# In the Supreme Court of the State of California

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| **THE PEOPLE OF THE STATE OF CALIFORNIA,**<br><br>**Respondent,**<br><br>**v.**<br><br>**DUNG DINH ANH TRINH,**<br><br>**Appellant.** | Case No. S115284<br><br>CAPITAL CASE |



Orange County Superior Court Case No. 99 NF 2555
The Honorable John J. Ryan, Judge

## RESPONDENT'S BRIEF

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## STATEMENT OF THE CASE

On July 14, 2000, the Orange County District Attorney filed an information charging appellant Dung Dinh Ahn Trinh with the murders of Marlene Mustaffa (count 1), Vincent J. Rosetti (count 2), and Ronald Robertson (count 3), in violation of Penal Code[1] Section 187, subdivision (a)); and the attempted murder of Mila Salvador (count 4), in violation of sections 667 and 187, subdivision (a). It was alleged that the murders of all three victims were committed under the special circumstance of lying in wait within the meaning of section 190.2, subdivision (a)(14). It was further alleged that Trinh committed multiple murder within the meaning of section 190.2, subdivision (a)(3). As to counts 1, 2 and 3, it was alleged that Trinh personally and intentionally discharged a firearm causing great bodily injury or death. (§ 12022.53, subd. (d).) As to count four, it was alleged that Trinh personally and intentionally discharged a firearm. (§ 12022.53, subd. (c).) Finally, as to all counts, it was alleged that Trinh personally used a firearm. (§ 12022.5, subd. (a).) (1 CT 1-4.)

On April 11, 2002, the District Attorney filed an amended information which alleged a "lying in wait" special circumstance only as to count 1, but was the same in all other respects. (2 CT 335-337.)

On July 2, 2002, the lying in wait special circumstance allegation was dismissed pursuant to the People's motion. (2 RT 544, 556; 2 CT 390-391.) Jury selection began on July 8, 2002. (2 CT 416.) The guilt phase of the trial began on July 29, 2002. (2 CT 476.) Jury deliberations began on August 19, 2002 and on that same date, the jury found Trinh guilty of three counts of first degree murder and one count of willful, premeditated and deliberate attempted murder. The jury also found true the multiple murder

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

special circumstance and all firearms allegations. (11 RT 2649-2653; 3 CT 702-706, 738-741.)

The penalty phase of the trial commenced on August 26, 2002. (3 CT 751.) On September 3, 2002, the jury stated it was unable to reach a verdict and the court declared a mistrial. (13 RT 3076-3080; 3 CT 833.)

A second penalty phase trial commenced on October 28, 2002. (5 CT 1138.) On December 4, 2002, the jury stated it was unable to reach a verdict and the court declared a mistrial. (20 RT 4708-4712; 6 CT 1463-1464.)

A third penalty phase trial commenced on February 24, 2003. (6 CT 1617.) On March 18, 2003, the jury began deliberations and on March 19, 2003, the jury determined that death was the appropriate penalty. (27 RT 6401; 7 CT 2007; 8 CT 2079, 2089, 2092.)

On April 14, 2003, the trial court denied Trinh's motion to reduce the sentence to life without the possibility of parole (§ 190.4, subd. (e)). (27 RT 6429; 8 CT 2182-2190.) The court sentenced Trinh to death for the murders of Mustaffa, Rosetti and Robertson (counts 1-3) and life without the possibility of parole for the attempted murder of Salvador (count 4). The court imposed consecutive 25-year to life sentences on counts 1 through 3 for the discharge of a firearm resulting in great bodily injury (§12022.53, subd. (d)) and to a consecutive 20-year sentence on count 4 for discharging a firearm (§12022.53, subd. (c)). The court struck the remainder of the enhancements. (27 RT 6430-6433, 6436-6437; 8 CT 2191-2193.)

This appeal is automatic. (§ 1239.)

## STATEMENT OF FACTS

### I. GUILT PHASE

#### A. Prosecution Case

In this case, Trinh entered the West Anaheim Medical Center in Orange County ("Hospital") wearing a holster, carrying two .38 caliber handguns and a pouch of ammunition several months after his mother had been treated at the Hospital. Once inside the Hospital he shot three staff members to death and attempted to kill a fourth staff member. Trinh's shooting spree continued up until he was ultimately subdued by the heroic intervention of unarmed civilians.

On September 14, 1999, between 10:30 and 10:40 a.m., Vinita Kothari, a registered nurse at West Anaheim Hospital, and Mitchell Watson, a respiratory care practitioner, were on the second floor performing their duties when they noticed Trinh walking quickly down the hallway. (5 RT 1196-1198; 6 RT 1474-1476.) Trinh gave Kothari a half smile and walked into the office of Mila Salvador, a nursing supervisor. (5 RT 1197, 1255-1256; 6 RT 1477-1478.) At the time, Salvador was speaking with nurse's aide Marlene Mustaffa about Mustaffa's upcoming vacation. (5 RT 1256-1258.) Trinh pointed a gun at Mustaffa and shot her in the head. (5 RT 1257-1258.) Mustaffa fell to the floor in front of Salvador's desk. (5 RT 1258-1259.) Trinh then moved towards Salvador and fired the gun at her head, but the shot missed. (5 RT 1259.) Trinh immediately walked out the door. (5 RT 1260-1261.) Salvador tried to resuscitate Mustaffa but was unsuccessful. (5 RT 1262.) Salvador then moved Mustaffa's body, barricaded herself in the office and dialed 911. (5 RT 1262-1263.)

When Trinh fired the first shots, a "code grey" was announced over the Hospital's loudspeakers which indicated to staff that there was an

unruly patient or family member and male assistance was required. (5 RT 1219-1220, 1278-1279; 6 RT 1314.) The code grey announcement expressly directed all male employees to the progressive care unit on the east side of the second floor. (5 RT 1279.) As the broadcast over the loudspeakers was being made, Trinh ran towards the nurses' station on the second floor still holding a gun. (5 RT 1238-1239.) After hearing shots fired on her floor and the code grey announcement, nurse Kothari hid under her computer desk. As Trinh walked down the second floor hallway, he pointed the gun at her head but did not fire it. (6 RT 1480.)

Rosa Marie Augustin and Andrew Armeta were working on the first floor when they heard the code grey announcement. (5 RT 1219-1221, 1234-1235, 1239-1240.) Armenta saw Rosetti running toward the stairwell in apparent response to the code grey announcement and called to him. Armenta also ran towards the stairwell and as he reached the door to the stairwell, it was already open. Armenta entered the stairwell and heard gunshots coming from inside the stairwell. (5 RT 1222-1223; 1240-1241.) Armenta and Augustin went to the board room to hide in response to the gunfire in the stairwell. (5 RT 1226, 1228, 1242.) Augustin later found Rosetti's body in the second floor stairwell by the elevator. (5 RT 1245-1246.) He had been shot in the head. (5 RT 1246.)

Norman Bryan, the supervisor of the cardiovascular laboratory, Ron Robertson, director of environmental services, and John Collins, the hospital controller, also responded to the code grey. (5 RT 1278-1279; 6 RT 1314-1316.) Bryan and Robertson ran down the first floor hallway and turned left to take the stairs up to the second floor. After hearing the shots fired in the stairwell, the two went in different directions. (5 RT 1280.) Bryan went to evacuate employees, while Robertson ran to close the doors to the lobby. (5 RT 1280; 6 RT 1294.) As Robertson closed one of the two doors, Trinh ran toward him, holding a gun. (6 RT 1294-1295.) As

Robertson was closing the second door, Trinh shot him in the chest. (6 RT 1296-1297.) Robertson then grabbed Trinh and they both fell to the ground. (6 RT 1306-1307.)

John Nuzzo, a patient who was waiting to be admitted for surgery, grabbed Trinh by the hand and leg. (6 RT 1317-1318, 1362-1363.) Trinh looked at Robertson and said, "They killed my mother. You killed my mother." (6 RT 1317-1318; 1368-1369.) Trinh shot Robertson a second time. Robertson collapsed. (5 RT 1241; 6 RT 1306-1307, 1317.) Collins looked down at Robertson. Collins saw a small handgun, a large handgun, and a vinyl pouch on the floor nearby. (6 RT 1318, 1366.) Bullets were falling out of the pouch and were scattered all over the floor. (6 RT 1318-1319, 1366.) Once Collins and Nuzzo were able to subdue Trinh, director of human resources George Wilhelm picked up the two guns and the pouch, placed them in Rosetti's office, and locked the door. (6 RT 1318-1319, 1344.) Robertson was taken into the Hospital's emergency room and died shortly thereafter. (5 RT 1207-1208.)

Anaheim Police Department Officers responded to the scene. (6 RT 1376-1377.) Officer Thomas McManus took Trinh into custody. (6 RT 1377-1378.) Trinh was still wearing a holster for a handgun. (6 RT 1381-1382.) Officer McManus placed Trinh in the back of his patrol car and stood outside the car with the windows rolled down. Trinh looked at McManus and said, "You American people kill my mother. Now I kill you. You kill my people. I kill you. You know, you just kill my mother. Right now she lay at Martin Luther Hospital by herself. You kill her." (6 RT 1379.) Trinh was very angry. (6 RT 1381.)

When police searched Trinh's car, the key was in the ignition, covered by a piece of paper towel. (6 RT 1441.) There were also empty boxes for I.M. .38 caliber ammunition and P.M.C. ammunition inside Trinh's car. (6 RT 1458-1459.)

Police examined the two guns and pouch which Wilhelm had locked in Rosetti's office. One gun was a .38 Smith and Wesson five-shot revolver.[2] The second was a .38 Charter Arms five-shot revolver. The Smith and Wesson had empty spent casings in the chambers. The Charter Arms was fully loaded. Trinh's pouch contained 103 rounds of varying brands of .38 special ammunition. (6 RT 1437.) The guns were examined, and it was determined that they were functioning properly in all respects. (6 RT 1505-1506, 1509.)

Other crime scene investigators found numerous cartridges and bullet casings inside the Hospital where Robertson and Rosetti had been shot. There were several cartridges on the ground in the lobby. (6 RT 1394-1395.) Three casings were found in the stairwell near where Rosetti was shot. (6 RT 1464-1465.) In Salvador's office, there was a bullet hole in one of the walls. (6 RT 1468.) Projectiles recovered from the Hospital were fired from Trinh's Smith and Wesson revolver. (6 RT 1512-1515.)

Doctor Joseph Halka, a forensic pathologist, performed autopsies on the bodies of Mustaffa, Rosetti and Robertson. (7 RT 1538, 1543, 1549-1550.) Mustaffa had been shot in the left temple. (7 RT 1539.) The cause of death was fragmentation of the brain and skull fractures due to a gunshot wound to the head. (7 RT 1524.)

Rosetti had three gunshot wounds. The first was on the crown of his skull. The second was on his left lip, extending to his cheek. The third was on his left neck, a little below the hairline. (7 RT 1544.) Each shot, alone, was lethal. (7 RT 1545-1546.) The cause of death was cerebral and cerebellar lacerations due to multiple gunshot wounds to the head and face. (7 RT 1547.)

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[2] The parties stipulated that Trinh lawfully purchased and registered both guns in the 1980's. (9 RT 1949-1940.)

Robertson sustained two gunshot wounds to his right chest. The wounds were two to three inches apart. (7 RT 1551.) The cause of death was blood loss due to the two gunshot wounds. (7 RT 1553.)

### B. Defense Case

The defense conceded Trinh shot all three victims but contended that the crimes were at most second degree murder, and the special circumstance was untrue, because Trinh acted under extreme emotional stress beginning when his mother was admitted to the Hospital for hip replacement surgery in late May 1999 and ending when she died in Trinh's home the morning of September 14, 1999.

On May 26, 1999, Trinh dialed 911. (7 RT 1548; 2 CT 487.) Trinh reported that his 72-year-old mother, Mot Trinh, collapsed when he took her to the bathroom. (2 CT 487.) The 911 operator gave Trinh instructions and told him help was on the way. (7 CT 488-491.) Paramedics arrived and transported Mot[3] to the Hospital. (7 RT 1303-1304.) On June 7, Mot had surgery to replace her hip. (8 RT 1943; 9 RT 1955, 2140-2141.) Mot had initially refused the surgery and relented only after Trinh convinced her it was in her best interests. (9 RT 2141-2142.)

On June 8, while the physical therapist was working with Mot, Mot became unresponsive. (8 RT 1934-1935; 9 RT 1955.) As a result, she was transferred to the intensive care unit ("I.C.U."), where she remained until her condition improved. (8 RT 1936; 9 RT 1957.) At the time of her hospitalization in May, Mot already suffered from end stage renal disease, congestive heart failure, and diabetes. (9 RT 2121-2122.)

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[3] Parties and witnesses sharing a last name are referred to by first name to avoid confusion.

Mot spent about a month at the Hospital. (7 RT 1703-1710.) Trinh was often at her bedside. (7 RT 1703-1710; 9 RT 1954, 1962-1963; 10 RT 2245.) Because Mot spoke only Vietnamese, Trinh acted as her interpreter. (7 RT 1703-1710; 9 RT 2177, 2183.) Mot was frequently loud, obnoxious and uncooperative. (7 RT 1703-1710; 9 RT 2182, 2205, 2207, 2210.)

On June 24, 1999, Mot was transferred to La Palma Intercommunity Rehabilitation Center ("La Palma"), where she remained until July 22. (7 RT 1719-1720; 9 RT 2160; 10 RT 2317.) Mot continued her pattern of non-cooperation and refusal to follow basic instructions. (9 RT 2149-2160.) Trinh was there almost every day, acting as an interpreter and attempting to calm Mot down. (9 RT 2149-2160; 10 RT 2245-2246.) On a few occasions, staff had to restrain Mot because she had fallen or climbed out of bed. (9 RT 2194-2197.) When Trinh saw the restraints, he got angry. (9 RT 2197.)

Marcella Mabaquiao, an occupational therapist, Ruth Hardcastle, a registered nurse, and Sylvia Weber, a physical therapist, worked with Mot while she was at La Palma. (9 RT 2060-2061, 2186; 10 RT 2224-2225.) Mot had limited ability to perform even the most basic tasks by herself. Trinh assisted and also translated the instructions from English into Vietnamese. (9 RT 2064-2065, 2187-2189; 10 RT 2226-2238.) When Mot was discharged from La Palma and sent home, Trinh continued to assist her with the activities of daily living. (11 RT 2404, 2406-2407.) Although Trinh was working at Hometown Buffet making $7.25 per hour, Trinh voluntarily quit his employment on August 14, 1999 to devote all of his time to taking care of Mot. (10 RT 2318-2319.) On August 13, 1999, Trinh received a notice from his landlord that the monthly rent on his apartment would be increased by $20 effective September 13. (7 RT 1698-1699, 1702.) On August 26, 1999, Trinh filed a petition for bankruptcy, listing assets of $4,545 and liabilities of $8,710. (9 RT 2148.) Sometime during

that same period, Trinh received a parking ticket from the City of Anaheim. (9 RT 2056-2057.)

