flawed, such an argument is illogical and untenable. "The Judicial Council's adoption of the CALCRIM instructions did not render any of the CALJIC instructions invalid or 'outdated,' as appellant claims. CALJIC instructions that were legally correct and adequate on December 31, 2005, did not become invalid statements of the law on January 1, 2006. Nor did their wording become inadequate to inform the jury of the relevant legal principles or too confusing to be understood by jurors." (*People v. Thomas*, *supra*, 150 Cal.App.4th at p. 465.) To suggest that all courts which used CALJIC instructions—even before

CALCRIM instructions were available—committed reversible error strains all credulity. Appellant's claim should be rejected.

XXXV.

THE SPECIAL-CIRCUMSTANCE INSTRUCTIONS WERE PROPER (APPELLANT'S CLAIMS 52-53)

The court instructed the jury with CALJIC No. 8.80.1 as follows:

> Unless an intent to kill is an element of a special circumstance, if you are satisfied beyond a reasonable doubt that the defendant actually killed a human being, you need not find that the defendant intended to kill in order to find the special circumstance to be true.
>
> If you find that a defendant was not the actual killer of a human being, or if you were unable to decide whether the defendant was the actual killer or an aider or abettor or a co-conspirator, you cannot find the special circumstance to be true as to that defendant unless you are satisfied beyond a reasonable doubt that such defendant with the intent to kill aided, abetted, and counseled, commanded, induced, solicited, requested, or assisted any act during the commission of the murder in the first degree, or with reckless indifference to human life and as a major participant who aided, abetted, counseled, commanded, induced, solicited, requested or assisted in the commission of the crime of burglary or robbery which resulted in the death of a human being, namely, Ramon Morales, Martha Morales or Fernando Martinez.

(53 RT 10457; 5 CT 1293.)

Appellant makes several claims of error regarding the special circumstance instructions. However, appellant did not object to the standard instructions or propose any modifications. Thus he has waived his claim on appeal. (*People v. Daya*, *supra*, 29 Cal.App.4th at p. 714 ["defendant is not entitled to remain mute at trial and scream foul on appeal for the court's failure to expand, modify, and refine standardized jury instructions"].) In any event, his claims fail on the merits.

A. The Instructions Did Not Permit The Jury To Find The Special Circumstance True Without A Finding That Appellant Was The Actual Killer Or Was A Major Participant Acting With Reckless Indifference

Appellant correctly points out that for a felony-murder special circumstance to be found true, the prosecution must prove that the defendant was the actual killer, aided and abetted the murder with the intent to kill, or aided and abetted with reckless indifference to human life and as a major participant. Appellant contends that the special-circumstance instruction was erroneous because it required the jury to find reckless indifference only "if the jurors were 'unable to decide whether the defendant was the actual killer or . . . a co-conspirator." (AOB 483.) Thus, according to appellant, because the jury *was* able to find that appellant was a co-conspirator, it was not required to find reckless indifference or intent to kill. (AOB 484.)

Appellant's claim is premised on a misreading of the jury instruction. CALJIC 8.80.1 provides that if the jury finds the defendant to be the actual killer, nothing more must be proven. Otherwise, the jury must find intent to kill or reckless indifference. The fact that the jury might also find a defendant to be a co-conspirator is unrelated to that necessary finding. Indeed, the jury could have believed that appellant was the actual killer *and* a co-conspirator. Thus, the fact that the jury believed that appellant was a co-conspirator is irrelevant to its finding under the special circumstance.

In other words, if the jury believed that appellant was the actual killer (and a co-conspirator) it did not need to find any intent. If it believed that appellant was not the actual killer (but was a co-conspirator) it had to find intent or reckless indifference. If it was unsure if appellant was the actual killer (but was a co-conspirator) it had to find intent or reckless indifference. The given instructions were proper.

B. The Instructions Did Not Improperly Limit The Jury's Consideration Of Appellant's Intoxication

Appellant contends that the given instructions failed to permit juror consideration of his intoxication, specifically as it related to the reckless indifference determination for the special-circumstance findings. (AOB 488.) However, as discussed above (see Arg. XIV, *supra*), appellant was not entitled to any intoxication instructions because he presented insufficient evidence to support such a theory. Moreover, the court did give an instruction permitting the jury to consider appellant's intoxication as a defense to specific intent crimes. The court did not otherwise limit the jury's consideration of appellant's intoxication, and the special circumstance required the jury to find either an intent to kill or reckless indifference. It is not reasonably likely that the jury would have understood the intoxication instruction to permit consideration of intoxication in determining intent to kill, but not in considering the alternative mental state of reckless indifference.

C. The Court Was Not Required To Define The Term "Actual Killer" Or Instruct On Causation

Appellant contends that, because there were multiple shooters, and there was no conclusive evidence about which bullet or bullets actually caused each victim's death, the "term 'actual killer' should have been defined and the jurors should have been instructed on the law of causation." (AOB 489.) However, any failure of the court to define causation could have inured only to appellant's benefit.

CALJIC Nos. 3.40 and 3.41 provide that:

> "[a] cause of death is an act that sets in motion a chain of events that produces as a direct, natural and probable consequence of the act, the death of a human being, and without which the death would not occur. ¶ There may be more than one cause of death. ¶ When the conduct of two or more persons contributes concurrently as a cause of death, the

> conduct of each is a cause of the death if that conduct was also a substantial factor contributing to the death. ¶ A cause is a concurrent cause if it was operative at the moment of death and acted with another force to produce the death. ¶ If you find that a defendant's conduct was a cause of death to another person, then if is no defense that the conduct of some other person also contributed to the death." [Citations.]

(*People v. Sanchez* (2001) 26 Cal.4th 834, 845.) Under this standard, even where it cannot be determined which shooter fired the fatal shot, all shooters are considered a "substantial concurrent, and hence proximate, cause" of the victim's death. (*Id.* at p. 849.)

If the jury had been instructed on causation, it could have found that appellant was the actual killer, even without knowing which bullet caused each victim's death. Without the instruction, on the other hand, it is reasonably likely that the jury would have understood the instructions to require a finding that appellant's bullet was the actual cause of death if it were to find him to be the actual killer. Because the evidence was unclear about which bullet actually caused each death, the jury would not have been able to find that appellant was the "actual killer," under the given instructions, and would have been required to make a further finding of reckless indifference in order to find the special circumstances true. Thus, any failure to instruct on causation could only have benefitted appellant, and his claim should be rejected.

D. The Instructions Did Not Shift Or Erroneously Define The Burden Of Proof

Appellant contends that CALJIC No. 8.80.1 improperly shifted the burden of proof. Specifically, appellant claims the phrase "*if you find* that a defendant was not the actual killer," unconstitutionally "implied that appellant was obligated to prove he was not the 'actual killer.'" (AOB 491.) However, there is no reasonable likelihood that the jury understood the highlighted language to alter the burden of proof. The language simply explained the findings that the

jury was required to make based on the evidence presented. The jury would have already found appellant guilty of murder beyond a reasonable doubt, as it was considering a special circumstance. Thus, the only reason the jury was required to make a finding on whether appellant was the actual killer was to determine what intent was necessary to be proved beyond a reasonable doubt. If the jury found that appellant, beyond a reasonable doubt, was the actual killer, then no further intent must be proven. (53 RT 10456.) Conversely, if the jury could not make that finding beyond a reasonable doubt, then it was required to find that intent to kill or reckless indifference had been proven beyond a reasonable doubt. Nothing in the instruction suggested that appellant was required to provide any proof that he was not the actual killer; a finding that he was not the actual killer simply reflected the prosecution's failure of proof on the issue.

Appellant also complains of the language in the instruction: "you cannot find the special circumstance to be true as to that defendant *unless you are satisfied* beyond a reasonable doubt" that the defendant acted with intent to kill or reckless indifference. Appellant argues that the phrase "unless you are satisfied," improperly "defined the burden in terms of the jurors' subjective opinion. Proof beyond a reasonable doubt does not turn on whether or not the jurors subjectively believe the defendant guilty." (AOB 492.)

Appellant cites no cases to support his contention that the term "satisfied" does not properly define the burden of proof. Satisfy is defined as "to persuade by argument or evidence" or "to put an end to (doubt or uncertainty)." (Webster's 3d New Intern. Dict. (2002) p. 2017.) Here, the jury had to be persuaded, or "satisfied," that the necessary facts were proven beyond a reasonable doubt.

Indeed, as the court instructed, each party is "entitled to the *individual opinion* of each juror." (53 RT 10471; 5 CT 1322; CALJIC No. 17.40, italics

added.) Jurors' opinions are, by definition, subjective. There is no "objective" standard by which each juror must come to a verdict; to hold otherwise would prevent each party from obtaining the individual decision of each juror.

Further, appellant does not explain how the term "satisfy" could be understood in a detrimental manner. (*Estelle v. McGuire*, *supra*, 502 U.S. at p. 72.) The jury was specifically instructed that "the People have the burden of proving the truth of a special circumstance," and if "you have a reasonable doubt as to whether a special circumstance is true, you must find it to be not true." (53 RT 10456-10457; 5 CT 1293.) There is no reasonable likelihood that the jury found the special circumstance true without finding it proven beyond a reasonable doubt. Appellant's claim should be rejected.

E. The Consciousness Of Guilt Instructions Were Proper

Appellant contends the consciousness of guilt instructions (CALJIC Nos. 2.03 and 2.52; see Arg XIX.B., *supra*), improperly "permitted the jurors to consider consciousness of guilt in determining the special circumstances." (AOB 494.) Appellant apparently claims that, because consciousness of guilt evidence such as flight and false statements do not bear on a defendant's state of mind at the time of the crime, such evidence cannot be used to prove appellant's intent to kill or reckless indifference as it relates to the special circumstance finding. (AOB 493-494.)

First, CALJIC Nos. 2.03 and 2.52 did not specifically reference the special circumstance instructions. They were general instructions, which specifically explained that the jury was to determine the significance, *if any*, of appellant's false statements or flight from the scene. The court also instructed the jury that some instructions may not apply and to "disregard any instruction which applies to facts which you determine do not exist." (53 RT 10470.) The instructions did not require the jury to consider appellant's false statements or flight in order

to make the special circumstance finding. If, as appellant claims, consciousness of guilt evidence had no bearing on appellant's mental state, then the jury would have disregarded those instructions in making its special circumstance findings. There is no reasonable likelihood that the jury misapplied the given instructions. (*Estelle v. McGuire*, *supra*, 502 U.S. at p. 72.)

Moreover, appellant cites *People v. Anderson* (1968) 70 Cal.2d 15, to support his contention that consciousness of guilt evidence is irrelevant to the defendant's state of mind at the time of the crime. However, *Anderson* was addressing the sufficiency of evidence to prove premeditation and deliberation. It did not discuss the propriety of the jury instructions at issue here, and this Court has subsequently made clear that these instructions are proper without modification. (*People v. Kipp* (1998) 18 Cal.4th 349, 375 [rejecting contention that consciousness of guilt instruction "improperly permitted the jury to consider defendant's false statements as a circumstance in deciding his mental state at the time of the charged offenses"]; *People v. Jackson, supra*, 13 Cal.4th at p. 1224 [rejecting contention that "the trial court should have modified [consciousness of guilt] instructions . . . to clarify to the jury that a defendant's deceptive or evasive behavior . . . is not probative of the defendant's state of mind at the time the crime was committed"].) Appellant's claim should be rejected.

XXXVI.

CALIFORNIA'S DEATH PENALTY AND SPECIAL-CIRCUMSTANCES STATUTES ARE CONSTITUTIONAL (APPELLANT'S CLAIMS 54-56)

Appellant makes several constitutional attacks on California's death penalty and special-circumstance statutes. First, appellant contends that the felony-murder special circumstance is unconstitutional because it fails to narrow the

class of death-eligible murders, fails to require the prosecution to prove mens rea, fails to require an intentional killing, violates equal protection, and "erodes the relationship between criminal liability and moral culpability." (AOB 497.) Second, appellant claims that the multiple-murder special circumstance allows too broad a class of death-eligible defendants. (AOB 498.) Finally, appellant contends that the felony-murder special circumstance is not a validly-enacted statute. (AOB 499.)

As appellant recognizes, this Court has repeatedly rejected the above claims. (See e.g., *People v. Stanley* (2006) 39 Cal.4th 913, 968 [felony-murder special circumstance constitutional]; *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1265-1266 [same]; *People v. Marshall* (1990) 50 Cal.3d 907, 945-946 [same]; *People v. Stevens* (2007) 41 Cal.4th 182, 221 [multiple-murder special circumstance constitutional]; *People v. Box*, *supra*, 23 Cal.4th at p. 1217 [same]; *Yoshisato v. Superior Court* (1992) 2 Cal.4th 978, 992 [Proposition 115's amendments to section 190.2 are validly enacted, and went into effect the day of Proposition 115's passage in June 1990].) Appellant provides no compelling reason for revisiting this Court's prior holdings.

XXXVII.

THERE WAS NO "CUMULATIVE" ERROR IN THE GUILT PHASE (APPELLANT'S CLAIM 57)

Appellant seeks reversal on "cumulative" error grounds. He argues: "The guilt phase claims [claims 1-51] and special circumstance claims [Claims 52-56] identified in this brief were cumulatively prejudicial when considered together with each other and with all of the other guilt, special circumstance and penalty phase errors in appellant's trial." (AOB 500.)

As we have demonstrated, no "serious flaw" appears in the guilt phase. (See *People v. Millwee, supra*, 18 Cal.4th at p. 168.) As discussed above, the

burglary-felony-murder special circumstances must be reversed for *Ireland* error, but such error was harmless as to the remaining substantive charges and special circumstances. Moreover, overwhelming evidence established appellant's guilt on all charges and the truth of the remaining special circumstances. Accordingly, appellant's various challenges, alone or in combination, furnish no further basis for relief. (See *Fuller v. Roe* (9th Cir. 1999) 182 F.3d 699, 704 ["where no single error is sufficiently prejudicial to warrant reversal, nothing can accumulate to the level of a constitutional violation"].)

XXXVIII.

THE COURT PROPERLY ADMONISHED THE JURY AFTER THE GUILT PHASE (APPELLANT'S CLAIM 58)

After the jury delivered its verdict in the guilt phase, the court stated:

> As this jury has deliberated diligently for three days in this case, I don't believe I have been associated with a jury that has worked harder or more responsibly on a case. The foreperson having informed the Court that further deliberation on that particular special finding [personal use of a firearm] would not be productive, all members of the panel having agreed with that opinion, the Court declares a mistrial as to that finding and that finding only. The other verdicts, findings and special findings, will all be recorded. And that completes your service as to the guilt phase of this particular case.
>
> By previous arrangement, should we go to a penalty phase, which we are now going to do, the penalty phase will begin on Monday, September 14th.
>
> The panel in just a moment is going to be excused until Monday morning, the 14th of September, at 9:00 o'clock to commence the penalty phase of the trial.
>
> In the interim, I want to congratulate you and to thank you for your diligent service to date, and to point out, obviously, that there is going to be extensive media coverage of your verdict today, and possibly other

> aspects of the case. It's now more important than ever that you not monitor the media. If anyone were to ask you any questions about your jury deliberations, you are instructed to ignore any inquiries and to not answer any questions that anybody puts to you concerning any aspect of your deliberations or your future deliberations. You're to have no contact or no discussion with anyone concerning this case until it is finally completed. I'll have further instructions for you at that point.
>
> But should anybody ask, you are not to have any comment, and of course, you're not to discuss the case yet with family members, friends, counsel, or anyone. That means everyone and anyone, no discussions of any kind.
>
> *Please keep to the admonition* and continue keeping to the admonition not to visit the crime scene or to attempt to gather any outside information about the case of any kind. In no way are you to seek outside information either on the law or on the facts. So for now, the jury is excused with the thanks of the Court for a very, I know, difficult and demanding three weeks of hard work. You are free to leave. Have a pleasant week. We'll see you 9:00 o'clock sharp, Monday morning, September 14th, to begin the penalty phase of the trial. You're now excused.

(56 RT 11048-11049, italics added.) Defense counsel did not object to the court's admonition. Moreover, after opening statements in the guilt phase, defense counsel specifically stipulated that the court need not give the entire admonishment each time it excused the jury, and that reminding the jury of the admonition was "more than sufficient." (37 RT 7267.)

Appellant contends that because the court did not specifically reiterate that the jury should not "form or express any opinion" on the case until the matter was finally submitted, the "reasonable interpretation of the admonition . . . allowed the jurors to think about the penalty question and to form opinions about it." (AOB 532.) However, the court did remind the jurors to keep to the "admonition," in which the court had previously instructed them not to form any opinion until the case was submitted. (See 37 RT 7239, 7266.)