Around 5:40 a.m. on September 14, 1999, Trinh dialed 911. (7 RT 1670, 1697; 2 CT 506.) Trinh told the 911 operator that Mot had stopped breathing and that blood was coming out of her mouth. (2 CT 506.) The 911 operator dispatched paramedics to Trinh's residence, and instructed Trinh on how to perform C.P.R. (2 CT 507-513.) Paramedics David Youngs, Matthew Maxon, and Robert Peterson responded to Trinh's apartment. (7 RT 1669-1670, 8 RT 1884-1885; 9 RT 2015-2016.) Mot was lying on the floor. (7 RT 1671.) Trinh was on the floor as well, attempting to resuscitate her. (8 RT 1885.) Peterson and Maxon took over. (7 RT 1761; 8 RT 1886.) Trinh was distraught. (7 RT 1674; 8 RT 1886; 9 RT 2017.) As the crew was wheeling Mot out the door, Trinh asked Youngs how she was doing. Youngs told Trinh her condition was serious. (7 RT 1672.)

Youngs also informed Trinh that they were transporting Mot to Martin Luther Hospital. (7 RT 1672.) Youngs wrote out directions on a piece of paper. (7 RT 1672-1673.) The directions were correct; however, Youngs listed the address of Martin Luther as 1830 West La Palma Avenue. The actual address was 1830 West Romneya Avenue. (9 RT 2088-2089.)

At around 8:00 a.m. on September 14, Trinh entered Martin Luther Hospital looking for Mot. (7 RT 1686-1687.) By that time, Mot had already died, having suffered full cardiac arrest. (7 RT 1687.) The emergency room physician, Dr. Jai Ho, explained the situation to Trinh. (9 RT 2143-2144.) Trinh's response was, "She is okay?" (9 RT 2144-2145.) Trinh then became very upset. Doctor Ho took Trinh to see Mot's body. Trinh started crying. (9 RT 2145.) Trinh remained in the room for awhile, holding Mot's hand. (7 RT 1690-1692.) A nurse asked Trinh if there was

anyone she could call. Trinh said no, everyone he knew was still in Vietnam.[4] (7 RT 1693.)

The defense presented a number of expert witnesses, none of whom were familiar with this facts of this case, to try and show that Trinh's "life situation," i.e. the stress of caring for his mother, his grief from her death, and cultural differences, contributed to the shootings at the Hospital. A lot of this testimony was directed towards the cultural differences between Western and Eastern medicine, and the corresponding need for qualified medical interpreters. Experts in this area included Marjorie Muecke, a professor of nursing, Giao Hoang, a Vietnamese internist, Jean Gilbert, a medical anthropologist, and Carola Green, a trainer for medical interpreters. (8 RT 1740, 1890-1891; 9 RT 1890, 2025-2026.) According to these witnesses, medical care in Vietnam, particularly in the 1970's in rural areas, was quite a bit different from that in the United States. Because the Vietnamese believe in traditional religious healing, self care, and herbal treatments, they are very distrustful of Western medicine. (8 RT 1756-1758.) Moreover, the Vietnamese believe that ill health is caused by disharmony in nature. (8 RT 1909-1909.) They will therefore wait to see a doctor until their pain is acute and enduring. (8 RT 1904-1905.) Hospitalization and surgery are used only as a last resort. (8 RT 1909-1910.) The primary source of emotional support for a Vietnamese individual is the family. (8 RT 1778, 1784, 1919.)

It is thus very important for a doctor to understand not only the patient but also her culture. (8 RT 1897-1898.) The doctor should take time explaining a procedure to a patient before it is performed. (8 RT 1909.) Similarly, in order for an interpreter to be effective, the interpreter must

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[4] Trinh and Mot came to the United States in 1975. (9 RT 2148-2149.)

know the culture as well as the language. (8 RT 1766; 9 RT 1985-1987, 2028.) The interpreter should also have medical training. (8 RT 1766-1767; 9 RT 1988-1989, 2042.) It is unacceptable to rely upon family members or friends to interpret for several reasons. (8 RT 1767; 9 RT 1992.) First, the interpreter must understand the medical terminology and adequately convey it to the patient. (8 RT 1771-1775, 1916; 9 RT 1995-1996, 2044.) Second, the patient's complaints may not be adequately conveyed to the doctor. (9 RT 1995, 2044.) Third, the patient is more likely to withhold information from a family member. (9 RT 1993, 2044.) Fourth, the family member might withhold information from the patient. (9 RT 1993, 2047.) Fifth, there is a loss of patient confidentiality. (9 RT 1992-1993.) Sixth, and finally, family members might make mistakes because they are emotional about the situation and not thinking clearly. (9 RT 1998, 2048.)

Carol Aheshensel, a professor of Community Health Sciences, testified about "caregiver burnout." Care giving stress is chronic, and can go on for years. (8 RT 1840.) It takes over a person's life, penetrating everything that person does. (8 RT 1841.) It is pervasive and spills over into other areas, such as finances. (8 RT 1841-1842.) Aheshensel explained that "primary stressors" are the physical tasks associated with care giving. Problems may arise when the recipient of the care is angry, resists the care, is aggressive, is argumentative, or has cognitive deficits. (8 RT 1844-1845.) The more the caregiver has to help the recipient with the activities of daily living, the greater the stress. (8 RT 1844.) Other factors include the caregiver's culture, education and training. (8 RT 1847-1848.) "Secondary stressors" are problems that come up in other areas of life. (8 RT 1848.) When all of the stressors combine, the caregiver can become depressed, angry, anxious or ill. (8 RT 1848-1849.) It is more difficult when the caregiver is on his own, lacks coping mechanisms, and is poor. (8

RT 1850-1853.) Given a hypothetical mirroring Trinh's life situation, Aheshensel opined that the person would be at higher risk for burnout than most other caregivers. (8 RT 1855.)

Paul Leung, a psychiatrist specializing in cross-cultural psychiatry who was born in Vietnam, testified generally about depression in Vietnamese society. (11 RT 2427, 2430-2431.) Clinical depression is defined as at least two or more weeks of a mood so down that the ability to perceive joy in life is gone. (11 RT 2445.) Other symptoms include sleep disturbances, loss of appetite, fatigue, memory loss, lack of concentration, suicidal thoughts, and, in extreme cases, hallucinations or delusions. (11 RT 2446-2447.) A large number of Vietnamese refugees who came to the United States from 1975 through 1978 suffer from, but are not necessarily debilitated by, depression. (11 RT 2446.) The problem is further complicated because most Vietnamese find it shameful to see a professional for mental health problems, preferring to discuss any problems with family rather than with an outsider. (11 RT 2433-2437.)

Finally, Ronald Barrett, a psychology professor specializing in thanatology (the study of death and dying), discussed the grieving process. (10 RT 2263-2264.) He explained that a person's manner of grieving depends upon a number of factors, including the closeness of the relationship to the deceased, its nature, any unfinished business, the manner of death, the type of death, the way in which the survivor learns of the death, the survivor's personality, the availability of a support system, and the economic impact of the death. (10 RT 2269.) When someone loses a parent, it is crucial for the survivor to have social support. (10 RT 2271-2272.) Without it, the sense of emptiness may be devastating. (10 RT 2280-2281.) If the survivor has been the deceased's caregiver, the sense of distress and grief is intense. For others in the same situation, however,

there may be a feeling of relief that the loved one is no longer suffering. (10 RT 2290-2291.)

## II. PENALTY PHASE

### A. Prosecution Case

Because the penalty phase jury had not adjudicated Trinh's guilt, the prosecution presented substantially the same evidence regarding the murders as it presented in the guilt phase of the trial. (23 RT 5401-5412, 5420-5430; 24 RT 5444-5455, 5462-5467, 5469-5490, 5503, 5507-5515, 5507-5515, 5524-5526, 5531-5538, 5540-5546, 5599-5608.)

In addition, Trinh's testimony from the second penalty phase trial was read to the jury. During his direct examination in that trial, Trinh said that more than three years earlier, he walked into the Hospital of sound mind, with a plan. (24 RT 5553.) He knew exactly what he was doing and what he was going to do. Trinh said he executed three people, accepted the consequences, felt no remorse, was not sorry, and would not apologize to anyone in the courtroom. Trinh continued, "The way I live, life for a life, eye for an eye, kill and be killed." According to Trinh, people at the Hospital killed his mother, so he killed them. (24 RT 5554-5555.) Trinh explained that he shot the victims in the head to make sure they died. If he just wanted to hurt them, he would have shot them in the arm, leg or back. Trinh ended his statement by telling the jury, "I don't have any sorry, apologize for that, none at all. I accept what for the same return, that's the way it is. Kill and be killed. Simple as that. So be it." (24 RT 5555.)

When he was cross-examined by the prosecutor, Trinh said he killed Mustaffa for revenge. (24 RT 5368.) He explained that she looked familiar, so he walked up to her and executed her. (24 RT 5568-5569.) Trinh acknowledged that Mustaffa never did anything to Mot. Trinh added

that Salvador also looked familiar, "and I just shot her." (24 RT 5569.) He shot Rosetti because Rosetti got in his way. (24 RT 5572-5573.) Trinh explained that he intended to shoot only those people he blamed for Mot's death. (24 RT 5570.) If he had a second chance, he would not hesitate to pull the trigger again. This time, he would kill everyone on his list. If someone looked familiar, he would shoot them. (24 RT 5571.)

Discussing the events of September 14, Trinh said that he made his plans when he checked Mot out of La Palma on July 22. He did not act on them at that time because he had to take care of Mot. (24 RT 5581.) After the paramedics took Mot away the morning of the 14th, Trinh loaded his guns and retrieved his ammunition because he knew she was going to die. (24 RT 5584.) On the way to the Hospital, he stopped at Circle-K for something to drink. He changed his mind, got back into his truck and drove to the Hospital. (24 RT 5585.) When he got there, he exited his truck, went inside, and looked around for people to shoot. He did not see anyone, so he returned to his truck. He thought about going back to his apartment, but there was nothing there for him. (24 RT 5586.) His mind turned to revenge. He went into the Hospital a second time. (24 RT 5587.) Trinh added that if he had not been stopped, he would have gone to La Palma and killed a few people there. (24 RT 5577.) When he was finished, he would have shot himself. (24 RT 5580.)

The prosecution also presented evidence the impact the victims' deaths had on their family members. Dave Mustaffa testified about his life with his wife Marlene, their future plans, and how devoted she was to her children and grandchildren. He testified that her death had adversely impacted him, her children and her grandchildren. (24 RT 5611-5616.)

Vince Rosetti's mother, adult siblings, and his two daughters, testified about his generosity, sense of humor, and his service in Vietnam. They

spoke of the void in their lives because of his death. They also testified about the adverse impact on his family from his death. (24 RT 5617-5637.)

Ron Robertson's wife and his son testified about his love and devotion for his family, his service in Vietnam, and the impact his death had on their family. (24 RT 5638-5661.) Mila Salvador testified to the effect Trinh's attempt to kill her has had on her life. (23 RT 5411-5412.)

### B. Defense Case

The defense presented substantially the same evidence as it did in the guilt phase of the trial regarding caregiver burnout, Vietnamese culture, the differences between Western and Eastern medicine, and the need for trained medical interpreters. (24 RT 5663-5668; 25 RT 5759-5771, 5786-5799, 5819-5829, 5838-5846; 5904-5906, 5910-5918, 5920-5925, 5928-5930, 5947-5961, 5964-5977, 5980-5981; 26 RT 5983-6011, 6044, 6052-6066, 6068-6074, 6087-6089, 6093-6114, 6123-6131, 6135-6156, 6187-6226.)

Two of Trinh's friends, Dr. Tai Le and Hao Thi Nguyen, and Trinh's middle school teacher, Le Hang Bui, testified about Trinh's childhood and teenage years. Trinh and Mot lived in Saigon, in a poorer part of town. (26 RT 6231, 6240-6241.) Aside from Mot, Trinh had no friends or family while he was growing up. (26 RT 6233-6234.) At recess, he sat by himself and did not play with the other children. He always walked home alone. (26 RT 6242.) He was bullied and teased because he was an illegitimate child, considered disgraceful in Vietnamese society. (26 RT 6242-6243.) Trinh frequently arrived at Bui's house with gifts for her family. (26 RT 6244-6245.) Trinh loved children. (26 RT 6245.) Doctor Le, who met Trinh and Mot when they were in Guam waiting to enter the United States, testified that even at that time, Trinh treated Mot as the only person in his life. (24 RT 5714-5715, 5721.) He would get her food and water whenever

he could. (24 RT 5716, 5727-5728.) Doctor Le considered Trinh to be a close friend, almost a brother. (24 RT 5720, 5726.)

Other witnesses also described Trinh's devotion to Mot. Trinh told people he had no other friends or relatives in the United States. He never married because he was busy taking care of Mot. (26 RT 6078.) He spent all of his free time with her. (26 RT 6078-6079, 6264.) When he took her out to dinner, he helped her into the restaurant, straightened her clothing, and wiped her mouth with a napkin. (26 RT 6249-6250.) He fed her and cleaned her off before he started eating. (26 RT 6250-6251.) As she got weaker, he carried her up and down the stairs to his apartment, and to and from the car. (26 RT 6084-6085, 6185.) He boiled her water and massaged her arms. (26 RT 6082.)

Several witnesses described Trinh as a good tenant and an exceptionally hard worker. Cuu Nguyen, who rented a room to Trinh and Mot in 1994, testified that Trinh insisted on paying for electricity, and brought home food for the family. (26 RT 6080-6081.) Trinh gave her a cassette tape as a gift. (26 RT 6083.) When he left, he voluntarily gave Nguyen extra money so she could advertise the room. (26 RT 6085-6086.) Trinh worked for a family restaurant called Margie's Country Kitchen from 1987 until 1994. (26 RT 6254, 6259.) Trinh did everything around the restaurant - assisting in the kitchen, greeting customers, pouring coffee, serving food, and cleaning. (26 RT 6254-6255.) Trinh was dependable, reliable, responsible, and always on time. (26 RT 6255.) He frequently stayed late and did extra work. (26 RT 6260, 6269.) He was the best employee the owners had ever seen. (26 RT 6255, 6260.) Customers loved him. (26 RT 6260, 6269-6270.) Trinh would give the owners gifts but at the same time, would refuse to take either gifts or bonuses. (26 RT 6261-6263, 6270-6271.)

Trinh's supervisors at Hometown Buffet gave similar descriptions. Trinh was hired in 1992 as a dishwasher but quickly worked his way up to

cook. (26 RT 6041.) Trinh was punctual, cooperative, respectful, and very good at his job. (26 RT 6029-6030, 6035, 6042-6043.) Because of the quality of his work, he was certified to train other employees. (26 RT 6030-6031, 6042-6043.)

Trinh testified on his own behalf and made a statement to the jury. Trinh said that three and a half years ago, he walked into West Anaheim Hospital with a plan to execute three United States citizens. He accepted full responsibility for his actions, and had no excuses. (24 RT 5703.) He would not say he was sorry; he had nothing to say; "not a damn thing to apologize." (24 RT 5703-5704.) He killed and accepted being killed in return. He had no regret and no remorse. (24 RT 5704.) He did his duty as a Vietnamese citizen and a son when he pulled the trigger. "And if I have a chance," continued Trinh, "I am going to do it again." (24 RT 5710.) As Trinh was leaving the witness stand, he said, "May I say to all of you, down with the U.S. Government, down with capitalism . . . long live Communist, viva Socialist . . . Do your job, thank you." (24 RT 5713.)

The defense played two videotaped interviews Trinh gave on September 14, 1999, which the court had excluded during the prosecution's case in chief, to show that Trinh had expressed regret over killing Rosetti and Robertson. The first interview took place from 1:26 p.m. to 3:26 p.m., the second, from 7:16 p.m. to 8:15 p.m., on the day of the shootings. (25 RT 5781.) In the first interview, Trinh repeatedly told detectives that he was sorry that he shot Rosetti and Robertson. Trinh said they were innocent, they had nothing to do with Mot. He would not have shot them if they had not tried to stop him. He expressed concern for their families and said he hoped his shots were not fatal. (7 CT 1757-1758, 1775-1777, 1789, 1975, 1804, 1808, 1818.) Trinh made statements like, "Oh, I hope the two men make it." "From the bottom of my heart, I hope for the two men." (7

CT 1777.) He asked the men to forgive him because he did not mean to kill them, they were in his way. (7 CT 1789.)

Trinh admitted, however, that he wanted to kill Mutaffa and other nurses, explaining that Mot was gone, "so they're going to pay for that." (7 CT 1768; see also 7 CT 1758, 1798, 1808, 1817-1818.) Trinh said that when Mot was at the Hospital, nurses would laugh at her. (7 CT 1760.) They did not care about her because she was old, Vietnamese and poor. (7 CT 1785.) When she was released from La Palma, her condition went downhill. (7 CT 1797.) At that time, Trinh formulated a plan to kill nurses. He did not carry it out because Mot was still alive, and there would be no one to take care of her. (7 CT 1765, 1773.)

Trinh also discussed some of the circumstances surrounding the offenses. He said that before he left his house to go to Martin Luther Hospital, he had a beer. (7 CT 1764.) He loaded his guns and ammunition in his truck because he knew Mot was not going to make it. (7 CT 1766-1767.) When he got to Martin Luther, he left everything in his truck because the people there had nothing to do with his mother's condition. (7 CT 1767-1768, 1788.) After he left Martin Luther, he went to West Anaheim Hospital. He went because Mot was gone, "so they're going to pay for that." (7 CT 1768.) On the way, he stopped at a convenience store for a soda. He went in, changed his mind about the soda, and walked out. (7 CT 1768, 1770.) He drove to the Hospital. (7 CT 1770.) He left the car key in the ignition so it would be easier to escape. (7 CT 1804.) He walked in, took a look around, walked out again, and sat in his truck. He walked in a second time. (7 CT 1770.) He went to Mustaffa's office. Two women (Mustaffa and Salvador) were in there. One was standing, the other was sitting at a desk. He pointed the gun at their heads "and I just happy trigger. Boom." He tried to run away. He passed several people who were hiding from him. He did not shoot them because they were "innocent." He

had to get away because he wanted to go to La Palma. (7 CT 1775.) He shot Rosetti because Rosetti was in the way. Trinh ran to the stairway. Robertson jumped out, so Trinh shot him. (7 CT 1808.) Trinh said he planned to drive a couple of blocks and carjack someone to get to La Palma, because he knew his car's description would be broadcast by police. (7 CT 1803-1804.) Asked what he would do if the owner would not let him have the car, Trinh responded, "I'd push them out[.]" (7 CT 1825.)

During the second interview, Trinh gave complete details about the crimes. Trinh said that he stayed at Martin Luther with Mot's body for about an hour. He then went to his truck, where he sat for a few minutes. He drove towards West Anaheim Hospital. He stopped at Circle K for a soda. (7 CT 1728.) He went in, looked around, and walked out. (7 CT 1728-1729.) He drove to the Hospital parking lot. He entered the Hospital looking for the "whole staff," particularly the nurse who sent Mot to the I.C.U. (7 CT 1729.) He could not find anyone, so he returned to his truck. He sat there for awhile. (7 CT 1732, 1734.) He exited his truck again, leaving one car key in the ignition and taking another key with him. (7 CT 1736.) He had one gun in a holster, the other in a pouch along with ammunition. (7 CT 1737.) He also had five bullets in each pants pocket. (7 CT 1737.) He entered the Hospital and took the elevator upstairs. (7 CT 1737-1738.) Trinh walked to the end of the hallway, holding one of the guns, which he kept hidden under a newspaper. (7 CT 1738.) He saw two women he recognized (Mustaffa and Salvador). He shot both women in the face. He went back the same way. (7 CT 1739.) He pushed the elevator button to go down to the lobby. Realizing that the Hospital would probably cut off the electricity, he changed his mind and decided to take the stairs. He walked to the stairwell door. He opened the door and a man (Rosetti) "appeared from nowhere." (7 RT 1740.) Rosetti jumped out and either grabbed Trinh or pushed him. Trinh shot Rosetti and then walked down the

stairs. (7 CT 1741.) Halfway down the stairs, he reloaded his gun. He exited the stairwell at the lobby. When he got to the lobby, another man (Robertson) saw him with the gun. Robertson closed one of the lobby doors. Because Robertson would not get away from the doors, Trinh shot him. (7 CT 1742.) Robertson grabbed Trinh. Trinh shot him again. Trinh tried to get away but was subdued. As he was being subdued, Trinh said, "You guys killed my mother." (7 CT 1743.) Trinh ended his description by saying again that he felt sorry about what happened to Rosetti and Robertson. Asked if he felt sorry about Mustaffa and Salvador, Trinh responded, "Not a bit, not a bit." (7 CT 1748.)

The defense read into the record Trinh's testimony from the first penalty trial. Trinh made a statement to the jury. Trinh told jurors that no matter what he said, it would not bring anybody back. He accepted the consequences and accepted full responsibility for his decision. The shootings were planned. He walked into the Hospital to deliberately and intentionally kill. (25 RT 5862.) He took three innocent lives. (25 RT 5682-5683.) There was nothing he could do to bring the victims back. Trinh continued, "So now, eye for an eye, life for a life." Trinh said he accepted the death penalty because he hurt the victims' families. Trinh ended by saying, "I bow my head before all of you and apologize. And I am sorry for that." (25 RT 5863.)

During cross-examination, Trinh reiterated the fact that he did not regret killing Mustaffa, he only regretted killing Robertson and Rosetti. (25 RT 5865-5866.) Trinh said he was simply sorry he killed the wrong people. (25 RT 5869-5870, 5872.) Trinh said if someone wronged him, he would enjoy killing that person. (25 RT 5873.) If he had it to do all over again, he would make sure he got the right people. (25 RT 5878.) At the end of his testimony, Trinh made a second statement to the jury. Trinh again apologized to the families. He said he took three innocent lives and

was willing to pay for his crimes. He asked the jury to sentence him to death. (25 RT 5880-5881.)

Susan Webster, who worked in the mental health department at the Orange County jail in 1999 and 2000, Sister Anne Marie Nguyen, who visited Trinh while he was in jail, and Chau Stolemyre, the courtroom interpreter, all testified to expressions of remorse by Trinh. When speaking to Webster, Trinh cried, said he was concerned about the victims' families, and repeatedly referred to himself as a "low life." (25 RT 5883-5886.) Trinh told Sister Nguyen he prayed the victims' families had good lives. He knew what he had done was wrong. He wanted to die in order to repay the victims for killing them. (26 RT 6049.) About a month before the first trial, during a conditional examination of a witness, Trinh turned to Stotelmyre and said, "Please forgive me." (26 RT 6267.)

## ARGUMENT

### I. THE TRIAL COURT CORRECTLY DENIED TRINH'S MOTIONS TO RECUSE THE ORANGE COUNTY DISTRICT ATTORNEY'S OFFICE

In Argument I of his opening brief, Trinh contends that the trial court erred, and violated his rights to due process and equal protection, when it denied his various motions to recuse the Orange County District Attorney's Office from prosecuting the case. (AOB 77-120.) Trinh's contention is meritless. There was neither a constitutional violation nor error under state law. Moreover, Trinh has failed to demonstrate that the court's rulings deprived him of a fair trial.

#### A. Procedural And Factual Background

On October 23, 2001, defense counsel filed a motion to recuse the entire Orange County District Attorney's Office. Counsel cited four

grounds for the motion: (1) Orange County District Attorney Tony Rackauckas acted capriciously in seeking the death penalty against Trinh; (2) the decision to seek the death penalty was standardless; (3) Trinh was singled out in violation of his constitutional right to equal protection; and (4) imposition of the death penalty would constitute cruel and unusual punishment. (1 CT 110-213.)

The basis for the motion was a 1999 change in policy by the District Attorney's Office with regard to crimes classified as "rampage killings," of which Trinh's was the first. The defense alleged that immediately after Trinh was arraigned, Rackauckas publicly announced that the death penalty would be sought in his case. In all other special circumstances cases in the past 15 years, the district attorney's office had followed a procedure whereby the trial deputy, after receiving input from several sources, recommended either death or life without parole. After the recommendation, there would be a meeting between the trial deputy and at least three other senior members of the homicide unit. If the committee decided that death was the appropriate sentence, it would schedule a hearing, commonly referred to as a "Livesay" hearing. During that hearing, defense counsel could present factors in mitigation. Factors in aggravation would also be discussed. (1 CT 112.) At the conclusion of the hearing, the committee recommended death or life without the possibility of parole. (1 CT 112-113.) The committee then forwarded the decision to the Senior Assistant District Attorney or District Attorney for review. Finally, once a decision had been made, a letter was sent to defense counsel. (1 CT 114.) In the motion to recuse, defense counsel alleged that Rackauckas changed the policy because, a few days before the shootings, his father had been a patient at West Anaheim Hospital. Thus, claimed the defense, Rackauckas based his decision to seek the death penalty against Trinh on personal bias rather than on legitimate law enforcement interests. (1 CT 114.)

Attached to the recusal motion were several exhibits. A newspaper article in the Los Angeles Times, Orange County Edition on September 17, 1999 reported that in response to a spate of mass killings around the country, Rackauckas had announced that suspects prosecuted for public rampage shootings would automatically face the death penalty. According to the article, Trinh's case was the first to be affected by the new policy. The article further noted that the policy was announced a day after a shooting in Forth Worth, Texas, where a man fired shots in a Baptist church, killing seven people and wounding seven others before killing himself. (1 CT 134-135.) There was a similar article in the Orange County Register that the same day. (1 CT 136.) Both articles were attached as Exhibit A to the motion. Exhibit B was a memo dated September 1, 1999, from Charles Middleton, Senior Assistant District Attorney, updating and delineating the special circumstances review process. The memo set forth a three-step procedure: (A) recommendation by the trial deputy; (B) review by the special circumstances committee; and (C) review by the senior assistant district attorney. The memo included several forms which were to be filled out at each step of the review process. (1 CT 138-157.) Exhibit C was a declaration by Mike Jacobs, a former deputy district attorney with the Orange County District Attorney's Office. Jacobs stated that he was head of the homicide unit from January 1999 to mid October 2000. Special circumstances review hearings began in 1981. The procedures were modified in 1985. The hearings gave defense counsel the opportunity to present mitigating evidence to convince the office not to seek the death penalty. Sometimes, the evidence was persuasive and caused the office to change its mind. Jacobs further stated that he was present on two occasions when Rackauckas discussed Trinh's case. At a meeting of senior homicide prosecutors held on September 16, 1999, Rackauckas announced that there would be an immediate change in the special circumstance policy, whereby

there would be no review hearings in cases involving public rampage killings. In those cases, death would be automatically sought. The new policy would be announced following Trinh's arraignment. Rackauckas also stated that this case was particularly upsetting and aggravating to him because his father had been hospitalized at West Anaheim Hospital, and he had visited his father at the Hospital. Rackauckas also expressed concern about the media reaction to his father being a patient there. According to the declaration, the second meeting was the first week of August 2000. An argument ensued at the meeting because Jacobs and another senior deputy disagreed with the new policy. When Jacobs presented Rackauckas with a legal memorandum addressing equal protection and due process issues, and said any conviction might not survive federal review, Rackauckas responded, "So you mean that one of our cases could be reversed in 15 to 20 years? Why should we care?" Rackauckas also appeared unconcerned about possible discovery or recusal motions. A few weeks after the meeting, Jacobs was transferred to another unit without explanation. As of the transfer the new public rampage killing policy had not been reduced to writing. On June 15, 2001, Jacobs was fired. (1 CT 159-165.) Exhibit D was an undated article from the Orange County Register reporting that Jacobs had announced plans for a special circumstance review hearing for Trinh, even though Rackauckas had already indicated he planned to seek the death penalty. According to the article, the recommendation at that hearing would be death. (1 CT 167.) Exhibit E was a July 26, 2000 letter to Trinh's counsel advising him that the district attorney's office would pursue the death penalty against Trinh. (1 CT 169.) Exhibit F was a letter dated August 24, 2000 from defense counsel demanding a special circumstance review hearing. (1 CT 171.) Exhibit F was information

showing Rackauckas, Sr. was admitted to the Hospital on September 10, 1999 and discharged on September 12, 1999.[5] (1 CT 173.) Exhibit H was various internal memos regarding Trinh's case. In one, dated August 25, 2000, Rackauckas stated that because Trinh's case qualified as a public rampage killing, there would be no special circumstance review hearing. (1 CT 175.) In the second, Jacobs expressed his opinion that the hospitalization of Rackauckas, Sr. at West Anaheim Hospital should be disclosed to the defense. (1 CT 177.) In the third, an investigator with the district attorney's office stated that at first, someone at the Hospital told him that no one with the last name Rackauckas had ever been a patient there. However, he later received documents indicating that Rackauckas, Sr. was at the facility from September 10 through September 12, 1999. The discrepancy arose because for unknown reasons, the name had not come up during an initial computer search of hospital patient records. (1 CT 177-178.) In the fourth and final memorandum, deputy district attorney Chris Kralick asked Claudia Silbar, another deputy, to provide the information to defense counsel as soon as possible. (1 CT 179.) Exhibit I was another copy of the procedures governing the special circumstances review committee. (1 CT 180-209.) Exhibit J was a declaration from James Enright, a retired Orange County deputy district attorney who served as Chief Deputy from 1966 through 1990. Enright stated that he started the special circumstance review procedure in the early 1980's for economic reasons and to ensure uniformity in sentencing. At first, the process was informal. It was formalized sometime after 1981. At that same time, the procedure was changed to allow the defense to present mitigating evidence to the committee. (1 CT 210-212.)

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[5] Trinh's crimes at West Anaheim Hospital occurred two days later on September 14, 1999. (E.g., 5 RT 1196-1198.)

On December 5, 2001, the Attorney General filed an opinion ("Opinion") recommending against recusal. The Opinion concluded that the district attorney appropriately exercised his charging discretion when he decided to seek the death penalty in this case. The policy decision to seek the death penalty in public rampage killings because of the circumstances of those cases was well within that discretion. Further, the failure to afford Trinh a special circumstances review hearing, at which he could have input into the prosecutor's charging decision, neither violated Trinh's rights nor demonstrated a conflict of interest. Additionally, Rackauckas Sr.'s stay at the Hospital days before the murders without more did not show a conflict of interest such that Trinh would be unlikely to receive a fair trial. (1 CT 221-242.)