"To give an abbreviated admonishment after first delivering a full one is permissible." (*People v. Gray* (2005) 37 Cal.4th 168, 230.) As this Court has explained: "After the jury have [*sic*] been repeatedly admonished in the full substance of Penal Code, section 1122, it is not prejudicial error to give the admonition in abbreviated form such as 'Remember and abide by the admonition heretofore given,' rather than repeating in full the words of the statute. [Citation.] This is particularly true where no objection is made at the time the abbreviated instruction is given." (*People v. Linden* (1959) 52 Cal.2d 1, 29.)[39/]

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39. Penal Code section 1122 provides:

(a) After the jury has been sworn and before the people's opening address, the court shall instruct the jury generally concerning its basic functions, duties, and conduct. The instructions shall include, among other matters, admonitions that the jurors shall not converse among themselves, or with anyone else, on any subject connected with the trial; that they shall not read or listen to any accounts or discussions of the case reported by newspapers or other news media; that they shall not visit or view the premises or place where the offense or offenses charged were allegedly committed or any other premises or place involved in the case; that prior to, and within 90 days of, discharge, they shall not request, accept, agree to accept, or discuss with any person receiving or accepting, any payment or benefit in consideration for supplying any information concerning the trial; and that they shall promptly report to the court any incident within their knowledge involving an attempt by any person to improperly influence any member of the jury.

(b) The jury shall also, at each adjournment of the court before the submission of the cause to the jury, whether permitted to separate or kept in charge of officers, be admonished by the court that it is their duty not to converse among themselves, or with anyone else, on any subject connected with the trial, or to form or express any opinion thereon until the cause is finally submitted to them.

Although here the court's abbreviated admonition repeated some specifics, it still admonished the jury to "keep the admonition" previously given. The specificity was merely based on concern about the media attention and additional questions that the jurors would face after a verdict had been rendered. Thus, the court wanted to reiterate that the jury was still prohibited from discussing the case with anyone else. However, just because the court emphasized a portion of the admonition, does not mean that the jury would have believed that the rest of the admonition was inapplicable. Appellant's argument assumes that the jurors would have believed that, during the recess, they could start thinking and deliberating about the proper penalty, even though they had not heard any evidence or law on the issue. There is no reasonable likelihood that the jury would have understood the abbreviated admonition in such a fashion. (*Estelle v. McGuire*, *supra*, 502 U.S. at p. 72.)

Moreover, appellant has pointed to nothing in the record which would suggest that he was prejudiced by any failure to give a proper admonition. "'[Error] in failing to give the required admonition does not require reversal unless the defendant calls the trial court's attention to the omission at the time of the adjournment, or unless the defendant on appeal affirmatively points to prejudice resulting from the omission.' [Citations.] [¶] Prejudice is not presumed and no prejudice appears. The jury was amply warned against overt discussion of the case; the only possibility of prejudice would be from a juror's internally and subjectively making a premature judgment as to guilt. But the jury was repeatedly told to keep an open mind (even though not at the end of every session), and the general instructions to decide guilt solely on the basis of the evidence and the law stated by the court, together with the jury's deliberative process, made it improbable that any juror would think he or she had any right to adhere blindly to an opinion formed before the end of the trial." (*People v. Heishman* (1988) 45 Cal.3d 147, 175.)

Similarly, the jury here was instructed to decide guilt or penalty based solely on the evidence and the law. (RT 53 RT 10419; 68 RT 13445-13446.) Moreover, appellant did not object to the admonition as given, and there is no evidence that any juror improperly formed an opinion before the case was submitted. Appellant's suggestion that the jurors failed to consider "critical mitigating evidence," because it was presented in "the latter portion of the penalty trial," is pure speculation. (AOB 535.) Appellant has not demonstrated that the court erred in giving an abbreviated admonition, nor that he was prejudiced by such an admonition. His claim should be denied.

XXXIX.

THE COURT PROPERLY ADMITTED THE PROSECUTION'S DEMONSTRATIVE VIDEO DURING CLOSING ARGUMENT (APPELLANT'S CLAIM 59)

Before penalty phase closing arguments, the prosecutor presented a videotape of selected items of evidence that she wished to show to the jury during argument. The tape was approximately three and a half minutes long. It began with the 911 audiotape playing and one photo of each victim alive, followed by a photo of each victim at the crime scene. As the 911 audiotape continued, there were photos of the mannequins showing the wounds on Ramon and Martha, and photos of Alejandra's bloody clothes.

After the 911 audiotape was complete, the audiotape of the police dispatch call played as an aerial photo of 1022 East Market Street was shown, followed by small parts of the crime scene videotape. The crime scene videotape was cut with still photos of the crime scene, including the location of the bodies, casings, and blood spatter on the walls. As the police officer on scene was heard to say there was an infant victim, the tape displayed one photo of 11-month-old Alejandra smiling, and several photos of Alejandra being treated for her injuries.

Next, a portion of appellant's videotaped statement from Mexico was played. A photo of the razor blades that were found in his cell, and photo of an AR-15 and a .30/.30 were briefly shown during his statement. After appellant's statement, the police dispatch tape once again played in the background, and close up photos of the victims' wounds were shown. At one point, the photo of the AR-15 and the .30/.30 were shown at the same time as some of the victims' wounds. Finally, as a police officer indicated on the dispatch tape that there was a fourth victim, two photos of four-year-old Alejandra were shown, and the videotape ended.

The court reviewed the videotape, and the prosecutor provided a list of the items of evidence used to compile it. (3 Supp. CT 880-881.) Defense counsel objected to the videotape on several grounds: (1) the display of several "gruesome" photographs on a "gigantic" screen would "arouse anger and passion in the jury;" (2) the damage depicted in the gruesome photographs was inflicted by the .30/.30 rifle and the AR-15, and there was no evidence that appellant fired either of those two weapons; and (3) the pictures of the baby "interspersed" throughout the video would arouse the anger and passion of the jury. (67 RT 13202-13203.)

The court ruled:

> I've looked at the video. It is theatrical to some degree.
>
> However, the People are entitled to summarize the evidence and confront the jury with the evidence.
>
> All of these items could be brought up one at a time and played or presented to the jury, so I see no reason why the tape, as it has been composed, cannot be utilized in penalty-phase argument.

(67 RT 13203.)

Appellant contends that the court should have excluded the videotape as unduly prejudicial pursuant to Evidence Code section 352. (AOB 538-540.)

However, the video was compiled with properly admitted evidence.[40] As the court pointed out, the prosecutor would have been permitted to rely on each item of evidence during closing argument. (See *People v. Harrison* (2005) 35 Cal.4th 208, 249 ["Evidence of the March 1987 incident was admitted without objection. Thus the prosecutor was permitted to refer to such evidence"].) Appellant does not contend that any of the items on the tape were improperly admitted, or that they were, in isolation, unduly prejudicial. If each item was separately relevant and admissible, appellant does not demonstrate how the items, put together, were unduly prejudicial.

Appellant cites cases which suggest that videotapes may be excluded as irrelevant or unduly prejudicial. (See *People v. Dabb* (1948) 32 Cal.2d 491, 498; *People v. Sims* (1993) 5 Cal.4th 405; *Bolstridge v. Central Maine Power Co.* (D. Me. 1985) 621 F.Supp. 1202.) However, in those cases, the issues were whether the evidence presented in the videotape was appropriate to show to the

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40. Appellant contends that the prosecutor included photos of evidence that had not been admitted in the videotape–specifically, the mannequins and the guns. (AOB 546.) However, the court granted the prosecutor's in limine motion, without objection by appellant, to admit the mannequins as evidence. (11 RT 2007, 2015; 3 CT 677-678.) Likewise, at the time the prosecutor questioned Ramirez about the guns, defense counsel objected and was overruled. (41 RT 8009.) Ramirez was permitted to testify that the guns possessed by Nunez and Sanchez were similar to the ones shown in court. (41 RT 8009-8011.) Notably, defense counsel, at the time he objected to the admission of the videotape, did not argue that it included inadmissible evidence, and, in fact, specifically stated that he was objecting despite the fact that "the items there depict items of evidence." (67 RT 13202.)

Moreover, whether the evidence was "formally admitted" (AOB 546), as evidence that could go into the jury deliberation room is irrelevant, as the jury had viewed the demonstrative evidence during the trial, and, thus the prosecutor was permitted to show it during closing argument. It would be similar to a situation where a witness drew a map during his testimony describing his location during the crime—the prosecutor would be permitted to refer to the map during closing argument, whether or not the map was formally admitted into evidence.

jury. Here, the images in the videotape were pieces of admitted evidence; the court had already conducted the required balancing under Evidence Code section 352, and the jury had already viewed the evidence.

Appellant also argues that the use of the videotape constituted prosecutorial misconduct. (AOB 542-543.) He claims that the prosecutor over-emphasized certain favorable pieces of evidence, and chose the sequence and timing of the images. (AOB 543.) However, that is exactly what a prosecutor is required to do during closing argument—marshal the facts that demonstrate that death is the appropriate penalty, and present the strongest case to the jury. The prosecutor did not misstate any facts; all of the visual and audio pieces of the videotape were admitted evidence.

Appellant complains that the prosecutor played appellant's videotaped statement only in Spanish. (AOB 544.) However, she did so only because appellant spoke Spanish on the videotape; there was no videotape in which appellant's statement had been dubbed or subtitled in English. The jury was given a written translation, and it was in evidence. (50 RT 9826.) The prosecutor had no duty to repeat "key exculpatory details," of appellant's statement, or to tell the jury to refer to the translated statement in her closing argument—that was defense counsel's responsibility.

Nor did the prosecutor's use of the photograph of the AR-15 and the .30/.30 improperly mischaracterize the evidence. (AOB 544.) There was dispute that the guns used by appellant's coparticipants were substantially similar to the guns presented at trial. There was no dispute that appellant did not possess either of those weapons during the crime. The fact that the prosecutor showed those guns during the videotape did not imply that appellant used either of those guns. But the fact that appellant's coparticipants used those weapons was a "circumstance[] of the crime," which could be considered in determining penalty. (Pen. Code, § 190.3, subd. (a).)

In essence, appellant's complaint is that the prosecutor committed misconduct because she vigorously argued, using the admitted evidence showing the severity and gruesomeness of the crime, that appellant should be sentenced to death, and she did so without focusing on the facts which would counsel for life in prison. That is not misconduct, it is the prosecutor's job. "A prosecutor is allowed to make vigorous arguments and may even use such epithets as are warranted by the evidence, as long as these arguments are not inflammatory. . . ." (*People v. Pensinger, supra*, 52 Cal.3d at p. 1251.) Moreover, the fact that the videotape was "dramatic," and "calculated to play upon the jurors' passions" (AOB 544-545), is appropriate at the penalty phase of a capital trial. "Although appeals to the sympathy or passions of the jury are inappropriate at the guilt phase [citation], at the penalty phase the jury decides a question the resolution of which turns not only on the facts, but on the jury's moral assessment of those facts as they reflect on whether defendant should be put to death. It is not only appropriate, but necessary, that the jury weigh the sympathetic elements of defendant's background against those that may offend the conscience." (*People v. Haskett* (1982) 30 Cal.3d 841, 864.) Of course, the images and sounds of the videotape—photos of the injured infant while hearing the infant crying on the dispatch tape, photos of the three victims both alive and dead, photos of the victims' wounds, along with a photo of weapons like those that inflicted the wounds—were disturbing. However, "[a]lthough the [videotape] no doubt evoked an emotional response, that reaction is attributable more to the gruesome nature of the crime than to the perspective from which it was portrayed." (*Ibid.*)

Finally, even if the court should have excluded the videotape, the error was harmless under any standard. As discussed above, the videotape showed only evidence which the jury had already seen and evidence which the prosecutor could have shown the jury during argument. For example, had the court not

allowed the videotape to be played, the prosecutor could have played the relevant audiotapes, while holding up, in succession, the relevant pictures for the jury to see. She could have played appellant's statement while holding the AR-15 and the .30/.30. She could have finished her argument by showing a photograph of four-year-old Alejandra smiling. The jury would have considered the emotional evidence contained in the videotape and would have reached the same verdict. Any error was harmless.

XL.

THE COURT PROPERLY INSTRUCTED THE JURY REGARDING THE APPROPRIATE USE OF THE DEMONSTRATIVE VIDEO AND THE VICTIM IMPACT EVIDENCE (APPELLANT'S CLAIM 60)

Appellant proffered the following instruction, "which would have limited the inflammatory impact of" the victim impact evidence and the prosecution's closing argument videotape (AOB 554):

> Evidence has been introduced for the purpose of showing the specific harm caused by the defendant's crime. Such evidence, if believed, was not received and may not be considered by you to divert your attention from your proper role of deciding whether defendant should live or die. You must face this obligation soberly and rationally, and you may not impose the ultimate sanction as a result of an irrational, purely subjective response to emotional evidence and argument. On the other hand, evidence and argument on emotional though relevant subjects may provide legitimate reasons to sway the jury to show mercy.

(3 Supp. CT 874.)

The court rejected the instruction, stating that it was improper to instruct the jury on mercy, and that the remainder of the instruction was argumentative. (66 RT 13015-13016.)

Appellant contends that the court erred in rejecting the proffered instruction because without it, "there was a very real danger that emotions engendered by

the victim-impact evidence would preclude the jury from making a rational penalty decision . . . ." (AOB 555.)

However, this Court has held that the exact instruction proffered by appellant is duplicative and argumentative. (*People v. Zamudio* (2008) 43 Cal.4th 32, 368-369; see *People v. Berryman* (1993) 6 Cal.4th 1048, 1079, overruled on another ground in *People v. Hill, supra*, 17 Cal.4th at p. 800 ["'[i]t is not erroneous to refuse' even a legally correct instruction if it is duplicative"]; *People v. Wharton* (1991) 53 Cal.3d 522, 570-571 [an instruction which invites the jury to draw inferences favorable to the defendant from specified items of evidence and/or elevates one or more factors in the jury's decision making process over others is properly rejected as argumentative].)

"First, the substance of the requested instruction, insofar as it correctly stated the law, was adequately covered by the slightly modified version of CALJIC 8.84.1 the trial court gave; '[t]he proposed instruction would not have provided the jury with any information it had not otherwise learned from CALJIC No. 8.84.1.' [Citation.]" (*People v. Zamudio, supra*, 43 Cal.4th at p. 368; *People v. Ochoa, supra*, 26 Cal.4th at p. 455.)

"Second, the requested instruction is misleading to the extent it indicates that emotions may play no part in a juror's decision to opt for the death penalty. Although jurors must never be influenced by passion or prejudice, at the penalty phase, they 'may properly consider in aggravation, as a circumstance of the crime, the impact of a capital defendant's crimes on the victim's family, and in so doing [they] *may exercise sympathy for the defendant's murder victims and . . . their bereaved family members.* [Citation.]' [Citation.]" (*People v. Zamudio, supra*, 43 Cal.4th at pp. 368-369.)

The court properly refused appellant's proffered instruction, and the jury was adequately informed of its duty with regards to victim impact evidence. (*Ibid.*) Appellant's claim should be denied.

XLI.

THE COURT PROPERLY INSTRUCTED THE JURY REGARDING THE GUILT PHASE EVIDENCE (APPELLANT'S CLAIM 61)

At the end of the penalty phase, the court instructed the jury to "determine what the facts are from the evidence received during the entire trial, unless you are instructed otherwise." (68 RT 13446; 5 CT 1180.) Appellant contends that the court failed to specifically instruct the jury that it could not consider the evidence relating to the use of a knife during the commission of the offense, because the jury found that allegation to be not true. (AOB 562.) Appellant further contends that evidence regarding the personal use of a firearm and conspiracy to commit murder—findings which the jury was unable to unanimously agree upon—could be considered only by a juror who believed the allegations proven beyond a reasonable doubt. (AOB 562.)

Assuming that the court should have tailored the instructions to exclude the evidence of the knife use enhancement and to specifically subject the gun use and conspiracy evidence to a reasonable doubt requirement (see *People v. Jennings, supra*, 53 Cal.3d at pp. 389-390), any error was harmless (*id.* at p. 390.) "First, the jury was instructed not to consider evidence of other criminal activity unless it found beyond a reasonable doubt that defendant had committed the crime. Because the same jury ha[d] earlier acquitted [appellant] of the [knife use enhancement], we assume it followed the penalty phase instruction and accorded no weight to [that enhancement] at the penalty phase." (*Ibid.*; 68 RT 13454.)

Moreover, the main aggravating factor in this case was the shocking and gruesome nature of the crimes themselves. Three family members were executed in their own home. The victims were shot not just once in the head, but multiple times. Ramon's face was "torn apart." Martha was executed while holding her infant daughter in her arms. Whether or not appellant was an actual

shooter, he was a major accomplice. He drove the men to procure the guns; he drove them to the mountains to test fire the weapons; he approached the victims' front door so that they would have an easier time gaining entry; he fled from the scene, leaving Alejandra injured and crying at her mother's feet. Even if the jury had been instructed to limit its consideration of evidence relating to the challenged allegations, the circumstances of the crime remained the same. Appellant's participation in the "massacre," outweighed any mitigating evidence provided by defense. (67 RT 13239-A.)

Finally, the prosecution did not rely on the knife use, gun use, or conspiracy to commit murder allegations during closing argument. The prosecutor mentioned the possibility that some jurors believed appellant to be an actual shooter only as it related to appellant's participation as an accomplice. (67 RT 13227, 13232.)[41/] The thrust of her argument was that appellant was, at the very least, an accomplice to the crimes. She argued that even though appellant was an accomplice, the evidence, regardless of his gun use, showed that his participation was not minor. (67 RT 13227-13233.) She did not argue the

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41. The court instructed the jury with CALJIC No. 8.85, in relevant part:

> In determining which penalty is to be imposed upon the defendant, you shall consider all of the evidence which has been received during any part of the trial of this case except as you may be hereafter or previously instructed. You shall consider, take into account and be guided by the following factors, if applicable:
>
> . . .
>
> Factor J: Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.

(68 RT 13451-13453; 5 CT 1191.)

evidence as an aggravating factor. "Under these circumstances, there is no reasonable possibility that consideration of the [alleged personal use enhancements and conspiracy to commit murder] could have improperly influenced the jury." (*People v. Jennings*, *supra*, 53 Cal.3d at p. 390.) Appellant's claim should be denied.

XLII.

THE PROSECUTOR DID NOT COMMIT MISCONDUCT (APPELLANT'S CLAIM 62)

As discussed above, during the guilt phase closing argument, the prosecutor stated that the jurors should determine "what our community will and will not tolerate." (See Arg XIII, *supra*.) Appellant contends that, even if not prejudicial at the guilt phase, the statement constituted prejudicial misconduct during the penalty phase. (AOB 565.)

Appellant's claim fails, however, because, as discussed above, the prosecutor did not commit misconduct. Moreover, because the statement was made during the guilt phase closing argument; there is no reasonable probability that the jury considered that prior statement during its penalty deliberations.

XLIII.

ANY ERROR IN INSTRUCTING THE JURY WITH THE CONSCIOUSNESS OF GUILT INSTRUCTIONS WAS HARMLESS (APPELLANT'S CLAIM 63)

As discussed above, during the guilt phase the court gave standard CALJIC instructions 2.03 (Witness willfully false), and 2.52 (Flight after the crime). (See Arg. XIX. B., *supra*.) At the penalty phase, the court instructed the jury:

> You are still to be guided by the Court's previous instructions regarding such matters as the functions and duties of jurors, the evidence, the evaluation of evidence, expert testimony and the definition of and culpability for crimes where applicable and with certain exceptions. Namely, with respect to instruction number 1.00: The previous instruction that you were not to be influenced by sympathy is not applicable in the penalty phase. And secondly, the admonition in that instruction that you are to reach a just verdict regardless of the consequences is no longer applicable. You are still to strive to reach a just verdict, but you are now free to consider and weigh the consequences as part of your deliberative process.

(68 RT 13445-13446; 5 CT 1179.)

Appellant claims that the court's failure to specifically exclude the guilt phase instructions on flight and false statements was prejudicial error. (AOB 566.) Appellant is correct that "[i]t is error for a court to give an 'abstract' instruction, i.e, 'one which is correct in law but irrelevant[.]' [Citation.]" (*People v. Rowland* (1992) 4 Cal.4th 238, 282.) Here, both 2.03 and 2.52, by their terms, were relevant only to the jury's determination of guilt. At the penalty phase, the issue of appellant's guilt had been determined. Thus, it was error to reference back to those particular instructions. However, as this Court has pointed out, the giving of abstract consciousness of guilt instructions does not require reversal.

> "[I]n most cases the giving of an abstract instruction is only a technical error which does not constitute ground for reversal." [Citation.] This is such a case. The jurors here must have understood the instruction in accordance with the common meaning of its plain words, judged it to be mere surplusage, and passed over it without further thought. Certainly, they could not have been led to give undue weight to defendant's [flight or false statements].
>
> Against our conclusion, defendant claims that reversal is required. For argument's sake only, we shall assume the validity of his major premise—that an abstract instruction that misleads the jury may cause prejudice. But we cannot accept the soundness of his minor premise—that the instruction here may have actually misled the jurors. The argument is that the language in question might have been

> understood by the jury to allow consideration of "aggravating" circumstances beyond those permitted by the law. There is simply no reasonable likelihood of such a result. (*People v. Clair* [1992] 2 Cal.4th [629,] 662-663 [stating the "reasonable likelihood" standard as the test for determining whether the jury misconstrued or misapplied an instruction].) The common meaning of the plain words stands in the way. Hence, there is no reasonable possibility that the error affected the outcome. [Citations.]

(*People v. Rowland, supra*, 4 Cal.4th at p. 282.) This Court further found that any error "did not substantially implicate any federal constitutional guaranty." (*Id.* at p. 282, fn. 21.) Any reference to CALJIC Nos. 2.03 and 2.52 during the penalty phase does not require reversal.[42/]

XLIV.

THE COURT PROPERLY INSTRUCTED THE JURY REGARDING APPELLANT'S FAILURE TO TESTIFY (APPELLANT'S CLAIM 64)

Appellant contends that the court erred in failing to give, upon appellant's request, CALJIC No. 2.60 at the penalty phase. (AOB 567.) However, the court did not deny appellant's requested instruction; it specifically stated it would give CALJIC No. 2.60. (66 RT 13007.)[43/] After closing arguments in the penalty phase, the court instructed the jury:

> A defendant in a criminal trial has a constitutional right not to be compelled to testify. You must not draw any inference from the fact that a defendant does not testify. Further, you must neither discuss this matter nor permit it to enter into your deliberations in any way.

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42. Moreover, as discussed below (see Arg. LVII), even though the court referred back to the guilt phase instructions, it subsequently told the jury to disregard all instructions not repeated during the penalty phase. The court did not repeat CALJIC Nos. 2.13 and 2.52, making it more likely that the jury ignored any possible reference back to those inapplicable instructions.

43. At appellant's request, the court did not give CALJIC No. 2.61. (66 RT 13007.)

(68 RT 13450; 5 CT 1189.)

Thus, because the court gave appellant's requested instruction, appellant's claim should be rejected.

XLV.

THE INSTRUCTIONS DID NOT PERMIT THE JURORS TO CONSIDER NON-STATUTORY AGGRAVATING FACTORS (APPELLANT'S CLAIM 65)

Appellant contends that the given instructions improperly allowed the jury to consider nonviolent, uncharged criminal acts as nonstatutory aggravation. (AOB 570.) Specifically, he claims that the instructions allowed the jury to consider: (1) the vehicular arson; (2) appellant's coyote activities; and (3) appellant's driving under the influence convictions, none of which qualified as Factor (b) aggravation.[44/] First, appellant failed to request a modification of the standard instructions and has thus waived his claim on appeal. (*People v. Daya*, *supra*, 29 Cal.App.4th at p. 714 ["defendant is not entitled to remain mute at

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44. The court gave CALJIC No. 8.85, which stated, in relevant part:

> In determining which penalty is to be imposed upon the defendant, you shall consider all of the evidence which has been received during any part of the trial of this case except as you may be hereafter or previously instructed. You shall consider, take into account and be guided by the following factors, if applicable:
>
> . . .
>
> Factor B: The presence or absence of criminal activity by the defendant, other than the crimes for which the defendant has been tried in the present proceedings, which involved the use or attempted use of force or violence or the express or implied threat to use force or violence.

(68 RT 13541-13452; 5 CT 1191.)

trial and scream foul on appeal for the court's failure to expand, modify, and refine standardized jury instructions"].)

In any event, appellant's claim fails on the merits. To support his claim, appellant relies on a single passage in the jury instructions, which informed the jury that "[a]n aggravating factor 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 crime itself. (68 RT 13455-13456; 5 CT 1194; CALJIC No. 8.88.) However, appellant takes this passage out of context. As to the factor (b) evidence, the jury was also informed that:

> Evidence has been introduced for the purpose of showing that the defendant, Daniel Sanchez Covarrubias, has committed the following criminal acts:
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> June 30th, 1996. Possession or attempted manufacture of a weapon by a prisoner.
>
> July 13th, 1996. Possession or attempted manufacture of a weapon by a prisoner.
>
> August 18th, 1996. Assault and battery against a custodial officer in the performance of his or her duties. And attempted escape by force or violence.
> As I said, evidence has been introduced for the purpose of showing that the defendant has committed these acts which involved the express or implied use of force or violence. Before a juror may consider any criminal acts as an aggravating circumstance in this case, a juror must first be satisfied beyond a reasonable doubt that the defendant did, in fact, commit the criminal acts. *A juror may not consider any evidence of any other criminal acts as an aggravating circumstance.*

(68 RT 13453-13454; 5 CT 1193, italics added; see CALJIC No. 8.87.)

Given all the instructions, there is no reasonable likelihood that the jury understood the instructions to allow consideration of the arson, driving under the influence, or the immigration violations as aggravating factors. (*Estelle v. McGuire, supra*, 502 U.S. at p. 72 ["It is well established that the instruction

'may not be judged in artificial isolation,' but must be considered in the context of the instructions as a whole and the trial record. [Citation.] In addition, . . . we inquire 'whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the Constitution].)

The jurors were specifically informed that criminal acts, other than those specifically listed in the instruction, could not be considered as factor (b) evidence. The prosecutor did not argue any of the nonviolent criminal acts as aggravation. The DUIs and the coyote activities were presented as defense evidence of mitigation—to explain how alcohol impaired appellant's judgment, and to demonstrate his willingness to help others. Nothing in the instructions or in the arguments of counsel was reasonably likely to lead the jury to consider appellant's nonviolent criminal conduct as an aggravating factor.

Finally, to the extent appellant contends that the court should have modified the standard instructions to expressly inform the jury that its consideration of aggravating evidence was limited to the enumerated statutory factors, this Court has rejected that claim. (*People v. Harris* (2005) 37 Cal.4th 310, 359; *People v. Taylor* (2001) 26 Cal.4th 1155, 1180.)

XLVI.

THE INSTRUCTIONS DID NOT ALLOW THE JURY TO DOUBLE COUNT AN AGGRAVATING FACTOR (APPELLANT'S CLAIM 66)

As discussed above (see Arg. XLV), the court instructed the jury that the specific criminal acts alleged as factor (b) aggravating facts were the June 30, 1996, and July 13, 1996, possession or attempted manufacture of a weapon by a prisoner, and the August 18, 1996, assault and attempted escape by force or violence. (68 RT 13454.) Appellant contends that, because the assault and attempted escape were "predicated on a single course of conduct," the

instructions allowed the jury to improperly "double count" the same aggravating fact. (AOB 575.)[45]

However, while it is true that "an individual criminal act cannot be counted twice in aggravation *for the same purpose*," there is "no constitutional obstacle to separate consideration of properly distinct aspects of the penalty determination, even when those aspects happen to coexist in a single incident." (*People v. Melton* (1988) 44 Cal.3d 713, 764-765, original italics.)

Here, although the acts took place during one incident, there were two criminal acts—an assault and a forceful escape attempt. Appellant could have been charged and convicted of two separate crimes, and neither crime was necessary to the completion of the other. That appellant chose to commit both acts at the same time should not insulate him from the consideration of both acts at the penalty phase. There was no improper "double counting" of one event, because there were two separate events to "count." Both the assault and the attempted escape could be counted once under factor (b), and the jury was so instructed. Appellant's claim should be denied.

XLVII.

THE INSTRUCTIONS ALLOWED THE JURY TO CONSIDER APPELLANT'S CLAIM THAT HE DID NOT PERSONALLY SHOOT OR INTEND TO KILL THE VICTIMS (APPELLANT'S CLAIM 67)

Appellant contends that the court's instruction on factor (j) was improper because it precluded the jury from considering the mitigating facts that

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45. Once again, appellant did not object or request a modification of the standard instructions, thereby waiving his claim on appeal. (*People v. Daya*, *supra*, 29 Cal.App.4th at p. 714 ["defendant is not entitled to remain mute at trial and scream foul on appeal for the court's failure to expand, modify, and refine standardized jury instructions"].)

appellant was not the shooter and/or did not intend to kill anyone. (AOB 577.)[46] However, the instructional language of factor (j) is taken verbatim from Penal Code section 190.3, and the instruction itself has been repeatedly approved by this Court. (See *People v. Ramos* (2004) 34 Cal.4th 494, 530; *People v. Mendoza* (2000) 24 Cal.4th 130, 191; *People v. Kipp, supra*, 18 Cal.4th at pp. 380-381.) Moreover, appellant did not object to the standard instruction, and has thus waived his claim on appeal. (*People v. Daya, supra*, 29 Cal.App.4th at p. 714 ["defendant is not entitled to remain mute at trial and scream foul on appeal for the court's failure to expand, modify, and refine standardized jury instructions"].)

In any event, according to appellant, the language of the instruction "precluded consideration of appellant's accomplice status as a mitigating factor unless the jurors also found that appellant's participation in the offense was 'relatively minor.'" (AOB 578.) However, that is exactly how the instruction should be interpreted. According to Penal Code section 190.3, being an accomplice is a mitigating factor only if the defendant was also a minor

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46. The court instructed the jury with CALJIC No. 8.85, in relevant part:

> In determining which penalty is to be imposed upon the defendant, you shall consider all of the evidence which has been received during any part of the trial of this case except as you may be hereafter or previously instructed. You shall consider, take into account and be guided by the following factors, if applicable:
>
> . . .
>
> Factor J: Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.

(68 RT 13451-13453; 5 CT 1191-1192.)

participant. (Pen. Code, § 190.3 ["Whether or not the defendant was an accomplice to the offense *and* his participation in the commission of the offense was relatively minor"], italics added.)

The "mitigating factors" cited by appellant—that he was not the actual shooter and had no intent to kill—were facts which bore on the issue of whether he was a major or minor participant. Thus, the jury was not precluded from considering those mitigating factors; that evidence was relevant to the jury's determination of both appellant's accomplice status and the level of his participation. If the jury believed that he was not the shooter and did not intend to kill, it may well have found that appellant's participation was minor. Thus, those factors would have properly been considered mitigating.

Apparently, appellant claims that the instruction was erroneous because it allowed the prosecutor to argue that appellant's role was not minor even if the jury believed that appellant was not the shooter and did not intend to kill anyone. (AOB 578.) However, appellant improperly conflates counsel's argument with instructional error. Of course the prosecutor argued that appellant was a major participant regardless of whether he was the actual shooter or had the intent to kill. That was her interpretation of the evidence. Likewise, defense counsel was free to argue, and did argue, that appellant was not a shooter and had no intent to kill as mitigating and supportive of a finding of LWOP. (See 68 RT 13417 ["you couldn't unanimously agree that, one, he conspired to commit murder, or two, . . . that he personally used a firearm. Those are things that you consider in this case, too"]; 68 RT 13421 ["I do ask you to consider that the evidence that was presented in the guilt phase really does strongly suggest that Daniel Covarrubias never fired a weapon that night. Strongly suggests it. But again, you heard the evidence. You all decide. Nobody can decide it for you. You must decide. Again, I'm not trying to make the fact he didn't shoot an excuse for this conduct. It's not. He was there. He

was involved. And you convicted him, and now he'll pay for it. The circumstances of this case cry just as loudly that it was a robbery/burglary that went wrong as anything else"]; 68 RT 13432 ["One aspect of mitigating evidence is that it gives rise to compassion or sympathy for the defendant, and the jury may, based upon that alone, reject death as the appropriate penalty. . . . Also, if he was an accomplice, if you found he was an accomplice, you can consider that in some ways mitigating. . . . The fact, if you can find he was not the actual killer, you can consider that"].) The fact that the parties had different interpretations of the evidence does not mean that the instructions were erroneous.[47] Appellant's claim should be denied.

XLVIII.

THE COURT PROPERLY EXCLUDED APPELLANT'S PROFFERED HEARSAY EVIDENCE (APPELLANT'S CLAIM 68)

At the penalty phase, appellant sought to introduce reports by the defense investigator summarizing her interviews with Adan Medina-Garcia and Humberto Hernandez. (2 Supp. CT 350-359.)