The prosecution submitted written opposition to Trinh's motion. The prosecution stated that it disagreed with many of Trinh's factual assertions. However, even if the facts were as Trinh stated them to be, there was no disabling conflict of interest. Thus, the prosecution stated, an evidentiary hearing was not warranted. The prosecutor noted that none of the declarations established that Rackauckas enacted the new policy because of his father's stay at the Hospital. At most, they showed that the shooting was upsetting to him for this reason. Thus, there was a lack of a causal connection between the two events. Moreover, contrary to Trinh's assertion, there was no evidence the new policy was hidden from the defense. Further, although Jacobs could disagree with the new policy, Rackauckas had the right to establish it. And, there was no legal support for Trinh's assertion that he was entitled to a special circumstances review hearing. Rather, the prosecution had a right to conclude that in certain types of cases (i.e., public rampage shootings), it would seek death without such a hearing. (1 CT 242-252.) Attached to the opposition was a declaration from District Attorney Rackauckas. Rackauckas stated that

since he took office, he had been closely involved in the special circumstance review process. The final decision on whether to seek the death penalty is his. On September 14, 1999, he learned that Trinh walked into West Anaheim Hospital and shot several people, killing three. Before this crime, there had been several similar highly publicized cases, where someone had murdered innocent victims in a public place in order to make a statement. Because of his duty as District Attorney to take a stand against this type of killing, he enacted a policy to seek the death penalty in such cases. He publicized the policy on September 16, 1999, the date of Trinh's initial court appearance. Rackauckas further stated that his decision was unaffected by his father's stay at the facility. His father was discharged before the shootings and neither of them knew any of the victims. The crime was no more upsetting to him than any similar case. (1 CT 251.) He did not urge his staff to withhold information from the defense nor did he withhold it from the media. (1 CT 251-252.) Rackauckas added that when Jacobs told him his policy would result in challenges on appeal, he responded that this was common in capital cases. He never said he did not care if a case was reversed in the future. Finally, he did not believe that lack of a special circumstance review hearing changed the office's decision to seek the death penalty in Trinh's case. The circumstances were extremely aggravated, all members of the office concurred with his decision, and there were no facts even remotely suggesting that the appropriate penalty was life without parole. (1 CT 252.)

Trinh's counsel submitted a reply basically repeating what was in the moving papers. The defense also asked for an evidentiary hearing to resolve disputed issues of fact. (1 CT 254-277.) The defense included some more exhibits. As relevant here, Exhibit A was a memorandum to Deputy District Attorney Brian Gurwitz from Deputy District Attorney Jim Mulgrew dated December 20, 2001. The memo detailed a conversation

which Mulgrew had with Jacobs concerning Trinh's case. During the conversation, Jacobs in turn related a discussion he had with Rackauckas. In the discussion, Rackauckas allegedly told Jacobs that he hoped the media did not find out about his father's stay at the Hospital. The memo also stated that Rackauckas never said the case was particularly upsetting to him, and there was no effort to prevent the defense from learning about his father's hospitalization. (1 CT 271.)

At a hearing held on January 11, 2002, both parties submitted on the briefing. (1 RT 66.) The court denied the motion. The court stated that Trinh had not shown that an actual or apparent conflict existed rendering it likely he would be treated unfairly. Further, there was neither a constitutional violation nor arbitrary and invidious discrimination. (1 RT 66-68.)

On February 5, 2002, Trinh filed a petition for writ of mandate in the Court of Appeal, Fourth District, Division Three, case number G030241. Trinh claimed that the trial court abused its discretion in denying the motion without an evidentiary hearing and asked for an order remanding the matter for that purpose. (1 Supp. CT 177-300; 2 Supp. CT 301-561.) On March 1, 2002, the district attorney filed an informal response. (2 Supp. CT 565-568.) On March 1, 2002, the Attorney General's Office filed an informal response. (1 CT 284-294.) On April 18, 2002, the court of appeal denied the petition. (2 Supp. CT 581-582.)

On October 21, 2002, after the first penalty trial, Trinh's counsel filed a motion asking the court to reconsider the recusal motion. (4 CT 841-1114.) Attached as exhibits to the motion was all the paperwork submitted in connection with the original recusal motion. The defense also submitted a lengthy report ("Report") from the Orange County Grand Jury sitting from July 2001 through June 2002 detailing an investigation it had conducted of the Orange County District Attorney's Office. The Report covered the following areas: (1) organizational restructure; (2) district attorney

investigators; (3) use of county resources; (4) personnel practices; (5) the "Tony Rackauckas Foundation;" (6) Rackauckas' dealings with a man named Patrick Di Carlo in April 2000; (7) the Arnel Management consumer fraud case; and (8) disposition of certain criminal cases. (4 CT 1014-1113.) The Grand Jury returned a total of 92 findings involving the Orange County District Attorney's Office. Although too numerous to list here, they can be broken down by general categories. First, the Grand Jury concluded that the office used employment decisions to reward family and friends of Tony Rackauckas, as well as those who had contributed to his campaign. Employment decisions were also used to penalize persons who had contributed to candidates opposing Rackauckas or who had run against him themselves. These employment decisions affected both lawyers and investigators in the office. Second, the Grand Jury concluded that in several instances, county computers were used for personal business, including business relating to Rackauckas election events. The policy against unauthorized computer use was not uniformly enforced. Third, county investigators' time was spent on a few occasions on personal matters involving family members of the Chief Investigator and of Rackauckas. Fourth, the District Attorneys' Special Fund had been misused. Specifically, monies had been spent on meals and alcohol in connection with events that did not concern pending criminal or civil investigations. Fifth, Rackauckas' wife Kay, a deputy district attorney, had received preferential treatment, had an unwarranted level of access to management, and was interfering with decisions made by line deputies. Sixth, a position of "media relations director" was established with no guidelines regarding its function or limitations. No formal interviews were conducted for the position, instead it was awarded to a political ally of Rackauckas. Seventh, someone inappropriately leaked confidential documents to the press. Other unknown individuals were searching employees' offices and computers to obtain

sensitive material for dissemination. Eighth, the Tony Rackauckas Foundation, an outreach program, did not follow proper procedures in its organization or governance. It used district attorney resources for matters without documenting them. Moreover, it had given out wallet law enforcement type badges to its members, which could result in criminal charges if the badges were used for improper purposes. Ninth, the district attorney should have recused himself from a major crimes prosecution against Patrick DiCarlo, in that DiCarlo was Rackauckas' close personal friend and a contributor to his campaign. Rackauckas' handling of the case caused problems between himself and the office's Organized Crime Unit, problems which continued even after the matter was transferred to another prosecuting agency. Tenth, Rackauckas negotiated a settlement in a complex case involving Arnel Management Company without input from others. Rackauckas should not have participated in the negotiations at all because Arnel was a contributor to his election campaign. Eleventh, and finally, settlements unfair to the People were reached in a domestic violence case, a robbery case, and a misdemeanor hit and run case, because someone involved in either the crimes or the plea bargaining process was a Rackauckas campaign supporter, fundraiser, or family friend. (4 CT 1096-1105.) The Grand Jury made 64 recommendations to alleviate these problems and to avoid having similar situations occur in the future. (4 CT 1106-1113.)

At a hearing held on October 30, 2002, defense counsel submitted on the paperwork. Counsel added that there was "some language" in the Report which she wanted the court to consider. (14 RT 3139.) The prosecutor responded that no evidentiary hearing was necessary because, even if the facts alleged by the defense were true, there was an insufficient nexus between those facts and the inference that Trinh would not receive a fair trial. (14 RT 3140.) This was true independent of the declaration submitted by Rackauckas in opposition to the original motion. (14 RT

3141.) The Report, the prosecutor continued, should not be considered. Even if the court considered it, the prosecutor added, it did not change anything. (14 RT 3140-3141.) Specifically, nothing in the Report suggested that Rackauckas sought the death penalty in Trinh's case because his father had been treated at West Anaheim Hospital. (14 RT 3141.) Finally, the prosecutor stated, if the court ordered an evidentiary hearing, the prosecutor handling Trinh's case would testify that he made his own discretionary decision to recommend the death penalty based on the aggravated nature of the crimes. (14 RT 3141-3142.)

The court stated that it was not sure it could reconsider a motion which had already been ruled on. Additionally, continued the court, the Report did not add anything not known before its release. (14 RT 3142.) Specifically, the information contained therein was in the local papers. More importantly, Trinh already had a fair trial, and there was nothing to suggest that the penalty retrial would not be fair. (14 RT 3143.) For all of those reasons, the court again denied the motion to recuse. (14 RT 3144.)

Before the third penalty trial, the defense orally renewed its motion. Defense counsel claimed that the decision to have a third penalty phase trial showed bias against Trinh. (21 RT 4780.) The court noted that this was not the first murder case in its experience where there had been several retrials. The prosecutor added that he had never spoken to Rackauckas or his representatives about trying the case a third time; the decision was his (the trial prosecutor's) alone. The court stated it accepted the prosecutor's representation, moreover, the defense still had shown no basis for recusal. The court thus denied the renewed motion. (21 RT 4781.)

### B. There Was No State Law Error

Section 1424, subdivision (a)(1) permits a defendant to move to disqualify a district attorney from performing any authorized duty. Under

this section, a motion to disqualify must be supported by affidavits showing a conflict of interest requiring disqualification, and legal authorities in support of the request. The district attorney, attorney general, or both may file papers in opposition. The trial judge must then review the paperwork and determine whether an evidentiary hearing is necessary. This section further provides that "[t]he motion may not be granted unless the evidence shows that a conflict of interest exists that would render it unlikely that the defendant would receive a fair trial."

Before the enactment of this section, this Court held that the district attorney could be recused upon the determination that he "suffers from a conflict of interest which might prejudice him against the accused and thereby affect, or appear to affect, his ability to impartially perform the discretionary functions of his office." (*People v. Superior Court* [*Greer*] (1977) 19 Cal.3d 255, 269.) In 1980, section 1424 was enacted in response to suggestions in *Greer* that the recusal of the district attorney could be premised upon the mere appearance of impropriety, a conflict of interest, or of partiality. (*People v. Eubanks* (1996) 14 Cal.4th 580, 492, see also *People v. Merritt* (1993) 19 Cal.App.4th 1573, 1578; *People v. Lopez* (1984) 155 Cal.App.3d 813, 824.) As this Court has explained, "section 1424 unlike the *Greer* standard, does not allow disqualification merely because the district attorney's further participation in the prosecution would be unseemly, would appear improper, or would tend to reduce public confidence in the impartiality and integrity of the criminal justice system." (*People v. Eubanks, supra,* 14 Cal.4th at p. 592.)

By its own clear terms, section 1424 requires that before a recusal motion is granted, the moving party must show both that there exists a conflict of interest and that the conflict is "so grave" as to render a fair trial "unlikely." (*Haraguchi v. Superior Court* (2008) 43 Cal.4th 706, 711; *People v. Conner* (1983) 34 Cal.3d 141, 147-148; see also *People v. Breaux*

(1991) 1 Cal.4th 281, 294.) This Court has defined a conflict of interest as follows:

> [A] "conflict" within the meaning of section 1424 exists whenever the circumstances of the case evidence a reasonable possibility that the [district attorney's] office may not exercise its discretionary function in an evenhanded manner.

(*People v. Conner, supra*, 34 Cal.3d at p. 148.)

If and when a court determines that a conflict of interest exists, the court must then go on to determine whether "this conflict [is] so grave as to render it unlikely that defendant will receive fair treatment during all portions of the criminal proceedings." (*People v. Conner, supra*, 34 Cal.3d at p. 148.) This Court clarified the requirement as follows:

> Whether the prosecutor's conflict is characterized as actual or only apparent, the potential for prejudice to the defendant -- the likelihood that the defendant will not receive a fair trial -- must be real, not merely apparent, and must rise to the level of a likelihood of unfairness.

(*People v. Eubanks, supra*, 14 Cal.4th at p. 592.) The showing that a conflict of such gravity exists as to make a fair trial unlikely "must be especially persuasive when [as here] the defendant seeks to recuse an entire prosecutorial office and not simply a particular prosecutor." (*People v. Hamilton* (1988) 46 Cal.3d 123, 139, disapproved on other grounds in *People v. Eubanks, supra*, 14 Cal.4th at p. 592; see also *People v. Gamache* (2010) 48 Cal.4th 347, 361; *People v. Snow* (2003) 30 Cal.4th 43, 239.)

The trial court's ruling on a motion to recuse the district attorney is reviewed under a two-part standard: Whether there is substantial evidence to support the lower court's factual findings; and, based on the factual findings, whether the trial court abused its discretion in denying the recusal motion. (*People v. Gamache, supra*, 48 Cal.4th at pp. 361-362; *People v. Vasquez* (2006) 39 Cal.4th 47, 56.)

Here, the trial court did not abuse its discretion in denying the motion. Trinh failed to carry his burden of showing it was unlikely he would treated fairly because the Orange County District Attorney's Office had a conflict of interest. Trinh does not identify the conflict of interest he alleged existed for the Orange County District Attorney. Instead, he asserts that "the evidence demonstrated a conflict of interest." (AOB 92.) In an exercise of circular reasoning, he suggests that because the District Attorney decided to seek the death penalty, without a review by the special circumstances committee or input from the defense, the District Attorney did not exercise his discretion in a fair manner. Therefore, Trinh claims, the District Attorney had a conflict of interest. (AOB 93.) In fact, the District Attorney did exercise his discretion. He concluded that under the circumstances of this case - arbitrary, indiscriminate, rampage killings of three people in a hospital - it was appropriate to dispense with the previously used review procedures and seek the death penalty. Such a decision in no way shows a conflict of interest.

Trinh argues that the possibility of bias was established by the fact that Rackauckas announced the new policy because the shootings occurred at a hospital where his father had been a patient. (AOB 92.) Trinh is mistaken. The facts set forth in Trinh's motion simply showed that there had been a review process in place before the death penalty was charged. As part of this review process, defense counsel could present evidence in mitigation. Ultimately the final decision was up to Rackauckas. (1 CT 138-157.) In 1999, however, there were a series of mass shootings around the country. As a result, Rackauckas decided that such cases would no longer undergo the review process. (1 CT 134-136.) Trinh's case happened to be the first under the new policy. (1 CT 134-135.) As a separate matter, Rackauckas' father was a patient at the Hospital from September 10 through 12. (1 CT 173.) However, contrary to Trinh's

assertion, there was no evidence of any connection between Rackauckas Sr.'s hospitalization and new policy. At most, Trinh showed that Rackauckas was "angry" about the shootings, a few other deputies disagreed with the policy change, and one of them was terminated for unknown reasons. (1 CT 159-165.) Contrary to Trinh's speculative assertion, the evidence showed that the stated policy change was motivated by the highly public rash of these types of multiple murders which had occurred before the current offense. (1 CT 134-136.) Under the circumstances, where the defendant arbitrarily murders three people, attempts to kill a fourth, and reasonably could be expected to have killed many others had he not been stopped, there is no basis for this Court to conclude that the court below abused its discretion in finding that Trinh had not met his burden of showing that the District Attorney's decision to seek the death penalty was based on anything other than the circumstances of the case and considerations necessary for the effective and efficient administration of law enforcement. (*People v. Keenan* (1988) 46 Cal.3d 478, 506.) The trial court's finding that the fact that Rackauckas, Sr., was at the location of the murders days before they occurred, like the fact that the District Attorney or any member of his staff might be in any public location in the community where a crime is subsequently committed, did not give rise to the possibility of bias, is fully supported by the record.