According to the reports, Medina-Garcia met appellant in Mexicali around 1991, when Medina-Garcia was having financial trouble. (2 Supp. CT 350.) Appellant permitted Medina-Garcia to live on his property in Mexicali, and put up $200 to start a business with Medina-Garcia. (2 Supp. CT 350.) Eventually, they split their partnership and appellant moved across the border

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47. To the extent appellant contends that the court should have given his proposed pinpoint instruction that "the fact that the defendant was not the actual killer may be considered as a mitigating factor" (see AOB 579, fn. 367), he cannot prevail. His proposed instruction highlighted one particular mitigating fact, and as such was not a proper pinpoint instruction. (*People v. Cook* (2007) 40 Cal.4th 1334, 1364; *People v. Caitlin* (2001) 26 Cal.4th 81, 173-174.)

to the United States to work. (2 Supp. CT 350-351.) Although appellant lived in the United States, he often visited Medina-Garcia in the evenings and helped work on his house. (2 Supp. CT 351.)

In late 1994, Antonio Sanchez, Medina-Garcia's cousin, was in Mexicali. (2 Supp. CT 351.) However, Sanchez was not welcome at many of his relatives' homes and was anxious to get back to the United States. (2 Supp. CT 351-352.) Medina-Garcia did not want Sanchez to stay with him because he drank too much and used offensive language in front of his family. (2 Supp. CT 351.) Medina-Garcia told Sanchez to leave, and appellant supported his decision. (2 Supp. CT 351.)

Appellant told Medina-Garcia that Sanchez and Nunez wanted him to take them to Salinas. (2 Supp. CT 352.) Appellant said that Sanchez's mother agreed to send appellant $100 to pay for the trip to and from Salinas. (2 Supp. CT 352.) About eight days before he left for Salinas, appellant said that he was going to Salinas to get some guns for Lorenzo Nunez. (2 Supp. CT 352.) Since Sanchez's mother had given him money, and he was going anyway, he agreed to take Sanchez and Nunez to Salinas. (2 Supp. CT 352-353.) The money from the guns was to be used as payment for appellant bringing Lorenzo's wife into the United States. (2 Supp. CT 352-353.)

Appellant said he planned to drive to Salinas, pick up the guns, and return to Mexicali as fast as he could. (2 Supp. CT 352.) Appellant was worried about getting back to work in the fields, because he could lose his residency papers if he did not work enough hours. (2 Supp. CT 352.)

According to Medina-Garcia, neither Sanchez, Nunez, nor appellant mentioned anything about planning any crimes in Salinas. (2 Supp. CT 353.) When they left for Salinas, both Sanchez and Nunez had bags packed with clothes, but appellant did not take a change of clothes because he did not plan to stay in Salinas. (2 Supp. CT 353.)

When Sanchez and Nunez returned to Mexicali, appellant was not with them. (2 Supp. CT 353-354.) Sanchez told Medina-Garcia that they had killed three people in Salinas. (2 Supp. CT 354.) Sanchez was carrying a .22 caliber pistol in his waistband. (2 Supp. CT 354.) Medina-Garcia told them to leave his house immediately or he would call the police. (2 Supp. CT 354.) While Sanchez and Nunez were still there, appellant and his wife arrived at Medina-Garcia's house. (2 Supp. CT 354.) Appellant was in a hurry and would say only that something bad happened in Salinas. (2 Supp. CT 354.) Appellant left the house within minutes of arriving. (2 Supp. CT 354.)

Medina-Garcia did not have any contact with appellant for the next eight months. (2 Supp. CT 355.) One day, appellant showed up at Medina-Garcia's house and said that he was tired of hiding and wanted to turn himself in. (2 Supp. CT 355.)

Medina-Garcia was present when the bounty hunters apprehended appellant. (2 Supp. CT 355-356.) At the time of his apprehension, appellant was working on his car so that he could drive it to the United States and surrender to authorities. (2 Supp. CT 356.)

Humberto Hernandez met appellant at Jesus and Elvia's home in Salinas, and later worked with appellant for about six months. (2 Supp. CT 357.)

In November 1994, Hernandez was living with Jesus and Elvia near Salinas. (2 Supp. CT 357.) One day when he arrived home, he saw appellant leaving the house after a visit. (2 Supp. CT 357.) Appellant was with two other men, one of whom he identified as Sanchez. (2 Supp. CT 357-358.)

Just before Christmas 1994, Hernandez visited his parents in Guanajuato, Mexico. (2 Supp. CT 358.) Appellant was there. (2 Supp. CT 358.) Appellant appeared "depressed and down." (2 Supp. CT 358.) Appellant would not talk about what happened in Salinas because "it hurt him so much." (2 Supp. CT 358.) Once, appellant told Hernandez, "I shouldn't have been with them,"

referring to Sanchez and Nunez. (2 Supp. CT 359.) Appellant appeared sincere, and tears welled up in his eyes. (2 Supp. CT 359.)

During in limine motions, defense counsel explained that he had been unable to locate Medina-Garcia and Hernandez in Mexico in order provide live testimony. (59 RT 11612-A.) Defense counsel conceded that the statements to the defense investigator were not taken under oath, or with a view of someone presenting their testimony to the Court. (59 RT 11613-A.) The court excluded the evidence, stating:

> I don't know of any authority for the admission of rank hearsay material without any indicia of trustworthiness where the statements, themselves, are not verified by the people making them, and the process by which they were taken cannot, in some way, be deemed trustworthy, believable, acceptable.

(59 RT 11613-A.)

Appellant contends that the hearsay statements should have been admitted despite the fact that they fall within no exception to the hearsay rule. (AOB 586-587.) Appellant relies on his federal constitutional right to present a defense, and the principle that "a defendant's due process rights are violated when hearsay testimony at the penalty phase of a capital trial is excluded, if both of the following conditions are present: (1) the excluded testimony is 'highly relevant to a critical issue in the punishment phase of the trial,' *and* (2) there are substantial reasons to assume the reliability of the evidence." (*People v. Kaurish* (1990) 52 Cal.3d 648, 704, quoting *Green v. Georgia* (1979) 442 U.S. 95, 97, italics added.)

However, "[a]lthough the Eighth and Fourteenth Amendments confer a right upon capital defendants to present all relevant mitigating evidence to the jury [citation], the United States Supreme Court never has suggested that this right precludes the state from applying ordinary rule of evidence to determine whether such evidence is admissible. [Citations.]" (*People v. Smithey* (1999) 20 Cal.4th 936, 995.) Moreover,

> [i]n *Green v. Georgia* . . ., evidence "highly relevant to a critical issue in the punishment phase" consisted of hearsay testimony that the defendant's accomplice had confessed to killing the victim after ordering the defendant to run an errand. The state had used the same testimony to obtain a conviction and death sentence in the accomplice's trial. The high court held that "[i]n these unique circumstances," application of the hearsay rule denied the defendant a fair trial on the issue of punishment. [Citations.] Thus, in these decisions, the high court found due process violations when the excluded evidence was highly probative of the defendant's innocence. By contrast, we have held that if the exculpatory value of the excluded evidence is tangential, or cumulative of other evidence admitted at trial, exclusion of the evidence does not deny the accused due process of law. [Citations.]

(20 Cal.4th at p. 996.)

Here, the evidence was minimally relevant to any mitigation issues. Appellant contends that the statements demonstrated appellant's remorse and willingness to surrender to authorities. (AOB 588.) However, this type of sympathetic factor (k) evidence was not "highly probative of [appellant's] innocence." (20 Cal.4th at p. 996.)[48/] Unlike the evidence in *Green*, for example, the evidence here did not suggest that appellant was not involved in the murders. To the contrary, both statements indicated that appellant had admitted that he was involved in "something bad" in Salinas.

Appellant also claims that the evidence "corroborated the defense theory that Antonio Sanchez was the instigator of the crimes and that appellant never intended to conspire with Antonio Sanchez to rob or kill the victims." (AOB

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48. Penal Code section 190.3 provides, in relevant part:

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

588.) However, Medina-Garcia's statement suggests only that, as far as he knew, there was no plan to rob or kill anyone when the men left Mexico. As the guilt phase evidence demonstrated, the men were in Salinas for several days before the incident. The excluded evidence does not disprove that appellant, at some point in Salinas, agreed to go along with Sanchez's plan to rob and/or kill the victims, and formed the requisite intent.

More importantly, there is nothing to suggest that either statement was reliable. They were not taken under oath, and were given to appellant's investigator by appellant's friends in order to help appellant's case. As defense counsel conceded, he planned to call the witnesses but was unable to locate them. There was no opportunity for cross-examination, and the investigator's report was not written with a "view of someone presenting their testimony to the Court." (59 RT 11613-A.) "[N]o substantial reason exists to assume the statement[s] [are] reliable." (*People v. Phillips* (2000) 22 Cal.4th 226, 238.) The court properly excluded the statements as "rank hearsay." (59 RT 11613-A.) Appellant's claim should be denied.

XLIX.

THE INSTRUCTIONS ALLOWED THE JURY TO CONSIDER APPELLANT'S INTOXICATION AS A MITIGATING CIRCUMSTANCE (APPELLANT'S CLAIM 69)

Reiterating an earlier argument, appellant contends that the instructions improperly "limited the jurors' consideration of [appellant's] intoxication solely to specific intent," and the jurors were "effectively precluded from considering appellant's intoxication as to the essential knowledge elements of the charges." (AOB 594.) The jurors were further precluded from "considering intoxication in deciding whether appellant was an aider and abettor." (AOB 594.)

As discussed above (see Arg. XIV), the instructions on voluntary intoxication were not erroneous. Indeed, appellant was not entitled to *any* instructions on voluntary intoxication. Moreover, to the extent voluntary intoxication instructions were given, there was no reasonable likelihood that the jury understood the instructions to limit its consideration of appellant's intoxication as to all relevant mental states.

Appellant contends that the erroneous guilt phase instructions were prejudicial during the penalty phase, because they prevented the jury from considering appellant's intoxication in determining whether appellant was subjectively aware of Sanchez's criminal intent, whether appellant actually entered an agreement to rob and/or kill the victims, and whether appellant appreciated the danger to human life if he indeed agree to Sanchez's criminal plan to rob and kill. (AOB 595.) However, whether appellant possessed the requisite mental state for criminal liability was not at issue at the penalty phase. The jury already found him guilty of the charged crimes. The court instructed the jury to consider the prior guilt phase instructions only "where applicable." The challenged instructions specifically discussed the effect of appellant's intoxication on his guilt or innocence. As discussed above (see Arg XLIII), "[t]he jurors here must have understood the instruction in accordance with the common meaning of its plain words, judged it to be mere surplusage, and passed over it without further thought." (*People v. Rowland*, *supra*, 4 Cal.4th at. p. 282.)

Moreover, the penalty phase instructions specifically permitted the jury to consider appellant's intoxication as a mitigating factor. (See 68 RT 13452-13453; 5 CT 1191-1192; CALJIC No. 8.85 ["Factor (h): Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or the effects of intoxication"].)

Appellant contends that factor (h) was insufficient to allow the jury to consider appellant's intoxication because it "addressed 'capacity" to 'appreciate criminality' rather than actual subjective knowledge or awareness." (AOB 595.) Assuming there is some distinction between a defendant's capacity to "appreciate criminality," and his subjective awareness of facts which would relieve him of liability for those criminal acts, the jury was also instructed with the "catch-all" provision of CALJIC No. 8.85. Factor (k) allowed the jury to consider "[a]ny other circumstance which extenuates . . . the gravity of the crime even though it is not a legal excuse for the crime and any sympathetic or other aspects of the defendant's character or record that the defendant offers as a basis" for mitigation. (68 RT 13453; 5 CT 1192.) "These instructions clearly told the jury it could consider 'any mitigating, sympathetic, or extenuating circumstances,' including any mental defect, disease, or intoxication." (*People v. Monterroso* (2004) 34 Cal.4th 743, 790.) The jury was not precluded from considering appellant's intoxication in determining whether the mitigating factors outweighed the aggravating factors. Appellant's claim should be denied.

L.

THE COURT PROPERLY INSTRUCTED THE JURY REGARDING "FACTOR (K)" (APPELLANT'S CLAIM 70)

Appellant contends that CALJIC No. 8.85's "catch-all" provision was erroneous because it limited the jurors' consideration of mitigating evidence to evidence "that the defendant offers." He claims that he did not "offer" his videotaped statement which minimized his role in the crime, and it was prosecution witnesses, not defense witnesses, who testified about his

intoxication on the day of the crime and the fact he was not involved in the sale of drugs. (AOB 601.)

Once again, appellant failed to object to the standard instruction and therefore waived his claim on appeal. (*People v. Daya, supra*, 29 Cal.App.4th at p. 714 ["defendant is not entitled to remain mute at trial and scream foul on appeal for the court's failure to expand, modify, and refine standardized jury instructions"].) In any event, as appellant recognizes, this Court has rejected his claim that the factor (k) instruction improperly limits the jury's consideration of all mitigating evidence. (*People v. Dunkle, supra*, 36 Cal.4th at p. 926 ["The instructions did not tell the jury not to consider any of the mitigating factors. Indeed, they directed the jury to consider all of the evidence received during any part of the trial, enumerated the statutory and aggravating factors, and advised the jury it was free to assign whatever moral or sympathetic value it deemed appropriate to each of the factors it was permitted to consider"].) Indeed, both the prosecutor and defense counsel discussed appellant's intoxication and accomplice status during closing arguments. (See 67 RT 13224-13226, 13227-13233; 68 RT 13407, 13417, 13421-13422, 13432.) Neither suggested that such evidence could not be considered in mitigation. There is no reasonable likelihood that the jury understood the instructions in the manner appellant suggests. (*Estelle v. McGuire, supra*, 502 U.S. at p. 72.) Appellant's claim should be denied.

LI.

THE COURT PROPERLY REFUSED APPELLANT'S REQUESTED INSTRUCTION REGARDING RAMIREZ'S SENTENCE (APPELLANT'S CLAIM 71)

Appellant proposed the following instruction: "You may consider the fact that defendant's accomplice[s] received a more lenient sentence as a mitigating

factor." (3 Supp. CT 875.) The court refused to give the instruction. (66 RT 13017-13018.)

Appellant contends that the court erred in refusing to give a proper pinpoint instruction. (AOB 603.) However, this Court has consistently held that the "'sentence received by an accomplice is not constitutionally or statutorily relevant as a factor in mitigation.' [Citation.]" (*People v. Ledesma*, *supra*, 39 Cal.4th at p. 735; *People v. Ochoa*, *supra*, 26 Cal.4th at p. 456 ["the jury need not be instructed to consider the sentences received by codefendants"].) "The focus in a penalty phase trial of a capital case is on the character and record of the individual offender. The individually negotiated disposition of an accomplice is not constitutionally relevant to defendant's penalty determination." (*People v. Johnson* (1989) 47 Cal.3d 1194, 1249.) The court properly refused to give appellant's proffered instruction.

LII.

THE COURT PROPERLY INSTRUCTED WITH CALJIC NOS. 8.85 AND 8.87 (APPELLANT'S CLAIM 72)

Appellant contends that CALJIC No. 8.85, in conjunction with CALJIC No. 8.87, improperly instructed the jury that it had to reach a unanimous decision on a mitigating factor before such factor could be considered in fixing the penalty. CALJIC No. 8.87, regarding the burden of proof for other criminal activity, instructed the jury that it was "not necessary for all jurors to agree. If any juror is convinced beyond a reasonable doubt that the criminal activity occurred, that juror may consider that activity as a fact in aggravation." (68 RT 13454; 5 CT 1193.) Appellant claims that because no similar instruction was given regarding the mitigating evidence, the jurors would have reasonably inferred that unanimity was required on that evidence. (AOB 608.) This Court has rejected appellant's claim, holding that the totality of the penalty phase

instructions properly inform the jury that there is no unanimity requirement as to aggravating and mitigating factors. (*People v. Holt*, *supra*, 15 Cal.4th at pp. 685-686.)

Here, the jury was instructed that it was "free to assign whatever moral or sympathetic value *you* deem appropriate to *each and all* of the various factors you are permitted to consider," and that "[t]o return a judgment of death, *each of you* must be persuaded that the aggravating circumstances are so substantial in comparison to the mitigating circumstances that it warrants death instead of life without parole." (68 RT 13456-13457; 5 CT 1194-1195, italics added.) Moreover, the prosecutor specifically explained, "When you evaluate this aggravating and mitigating evidence, you individually assign weights to these different factors. You don't all have to agree that a certain factor applies or doesn't apply; nor do you have to get to your just verdict all in the same fashion. You just have to come up with the same verdict." (67 RT 13218.) The given instructions and the argument of counsel, "adequately informed the jury that resolution of penalty phase factual questions as well as deciding the appropriate penalty was an individual responsibility." (*People v. Holt*, *supra*, 15 Cal.4th at p. 686.) There is no reasonable likelihood that the jury understood the instructions in the manner appellant suggests. (*Estelle v. McGuire*, *supra*, 502 U.S. at p. 72.) His claim should be denied.

LIII.

THE COURT PROPERLY REFUSED APPELLANT'S PROFFERED "MERCY" INSTRUCTION (APPELLANT'S CLAIM 73)

As discussed above (see Arg. XL), appellant proffered the following instruction, to be added to CALJIC No. 8.85, factor (k):

> Evidence has been introduced for the purpose of showing the specific harm caused by the defendant's crime. Such evidence, if believed, was

> not received and may not be considered by you to divert your attention from your proper role of deciding whether defendant should live or die. You must face this obligation soberly and rationally, and you may not impose the ultimate sanction as a result of an irrational, purely subjective response to emotional evidence and argument. On the other hand, evidence and argument on emotional though relevant subjects may provide legitimate reasons to sway the jury to show mercy.

(3 Supp. CT 874.)

The court rejected the instruction, stating that it was improper to instruct the jury on mercy, and that the remainder of the instruction was argumentative. (66 RT 13015-13016.)

Appellant contends that the court erred in rejecting the proffered instruction because without it, "there was a substantial likelihood . . . that the jury excluded any consideration of mercy—even when the concept was implicated by the evidence and arguments of counsel." (AOB 614.)

This Court has previously held that a capital defendant is not entitled to a pure "mercy" instruction." (See *People v. Lewis* (2001) 26 Cal.4th 334, 393.) Moreover, although appellant's proffered instruction related the concept of mercy to the admitted evidence, this Court has rejected the same instruction as argumentative and duplicative. (*People v. Zamudio*, *supra*, 43 Cal.4th at pp. 368-369.)

Contrary to appellant's contention, the failure to give the challenged instruction did not mislead the jury into discounting relevant mitigating evidence. "[H]aving received an instruction expressly declaring that it had to 'consider all the evidence' and could 'consider, take into account and be guided by' any factor including '[a]ny . . . aspect of the defendant's character or record that the defendant offers as a basis for a sentence less than death,' the jury adequately was advised that it could consider and give effect to all of the evidence presented by defendant in mitigation." (*People v. Griffin* (2004) 33 Cal.4th 536, 591-592.)

The court properly refused appellant's "mercy" instruction and his claim to the contrary should be denied.

LIV.

THE COURT PROPERLY REFUSED APPELLANT'S PROFFERED INSTRUCTION REGARDING GOOD CHARACTER EVIDENCE (APPELLANT'S CLAIM 74)

Appellant proffered a modified version of CALJIC No. 2.40 as follows:

> Evidence has been received for the purpose of showing the good character of the defendant for your consideration at this phase of the trial.
>
> Good character for the traits may be sufficient by itself to justify a verdict of Life Without Possibility of Parole.
>
> If the defendant's character as to certain traits has not been discussed among those who know him, you may infer from the absence of this discussion that his character in those respects is good.
>
> However, evidence of good character for certain traits may be refuted or rebutted by evidence of bad character for those same traits.
>
> Any conflict in the evidence of defendant's character and the weight to be given to that evidence is for you to decide.

(3 Supp. CT 864.) The court refused the instruction, stating: "2.40 . . . seems to me to apply to a situation where character traits of the defendant are offered in evidence for the purpose of bearing upon the question of guilt or innocence, which is not the situation in the penalty phase of a capital case." (66 RT 13005.)

Appellant contends that the failure to give the instruction prevented the jury from properly considering appellant's good character as it related to lingering doubt. However, as this Court has recognized, the trial court correctly concluded that CALJIC No. 2.40 "applies only to the guilt phase of trial." (*People v. Benavides* (2005) 35 Cal.4th 69, 112.) Moreover, even though the

instruction was modified to apply to the penalty phase, the court properly rejected it as duplicative. (*People v. Berryman, supra*, 6 Cal.4th at p. 1079.) "The court instructed pursuant to CALJIC No. 8.85, which states, in pertinent part, 'You shall consider, take into account and be guided by . . . any sympathetic or other aspect of defendant's character or record that the defendant offers as a basis for a sentence less than death, whether or not related to the offenses for which he has been on trial.'" (*People v. Benavides, supra*, 35 Cal.4th at p. 112.) Thus, "the jury was not without guidance as to the use of the character evidence presented at the penalty phase." (*Ibid.*) The court did not err in refusing appellant's proffered instruction.

LV.

THE COURT PROPERLY RESPONDED TO THE JURY'S INQUIRY (APPELLANT'S CLAIM 75)

During penalty phase deliberations, the jury sent the following note: "If we can't come to an agreement on a penalty, is it a mistrial or defaults to life in prison w/o parole, or does Judge make decision?" (5 CT 1212.)

With the approval of defense counsel (69 RT 13601), the court responded: "The consequences of a failure to reach a verdict on the question of penalty is a matter with which the jury should not concern itself." (69 RT 13602.)

Recognizing that "a trial court 'is not required to "educate the jury on the legal consequences of a possible deadlock"'" (*People v. Rodrigues, supra*, 8 Cal.4th at p. 1193), appellant nevertheless contends that the court should have instructed the jury that the "guilt and special circumstances verdicts would still stand even if they didn't agree as to penalty." (AOB 623.) Appellant is wrong.

First, appellant claim is "waived by defense counsel's agreement with the trial court that informing the jury of the consequences of a deadlock would have been improper." (*People v. Hughes, supra*, 27 Cal.4th at p. 402; *People*

v. Rodrigues, *supra*, 8 Cal.4th at p. 1193.) In any event, this Court has repeatedly held that informing the jury of the consequences of a hung jury "would have the potential for unduly confusing and misguiding the jury in their proper role and function in the penalty determination process. Penalty phase juries are presently instructed that their proper task is to decide between a sentence of death and life without the possibility of parole. Any further instruction along the lines suggested herein could well serve to lessen or diminish that obligation in the jurors' eyes." (*People v. Belmontes* (1988) 45 Cal.3d 744, 814; see also *People v. Gurule* (2002) 28 Cal.4th 557, 648; *People v. Hughes*, *supra*, 27 Cal.4th at p. 402; *People v. Hines* (1997) 15 Cal.4th 997, 1075.)

Appellant apparently distinguishes his case by suggesting, not that the jury have been informed about the specific effect of a hung jury, i.e. retrial or default to life imprisonment, but the jury should at least have been informed that the guilt and special circumstances verdicts would stand regardless of a hung jury at the penalty trial. However, the jury did not ask about the guilt and special circumstance verdicts. It specifically asked about effect of a hung jury on the penalty disposition: "mistrial or defaults to life in prison w/o parole, or does Judge make decision?" (5 CT 1212.) Thus, appellant's suggested answer would have been nonresponsive to the jury's question.

Moreover, it is pure speculation to suggest that some jurors may have believed "that without such instruction, . . . deadlock at the penalty phase w[ould] nullify the guilty verdicts returned in the guilt phase." (*People v. Belmontes*, *supra*, 45 Cal.3d at p. 814, fn. 24.) "[I]n light of the instructions which explain the bifurcated nature of capital trials and the jury's function at the penalty phase, the possibility of such a mistaken inference being drawn is unlikely." (*Ibid*; see also *People v. Waidla*, *supra*, 22 Cal.4th at p. 747 ["Waidla asserts that the superior court was required to act in order to dispel a

concern by the jury that its inability to reach a unanimous verdict as to penalty might undermine its verdicts and findings as to guilt or, at least, result in a sentence of some term of imprisonment that might in fact allow parole. Any such concern, however, is solely a matter of speculation, and is altogether without basis in the record on appeal"].) Appellant's claim should be denied.

LVI.

THE COURT WAS NOT REQUIRED TO DELETE THE INSTRUCTION TITLES (APPELLANT'S CLAIM 76)

Appellant contends that the trial court erred in failing to delete the instruction titles from the written instructions given to the jury during the penalty phase. (AOB 627-628.) As appellant acknowledges, this Court has found no error in failing to "delete the descriptive title and the source of the written instructions that were sent to the jury room." (*People v. Bloyd, supra,* 43 Cal.3d at p. 355.) "Moreover, trial counsel did not request that the titles be deleted, nor did he object to the written instructions going to the jury." (*Ibid.*)

Appellant relies on a footnote in *People v. Staten* (2000) 24 Cal.4th 434, 459, fn.7, which suggests that the failure to strike inapplicable language in an instruction title might be error if the defendant could demonstrate prejudice. (AOB 630.) However, even if such an error were cognizable, appellant has not demonstrated any prejudice.

Indeed, appellant has identified only one instruction title that included inapplicable language: CALJIC No. 2.60 ["DEFENDANT NOT TESTIFYING—NO INFERENCE OF *GUILT* MAY BE DRAWN"]. (5 CT 1189, italics added.) Because the determination of "guilt" was not at issue at the penalty phase, appellant contends that the jury would have understood the instruction title to permit it to "rely upon appellant's failure to testify as a reason for imposing the death penalty." (AOB 633.) However, the instruction itself

instructed the jury not to draw *any* inference from the defendant's failure to testify at the penalty phase, and the jury was aware that it was no longer required to determine guilt or innocence, but was required to determine the appropriate penalty. The jury was also aware that the court had reread various guilt phase instructions for application at the penalty phase. There is no reasonable likelihood that the jury believed that the instruction applied only to the determination of guilt, despite the fact that all references to "guilt" had been removed from the substance of the instruction. (*Estelle v. McGuire*, *supra*, 502 U.S. at p. 72.)[49/]

Appellant contends that the remaining instruction titles improperly emphasized or deemphasized certain instructions and legal principles. For example, appellant contends that the specificity of the instruction entitled, "SUFFICIENCY OF TESTIMONY OF ONE WITNESS" (5 CT 1188), overemphasized that particular rule, while the crucial definitions of aggravation and mitigation were "buried [in] an instruction titled: "PENALTY TRIAL—CONCLUDING INSTRUCTION" [5 CT 1194,] rather than having individual titles." (AOB 632.) Likewise, appellant claims, the title of the expert testimony instruction was incomplete, because it said only "EXPERT TESTIMONY—QUALIFICATIONS OF EXPERT" (5 CT 1190), but also included the legal principle regarding a juror's assessment of the basis for an expert's opinion. (See AOB 632-633.)

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49. Appellant also claims that the instruction listing the mitigating and aggravating factors (5 CT 1191 ["PENALTY TRIAL—FACTORS FOR CONSIDERATION"]), was erroneous because it implied "that the jurors' consideration of mitigation was limited to those factors enumerated in the instruction." (AOB 634-635.) However, even if the jury drew such an inference from the instruction title, there is no error, in that the instruction contained the catch-all provision which allowed the jury to consider "*any other* circumstance which extenuates the gravity of the crime," and "*any other* sympathetic or other aspects of the defendant's character or record." (5 CT 1191; CALJIC No. 8.85, italics added.)

Even assuming some of the instruction titles were more specific than others, there is no reasonable likelihood that the jury would, based on the written instruction titles, have found some legal principles more important than others, or would have ignored legal principles not specifically listed in the instruction titles. At the outset of the penalty phase instructions, the court instructed the jury:

> Now I'm going to repeat a few of the instructions that I gave you earlier. The purpose of this is not to single them out. They are no more important than other instructions. I just thought it would be helpful to reread the ones that I'm going to reread for you.
>
> If any rule, direction or idea has been repeated or stated in different ways in these instructions, no emphasis was intended and you must not draw any inferences because of its repetition. Do not single out any particular sentence or any individual point or instruction and ignore the others. Consider the instructions as a whole and each in the light of all the others.
>
> The order in which the instructions have been given has no significance as to their relative importance.

(68 RT 13446-13447.)

There is no reasonable likelihood that the jury would have been misled by the written instruction titles in a manner detrimental to appellant. (*Estelle v. McGuire*, *supra*, 502 U.S. at p. 72.) Appellant's claim should be denied.

LVII.

THE COURT PROPERLY REFERRED BACK TO THE GUILT PHASE INSTRUCTIONS (APPELLANT'S CLAIM 77)

At the beginning of the penalty phase instructions, the court instructed the jury that it was "to be guided by the Court's previous instructions regarding such matters as the functions and duties of jurors, the evidence, the evaluation of evidence, expert testimony and the definition of an culpability for crimes

where applicable and with certain exceptions." (68 RT 13445; 5 CT 1179.) The court explicitly discussed the exceptions: that the jury was no longer prohibited from considering sympathy or the consequences of its verdict. (68 RT 13445-13446; 5 CT 1179.)

Appellant contends that even though this referral-back to the guilt phase instructions is "permissible in theory," the court's referral to general categories of instructions, as opposed to the specific instructions themselves, was prejudicial. (AOB 640.)

In *People v. Babbitt* (1988) 45 Cal.3d 660, 718, fn. 26, this Court suggested that "trial courts should expressly inform the jury at the penalty phase which of the instructions previously given continue to apply." Subsequent to *Babbitt*, the CALJIC committee amended CALJIC No. 8.84.1 to instruct the jury to "disregard all other instructions given to you in other phases of this trial," and suggested that the trial court reread all instructions that apply in the penalty phase. This Court found that procedure equally acceptable to the one suggested in *Babbitt*. (*People v. Steele, supra*, 27 Cal.4th at pp. 1256-1257.)

Appellant cites no case in which the method used here—referral-back to general categories of instructions—violates this Court's holding in *Babbitt*. More importantly, appellant does not explain how the jury may have misunderstood those general categories to his detriment. (*Estelle v. McGuire, supra*, 502 U.S. at p. 72.) He does not point to any relevant instruction which the jury may not have found applicable based on the referral-back instruction. Thus, even assuming referral-back to the general categories of guilt phase instructions is not sufficient to meet the standard in *Babbitt*, appellant has demonstrated no reasonable likelihood that the jury misapplied the instructions.

Moreover, after referring the jury back to the guilt phase instructions, the court then read CALJIC No. 8.84.1, and told the jury to "[d]isregard all other instructions given to you in other phases of this trial." (68 RT 13446; 5 CT

1180.) The court subsequently reread numerous guilt phase instructions, specifically CALJIC Nos. 1.01 [Instructions to be considered as a whole], 2.00 [Direct and Circumstantial Evidence—Inferences], 2.11 [Production of All Available Evidence Not Required], 2.12 [Weighing Transcript Testimony of Unavailable Witness], 2.20 [Believability of Witness], 2.21.1 [Discrepancies in Testimony], 2.27 [Sufficiency of Testimony of One Witness], 2.60 [Defendant Not Testifying—No Inference May Be Drawn], and 2.80 [Expert Testimony—Qualifications of Expert]. (68 RT 13446-13451.) This is the method of instruction which, according to appellant, is preferred over the referral-back method. (See AOB 639-640.) Thus, appellant's jury was instructed in the manner in which he desires.

Finally, to the extent that the court's instructions were conflicting—in that they first referred back to the guilt phase instructions, and subsequently told the jury to disregard the guilt phase instructions—appellant has demonstrated no prejudice. The relevant guilt phase instructions were reread to the jury, and appellant has not pointed to any particular instruction or legal concept which was improperly omitted. There is no reasonable likelihood that the jury misunderstood the relevant instructions. (*Estelle v. McGuire*, *supra*, 502 U.S. at p. 72.)

LVIII.

APPELLANT'S DEATH SENTENCE DOES NOT CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT (APPELLANT'S CLAIM 78)

Appellant contends that his execution after a lengthy confinement would constitute cruel and unusual punishment. (AOB 643.) This Court has rejected that claim. (*People v. Zambrano* (2007) 41 Cal.4th 1082, 1187; *People v.*

Lenart, supra, 32 Cal.4th at p. 1131; *People v. Taylor, supra*, 26 Cal.4th at p. 1176.)

LIX.

THE STANDARD CALJIC DEATH PENALTY INSTRUCTIONS WERE CORRECT (APPELLANT'S CLAIMS 80, 81, 83, 84, 86, 87)

Appellant makes numerous claims attacking the standard death penalty instructions, specifically CALJIC Nos. 8.85 and 8.88. (See AOB 647-678.) Once again, to the extent appellant did not request the specific modifications alleged here he has waived his claim on appeal. (*People v. Daya, supra*, 29 Cal.App.4th at p. 714 ["defendant is not entitled to remain mute at trial and scream foul on appeal for the court's failure to expand, modify, and refine standardized jury instructions"].) In any event, as appellant recognizes, both CALJIC Nos. 8.85 and 8.88 have been found to be constitutional (*People v. Moon* (2005) 37 Cal.4th 1, 41-42; *People v. Crew, supra*, 31 Cal.4th at p. 858), and this Court has rejected most of appellant's challenges to the standard instructions. Like this Court we find it unnecessary "to rehearse or revisit" the numerous claims previously and regularly rejected by this Court. (*People v. Ayala, supra*, 24 Cal.4th at p. 290 [internal quotation marks excluded].) For the most part we simply identify appellant's complaint and note the Court's applicable opinions.