Contrary to Trinh's assertion (AOB 100-105), the Grand Jury Report did not add facts showing a possibility of bias where no such possibility existed before. The Report addressed eight separate areas, resulting in numerous findings and recommendations. In general, the Grand Jury concluded that the District Attorney's Office based employment decisions on whether the (prospective) employee supported, or contributed to, Rackauckas' campaign. There was unauthorized used of county computers. Investigators were used on some occasions for personal matters. Meal and

alcohol funds were improperly spent for non-business related events. Rackauckas' wife, a deputy district attorney, had received preferential treatment, and had too much access and influence within his office. Specific guidelines needed to be established for the "media relations director" position. Confidential documents were leaked to the press. Office computers were searched without authorization. The "Tony Rackauckas Foundation" was mismanaged. Rackauckas should have recused himself from cases involving Patrick DiCarlo and Arnel Management. Finally, three unspecified criminal matters (none of them murder cases) were given preferential treatment because someone connected to the case was a Rackauckas friend or campaign supporter. (4 CT 1096-1195.) The Report made no mention of the special circumstance committee, the change in policy, any death penalty matters, or anything related to Trinh's case. Trinh's suggestion that the difficulties noted by the Grand Jury might have somehow affected his case (AOB 105) is pure speculation. "Such sheer speculation does not constitute sufficient evidence of potential bias to recuse an entire prosecutorial office from a case." (*People v. Hernandez* (1991) 235 Cal.App.3d 674, 680.)

Even if Trinh had demonstrated a possible conflict, he still failed to demonstrate that it was unlikely he would receive a fair trial. One set of Trinh's exhibits pertained to the existence of the special circumstances review procedure and its suspension in cases involving "rampage killings." (1 CT 112-165, 169-171, 175, 180-212.) The other set of exhibits pertained to the fact that Rackauckas, Sr. was a patient at the Hospital. (1 CT 173, 177-179.) Notably absent from these documents was information suggesting that, had a special circumstance review committee been convened, its recommendation would have been life without parole. In fact, Mike Jacobs, the deputy who was later terminated, told the Orange County Register that at any review committee hearing, he would recommend the

death penalty in Trinh's case. (1 CT 167.) When the defense renewed its motion before the third penalty trial, Bruce Moore, the prosecuting attorney, informed the court that he, alone, decided to try the case again, without any input from Rackauckas. (21 RT 4781.) Trinh has not shown that a case like his, involving three indiscriminate shootings in a hospital, warranted the District Attorney declining to seek the death penalty. Nor has Trinh shown that if another prosecutorial agency had handled his case, that agency would have sought a sentence of life without the possibility of parole.

In short, it is clear from the evidence that Rackauckas made his decision to seek the death penalty in this case based on the horrific nature of the crimes and not on any conflict due to his father's stay at West Anaheim Hospital. Because there was no evidence that personal animosity, bias, or personal emotions affected the office as a whole, this case is distinguishable from those where recusal of an entire District Attorney's Office was found appropriate. (See *People v. Vasquez, supra*, 39 Cal.4th at pp. 55-58 [district attorney declined to agree to bench trial because defendant's parents were employed by his office]; *People v. Eubanks, supra*, 14 Cal.4th at pp. 599-600 [fact district attorney requested substantial financial assistance from victim created significant risk that he was biased and under the influence or control of the victim]; *People v. Conner, supra,* 34 Cal.3d at pp. 148-149 [defendant tried to escape by shooting and stabbing deputy sheriff and then shot at deputy district attorney who witnessed crime; deputy district attorney reported incident to his superiors, discussed it with majority of prosecutors in his office, and gave interviews to media]; *People v. Choi* (2000) 80 Cal.App.4th 476, 481-482 [district attorney was close friend of murder victim and had made public statements regarding the murder of his friend and a connected case]; *Lewis v. Superior Court* (1997) 53 Cal.App.4th 1277, 180-1287 [every employee of district attorney's office necessarily a victim of and affected by the county auditor/controller's misconduct resulting in the

county's bankruptcy]; *People v. Lepe* (1985) 164 Cal.App.3d 685, 686-689 [district attorney had previously represented defendant in same matter and necessarily had privileged information about case].) Accordingly, the trial court properly denied Trinh's recusal motions.

### C. There Was No Federal Constitutional Error

Trinh further claims that denial of his various recusal motions deprived him of his federal constitutional rights to due process, equal protection, and to be free from cruel and unusual punishment. (AOB 107-116.) Trinh is mistaken.

In *People v. Vasquez, supra*, 39 Cal.4th 47, this Court held that violations of section 1424 do not usually implicate a defendant's due process rights. (*Id.* at pp. 59-65.) Such a violation will be found, this Court stated, only when the "conflict is so severe as to deprive [defendant] of fundamental fairness in a manner 'shocking to the universal sense of justice.' [Citation.]" (*Id.* at p. 65.) As examples of situations which might arise to the level of a due process violation, this Court discussed cases involving private prosecutors or those where the prosecutor has a direct pecuniary interest in the outcome of the litigation. (*Id.* at pp. 60-62.) This Court expressly distinguished cases, such as the present one, "where the prosecutor is alleged merely to have a personal interest that might add to his or her zeal." (*Id.* at p. 62.) Applying these principles to the facts in *Vasquez*, this Court held there was a conflict of interest requiring recusal of an entire prosecutor's office when the victim's parents worked for that office, resulting in its refusal of defense counsel's offer to waive a jury trial. (*Id.* at pp. 55-58.) This Court declined, however, to find a due process violation. This Court noted that "[n]either [the trial prosecutor], nor her supervisors, had a direct, substantial interest in the outcome or conduct of the case separate from their proper interest in seeing justice done." (*Id.* at pp. 64-65.)

The same is true here. The Orange County District Attorney had no personal financial stake in the outcome of this case. This was not a prosecution by a private party. The evidence shows that the decision to seek the death penalty was motivated solely by the heinousness of the crimes and the prevalence of such public rampage killings at the time they were committed. In short, Trinh has not shown a violation of "fundamental fairness." (*People v. Vasquez, supra*, 39 Cal.4th at p. 64.) Trinh's due process claim must therefore be rejected.

Equally without merit is Trinh's assertion that the prosecutor's conduct violated Equal Protection and the Eighth Amendment. (AOB 111-120.) Trinh has not identified any invidious discrimination in the charging decision in this case. Absent such discrimination, the decision is not subject to judicial scrutiny.

A defendant is not denied due process because of the district attorney's discretion to decide whether to seek the death penalty in any given case. (*People v. Redd* (2010) 48 Cal.4th 691, 758; *People v. Davis* (2009) 46 Cal.4th 539, 628.) Furthermore, prosecutorial discretion to select from eligible cases those in which the death penalty will be sought does not, in and of itself, violate equal protection or constitute cruel and unusual punishment. (*People v. Bennett* (2009) 45 Cal.4th 577, 629; *People v. Carter* (2005) 36 Cal.4th 1215, 1280.)

"[A]bsent a showing of arbitrary and invidious discrimination, prosecutors have wide latitude when selecting those eligible cases in which the death penalty will actually be sought. [Citations.]" (*People v. Arias* (1996) 13 Cal.4th 92, 132.) The defendant establishes deliberate, invidious discrimination only when he demonstrates that the prosecution's selective enforcement decision "was deliberately based upon an unjustifiable standard such as race, religion or other arbitrary classification." (*Murgia v. Municipal Court* (1975) 15 Cal.3d 286, 302; accord, e.g., *McCleskey v.*

*Kemp* (1987) 481 U.S. 279, 292-293 [107 S.Ct. 1756, 95 L.Ed.2d 262]; *Oyler v. Boles* (1962) 368 U.S. 448, 455-456 [82 S.Ct. 501, 7 L.Ed.2d 446].)

This Court's decision in *People v. Keenan, supra*, 46 Cal.3d 478, disposes of Trinh's claim. There, defense counsel sought extensive discovery regarding the capital charging policies of the San Francisco District Attorney's Office. The defendant stated that he wanted to challenge the constitutionality of the special circumstance allegations against him on two grounds: (1) the district attorney had no standards for deciding whether to charge the death penalty in an eligible case, and (2) the prosecution was arbitrarily alleging special circumstances in his case. (*Id.* at p. 504.) As a factual basis for his request, the defendant noted that special circumstances allegations were not filed against him until the third complaint; capital charges were not filed against his co-defendant; in other cases involving the same crimes, the district attorney had not alleged special circumstances; and as far as counsel was aware, the district attorney had no formal or informal standards for the exercise of prosecutorial discretion in charging death penalty cases. (*Id.* at pp. 504-505.) The trial court denied discovery, and its ruling was upheld by a court of appeal. This Court agreed with the lower courts. This Court held that unless there was intentional and invidious discrimination, "the requisite standards are those set forth in a constitutional death penalty statute." (*Id.* at p. 506.) This Court explained that "[b]y acceptably narrowing the circumstances under which capital punishment may be sought and imposed, such a law satisfies the constitutional prohibition against arbitrary and capricious exaction of the death penalty." (*Ibid.*; accord, e.g., *People v. Lucas* (1995) 12 Cal.4th 415, 478.)

Here, Trinh has never demonstrated arbitrary and invidious discrimination. Instead, the crux of his constitutional claims is that in previous cases, the Orange County District Attorney afforded capital

defendants a special circumstance review committee hearing. However, in 1999, the district attorney developed a new policy whereby defendants committing certain public rampage killings would not be afforded such a hearing. Trinh complains that it is unfair he did not receive the hearing according to the previous policy. (AOB 112, 116.) Trinh also asserts that the new policy is unconstitutional because there is no reason for the district attorney to single out "public rampage killings" for special treatment. (AOB 112-113.) However, as *Keenan* and its progeny make clear, the new policy is not subject to judicial scrutiny as it was not based on invidious criteria. Moreover, while the district attorney could offer review hearings as a courtesy to the defense, defendants have no right, constitutional or otherwise, to such hearings. In short, because there is no justifiable claim of invidious discrimination in this case, Trinh's equal protection and Eight Amendment claims must fail.[6]

### D. Any Error In Denying The Recusal Motions Was Harmless

Trinh makes no effort to assess prejudice from the denial of his various recusal motions. Instead, he argues that the purported error was structural requiring reversal per se. (AOB 116-120.) In *People v. Vasquez, supra*, 39 Cal.4th 47, this Court rejected an identical contention. This Court held that absent a due process violation, state law error from failure to recuse a district attorney or the district attorney's office is evaluated under the standard of *People v. Watson* (1956) 46 Cal.2d 818. (*People v.*

[6] Trinh's attempt to compare his case to another Orange County matter, *People v. Abrams*, No. 99HF0436 (AOB 112-113 & fn. 52) is unavailing. As this Court explained in *Keenan*, "To require prosecutors to justify each capital-charging decision by reference to others would 'place totally unrealistic conditions' on the use of capital punishment. [Citations.]" (*People v. Keenan, supra*, 46 Cal.3d at p. 506.)

*Vasquez, supra*, 39 Cal.4th at pp. 66, 70-71.) Thus, the reviewing court determines whether, "in light of the entire record, 'it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.' [Citations.]" (*Ibid.*)

Trinh's failure to explain the prejudice to him is understandable, as there was none. There is no reasonable probability that the Orange County District Attorney's Office would not have sought the death penalty in a case involving multiple murders where the defendant armed himself and went into a hospital hunting for nurses to kill because he did not like the treatment his mother received. The most Trinh can say is that he did not receive a special circumstance review hearing - a hearing he was not entitled to in the first place. (AOB 120.) However, even assuming for argument's sake this decision was made because of a conflict, Trinh has not shown that a non-conflicted prosecutor would have decided his case merited only a sentence of life without the possibility of parole. In fact, all of the evidence is to the contrary. Mike Jacobs, who wanted to convene a hearing, would have recommended the death penalty. (1 CT 167.) After listening to Trinh's mitigating evidence twice - the same evidence which would have gone to the review committee if a hearing had been held - trial prosecutor Bruce Moore elected to pursue death in the case without consulting Rackauckas. (21 RT 4781.) Accordingly, Trinh has failed to demonstrate any prejudice whatsoever from the denial of his recusal motions.

## II. TRINH'S BATSON-WHEELER MOTION WAS PROPERLY DENIED

Trinh contends that at the third penalty trial, the trial court erred in denying his *Batson-Wheeler*[7] motion as to prospective Vietnamese-

[7] *Batson v. Kentucky* (1986) 476 U.S. 79 [106 S.Ct 1712, 90 L.Ed.2d 69]; *People v. Wheeler* (1978) 22 Cal.3d 258.

American juror N.V. Trinh claims that the prosecutor's reasons for excusing the prospective juror were not supported by substantial evidence and that comparative juror analysis compels the conclusion that the court erred in denying the motion. (AOB 121-142.) Trinh's contention lacks merit. The trial court properly found that the prosecutor had ethnicity-neutral reasons for the challenge. Trinh's comparisons are incomplete, misleading, and do not support a different conclusion.

After the prosecutor exercised his third peremptory challenge against prospective juror N.V., defense counsel asked for a sidebar. Outside the presence of the prospective jurors, counsel made a *Batson-Wheeler* motion, claiming N.V. had said nothing which would warrant the exercise of a peremptory challenge to excuse him. The court asked the prosecutor for a response. (21 RT 5017.) The prosecutor told the court he would prefer that the court find a prima facie case before offering any explanation. (21 RT 5017-5018.) The court then found a prima facie case had been made based on that the fact prospective juror N.V. was Vietnamese, "voir dired very well," and his answers were similar to those offered by other prospective jurors. The prosecutor explained he was focused on the fact that N.V. was 45 years old, had never been married, had no children, and was a postal worker. In combination, these factors made him an undesirable juror for the prosecution. In addition, in his questionnaire, he said he had no opinion about the death penalty. During voir dire, the prosecutor attempted to obtain an opinion from N.V. regarding his views on the death penalty, but was unable to do so. N.V. was also non-responsive to some of the prosecutor's questions. Other times, he was "too easy to please," answering "yeah" to questions the prosecutor posed of him without thinking about what was being asked. Defense counsel replied, "Well, I just think that is insufficient, Your Honor, I will submit on that." (21 RT 5018.)

The court stated that, like another prospective juror the prosecutor excused, N.V. appeared very anxious to sit on this case. Additionally, the court observed that it was odd that he read about the case in the paper but did not give it any thought despite being Vietnamese, about the same age as Trinh, and single like Trinh. (21 RT 5018.) The court added that it was concerned about the prosecutor excusing prospective jurors who were postal workers because they were paid for jury duty. The prosecutor interjected that he relied on prospective jurors' occupations "quite a bit" in deciding on peremptory challenges, which was why he asked N.V. whether he was out in the field or in the office. "Because," continued the prosecutor, "I was very concerned about that." (21 RT 5019.)

The court asked the prosecutor what he meant by "nonresponsive." The prosecutor told the court that N.V. frequently answered the questions simply with, "yes sir." The prosecutor continued that because of the lack of a meaningful response, he knew very little about N.V. The court observed that the prosecutor questioned him quite a bit, but he had no opinion about the death penalty. The court stated that the prosecutor showed ethnicity-neutral reasons for the challenge, and asked defense counsel if he had anything to add. Defense counsel responded, "No, Your Honor, I submit it." (21 RT 5019.) The court found that N.V. was overly-eager to serve and that it was "very, very unusual" that he had no opinions about the case. The court added, "But if I were the prosecutor, I would be suspicious of a person who says no interest in the case after reading about it." Accordingly, the court denied the *Batson-Wheeler* motion. (21 RT 5020.)