A. No Further Definition Of Aggravating And Mitigating Was Required

Appellant contends that the penalty instructions were erroneous because "no further explanation/definition of aggravation vs. mitigation was offered, [and] reasonable jurors could have construed these terms as equivalent to morally bad and morally good which called for a balancing of evil versus

good." (AOB 647.) However, the court instructed the jury with the definitions of aggravating and mitigating factors as follows:

> An aggravating factor 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 crime itself.
>
> A mitigating circumstance is any fact, condition or event which does not constitute a justification or excuse for the crime in question, but may be considered as an extenuating circumstance in determining the appropriateness of the death penalty.

(68 RT 13455-13456; 5 CT 1194.)

Appellant does not provide any suggestion as to how the court should have further defined the concept of aggravating and mitigating, and indeed, this Court has held that the failure to provide the above instructions is not error. (See *People v. Brasure* (2008) 42 Cal.4th 1037, 1066; *People v. Williams*, *supra*, 16 Cal.4th at p. 267; *People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1018; see also *People v. Marshall* (1990) 50 Cal.3d 907, 936-937 [court's use of the terms "good" and "bad" in response to jury's request for definition of aggravating and mitigating was not misleading].) Appellant has not demonstrated any reasonable likelihood that the jury applied the given instructions in a manner detrimental to appellant. (*Estelle v. McGuire*, *supra*, 502 U.S. at p. 72.)

B. The Court Was Not Required To Instruct The Jury That Neither Party Has A Burden Of Proof At The Penalty Phase

Appellant contends that the court was obligated to instruct the jury that neither the prosecution nor the defense has the burden of proof at the penalty phase, and that failure to do so constitutes structural error. (AOB 650-651.) This Court has rejected that claim. (*People v. Moon*, *supra*, 37 Cal.4th at p. 44 ["There being no legal requirement that the jury be informed of a burden of

proof for the penalty phase, we also reject defendant's further claim that CALJIC No. 8.88's failure to inform the jury who bears the burden of proof constitutes a structural error"].)

C. CALJIC No. 8.88 Was Not Vague And Ambiguous

Appellant claims that CALJIC No. 8.88 was vague and ambiguous based on: (1) the use of the term "so substantial;" (2) the use of the term "warranted," as opposed to "appropriate;" and (3) the failure to inform the jury that neither party bears the burden of persuasion. (AOB 654-657.)

This Court has held that the terms "so substantial," and "warranted" are not vague and ambiguous. (*People v. Moon*, *supra*, 37 Cal.4th at p. 43; *People v. Davenport* (1995) 11 Cal.4th 1171, 1231; *People v. Boyette, supra*, 29 Cal.4th at p. 465.) This Court has also held that the trial court need not inform the jury that neither party bears the burden of persuasion. (*People v. Boyette*, *supra*, 29 Cal.4th at p. 465; *People v. Jackson*, *supra*, 13 Cal. 4th at p. 1244.)

D. The Court Was Not Required To Instruct The Jury That It Could Not Rely Solely On The Facts Of The Guilt Verdict To Impose Death

Appellant contends that the court should have instructed the jury that it "could not sentence appellant to death based solely upon the same facts that caused it to find appellant guilty of first degree murder." (AOB 660.) However, the jury was instructed that an "aggravating factor is any fact, condition or event attending the commission of a crime which increases its guilt or enormity or adds to its injurious consequence which is above and beyond the elements of the crime itself." (68 RT 13455-13456; 5 CT 1194.) Thus, the jury was instructed that it could impose death only if the aggravating factors were "so substantial in comparison to the mitigating circumstances" (68 RT 13457; 5 CT 1195), and that the aggravating factors it could consider were, by

definition, over and above the elements of the offense charged in the guilt phase. (*People v. Moon*, *supra*, 37 Cal.4th at p. 40 [the trial court need not "give a clarifying interpretation of factor (a) to inform the jury it cannot base its penalty determination on facts common to all murders"]; *People v. Earp* (1999) 20 Cal.4th 826, 900.)

Appellant's argument does not seem to be a complaint with the jury instructions per se; he seems to be suggesting that the jury should not be allowed to consider any guilt phase evidence at the penalty phase. (AOB 661 ["If the very facts needed to establish his death-eligibility are also the exclusive facts used to demonstrate death-worthiness, then the selection phase's capability to ensure that only the most culpable defendants receive death sentences is hampered. Requiring different evidence at the worthiness phase would alleviate this problem"].) However, consideration of the circumstances of the crime and special circumstances is specifically permitted by Penal Code section 190.3. This Court has repeatedly held that "consideration of the circumstances of the crime under section 190.3, factor (a) does not result in arbitrary or capricious imposition of the death penalty." (*People v. Alfaro* (2007) 41 Cal.4th 1277, 1330; *People v. Brown* (2004) 33 Cal.4th 382, 401; *People v. Earp*, *supra*, 20 Cal.4th at pp. 900-901.) Appellant's claim should be rejected.

E. The Court Was Not Required To Specifically Instruct The Jury That Its Task Was Different From The Factfinding Task At The Guilt Phase

Appellant contends that the instructions which told the jury to determine what "the facts are from the evidence" (68 RT 13446), and to "consider all of the evidence" in determining penalty (68 RT 13451), misled the jury as to its "normative" responsibilities. Appellant claims that the instructions focused on the jury's factfinding role, and, "[s]ince appellant's jury believed that its essential role was to find facts, it was likely to misunderstand and neglect its

normative role, *i.e.*, its role as the voice of the 'conscience of the community.'" (AOB 668.)[50/]

Appellant does not explain how the standard instructions would have misled the jury regarding its duties. The jury was instructed:

> After having heard all of the evidence and after having heard and considered the arguments of counsel, you shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed.
>
> . . .
>
> The weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side of an imaginary scale or the arbitrary assignment of weight to any of them. You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider.

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50. Appellant also claims that CALJIC Nos. 2.72 and 8.87 improperly refer to a determination of appellant's "guilt." (AOB 668.) However, the court did not reread CALJIC 2.72, which instructs the jury as to the corpus delicti requirement. (See 68 RT 13444-13459; 5 CT 1178-1195.) As discussed above (see Arg. LVII), although the court referred back to the guilt phase instructions, it also told the jury to disregard all other instructions except those guilt phase instructions repeated during the penalty phase. As such, the jury would not have considered CALJIC No. 2.72. Moreover, CALJIC No. 2.72 specifically applies to the finding of guilt, and thus, even if the jury did reconsider it, "[t]he jurors here must have understood the instruction in accordance with the common meaning of its plain words, judged it to be mere surplusage, and passed over it without further thought." (*People v. Rowland*, *supra*, 4 Cal.4th at p. 282.)

Moreover, CALJIC No. 8.87 did not state that the jury must find appellant "guilty" beyond a reasonable doubt. The jury was instructed that, if it was to consider any other criminal acts as aggravation, it had to be satisfied beyond a reasonable doubt that appellant "did in fact commit the criminal acts." (68 RT 13454; 6 CT 1193.) The instruction did not indicate that the jury had to find appellant "guilty" of those criminal acts. As such, there is no reasonable likelihood that the jury misunderstood its role at the penalty phase.

> In weighing the various circumstances . . ., you determine under relevance evidence [*sic*] which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances.
>
> To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison to the mitigating circumstances that it warrants death instead of life without parole.

(68 RT 13455-13457; 5 CT 1194-1195.)

The jury was adequately instructed that its duty was to weigh the evidence and make a normative decision as to the appropriate penalty. Appellant has not demonstrated a reasonable likelihood that the jury misunderstood the standard instructions. (*Estelle v. McGuire*, *supra*, 502 U.S. at p. 72.)

F. The Court Was Not Required To Specifically Explain What Evidence Was Offered In Mitigation

Appellant contends that "CALJIC 8.85 specifically pointed out the prosecutions' aggravation evidence, i.e., the circumstances of the crime, appellant's prior violent acts and his prior felony conviction," but that it did not explain "to the jurors what specific matters they could consider in mitigation." (AOB 668.) Indeed, CALJIC No. 8.85 did list the aggravating factors: (a) [circumstances of crime], (b) [prior violent acts], and (c) [prior felony convictions]. However, CALJIC No. 8.85 also specifically listed the mitigating factors: (d) [mental or emotional disturbance]; (e) [victim was a participant]; (f) [moral justification]; (g) [extreme duress]; (h) [capacity to appreciate criminality]; (i) [age at the time of the crime]; (j) [accomplice and minor participation]; (k) [any other extenuating circumstance]. (68 RT 13451-13453; 5 CT 1191-1192.)

To the extent that appellant complains that the given instructions did not properly inform the jury that it could consider appellant's background as a

mitigating factor, his claim fails. This Court has determined that the factor (k), "catch-all" provision in CALJIC No. 8.85, adequately informs the jury that it can consider appellant's background. (*People v. Webb* (1993) 6 Cal.4th 494, 534.)

Moreover, the court instructed the jury with CALJIC No. 8.88, which allowed the jury to assign a moral and sympathetic value to any of the given factors. Likewise, the prosecutor and defense counsel specifically told the jury that factor (k) included appellant's "life story." (68 RT 13429; see also 67 RT 13233-13234.) There is no reasonable likelihood that the jury did not understand that it could consider and weigh appellant's background in determining the appropriate penalty. (*People v. Sanchez* (1995) 12 Cal.4th 1, 82 ["The jury was fully aware that it could consider defendant's childhood in mitigation under factor (k); it was further instructed that this factor allowed the jury to consider 'any sympathetic or other aspect of the defendant's character or record that the defendant offers as a basis for a sentence less than death.' In addition, the jury was instructed that it was 'free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors' and that '[t]o return a judgment of death, each of you must be persuaded that the aggravating evidence and/or circumstances is so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole.' These instructions, combined with the arguments of [counsel], lead us to conclude that there is no possibility the jury misunderstood its sentencing obligation to consider defendant's background and character in determining the appropriate penalty"].)

G. The Court Was Not Required To Specifically Instruct The Jury That Mitigating Factors Are Unlimited

Appellant contends that the court should have instructed the jury that mitigating factors are unlimited. (AOB 669.) However, although this Court has mentioned such an instruction with approval, it has also held that "the catchall section 190.3, factor (k) instruction 'allows the jury to consider a virtually unlimited range of mitigating circumstances.'" (*People v. Smithey*, *supra*, 20 Cal.4th at p. 1007.) "The jury was thus 'not reasonably likely to have [been] misled . . . into believing that its consideration of mitigating circumstances somehow was limited.' [Citation.]" (*People v. San Nicolas, supra*, 34 Cal.4th at p. 673.)

H. The Court Was Not Required To Inform The Jury That It Could Always Return A Verdict Of Life

Appellant contends that the court should have instructed the jury that "the death penalty is never mandatory and that they always have the discretion to return a verdict of life without the possibility of parole." (AOB 670.) This Court has previously rejected this claim. (*People v. Johnson* (1993) 6 Cal.4th 1, 52; *People v. Perry* (2006) 38 Cal.4th 302, 320.)

I. The Court Was Not Required To Instruct The Jury That It Must Impose Life Without Parole If Mitigating Factors Outweigh Aggravating Factors

Appellant contends that CALJIC No. 8.88 should have explicitly instructed the jury that if mitigating evidence outweighed aggravating evidence then it must impose life without the possibility of parole. (AOB 672.) This Court has rejected such a claim. (*People v. Moon*, *supra*, 37 Cal.4th at p. 42; *People v. Dennis* (1998) 17 Cal.4th 468, 552; *People v. Duncan* (1991) 53 Cal.3d 955, 978.)

J. The Court Was Not Required To Instruct The Jury That Statutory Mitigating Factors Could Only Be Used In Mitigation

Appellant claims that CALJIC No. 8.85 was improper because it failed to instruct the jury that the listed mitigating factors were relevant only as mitigation, and they could not be used as aggravation. (AOB 676, 705-707.) This Court has rejected appellant's claim. (*People v. Moon*, *supra*, 37 Cal.4th at p. 42; *People v. Perry*, *supra*, 38 Cal.4th at p. 319; *People v. Morrison* (2004) 34 Cal.4th 698, 730.)

K. The Trial Court Was Not Required To Delete Inapplicable Mitigating Factors

Appellant claims that the court should have deleted the inapplicable factors from CALJIC 8.85. (AOB 676-677.) This Court has rejected that claim. (*People v. Perry*, *supra*, 38 Cal.4th at p. 319; *People v. Moon*, *supra*, 37 Cal.4th at p. 42; *People v. Davenport*, *supra*, 11 Cal.4th at p. 1230; *People v. Duncan*, *supra*, 53 Cal.3d at p. 979.)

L. The Trial Court Was Not Required To Instruct The Jury That It Could Not Consider Nonstatutory Aggravating Factors

Appellant contends that CALJIC No. 8.85 failed to specifically inform the jury that it could consider only those aggravating factors enumerated in Penal Code section 190.3. (AOB 677.) This Court has rejected that claim. (*People v. Moon*, *supra*, 37 Cal.4th at p. 42; *People v. Perry*, *supra*, 38 Cal.4th at p. 319; *People v. Taylor*, *supra*, 26 Cal.4th at p. 1180.)

M. Factor (i) Is Not Vague

Appellant claims that factor (i)—"the age of the defendant at the time of the crime"—is unconstitutionally vague. (AOB 678.) The United States Supreme Court has rejected that argument. (*Tuilaepa v. California* (1994) 512 U.S. 967, 978.)

LX.

THE COURT PROPERLY INSTRUCTED THE JURY ON THE DUTIES OF THE FOREPERSON (APPELLANT'S CLAIM 82)

Reiterating a prior argument (see Arg XXXII), appellant contends that the court should have specifically instructed on the duties of the foreperson, and informed the jury that the foreperson's vote carries no more weight than the vote of any other juror. (AOB 653.) For the reasons discussed above, the court was not required to modify the standard instructions regarding the duties of the foreperson. Moreover, during the penalty phase closing argument, defense counsel specifically told the jury that "the judgment of one of you is just as good as the as the judgment of any other. . . . [Y]ou don't have to surrender your beliefs merely because you're outnumbered." (68 RT 13442-13443.)

In light of all the given instructions, and the argument of counsel, there was no reasonable likelihood that the jury might give undue influence to the foreperson's opinion. (*Estelle v. McGuire*, *supra*, 502 U.S. at p. 72.) Appellant's claim should be denied.

LXI.

CALIFORNIA'S USE OF LETHAL INJECTION DOES NOT RENDER APPELLANT'S DEATH SENTENCE ILLEGAL (APPELLANT'S CLAIM 85)

Appellant contends that the California's use of lethal injection as a method of execution constitutes cruel and unusual punishment and requires reversal of his sentence. (AOB 663-665.) Appellant's claim is "not cognizable on appeal because [it does] not affect the validity of the judgment itself and do[es] not provide a basis for reversal of the judgment on appeal." (*People v. Tafoya* (2007) 42 Cal.4th 147, 199; see also *People v. DePriest* (2007) 42 Cal.4th 1, 61 ["Execution by lethal injection does not constitute cruel and unusual punishment per se . . . . Alleged imperfections and illegalities in the execution process that may or may not exist when his death sentence is implemented are premature"]; *People v. Boyer* (2006) 38 Cal.4th 412, 484-485.) Moreover, the United States Supreme Court has recently held that lethal injection is not cruel and unusual. (*Baze v. Rees* (2008) __ U.S. __; 128 S.Ct. 1520.) Appellant's claim should be denied.

LXII.

CALIFORNIA'S DEATH PENALTY STATUTE IS CONSTITUTIONAL (APPELLANT'S CLAIM 88)

Appellant "raises a number of . . . constitutional objections to the death penalty statute identical to those [the Court has] previously rejected." (*People v. Welch*, *supra*, 20 Cal.4th at p. 771.) To the extent appellant alleges statutory errors not objected to at trial, the issue is waived on appeal. (*People v. Saunders* (1993) 5 Cal.4th 580, 589.) Similarly, any complaints relating to instructions which were not erroneous but only incomplete are waived unless appellant requested clarifying or amplifying language. (*People v. Lewis*, *supra*,

25 Cal.4th at p. 666.) Like this Court we find it unnecessary "to rehearse or revisit" the numerous claims previously and regularly rejected by this Court. (*People v. Ayala, supra*, 24 Cal.4th at p. 290 [internal quotation marks excluded].) For the most part we simply identify appellant's complaint and note the Court's applicable opinions.

A. Penal Code Section 190.2 Is Not Impermissibly Broad

Appellant contends that Penal Code section 190.2 does not meaningfully narrow the pool of murderers eligible for the death penalty because the "special circumstances are so numerous and so broad in definition as to encompass nearly every first-degree murder." (AOB 682.) This Court has rejected the identical claim in numerous opinions. (See, e.g., *People v. Elliot* (2005) 37 Cal.4th 453, 487; *People v. Michaels* (2002) 28 Cal.4th 486, 541; *People v. Ray* (1996) 13 Cal.4th 313, 356.) Appellant offers no principled reason to depart from those decisions.

B. Penal Code Section 190.3, Subdivision (a) Does Not Violate The Federal Constitution

Penal Code section 190.3, subdivision (a) allows the jury to consider the circumstances of the crime and special circumstances in determining the appropriate penalty. While acknowledging its facial validity (see *Tuilaepa v. California, supra*, 512 U.S. at p. 967), appellant contends the provision "has been applied in . . . a wanton and freakish manner" resulting in the arbitrary and capricious imposition of death sentences. (AOB 683.) This Court has consistently rejected identical claims. (See, e.g., *People v. Elliot, supra*, 37 Cal.4th at p. 487; *People v. Mendoza, supra*, 24 Cal.4th at p. 192; *People v. Cain* (1995) 10 Cal.4th 1, 68.) It should do so again.

C. California's Death Penalty Statute Contains Sufficient Safeguards To Protect From Arbitrary And Capricious Sentencing

Appellant alleges that a number of "safeguards" present in other death penalty statutes are missing from California's scheme and contends that such factors are necessary to avoid arbitrary and capricious death sentences. (AOB 685-708.) His complaints are uniformly without merit.

1. Absence Of Reasonable Doubt Standard

Appellant argues the jury must be required to find beyond a reasonable doubt that aggravating factors are true and that aggravation outweighs mitigation. (AOB 686-694.) Although the Court has consistently rejected identical claims (see, e.g., *People v. Mendoza*, *supra*, 24 Cal.4th at p. 191; *People v. Sanchez, supra*, 12 Cal.4th at pp. 80-81), appellant contends that *Apprendi v. New Jersey* (2000) 530 U.S. 466, *Ring v. Arizona* (2002) 536 U.S. 584, *Blakely v. Washington* (2004) 542 U.S. 246, and *Cunningham v. California* (2007) 549 U.S. 270, compel a different result. He is wrong.

Apprendi held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 490.) This Court expressly found *Apprendi* inapplicable to California's scheme in *People v. Ochoa*, *supra*, 26 Cal.4th at pp. 453-454. Once a jury convicts of first degree murder with a special circumstance "the defendant stands convicted of an offense whose maximum penalty is death." (*People v. Ochoa*, *supra*, 26 Cal.4th at p. 454.) Nothing in *Apprendi* "require[s] a jury to find beyond a reasonable doubt the applicability of a specific section 190.3 sentencing factor." (*Id.* at p. 453.) *Apprendi* has no application to California death penalty scheme, because a penalty phase verdict does not produce a sentence any greater than that already authorized by the

jury's conviction with a finding beyond a reasonable doubt of at least one special circumstance. In short, the penalty verdict simply represents a choice between two previously-authorized sentences (death and life without parole), but the sentencing range is not, and cannot be, expanded at the penalty phase. (See *Jones v. United States* (1998) 526 U.S. 227, 249 [recognition that the finding of aggravating factors in capital sentencing involves a choice between a greater and lesser penalty, not a process of raising the ceiling of the available sentencing range].)

Ochoa was based in part on *Walton v. Arizona* (1990) 497 U.S. 639, a decision expressly overruled by the Supreme Court in *Ring v. Arizona, supra*, 536 U.S. at p. 584. *Ring* is inapposite, however, for the same reasons *Apprendi* is inapplicable and does not require reconsideration of the holding in *Ochoa*.

Ring invalidated Arizona's death capital sentencing scheme because death could be imposed only after the judge, sitting as sentencer without a jury, found at least one specifically enumerated aggravating factor to be true. Because death was not the maximum penalty that could be imposed based solely on the jury's conviction of first degree murder, the aggravating factors in Arizona "operate as the 'functional equivalent of an element of a greater offense.'" (*Ring v. Arizona, supra*, 122 S.Ct. at p. 2443.) However, as explained in *Ochoa* and other decisions of this Court upon which it was based, the aggravating factors considered by the jury at sentencing do not increase the maximum potential sentence but merely provide a basis for determining which of the authorized sentences should be imposed. Appellant's effort to bring California's capital statute within the ambit of *Apprendi* and *Ring* is unavailing.

2. Unanimous Jury Agreement

Appellant contends that the jury must unanimously agree on which aggravating factors warrant death. (AOB 686-696.) This Court has held

otherwise and appellant provides no reason to revisit those decisions. (See, e.g., *People v. Kipp*, *supra*, 18 Cal.4th at p. 381; *People v. Osband*, *supra*, 13 Cal.4th at p. 710.)

3. Written Jury Findings

Appellant argues the jury should be required to return written findings identifying the aggravating factors supporting the death verdict. (AOB 700-702.) As he concedes, the Court has rejected identical arguments. (See, e.g., *People v. Rogers*, *supra*, 39 Cal.4th at p. 893; *People v. Lucero* (2000) 23 Cal.4th 692, 741; *People v. Osband*, *supra*, 13 Cal.4th at p. 710.) Appellant provides no basis for rejecting those cases.

4. Inter-case Proportionality

Appellant next asserts that this Court's refusal to conduct inter-case proportionality review renders California's death penalty system cruel and unusual. (AOB 702-704.) Both the United States Supreme Court (*Pulley v. Harris* (1984) 465 U.S. 37, 50-53) and this Court (see, e.g., *People v. Moon*, *supra*, 37 Cal.4th at p. 48; *People v. Millwee, supra*, 18 Cal.4th at p. 168; *People v. Stanley*, *supra*, 10 Cal.4th at p. 842) have rejected identical claims. This Court should continue to do so.

5. Reliance On Unadjudicated Criminal Activity

Appellant contends the use of unadjudicated criminal activity as aggravating evidence in the penalty phase violates various constitutional rights. (AOB 704.) The Court should reject this argument as it has in the past. (See e.g., *People v. Carpenter* (1999) 21 Cal.4th 1016, 1061; *People v. Cain*, *supra*, 10 Cal.4th at pp. 69-70.)

6. "Restrictive" Adjectives In The List Of Mitigating Factors

Appellant complains that the presence, in Penal Code section 190.3, of certain "restrictive" adjectives, such as "extreme" (modifying "mental or emotional disturbance" in subdivision (d)) and "substantial" (subdivision (g)) "acted as barriers to the consideration of mitigation." (AOB 705.) The claim is without merit. The use of "extreme" to modify mental condition, for example, does not preclude the consideration of a lesser condition; factor (k), the catchall provision, permits consideration of such conditions. (*People v. Elliot*, *supra*, 37 Cal.4th at p. 488; *People v. Lewis*, *supra*, 26 Cal.4th at p. 395.)

7. Failure To Instruct That Mitigating Factors Were Relevant Only As Mitigators

Appellant complains that the jury should have been instructed that certain sentencing factors can only be mitigating. (AOB 705-708.) Again, this Court has rejected identical claims and should continue to do so. (See, e.g., *People v. Moon*, *supra*, 37 Cal.4th at p. 42; *People v. Morrison*, *supra*, 34 Cal.4th at p. 730; *People v. Kipp*, *supra*, 18 Cal.4th at pp. 380-381.)

D. California's Death Penalty Statute Does Not Violate Equal Protection

Appellant claims that California's death penalty statute violates equal protection because certain procedures utilized in non-capital cases do not apply to death cases. (AOB 708-710.) This Court has explicitly rejected such arguments. (See, e.g., *People v. Cox*, *supra*, 53 Cal.3d at p. 691; *People v. Allen* (1986) 42 Cal.3d 1222, 1286-1287.) Appellant's complaint should be rejected.

LXIII.

A REVERSAL OF A SUBSTANTIVE COUNT OR SPECIAL CIRCUMSTANCE DOES NOT REQUIRE REVERSAL OF THE PENALTY PHASE (APPELLANT'S CLAIM 89)

Appellant contends that the "reversal of any single substantive count or special circumstance finding warrants reversal of the penalty verdict." (AOB 711.) However, as this Court has noted, "We do not agree with defendant's suggestion that reversal of any felony conviction or special circumstance automatically mandates reversal of the death penalty. Harmless error standards may be applied to penalty phase error. [Citations.]" (*People v. Holt*, *supra*, 15 Cal.4th at p. 693.)

Appellant provides no analysis of any specific reversal which would result in prejudice at the penalty phase. As discussed above (see fn. 33), "'[E]very brief should contain a legal argument with citation of authorities on the points made. If none is furnished on a particular point, the court may treat it as waived, and pass it without consideration. [Citations.]' [Citations.]" (*People v. Stanley*, *supra*, 10 Cal.4th at p. 793.) However, because the People concede that the burglary-felony-murder special circumstances must be reversed for *Ireland* error (see Arg X), we specifically address the effect of such a reversal on the penalty phase.

The invalid burglary-felony-murder special circumstances had no effect on the jury's penalty determination. There was no evidence presented at the guilt phase of the trial to support the burglary special circumstances "that was not equally admissible" to support the robbery special circumstances. (*People v. Wade* (1988) 44 Cal.3d 975, 998.) The events occurring both before and after the entry into the Morales home were relevant to prove all of the substantive crimes and the charged special circumstances. "The erroneous special-circumstance finding was only a 'statutory label' which could not have affected

the verdict in light of the evidence properly before the jury." (*People v. Pensinger, supra*, 52 Cal.3d at p. 1272.)

Moreover, "[n]othing occurring during the penalty phase would have led the jury to place undue emphasis on the invalid special-circumstance findings." (*People v. Silva* (1988) 45 Cal.3d 604, 633.) The prosecutor did not argue that death was warranted based on the number of special circumstances that had been found true. Nor did the prosecutor suggest that the fact that the murders were committed during the course of a burglary necessarily aggravated the crime. Instead, the prosecutor argued that the underlying circumstances of the murders themselves were aggravating: the victims were "executed in their own home" (67 RT 13239-A); it was a "massacre" (67 RT 13239-A); appellant did not "have anything against any of the" victims, he's there "just for the thrill" (67 RT 13240-A-13241-A); Martha was shot while trying to "protect her baby" (67 RT 13245-A). The gruesome nature of the murders would have been aggravating evidence regardless of whether or not they occurred during the course of a burglary. In sum, the reversal of the burglary-felony-murder special circumstance would have had no effect on the jury's penalty verdict. As appellant has pointed to no other prejudice stemming from a particular reversal, his claim must be denied.

LXIV.

THERE IS NO CUMULATIVE ERROR (APPELLANT'S CLAIMS 79, 90, 91)

Appellant contends that the guilt and penalty phase errors were cumulatively prejudicial at the penalty phase (AOB 716), that the "many" errors deprived appellant of his opportunity to defend himself in violation of due process and the Eighth Amendment (AOB 646), and that any errors which may have been

found harmless at the guilt phase were nevertheless prejudicial at the penalty phase (AOB 713).

Aside from the burglary special circumstances discussed above (see Args X, LXIII), there were no other errors in the guilt or penalty phase. Because there was only one error in the guilt and penalty phases, there is nothing to "accumulate," and there was no violation of appellant's constitutional rights. (See *People v. Sandoval*, *supra*, 4 Cal.4th at p. 198.)

LXV.

APPELLANT'S DEATH SENTENCE IS NOT DISPROPORTIONATE TO HIS CULPABILITY (APPELLANT'S CLAIM 92)

Appellant asks this Court to undertake intracase proportionality review "to determine whether imposition of the death penalty in a given case is unconstitutionally disproportionate to the offense and the defendant's personal culpability." (*People v. Stanley*, *supra*, 39 Cal.4th at p. 966; see AOB 720.) Accordingly, this Court must evaluate "whether [defendant's] capital sentence is so 'grossly disproportionate' to the offenses as to constitute cruel or unusual punishment under article I, section 17 of the California Constitution." (*People v. Arias* (1996) 13 Cal.4th 92, 193.) "A death sentence is grossly disproportionate if it 'shocks the conscience and offends fundamental notions of human dignity.' [Citation.]" (*People v. Stanley*, *supra*, 39 Cal.4th at p. 967.)

Here, during the course of a home-invasion robbery, appellant shot, or aided and abetted the shooting, of four members of one family. The shootings were brutal, vicious, execution-style killings. Martha Morales was holding her baby in her arms, when her baby was shot and she was executed. Appellant and his accomplices fled the scene, leaving the baby crying on the floor at the feet of her lifeless mother.

Appellant contends that his death sentence is disproportionate because the "prosecution failed to prove beyond a reasonable doubt that appellant knowingly and intentionally participated in the shootings." (AOB 720.) However, the jury found, at the very least, that appellant knowingly and intentionally participated in the robbery and burglary of the Moraleses, felonies which led to the brutal shootings of each victim. The jury further found that, if appellant was not one of the shooters, then he was a major participant in the felonies, and acted with reckless indifference to human life. Contrary to appellant's contention, the mens rea of reckless indifference is a sufficient "predicate for death eligibility, as a matter of law." (See AOB 720.)

Appellant also points out that he had no violent criminal history, and his involvement in the murders was "totally out of character." (AOB 720.) However, as the trial court pointed out, "the nature and severity of these offenses simply overwhelms the proven factors in mitigation. . . ." (72 RT 14217.) Based on the aggravating facts of the crime, appellant's punishment is not disproportionate to his culpability.[51]

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51. Appellant also points out that Sanchez and Nunez did not receive the death penalty, and that appellant's case "stands apart from the vast majority of other cases in which this Court has conducted intracase proportionality review." (AOB 721.) However, such comparisons involve *intercase* review, which as discussed above, this Court has consistently declined to undertake. (See e.g. *People v. Arias*, *supra*, 13 Cal.4th at p. 193 ["the punishment received by others who might be involved in the crime is not relevant to [any] 'intracase' proportionality review, because a capital penalty determination is 'based on the character and record of the *individual* defendant and the circumstances of the offense'"], original italics; *People v. Mincey* (1992) 2 Cal.4th 408, 476; *People v. Frye, supra*, 18 Cal.4th 894, 1029.)

LXVI.

APPELLANT'S DEATH SENTENCE IS NOT ARBITRARY OR IRRATIONAL (APPELLANT'S CLAIM 93)

Appellant contends that permitting imposition of the death penalty for someone convicted of felony murder, but not permitting imposition of the death penalty for premeditated and deliberate murder is irrational and arbitrary, thereby violating the Eighth Amendment. (AOB 723.)

This Court has consistently rejected appellant's claim:

> Essentially, defendant's argument is that because the special circumstances provision of section 190.2, subdivision (a)(17), making felons convicted of enumerated offenses death eligible, is adventitious (because not necessarily related to an aggravating mental state), it irrationally imposes a capital penalty on those who have not been shown to have had a morally qualifying intent; while making a much larger class of murderers—those who kill with premeditation but not in the commission of a qualifying felony—not subject to the death penalty.
>
> . . . [I]n *People v. Marshall* (1990) 50 Cal.3d 907 we rejected an argument identical to the one petitioner makes here—"that the felony-murder special circumstance does not provide 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'"—on the ground that "in *People v. Anderson* [1987] 43 Cal.3d [1104,] 1147, we squarely rejected that very point." (*Id.* at p. 946.) We do so again in this case.

(*People v. Musselwhite, supra*, 17 Cal.4th at pp. 1265-1266; see also *People v. Cornwell* (2005) 37 Cal.4th 50, 102 [Penal Code section 190.2 "'does not impose overbroad death eligibility, either because of the sheer number and scope of special circumstances which define a capital murder, or because the statute permits capital exposure for an unintentional felony murder'"]; *People v. Anderson* (2001) 25 Cal.4th 543, 601 [same].)

Appellant's claim should be denied.

LXVII.

APPELLANT'S DEATH SENTENCE IS NOT BASED ON UNRELIABLE EVIDENCE (APPELLANT'S CLAIM 94)

Appellant contends that his death judgment must be reversed because it does not "meet the fundamental reliability requirements of the Eighth Amendment." (AOB 728.) Appellant claims that the "testimony of Jose Luis Ramirez was inherently unreliable due to numerous inconsistencies in his testimony[,] his own admission of untruthfulness in his pretrial statements, [and the fact that his] exposure for his participation in the crime was reduced from life in prison to less than 12 years." (AOB 728.)