Under the principles articulated in *Batson* and *Wheeler*, a party may not use peremptory challenges to remove prospective jurors on the basis of group bias. Group bias is a presumption that jurors are biased merely because they are members of an identifiable group distinguished by racial, religious, ethnic, or similar grounds. (*People v. Fuentes* (1991) 54 Cal.3d

707, 713; *People v. Wheeler, supra*, 22 Cal.3d at p. 276; see *Powers v. Ohio* (1991) 499 U.S. 400 [111 S.Ct 1364, 113 L.Ed.2d 411].) If a party believes that an opponent is improperly using peremptory challenges for a discriminatory purpose, that party must make a timely objection and must make a prima facie showing that the jurors are being excluded on the basis of group bias. (*People v. Fuentes, supra*, 54 Cal.3d at p. 714.)

To establish a prima facie case, the moving party should first make as complete a record as possible. Second, the moving party must establish that the persons excluded are members of a cognizable group. Third, the moving party must raise an inference that the challenged jurors were excluded because of their group association. (*Johnson v. California* (2005) 545 U.S. 162, 168 [125 S.Ct. 2410, 162 L.Ed.2d 129].) Once the moving party has established a prima facie case, the burden shifts to the opposing party to come forward with a group-neutral explanation for the exercise of the peremptory challenges. The trial court must then determine whether the moving party has carried its burden of proving purposeful discrimination. (*Johnson v. California, supra*, 545 U.S. at p. 168; *Hernandez v. New York* (1991) 500 U.S. 352, 358-359 [111 S.Ct. 1859, 114 L.Ed.2d 3095].)

Here, the trial court found a prima facie case and asked the prosecutor to explain the challenge. (21 RT 5018.) If the trial court makes a sincere and reasoned effort to evaluate the explanation, its decision that the prima facie showing was overcome is reviewed for substantial evidence. (*People v. Ward* (2005) 36 Cal.4th 186, 200.) This appellate review must be performed with "great restraint." (*People v. McDermott* (2002) 28 Cal.4th 946, 971.) Deference must be given to the findings of the trial court. (*People v. Burgener* (2003) 29 Cal.4th 833, 864.) The trial judge, who "observes the demeanor of the attorney who exercises the challenge" and can assess that attorney's credibility (*People v. Schmeck* (2005) 37 Cal.4th 240, 275, quoting *Hernandez v. New York, supra*, 500 U.S. at p. 365), is in

the best position to distinguish "bona fide reasons from sham excuses." (*People v. Lenix* (2008) 44 Cal.4th 602, 614; *People v. Ledesma* (2006) 39 Cal.4th 641, 677.)

"All that matters is that the prosecutor's reason for exercising the peremptory challenge is sincere and legitimate, legitimate in the sense of being nondiscriminatory [citation]." (*People v. Cruz* (2008) 44 Cal.4th 636, 655, internal quotations omitted.) "The justification need not support a challenge for cause, and even a 'trivial' reason, if genuine and neutral, will suffice. [Citation]." (*People v. Lenix, supra*, 44 Cal.4th at p. 613.) "A reason that makes no sense is nonetheless sincere and legitimate as long as it does not deny equal protection." (*People v. Guerra* (2006) 37 Cal.4th 1067, 1100-1101.)

Further, it is presumed that the parties used peremptory challenges in a constitutional manner. (*People v. Roldan* (2005) 35 Cal.4th 646, 701, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) Thus, "the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike." (*Purkett v. Elem* (1995) 514 U.S. 765, 768 [115 S.Ct. 1859, 131 L.Ed.2d 395] (per curiam).)

The trial court properly denied Trinh's motion, where the challenge was based on N.V.'s age, employment, lack of opinion about the death penalty, and non-responsiveness. A prosecutor can dismiss a potential juror whose occupation and/or age, in the prosecutor's subjective opinion, would not render that juror suitable for the case being tried. (*People v. Reynoso* (2003) 31 Cal.4th 903, 924-925 [customer service representative].) A prosecutor can also be legitimately concerned about a potential juror who does not meaningfully answer questions. (*People v. Howard* (2008) 42 Cal.4th 1000, 1019.) A prosecutor may dismiss a potential juror who declines to express any opinion on the death penalty, even when asked to

do so. (*People v. Mills* (2010) 48 Cal.4th 158, 176.) Moreover, reasons for exercising a peremptory challenge should be viewed in combination, as a party may decide to exercise a peremptory challenge for a variety of reasons, with no single characteristic being dispositive. (*People v. Ledesma, supra*, 39 Cal.4th at p. 678.)

Substantial evidence supports the court's decision to uphold the challenge. N.V.'s questionnaire indicated he was 45 years old, had never married, and had no children. (40 CT 10960.) He worked as a customer service supervisor at the Garden Grove Post Office. (40 CT 10961.) He had a high school education. (40 CT 10962.) On his questionnaire, he stated that he had read an article in the Orange County Register about a shooting that took place at West Anaheim. (40 CT 10964.) He did not pay much attention to the case. (40 CT 10965.) The questionnaire sought input about the death penalty. Asked his general feelings about the subject, N.V. responded, "None." (40 CT 10962.) To the question inquiring whether the death penalty was imposed too frequently, not often enough, or randomly, N.V. answered, "I don't have any opinion, I don't really pay attention about the death penalty." (40 CT 10972.) The prosecutor probed him about his answers, but he refused to express an opinion, saying he had none. He also said neither penalty was more severe than the other. (21 RT 4981-4982.) He continued, "I don't see anything different between the two." (21 RT 4982.) Furthermore, when the prosecutor asked him if he wanted to be a juror in this case, he responded, "Yes, Sir." Somewhat surprised, the prosecutor replied, "You do?" N.V.'s response was, "Yes." (21 RT 4984.)

Moreover, defense counsel, who had the ultimate burden of persuasion, made no attempt to rebut the prosecutor's explanations about why he excused N.V. Instead, when the court asked defense counsel if he had anything to add, he merely stated that he felt the prosecutor's reasons were "insufficient" but that otherwise, he was submitting the matter. (21

RT 5018, 5019.) The "paucity of defense counsel's reasons for a prima facie case," plus his failure to contradict the prosecutor's account of N.V.'s attitude, age, occupation and manner of answering questions, defeats Trinh's claim that N.V.'s dismissal was based on ethnic bias. (*People v. Adanandus* (2007) 156 Cal.App.4th 496, 504 & 510.)

Trinh attempts to compare N.V. to six seated jurors and three alternates. (AOB 134-142.) In *People v. Lenix, supra*, 44 Cal.4th 602, this Court held that even when comparative juror analysis was not performed in the court below, it is evidence which a reviewing court should consider in assessing claims of error at *Batson-Wheeler*'s third stage, when the defendant relies on such evidence and the record is adequate to permit the comparisons. (*Id.* at pp. 607, 613-628.) However, reviewing courts must remain "mindful that comparative juror analysis on a cold appellate record has inherent limitations. [Citation.]" (*Id.* at p. 622.) Further, comparative juror analysis is only one consideration and will not, standing alone, warrant a conclusion on appeal that there was discriminatory intent. (*People v. Mills, supra*, 48 Cal.4th at p. 177; *People v. Lenix, supra*, 44 Cal.4th at pp. 624-627.) Instead, courts must look to the totality of the circumstances. (*People v. Lenix, supra*, 44 Cal.4th at pp. 627-628.) The fluidness of jury selection, and "the complexity of human nature, 'make a formulaic comparison of isolated responses an exceptionally poor medium to overturn a trial court's factual finding.'" (*People v. Cruz, supra*, 44 Cal.4th at p. 659, quoting *People v. Lenix, supra*, 44 Cal.4th at p. 624.)

In all cases, the standard of review remains whether substantial evidence supports the trial court's determination that the prima facie case was overcome. If there is more than one reasonable conclusion, the reviewing court must adopt the one which supports the trial court's finding. (*People v. Taylor* (2009) 47 Cal.4th 850, 886; *People v. Lenix, supra*, 44 Cal.4th at pp. 628-629.)

Trinh compares N.V. to seated juror numbers 1, 2, 5, 6, 8, and 12; and to alternate juror numbers 1, 3 and 4.[8] Trinh argues that they were all similarly situated because some of them were around N.V.'s age, another one was single, three others had no children, one worked for the post office, two wanted to serve as jurors, and a few gave short answers when orally questioned by counsel. (AOB 138-141.) Trinh ignores the fact that each of these circumstances was only one factor which, when taken in consideration with all of the others, formed the basis for N.V.'s excusal. (21 RT 5018.) Moreover, an evaluation of each compared juror reveals that the older jurors were married. The sole unmarried juror was 22 years old. All of the other jurors had at least some education beyond the high school level. N.V. was the only one who declined throughout the voir dire proceedings to express any thoughts whatsoever about the death penalty. Others gave detailed answers in their questionnaires and frequently expanded on or modified those answers when questioned in open court.

Trinh claims that Juror No. 1 was similarly situated because she was about N.V.'s age and had no opinion on the death penalty. (AOB 138, 140-141.) Although Juror No. 1 was 46 years old, she was married and had two children. (38 CT 10237.) She was a middle school teacher. (38 CT 10239.) She had a master's degree in marriage and family counseling. (38 CT 10239.) In response to the question about whether the death penalty was imposed too often, too seldom, or randomly, she responded, "I'm not sure. Because I don't follow murder cases often or at all. I actually don't know

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[8] Respondent questions whether comparative analysis should include alternate jurors. In selecting alternates, the number of peremptory challenges per side is severely limited. Moreover, different considerations come into play once the actual jury is seated and the focus is on alternate jurors. Nevertheless, respondent discusses the voir dire of alternates in addition to the seated jurors indentified by Trinh.

how often (what percentage) the death penalty is imposed." (38 CT 10249.) However, answering the question calling for general feelings about the death penalty, Juror No.1 responded, "For the appropriate circumstances it has its place. But I think that each case must be looked at individually and carefully." (38 CT 10249.) She stated she had no conscientious objection to the death penalty, thought it should be imposed for crimes involving the torture/murder of children, and said that in cases involving multiple murder, she would examine the motives of the killer. (38 CT 10250.) Given a list of some of the factors jurors would be asked to consider in deciding the appropriate penalty, she responded, "This looks like a good list. I also think the feelings of the victims' families should be looked at." (38 CT 10251.) When told during voir dire that the role of victim impact evidence would be explained through jury instructions, she said she understood. (22 RT 5107.) Moreover, Juror No. 1 worked in a hospital for four years, her sister was a secretary at a hospital, and her mother was a retired nurse. (22 RT 5104; 38 CT 10243.) The prosecutor could reasonably conclude that Juror No. 1's background made her a desirable juror for the prosecution.

Trinh claims that Juror No. 2 was similarly situated because of her age and her short answers during voir dire. (AOB 138, 141.) Juror No. 2 was 48, but was married and had three children. (35 CT 9528.) She had a post-graduate degree in health services. (35 CT 9630.) On her questionnaire, Juror No. 2 stated she read about the case in the paper, and heard that Trinh wished to die for his crimes. (35 CT 9632.) Asked for her opinions about the case, she responded, "I'm leaning towards granting his request for death. But never having had to actually pass this sentence, I'm not sure that I'd do [it] if I actually had to pass sentence." (35 CT 9633.) Juror No. 2 was a registered nurse and several of her family members were health care professionals. (35 CT 9629, 9634.) In response to one question, she stated that doctors and nurses do the best they can; coming to work should not put

them at risk of being shot. (35 CT 9634.) When defense counsel questioned her about her ability to be impartial, she said that she could (22 RT 5102), and added that she had given the matter a lot of thought in the past 24 hours. (21 RT 5100-5101.)

Trinh claims that Juror No. 3 was similarly situated because he was unmarried, had no children, and gave short answers during voir dire. (AOB 139, 140.) Although Juror 3 was childless and single, he was single and childless at 22 years of age which readily distinguishes him from prospective juror N.V. who had never been married and was childless at the age of 45. (37 CT 10009.) He was currently unemployed. (37 CT 10010.) He had an associates degree in business administration. (37 CT 10011.) In answering the questions concerning pretrial publicity, he wrote, "The murder of three people by one person encourages me to lean towards a stricter punishment." (37 CT 10014.) He also had a brother in medical school. Asked if that would affect his partiality, he responded, "a person causing problems in a hospital setting in such a violent way makes me fear something similar happening in the future, and I'd like to prevent that." (37 CT 10015.) The reason he refused to give a general opinion on the death penalty was because he felt he could only base his conclusions on the facts of a given case. In general, he thought that the death penalty was imposed too often. (37 CT 10021.) However, he felt it was automatically warranted in cases involving "planned murders by serial killers, including murdering families." (37 CT 10022.) Questioned by defense counsel, he added that now that he understood the process, he was equally open to either penalty. (24 RT 5268.)

Trinh claims that Juror No. 5 was similarly situated because of his age (49). (AOB 138.) However, that is where the similarity ends. Unlike N.V., Juror No. 5 was married. (47 CT 12846.) He was a technical specialist for Jazz Semiconductor. (47 CT 12847.) He had three years of community college. (47 CT 12847.) Moreover, asked his general feelings about the

death penalty, he responded, "It is a necessary punishment in some cases." He believed it was not given often enough, stating, "I think more of the cases I have read about would have fit the circumstances for a death penalty." (47 CT 12857.) When the court questioned him orally, he explained that his answers were "man on the street" type responses and he could go either way, depending on the evidence. (22 RT 5120.) He told defense counsel he had felt the death penalty was not imposed enough because he thought all murderers were eligible. (22 RT 5121.) Answering the prosecutor's questions, he said he would not have a problem signing a verdict form for either penalty. (21 RT 5124.)

Trinh claims that Juror No. 6 was similarly situated because he had no children. (AOB 139.) Like the other seated jurors of comparable age to N.V. without children, Juror No. 6 was married. (44 CT 12103.) He had a master's degree in health care management. (44 CT 12104.) Defense counsel asked him if he wanted to be a juror on this case and he responded, "Yes I do." (21 RT 4990.) But Juror No. 6 was a desirable juror from the prosecution perspective. He had been a safety officer at the U.S.C. Medical Center Radiology Department for 35 years. (21 RT 4987; 44 CT 12103.) Juror No. 6 remembered quite a bit about Trinh's case from the news, stating that Trinh blamed hospital staff for the death of his mother, but shot persons who were not involved in his mother's care. Juror No. 6 added that the case was discussed at his place of work. Staff were concerned about a similar occurrence, because "we have more than our share of unhappy patients and patient relatives." (44 CT 12107.) He was familiar with West Anaheim Hospital, having undergone gall bladder surgery there a few months before he was called for jury duty. (21 RT 4986.) He stated that in his opinion, the death penalty was not imposed often enough. (44 CT 12114.) He felt all child murderers should be sentenced to death. (44 CT 12115.) Questioned by defense counsel, he said that after further

consideration, he no longer felt death sentences were too infrequent. (21 RT 4987-4988.) He assured the prosecutor he could be the foreperson and actually sign the verdict form for a death sentence, even though it might be a very difficult thing to do. (21 RT 4992.)

Trinh claims that Juror No. 8 was similarly situated because she was 45 years old and gave short answers during voir dire. (AOB 138, 141.) Juror No. 8 was married, had three children, and had one grandchild. (46 CT 12635.) She was a solution consultant engineer with JD Edwards. She had a bachelor's degree in liberal studies. (46 CT 12637.) Her brother-in-law worked for the Riverside County Sheriff's Department. (22 RT 5044.) Asked her general feelings concerning the death penalty, she responded, "I support the death penalty in heinous crime cases, i.e., Ted Bundy." She thought it was overused in Texas but not in California (46 CT 12647) and believed it should automatically be imposed for mass murders and extremely heinous crimes (46 CT 12648). When the court questioned her on voir dire, she said he wanted to revisit her answer. She did not feel the death penalty should be automatic for certain crimes, rather, she felt it was appropriate in those situations. (22 RT 5044.) She would evaluate the circumstances of Trinh's case before reaching a decision. (22 RT 5045.) She told the prosecutor that she could impose the death penalty in Trinh's case if it was supported by the evidence, and that she would consider appropriate factors in deciding which penalty was warranted. (22 RT 5047-5048.)

Trinh claims that Juror No. 12 was similarly situated because of her age, her lack of children, and her short answers during voir dire. (AOB 138, 139, 141.) Juror No. 12, while 45 and childless, was married. (37 CT 10161.) She was an assistant controller at Robinson-May Company. (37 CT 10162.) She had a bachelor's degree in business administration. (37 CT 10163.) Her general feelings about the death penalty were, "I believe that it should exist as an option to be imposed when a jury feels it is

appropriate." She gave a detailed answer to the question about whether it was imposed too frequently, not often enough, or randomly.[9] (37 CT 10173.) She engaged in an extensive dialogue with defense counsel on a variety of subjects when they conducted their voir dire. (21 RT 4885-4887, 4918-4919, 4852-4953.)

Trinh claims Alternate Juror No. 1 was similarly situated because she wanted to be a juror, was 42 years old, and had no opinion on the death penalty. (AOB 138, 141.) While Alternate Juror No. 1 was close in age to potential juror N.V., she was married with two children. (47 CT 12864.) She was an accounting technician for a high school. (47 CT 12865.) She had one year of junior college. (47 CT 12866.) She read about the case in the newspaper. She felt that in general, the death penalty was an option. (47 CT 12865, 12867.) She declined to express an opinion on whether it was imposed too frequently, not frequently enough, or too randomly, explaining that she had not followed all cases charged as death cases or their end results. (47 CT 12876.) Defense counsel asked her if she wanted to be a juror. (23 RT 5337.) She responded, "Yes." (23 RT 5338.) She told the prosecutor that she was open to both penalties and could be the one to sign a verdict form sentencing Trinh to death. (23 RT 5338-5339.)

Trinh claims that Alternate Juror No. 3 was similarly situated because of his age. (AOB 138.) Alternate Juror No. 3 was 47 years old. While Alternate Juror No. 3 was close in age to potential juror N.V., he was married and had one child. (36 CT 9704.) He was a sales support manager

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[9] She wrote: "I would like to believe that it is only used when appropriate but am sure that is not the case. I believe there are times when it should be used, but isn't, and times when it shouldn't but is. I don't know that I could make one generalized statement about its use as a whole. It is disturbing to me that some states, e.g., Texas, seem to impose the death penalty significantly more than others." (37 CT 10173.)

for SBC. (36 CT 9705.) He had a bachelor's degree in business and accounting. (36 CT 9706.) Of note, he had several family members who had been hospitalized. His mother-in-law was in the hospital for cancer treatment, his aunt for unspecified rehabilitation, and his niece after a cardiac arrest. (36 CT 9710.) His niece died after choking on some food. (36 CT 9711.) As to his general feelings on the death penalty, he answered, "I feel it can be appropriate depending on the circumstances of the case." (36 CT 9711.) He would always vote for death in cases involving torture/murder, especially of a child. While he did not feel the same way about multiple murders, "[k]illing more than one person would make me think more about a person's motive." (36 CT 9717.) Asked whether there was any reason he could not be open-minded, he responded, "Depending on why [Trinh] committed the crimes, based on his mother's care could prove to be a factor - but even so, I don't feel murder is right." (36 CT 9720.) He said deciding between life without parole and death would be "tough." (36 CT 9719.) He told defense counsel he could give honest consideration to either penalty in this case (23 RT 5326), and assured the prosecutor he would be fair to both sides. (23 RT 5333.)

Trinh claims that Alternate Juror No. 4 was similarly situated because of his age (45) and his employment with the United States Postal Service. (AOB 138, 140.) While Alternate Juror No. 4 was in close in age to prospective juror N.V., he was married and had two children. (38 CT 10313.) He was a consumer affairs associate for the U.S. Postal Service. (38 CT 10314.) He assisted customers who had problems with their mail. (23 RT 5335.) He had some college education. (38 CT 10315.) His aunt was a nurse and his friend was an anesthesiologist. Several of his family members had been patients in hospitals. In all of those situations, he felt that the care was good. (38 CT 10319.) He formerly worked as a motel clerk and in that job, had been robbed more than once at gunpoint. (25 RT

5320.) Most striking were his answers to questions regarding the death penalty. He said he supported it in cases where it was appropriate, then added, "I only feel that when it is given, the appeals process is too long. If convicted, it should not take 15-20 years for the appeals to drag on. Justice delayed is justice denied." (38 CT 10325.) He further stated, "My brother was close friends with Benjamin Brenneman, who was murdered. His killer was convicted and is on death row. He is going through the appeal process. Ben Brenneman was a paperboy, killed by a child molester, out on parole. This happened about 20 years ago, but the appeals process still drags on. A friend at the postal service was murdered about ten years ago by gang members, but I am not aware of the status of the case." (23 RT 5320.) He explained during defense counsel's questioning that Brenneman was his brother's best friend. The murder victim in the other case was taking part in a church event, went out to get some snacks, and was killed so his car could be taken. (23 RT 5328.) Given Alternate Juror No. 4's unique history, it is readily apparent why the prosecutor declined to excuse him notwithstanding that, like prospective juror N.V., he was a postal worker.

In short, the seated jurors are more noteworthy for their differences from N.V. than for their similarities to him. The fact that there were "isolated and discrete similarities" did not make them similarly situated for comparative analysis purposes. (*People v. Lewis & Oliver* (2006) 39 Cal.4th 970, 1019, fn. 14; *People v. Huggins* (2006) 38 Cal.4th 175, 234, accord, e.g., *People v. Fiu* (2008) 165 Cal.App.4th 360, 396 ["[t]his comparison of words in isolation fails as a basis for establishing that the prosecutor's reason was pretextual"].) Accordingly, Trinh's *Batson-Wheeler* claim should be rejected by this Court.

## III. THE TRIAL COURT PROPERLY REFUSED TO INSTRUCT THE JURY WITH TRINH'S PROPOSED SPECIAL INSTRUCTION "I"

In Argument III of his opening brief, Trinh contends that the trial court prejudicially erred, and violated various state and federal constitutional rights, by refusing, during the guilt phase of the trial, to give his proposed Special Instruction "I" in addition to CALJIC No. 8.42 [Sudden Quarrel or Heat of Passion and Provocation Explained]. (AOB 143-160.) Trinh's contention lacks merit. The instruction was properly refused as argumentative, confusing and unnecessary. Moreover, even assuming error, failing to give the proposed special instruction was harmless.

The trial court instruct the jury pursuant to CALJIC No. 8.42 as follows:

> To reduce an unlawful killing from murder to manslaughter upon the ground of sudden quarrel or heat of passion, the provocation must be of the character and degree as naturally would excite and arouse the passion, and the assailant must act under the influence of that sudden quarrel or heat of passion.
>
> The heat of passion which will reduce a homicide to manslaughter must be such a passion as naturally would be aroused in the mind of an ordinarily reasonable person in the same circumstances. A defendant is not permitted to set up his own standard of conduct and to justify or excuse himself because his passions were aroused unless the circumstances in which the defendant was placed and the facts that confronted him were such as also would have aroused the passion of the ordinarily reasonable person faced with the same situation. Legally adequate provocation may occur in a short, or over a considerable, period of time.
>
> The question to be answered is whether or not, at the time of the killing, the reason of the accused was obscured or disturbed by passion to such an extent as would cause the ordinarily reasonable person of average disposition to act rashly and without deliberation and reflection, and from passion rather than from judgment.

> If there was provocation, whether of short or long duration, but of a nature not normally sufficient to arouse passion, or if sufficient time elapsed between the provocation and the fatal blow for passion to subside and reason to return, and if an unlawful killing of a human being followed the provocation and had all the elements of murder, as I have defined it, the mere fact of slight or remote provocation will not reduce the offense to manslaughter.

(11 RT 2622-2623; 3 CT 677.)

On August 12, 2002, after the close of evidence, Trinh's counsel submitted a written request for special jury instructions. (2 CT 538-552.) As pertinent here, proposed Special Instruction I, which defense wanted as an addition to CALJIC No. 8.42 provided, "By saying that a defendant is not permitted to set up his own standard of conduct, the court is not instructing you that the question to answer is whether or not a reasonable person would commit the act of killing another because of the provocation that the defendant believed he was under. ¶ Rather the question is whether the provocation was such that a reasonable person would commit any act rashly and from passion rather than judgment because of it." (2 CT 550.)

During the jury instruction conference, defense counsel started by telling the court, "I don't profess it [the proposed instruction] to be the best-crafted in terms of wording[.]" (10 RT 2365.) Counsel then said she was asking for the instruction as a precaution, in case the prosecutor incorrectly argued regarding whether a defendant was permitted to establish his own standard of conduct. (10 RT 2365-2366.) Some prosecutors, counsel continued, told juries that because no one else would kill under similar circumstances, the defendant was not provoked. (10 RT 2366.) The law, however, was concerned only with whether a defendant would act rashly, not whether he would kill. (10 RT 2366-2367.) Counsel said she wanted the instruction if the prosecutor planned to argue that a person under

caregiver stress and grief would not kill somebody, therefore, Trinh had set up his own standard. (10 RT 2367.)

The prosecutor responded that he intended to make the argument because it correctly stated the law. The proposed instruction, however, made no sense and was unsupported by case law. (10 RT 2367.) Defense counsel countered that CALJIC No. 8.42 did not use the word "kill," it simply stated, "act rashly." (10 RT 2368.) Thus, the provocation did not have to lead someone to kill, it merely had to cause the person to act rashly. (10 RT 2369.) If the jury believed a reasonable person in Trinh's circumstances would act irrationally, the crime was voluntary manslaughter. (10 RT 2370-2371.)

The court noted that the instruction itself (CALJIC No. 8.42) referred to murder, killing and malice aforethought, a state of mind which applied only when there was a killing. One way to eliminate malice was heat of passion. (10 RT 2370-2372.) Counsel repeated her previous argument, claiming such a construction was compelled by the phrase in CALJIC No. 8.42, "The reason of the accused was so obscured and disturbed by passion that it would cause an ordinary person of average disposition to act rashly and without deliberation and reflection from the passion rather than the judgment." (10 RT 2272.) Counsel noted that this phrase did not include the word, "kill." (10 RT 2272-2273.) The prosecutor responded that from the entirety of the instruction, the test was whether the person would act rashly and kill. (10 RT 2373.) The court added that the second paragraph of the instruction referred to reducing a killing from murder to manslaughter. (10 RT 2373-2374.) Defense counsel repeated her interpretation for a third time. The prosecutor asked the court to reject the instruction because CALJIC No. 8.42 correctly stated the law and covered the necessary principles. (10 RT 2374.)

The court refused the instruction. The court stated that it was argumentative, incorrectly stated the law, and its principles were adequately covered by CALJIC No. 8.42.[10] (10 RT 2375-2376; 2 CT 590.)

Upon request, a defendant is entitled to an instruction that pinpoints his or her theory of the case. (*People v. Ledesma, supra*, 39 Cal.4th at p. 720.) However, the trial court may properly refuse an instruction that highlights or directs the jury to consider certain evidence. (*Ibid.*) Because the latter type of instruction "invite[s] the jury to draw inferences favorable to one of the parties from specified items of evidence," it is argumentative and therefore should not be given. (*People v. Earp* (1999) 20 Cal.4th 826; accord, *People v. Mincey* (1992) 2 Cal.4th 408, 437.) A proper instruction pinpoints the theory of the defendant's case rather than specific evidence. (*People v. Ledesma, supra*, 39 Cal.4th at p. 720.)

The first paragraph of Proposed Special Instruction I did not convey a principle of law. Instead, it directed the jury to specific facts, i.e., whether a reasonable person would kill, and then told the jury not to consider these facts. Because the proposed instruction was argumentative, it was properly refused. (*People v. Hartsch* (2010) 49 Cal.4th 472, 500.) Additionally, by using the word "not" three times in a single sentence, the instruction was confusing and misleading. For this reason, too, the court correctly declined the defense request. (*People v. Burney* (2009) 47 Cal.4th 203, 346.) Moreover, CALJIC No. 8.42 correctly conveyed the principles of voluntary manslaughter to the jury. (*People v. Steele* (2002) 27 Cal.4th 1230, 1254-1255.) In fact, the second paragraph of Proposed Special Instruction I repeated, nearly verbatim, the fourth paragraph of CALJIC No. 8.42.

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[10] While deficient for other reasons discussed, the proposed instruction did not affirmatively misstate the legal principles underlying the objective component of the heat of passion requirement. (See, e.g., *People v. Najera* (2006) 138 Cal.App.4th 212, 223-224.)

Therefore, the proposed special instruction was unnecessary. A court need not give a pinpoint instruction if it merely duplicates other instructions already given. (*People v. Moon* (2005) 37 Cal.4th 1, 30.)

Finally, Trinh was not prejudiced by the court's refusal to give Special Instruction I. The court fully and completely instructed on all theories even arguably supported by the evidence. Specifically, in addition to giving CALJIC No 8.42, the court instructed the jury pursuant to CALJIC Nos. 8.20 [Deliberate and Premeditated Murder] (11 RT 2618-2620; 3 CT 672); 8.30 [Unpremeditated Murder of the Second Degree] (11 RT 2620; 3 CT 673); 8.31 [Second Degree Murder—Killing Resulting From Unlawful Act Dangerous to Life] (11 RT 2620-2621; 3 CT 674); 8.40 [Voluntary Manslaughter -- Defined] (11 RT 2621-2622; 3 CT 676); 8.43 [Murder or Manslaughter -- Cooling Period] (11 RT 2624; 3 CT 674); 8.44 [No Specific Emotion Alone Constitutes Heat of Passion] (11 RT 2624-2625; 3 CT 675); 8.45 [Involuntary Manslaughter -- Defined] (11 RT 2625-2626; 3 CT 682); 8.50 [Murder and Manslaughter Distinguished] (11 RT 2626-2627; 3 CT 684); and 8.73 [Evidence of Provocation May Be Considered in Determining Degree of Murder]. (11 RT 2631-2632; 3 CT 688.) The court also gave a special instruction on heat of passion, CALJIC No. 8.42.1.[11] (11 RT 2623-2624; 3 CT 678.) After hearing all of these instructions, the jury nonetheless found Trinh guilty of three counts of willful, premeditated murder. Accordingly, there was no reasonable

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[11] This instruction provided:

> The provocation which incites the killer to act in the heat of passion must be caused by the decedent or reasonably believed by the accused to have been engaged in by the decedent. The provocation must be such as to cause an ordinary person of average disposition to act rashly or without due deliberation and reflection.