However, the jury was aware of Ramirez's inconsistencies, untruthfulness, and motive to lie, and nevertheless found some or all of Ramirez's testimony to be credible. The jury was instructed as to how to judge a witness's credibility. (See CALJIC No. 2.20.) The parties argued as to whether those facts so damaged Ramirez's credibility as to make his testimony unreliable. Appellant provides no authority which suggests that a reviewing court is permitted to reweigh the credibility of a witness and reverse a judgment despite the determination by the fact-finder of the witness's credibility. That appellant disagrees with the jury's factual determination is no basis for reversing his conviction.

LXVIII.

APPELLANT'S FAILURE TO OBJECT WAIVED HIS CLAIMED VIOLATION OF HIS CONSULAR NOTIFICATION RIGHTS (APPELLANT'S CLAIM 95)

Appellant contends that his consular notification rights were violated when he was detained at the United States-Mexican border, and that he is entitled to

an evidentiary hearing to review the prejudicial impact of such a violation. Appellant is wrong.

A. Factual Background

Appellant fled to Mexico after the murders. On July 28, 1995, appellant was at his home in Mexicali, when he was abducted by three bounty hunters at gunpoint. (5 CT 1097-1098.) He was struck on the head, handcuffed, and placed into the back seat of a car. (5 CT 1097-1098.) The bounty hunters drove the car to the Calexico port of entry into the United States. (5 CT 1098.) At the border crossing, appellant was placed into a second car. (5 CT 1098.) At the Port of Entry inspection site, the men were asked for citizenship papers. (5 CT 1099.) The driver of the vehicle told the inspector that appellant was under arrest and showed him documents indicating that appellant was wanted in Salinas. (5 CT 1099.) The men were told to go to a secondary inspection site, and a gun was discovered on one of the bounty hunters. (5 CT 1099.)

Appellant was interviewed in Spanish by FBI special agents, after signing an advisement of rights form, and consenting to the interview. (5 CT 1096.) The interview covered only the circumstances of appellant's abduction from Mexico, and did not address the Salinas incident. (5 CT 1096-1101.)

On August 30 1995, a follow-up interview of appellant was conducted by the FBI special agents. (5 CT 1107.)[52] Also present at the interview was an Assistant United States Attorney, an attorney representing appellant, a representative from the Mexican consulate, and a court-appointed interpreter. (5 CT 1107.) The Assistant United States Attorney "advised that there would

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52. Although the beginning of the narrative indicates that the interview took place on September 30, 1995, the remainder of the report lists the date as August 30. Moreover, because the date of transcription was September 29, 1995, and because appellant was already in Salinas on September 29, we believe that the August 30 date is correct. (1 CT 70; 5 CT 1107-1115.)

be no questions asked concerning alleged actions by [appellant] in Salinas, California." (5 CT 1107.)

On September 29, 1995, appellant first appeared in Monterey County on the arrest warrant for the instant case. (1 CT 70.)

On October 13, 1998, appellant filed a motion to modify the verdict (Pen. Code, § 190.4). (5 CT 1071.) At the conclusion of the motion, defense counsel included the following:

> **DIGRESSION**: A member of the Mexican Consulate had expressed a desire to address the court as to the imposition of the death sentence on Mr. Covarrubias and they have informed defense counsel they will provide some documentation of their interest and request as it relates to the imposition of the death penalty in this case where a Mexican National was kidnaped from Mexican soil and illegally transported to the United States.
> To date, no written communications have been received and upon receipt, they will be provided to the court.

(5 CT 1075.)

At the hearing on October 15, 1998, defense counsel indicated that two members of the Mexican consulate were present in court and wished to address the court regarding the propriety of the death penalty for a person kidnaped from Mexican soil. (71 RT 14004.) A representative from the Mexican consulate in San Diego, as friend of the court, agreed that the trial court had jurisdiction to try appellant in Monterey County, even though he had been kidnapped from Mexico. (71 RT 14012, 14015.) However, she suggested that justice could have been served, and "perhaps better served,"in Mexico. (71 RT 14015.) She also pointed out that Sanchez and Nunez were in custody in Mexico, and, as such, were not exposed to the death penalty for the same crime. (71 RT 14105.) She recognized that the court was not legally obligated to adhere to her request, but, "in the capacity of our functions of protecting the rights of Mexican nationalism and to have this matter terminate in the result that would have happened but for that kidnaping the Mexican government would

like to request the Court to impose a sentence other than the death penalty." (71 RT 14015-14016.)

The court put the case over for the District Attorney to research the evidence regarding the extradition treaties and executive agreements with Mexico. (71 RT 14017.) Before the next hearing, appellant submitted a declaration from his court-appointed interpreter assigned to assist the defense team. She indicated that she had consistently been in contact with the Mexican consulate, beginning on December 13, 1996, prior to appellant's trial. (5 CT 1157-1158.) Defense counsel also submitted a memorandum of law in which he indicated that "[f]rom the time even before defense counsel was appointed for the defendant, the Mexican Consulate has known about this case. Requests were made by defense to the Mexican Consulate for any and all assistance regarding their intervention in this case." (5 CT 1123.)

On October 27, 1998, the court discussed the information from the Mexican consulate and wondered why the information was first presented at the time of sentencing. The court continued:

> It really, at the end of the day, makes, in my judgment, no difference because in the posture that we are today this Court is here to consider, first of all, the automatic Motion for Modification of the Verdict, which by statute and case authority is to be determined according to the evidence presented to the jury during the trial. And so it's not really up to me to attempt to pass upon aspects of international law that don't bear upon the questions that are before me.

(72 RT 14206-14207.)

B. Applicable Law

> Article 36, paragraph 1(b), of the Vienna Convention provides that law enforcement officials "shall . . . inform" arrested foreign nationals of their right to have their consulate notified of their arrest, and if a national so requests, inform the consular post that the national is under arrest. Article I of the Optional Protocol Concerning the Compulsory Settlement of Disputes, April 24, 1963, 21 U.S.T. 325 (Optional

> Protocol), provides that disputes "arising out of the interpretation or application of the [Vienna Convention] shall lie within the compulsory jurisdiction of the International Court of Justice . . . ." The United States, upon the advice and consent of the Senate, ratified both instruments in 1969. (Vienna Convention, *supra*, 21 U.S.T. at p. 79.)

(*People v. Mendoza, supra*, 42 Cal.4th at p. 709.)

In 2003, Mexico instituted proceedings before the International Court of Justice (ICJ), alleging that the United States violated its legal obligations to Mexico under the Vienna Convention in the cases of 54 Mexican nationals who were sentenced to death in the United States without timely notification to the Mexican Consulate. (Case Concerning Avena and other Mexican Nationals (*Mexico v. United States*), 2004 I.C.J. No. 128 at ¶ 12, p. 10 ("*Avena*").) Mexico argued, among other things, that the United States was required to restore the status quo ante in the 54 cases, and provide a meaningful remedy at law for violations of the treaty, including the barring of any procedural defect for failure to raise a timely claim. (*Mexico v. United States, supra*, ICJ No. 128 at ¶ 12, p. 11.)

The ICJ found that the United States violated its treaty obligations by failing to notify a number of the Mexican nationals of their rights under Article 36, paragraph 1(b) of the Vienna Convention, and prevented Mexico from rendering assistance to, communicating with, and arranging assistance for those individuals. (*Id.* at ¶ 153, pp. 59-60.) As for a remedy, the ICJ rejected Mexico's claim that the United States was required to return the Mexican nationals to the status quo ante by overturning their convictions. (*Id.* at ¶¶ 117-125, pp. 47-49.) Instead, the ICJ ruled that the United States was obligated to permit review and reconsideration of the nationals' cases with a view to ascertaining whether the violation of the Vienna Convention caused actual prejudice. (*Id.* at ¶ 121, p. 48.)

On February 28, 2005, after the ICJ ruling in *Avena*, President George W. Bush issued a Memorandum to the United States Attorney General, stating that

the United States would discharge its obligations under that decision "by having State courts give effect to the decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision."

In *Medellin v. Texas* (2008) __U.S. ___; U.S. LEXIS 2912, the United States Supreme Court considered the effect of the *Avena* decision and the President's memorandum on the pending death penalty cases of the named *Avena* defendants. The Court granted certiorari to decide two questions: "First, is the ICJ's judgment in *Avena* directly enforceable as domestic law in a state court in the United States? Second, does the President's Memorandum independently require the States to provide review and reconsideration of the claims of the 51 Mexican nationals named in the *Avena* without regard to state procedural rules?" (*Id.* at p. *15.) The Court concluded that "neither *Avena* nor the President's Memorandum constitutes directly enforceable federal law," which is binding in state court or pre-empts state procedural default rules. (*Id.* at p. *15, *58; see also *Sanchez-Llamas v. Oregon* (2006) 548 U.S. 331.)

C. Appellant Waived His Consular Notification Claim

At no point did appellant argue in the trial court that his rights under the Vienna Convention had been violated. His failure to raise the issue in the trial court waives his claim on appeal. "'As a general rule, only 'claims properly raised and preserved by the parties are reviewable on appeal.' [Citation.]" (*People v. Smith* (2001) 24 Cal.4th 849, 852.) As discussed above, neither the ICJ *Avena* judgment nor President Bush's memorandum pre-empts state procedural default rules. (*Medellin, supra*, ___ U.S. __; 2008 U.S. LEXIS at p. *15.) Moreover, the *Medellin* court specifically held that state procedural default rules could properly be applied, even to named *Avena* defendants, despite the *Avena* court's contrary finding. (*Id.* at pp. *13-14.) Appellant's failure to raise the issue in the lower court waives his claim on appeal.

D. Appellant Has Demonstrated No Prejudice

Even assuming appellant's claim was not waived by the failure to raise in the trial court, appellant has demonstrated no basis for relief. First, notwithstanding the non-compliance with the consular notification requirement in the Vienna Convention on Consular Rights, it remains unclear whether appellant even has an individual right to assert under that treaty. Moreover, even assuming, arguendo, such a right, appellant cannot make the necessary showing of prejudice flowing from the denial of consular notification.

The Vienna Convention itself counsels against finding that individual rights are created by the treaty. The Preamble to the Vienna Convention states:

> Believing that an international convention on consular relations, privileges, and immunities would also contribute to the development of friendly relations among nations, irrespective of their differing constitutional and social systems, Realizing that the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of functions by consular posts . . . .

(See *United States v. Jiminez-Nava* (5th Cir. 2001) 243 F.3d 192, 196.)

The first sentence of Article 36 states that its provisions are adopted "with a view to facilitating the exercise of consular functions." (See Vienna Convention, Art. 36(1).)

The United States Supreme Court has not directly addressed the question of whether the Vienna Convention confers an individual right to consular assistance following arrest. However, the Court has "assume[d], without deciding, that Article 36 grants foreign nationals 'an individually enforceable right to request that their consular officers be notified of their detention, and an accompanying right to be informed by authorities of the availability of consular notification.'" (*Medellin v. Texas*, *supra*, 2008 U.S. LEXIS at p. *28, fn. 4, quoting *Sanchez-Llamas v. Oregon*, *supra*, 548 U.S. at pp. 342-343.) Many federal and state courts have held that the Vienna Convention does not create judicially enforceable individual rights. (See *United States v. Jiminez-Nava*,

supra, 243 F.3d at p. 198; *Cardena v. Dretke* (5th Cir. 2005) 405 F.3d 244, 253; *United States v. Emuegbunam* (6th Cir. 2001) 268 F.3d 377, 391; *Cauthern v. State* (Tenn.Crim.App. 2004) 145 S.W.3d 571, 626; *Gomez v. Commonwealth* (Ky.App. 2004) 152 S.W.3d 238, 242; *State v. Navarro* (Wis.App. 2003) 659 N.W.2d 487, 491.)

Even assuming that the Vienna Convention does create individually enforceable rights, the *Avena* decision requires appellant to demonstrate that denial of such rights caused him prejudice. The requirement of showing prejudice from the denial of consular notification is also clear from Ninth Circuit jurisprudence. (*United States v. Calderon-Medina* (9th Cir. 1979) 591 F.2d 529, 532; *United States v. Rangel-Gonzales* (9th Cir. 1980) 617 F.2d 529, 530.) Appellant cannot satisfy his burden of showing prejudice flowing from the failure of authorities to inform of his consular rights following his arrest.

The evidence in the record demonstrates that the Mexican consulate was notified soon after appellant's detention at the border. A consulate representative was present with appellant when he was interviewed, on August 30, 1995, about his kidnapping in Mexico. Notably, appellant was not asked any questions about the Monterey County crimes during this interview. Moreover, as defense counsel noted, the consulate was involved in appellant's Monterey County case before defense counsel was even appointed. Appellant's defense team was in contact with the consulate during the preparation of appellant's trial. Consular representatives were permitted to address the court at sentencing. Appellant has pointed to nothing in the record which would suggest that "the alleged violation denied [him] any benefit he would have otherwise received had the consulate been properly notified." (*People v. Mendoza*, *supra*, 42 Cal.4th at p. 711.)

Finally, "[w]hether defendant can establish prejudice based on facts outside of the record is a matter for a habeas corpus petition." (*Ibid.*)[53] Appellant suggests that a habeas corpus petition would be insufficient because, "under habeas corpus rules, there is no guaranteed right to evidentiary hearing . . . ." (AOB 754.) However, the *Avena* decision does not require an evidentiary hearing. The *Avena* decision held only that the United States has an obligation to permit "review and reconsideration" with a view toward ascertaining whether the violation caused actual prejudice. (*Avena*, at ¶¶ 121, 122, 138, pp. 48, 53.) If this Court decides to "review" appellant's *Avena* claim despite his failure to raise it in the trial court, appellant will have been provided the remedy contemplated by the *Avena* decision. Without *any* allegation of prejudice, no further review or evidentiary hearing is required. (Cf. *United States v. Rangel-Gonzales* (9th Cir. 1980) 617 F.2d 529, 530-531 [the "initial burden of production of evidence showing prejudice is on the defendant," and here, "[t]he appellant did show some likelihood that had the regulation been followed his defense and the conduct of the hearing would have been materially affected"].)

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53. Notably, appellant does not allege any particular facts, either in or outside the record, which would demonstrate prejudice. Indeed, he does not provide any argument about why he was prejudiced by any alleged Vienna Convention violation. He simply asserts that his case must be remanded to the lower court for an evidentiary hearing solely because he was a named defendant in the *Avena* decision.

LXIX.

THE USE OF THE DEATH PENALTY DOES NOT VIOLATE INTERNATIONAL LAW (APPELLANT'S CLAIMS 96-97)

Appellant contends "that the 'regular' imposition of capital punishment in California violates international norms, and hence constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the federal Constitution. [See AOB 760-761]. This is a variation on the familiar argument that California's death penalty law does not sufficiently narrow the class of death-eligible defendants to limit that class to the most serious offenders, a contention [this Court has] rejected in numerous decisions. (See *People v. Jones*, [2003] 30 Cal.4th [1084,] 1127-1128; *People v. Wader* (1993) 5 Cal.4th 610, 669.)" (*People v. Perry*, *supra*, 38 Cal.4th at p. 322.)

Appellant also contends that executing appellant after a lengthy delay would violate international law. (AOB 763.) This Court has similarly rejected that claim. (*People v. Ward* (2005) 36 Cal.4th 186, 222; *People v. Brown*, *supra*, 33 Cal.4th at p. 404; *People v. Lenart*, *supra*, 32 Cal.4th at p. 1131.)

CONCLUSION

Accordingly, respondent respectfully requests that this Court reverse the burglary special circumstances and otherwise affirm the judgment.

Dated: July 24, 2008

Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of the State of California

DANE R. GILLETTE
Chief Assistant Attorney General

GERALD A. ENGLER
Senior Assistant Attorney General

ALICE B. LUSTRE
Supervising Deputy Attorney General

BRIDGET BILLETER
Deputy Attorney General

Attorneys for Respondent

BB/bb/gm
SF1998XS0003

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Daniel Sanchez Covarrubias** No.: **S075136**

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 that same day in the ordinary course of business.

On **July 29, 2008**, I served the attached **RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

Thomas Lundy
Attorney at Law
2777 Yulupa Avenue, PMB 179
Santa Rosa, CA 95405

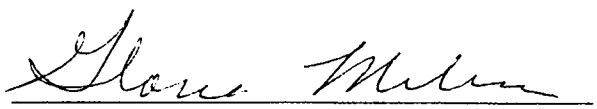
Clerk of the Superior Court
Monterey County
240 Church Street, Suite 318
Salinas, CA 93901

Honorable Dean D. Flippo
District Attorney
Monterey County
P O. Box 1131
Salinas, CA 93902

California Appellate Project
101 Second Street, Suite 600
San Francisco, CA 94105-3672

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on **July 29, 2008**, at San Francisco, California.

Gloria J. Milina
Declarant


Signature

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