(11 RT 2623-2624; 3 CT 678.)

probability that, had Special Instruction I been given, the verdict would have been more favorable to Trinh. (*People v. Breverman* (1998) 19 Cal.3d 142, 176.)

## IV. TRINH WAS NOT PREJUDICED BY THE TRIAL COURT'S FAILURE TO PROVIDE THE JURY WITH WRITTEN COPIES OF CALJIC NOS. 2.60 AND 2.61

The trial court instructed the jury pursuant to CALJIC No. 2.60 [Defendant Not Testifying -- No Inference of Guilt May be Drawn] and CALJIC No. 2.61 [Defendant May Rely on State of Evidence] (11 RT 2613).[12] The court, however, inadvertently neglected to include these two instructions in the written packet it gave to the jury. (3 CT 607-609, 663.) In Argument IV of his opening brief, Trinh contends that the court's failure to provide the written instructions violated his federal constitutional rights and that the error was not harmless beyond a reasonable doubt. (AOB 163-

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[12] CALJIC No. 2.60, as read by the court, provides:

> 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.

(11 RT 2613.)

CALJIC No. 2.61, as read by the court, provides:

> In deciding whether or not to testify, the defendant may choose to rely on the state of the evidence and upon the failure, if any, of the People to prove beyond a reasonable doubt every essential element of the charge against him.
>
> No lack of testimony on the defendant's part will make up for a failure of proof by the People so as to support a finding against him on any such essential element.

(11 RT 2613.)

170.) Respondent disagrees. There was no error. Moreover, any error was one of state law only, and was harmless.

Section 1093, subdivision (f), gives the trial court discretion to provide the jury with a copy of the written instructions. Under this section, the court is required to do so if the jury requests a copy. Despite Trinh's protestations to the contrary, this Court has held that "the provision of written instructions to the jury (although generally beneficial and to be encouraged) is not guaranteed by, and therefore does not implicate, any provision of the state or federal Constitution. [Citation.]" (*People v. Samayoa* (1997) 15 Cal.4th 795, 845.)

*People v. Ochoa* (2001) 26 Cal.4th 398, disapproved on other grounds in *People v. Prieto* (2003) 30 Cal.4th 226, 263, fn. 14, disposes of Trinh's claim. There, like here, the court orally read two instructions to the jury (CALJIC No. 2.01 and 2.02) but neglected to include them in the packet of written instructions. On his appeal from a judgment imposing the death penalty, the defendant claimed that the court erred in omitting the written instructions, and that the error violated his constitutional and statutory rights. Citing *Samayoa*, this Court found no constitutional violation. (*People v. Ochoa, supra*, 26 Cal.4th at p. 447.) This Court also found no error under section 1093, subdivision (f), noting that "the statutory right depends on an express request." (*Ibid.*) Finally, this Court held that, given the fact the instruction was read orally, the defendant had failed to carry his burden of showing prejudice. (*Ibid.*)

Here, likewise, while the defense asked the court to instruct the jury pursuant to CALJIC 2.60 and 2.61 (2 CT 541), there was no request that any instructions be given in writing. Thus, the court had no statutory duty to do so. Furthermore, while not provided in writing, CALJIC Nos. 2.60 and 2.61 were read to the jury. (11 RT 2613.) For this reason, Trinh's reliance on *Carter v. Kentucky* (1981) 450 U.S. 288 [101 S.Ct. 1112, 67

L.Ed.2d 241] and *People v. Evans* (1992) 62 Cal.App.4th 186 (AOB 162-164) is misplaced. Both cases involved a total failure to instruct jurors that they could not draw adverse inferences from a defendant's exercise of his constitutional rights, not a mere omission of such an instruction from a written packet. (*Carter v. Kentucky, supra*, 450 U.S. at pp. 295-305; *People v. Evans, supra*, 62 Cal.App.4th at pp. 190-191.) Trinh's jury heard the subject instructions. (11 RT 2613.) Accordingly, Trinh has shown no prejudice whatsoever.

## V. THE TRIAL COURT PROPERLY DENIED TRINH'S MOTION TO REDUCE HIS SENTENCE TO LIFE WITHOUT THE POSSIBILITY OF PAROLE

In Argument V of his opening brief, Trinh contends that the trial court erred, and violated various state and federal constitutional rights, in denying his motion, after the second penalty phase trial, to preclude a third trial and instead sentence him to life without the possibility of parole. (AOB 171-184.) Trinh's contention is without merit. The court's denial of the motion was an appropriate exercise of its discretion.

A trial court has discretion to order a sentence of life imprisonment without the possibility of parole after a jury is unable to reach a verdict for a second time. (*People v. Thompson* (1990) 50 Cal.3d 134, 177.) Specifically, Section 190.4, subdivision (b) provides in pertinent part:

> If the trier of fact is a jury and has been unable to reach a unanimous verdict as to what the penalty shall be, the court shall dismiss the jury and shall order a new jury impaneled to try the issue as to what the penalty shall be. If such new jury is unable to reach a unanimous verdict as to what the penalty shall be, the court in its discretion shall either order a new jury or impose a punishment of confinement in state prison for a term of life without the possibility of parole.

On December 18, 2002, after the jury in the second penalty phase trial was unable to reach a verdict, defense counsel filed a motion entitled "Notice of Motion and Motion for Court to Impose a Sentence of Life Without the Possibility of Parole." In the motion, Trinh's counsel noted that the first jury was unable to reach a verdict and had voted ten to two against the death penalty, while the second jury had voted eleven to one in favor of death when it was unable to reach a verdict. Counsel claimed that the change in jury sentiment was due to Trinh's testimony at the retrial urging the jury in even stronger words to sentence him to death. Counsel asked the court, pursuant to its authority under section 190.4, subdivision (b)(2), to sentence Trinh to life without the possibility of parole. In support of the motion, counsel summarized testimony by various witnesses who appeared for the defense at the second penalty phase trial and pointed to other mitigating circumstances. Specifically, counsel stated that Trinh killed because he was in grief and in pain, not for financial or other personal gain. Additionally, witnesses testified that Trinh was kind-hearted, a good neighbor and roommate, honest and trustworthy, an exceptional worker and extraordinarily devoted to his mother. The motion noted Trinh's difficult and socially isolated childhood, and the problems he faced as a refugee and sole caregiver for his mother. Counsel discussed the fact that Trinh made such a positive impression on so many people that they had traveled considerable distances to testify on his behalf. Counsel argued that Trinh killed under extremely emotional circumstances, i.e., the death of his mother. Furthermore, the crimes showed a lack of sophistication and planning. Counsel asserted that Trinh had fabricated his testimony at the penalty trials and would continue to lie on the stand until he received a death sentence. Counsel further asked the court to consider alleged misconduct by the second penalty phase jury which supposedly caused three jurors to change their minds. The asserted misconduct was:

(1) a juror bringing in quotations from the Bible to share with other jurors; (2) a second juror consulting an Asian co-worker for advice and repeating that advice in the jury room; and (3) a third juror researching the death penalty on the Internet and providing statistical information to other jurors. Finally, counsel argued that a sentence of life without parole was amply harsh punishment for Trinh's crimes. (6 CT 1563-1594.)

At a hearing held on December 19, 2002, the court stated it had read the motion and all of the attachments. The court asked the prosecutor for comments. The prosecutor stated he had received the motion the previous day. In the People's opinion, the appropriate penalty in Trinh's case was death. To obtain that verdict, there had to be another trial. Cost and the availability of the trial judge should not be a factor. (20 RT 4713.) The prosecutor added that the factors in the motion, including the conduct of the second jury, were not relevant in deciding what to do. (20 RT 4713-4714.) With regard to Trinh's testimony, the prosecutor informed the court he had spoken to jurors from both penalty trials, most of whom told him they had disregarded or disbelieved it. Moreover, Trinh's assertion that there needed to be new evidence in order to allow a third trial was without legal support. Finally, the victims in this case deserved a verdict, which should not be prevented by the fact that in the previous trial, one juror was a holdout vote for life without parole. (20 RT 4714.)

Defense counsel started his remarks by telling the court there was absolutely no justification for the horrible crimes Trinh committed. (20 RT 4714-4715.) However, counsel continued, Trinh had tremendous hardships in life, had a lifetime of outstanding character traits, was a kind, honest and hardworking person, and showed exceptional devotion to his mother. Therefore, counsel continued, a sentence of life without parole was a sufficiently severe punishment. (20 RT 4715, 4716.) Counsel also noted that in the first trial, ten jurors voted for life without parole while in the

second trial, one did. Thus, the total votes for life without parole exceeded those for the death penalty. (20 RT 4715.)

The court told counsel the issue before it was whether reasonable citizens in a third trial would reach a unanimous verdict. The prosecutor stated that he talked to the jurors after the first trial. He learned that because of a personality conflict, jurors were unable to deliberate. The jurors did not follow the law, did not consider the victim impact evidence, did not look at the exhibits and refused to consider anything about the victims. In short, there was a complete breakdown in deliberations. In the second trial, one juror refused to state his reasons for his verdict and would not deliberate. (11 RT 4716.)

The court asked the prosecutor to address defense counsel's assertion that there was juror misconduct, before which the split was eight to four. (20 RT 4716-4717.) The prosecutor argued that if it occurred, it was irrelevant to what would happen in a future trial. The court told the prosecutor it was relevant to whether any twelve people could ever agree to a verdict, the issue before it. (20 RT 4717.) The prosecutor asked the court to give more forceful instructions to prevent misconduct and added that in his experience, after an eleven to one split verdicts were usually obtained in a retrial. (20 RT 4717-4718.)

Defense counsel replied that if the prosecutor's argument was true, the second jury should have voted for life without parole. Moreover, the split was eight to four before the misconduct. (20 RT 4718-4719.) The prosecutor responded that the defense was relying on the assumption that misconduct changed the votes, which lacked any supporting evidence. (20 RT 4718-4719.) It was normal in the course of deliberations for votes to change over time, and intrusions into the thought processes of jurors was prohibited. (20 RT 4719.)

The court stated that if the final vote was eight to four, it would reach a different conclusion. (20 RT 4719.) However, eleven to one was "awfully close, just like ten to two was the other way around." (20 RT 4719-4720.) The court expressed strong concern for the families of the victims. The court noted that the second trial appeared much more painful to them than the first. Whatever was done, the court continued, would be difficult for them. The prosecutor told the court he had talked to the families and they assured him they wanted to go forward with a third trial. The court stated it would be even harder on them. The court then ruled in favor of allowing a third trial. The court explained, "Because of the close verdict of eleven to one, [the] motion is denied. Very hard decision." (20 RT 4720.)

Trinh claims that the trial court failed to exercise its discretion because it did not consider any of the mitigating evidence argued by the defense or the alleged juror misconduct at the second penalty phase trial. Instead, Trinh asserts, the court merely relied on the fact that in its opinion, a third jury would probably reach a verdict. (AOB 30-31.) This was not error. Section 190.4, subdivision (b) gives no guidance to trial courts as to what factors to consider in deciding whether to empanel a third penalty phase jury. Trinh does not explain why it would be error to consider the likeliness of a verdict upon retrial. If a verdict is improbable (i.e., because two juries were evenly divided), then it would probably not be in the interests of the victims' families, the defendant, the defendant's family, or the witnesses, to put the parties through a third trial.

While respondent could not find any published cases addressing a request to deny the prosecution a third penalty trial under section 190.4, subdivision (b), this Court's decisions considering the denial of the defendant's automatic motion to reduce the sentence to life without the possibility of parole pursuant to section 190.4, subdivision (e) are instructive. This Court has held that while a trial court must, in ruling on

such a motion, make the independent review required by statute, it does not need to recount on the record "every detail" supporting its determination. (*People v. Arias, supra*, 13 Cal.4th at p. 192.) Rather, the court must merely articulate its ruling in a manner sufficient to allow appellate review. (*People v. Romero* (2008) 44 Cal.4th 386, 427.)

For instance, in *People v. Lewis & Oliver, supra*, 39 Cal.4th 970, defense counsel noted as one of the mitigating factors in support of a sentence reduction, the defendant's age at the time of the crimes. At the hearing on the motion, the trial court described its duties and stated it had reviewed the entire transcript, including its extensive notes. The court further stated that it was exercising its independent judgment, was finding the mitigating factors outweighed the aggravating factors, and was denying the motion. (*Id.* at p. 1063.) The defendant argued on his automatic appeal that the court failed to consider his age because the court did not specifically mention it. This Court found the contention unavailing. This Court explained, "The failure to mention certain specific matters in mitigation implies, not that they were overlooked or deemed legally irrelevant, but simply that the court found them insubstantial and unpersuasive. [Citations.]" (*Id.* at p. 1064, internal quotations omitted.)

In the present case, defense counsel submitted extensive paperwork explaining why he felt a sentence of life without parole was a better option for Trinh than the death penalty. Defense counsel listed a number of mitigating circumstances, including Trinh's childhood, the death of his mother, and the good he had done at other times in his life. Counsel also asked the court to take into account alleged juror misconduct occurring at the second penalty phase trial. (6 CT 1563-1594.) When the hearing on Trinh's motion began, the court advised counsel it had read everything submitted by defense counsel. The court elicited comments from the prosecutor and from the defense. (20 RT 4715.) At that time, defense

counsel repeated his reasons why life without the possibility of parole was an adequate punishment for Trinh. (20 RT 4715-4716.) The court asked the prosecutor for a response to the defense's allegations of juror misconduct. (20 RT 4716-4717.) The court stated that one consideration was the impact of a third trial on the families of the victims. When the court denied the motion, it acknowledged that the decision was "very hard." (20 RT 4720.) The court's emphasis on the eleven to one split merely meant that this was the factor which ultimately tipped the balance in favor of a third trial. It does not mean the court failed to consider anything else. Further, the reasons the court gave for its ruling were sufficient to allow meaningful appellate review. (See *People v. DePriest* (2007) 42 Cal.4th 1, 56.) In short, Trinh has not shown that the court exercised its discretion in a manner which was "arbitrary, capricious or patently absurd[.]" (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124.)

## VI. SECTION 190.4, SUBDIVISION (B) IS CONSTITUTIONAL

In Argument VI of his opening brief, Trinh contends that section 190.4, subdivision (b), permitting retrial of the penalty phase, violates his federal constitutional rights to be free from cruel and unusual punishment, to due process, to a fair and reliable penalty verdict, and to equal protection, requiring reversal of his death sentence. (AOB 185-199.) Trinh's claims are without merit. The statute in constitutional.

Trinh argues that because only two states, including California, allow for a third penalty phase trial, section 190.4, subdivision (b) is contrary to the notions of "fundamental fairness" and "human dignity," rendering it a violation of the Eighth Amendment. (AOB 188-196.) In *People v. Taylor* (2010) 48 Cal.4th 574, this Court rejected an identical argument with regard to the mandatory penalty retrial following the first jury's inability to reach a verdict. This Court stated, "that California is among the handful of

states that allows a penalty retrial following jury deadlock on penalty does not, in and of itself, establish a violation of the Eighth Amendment or evolving standards of decency that mark the progress of a maturing society. [Citation.]" (*Id.* at p. 635.) Trinh acknowledges the decision in *Taylor*, but states that he disagrees with it. (AOB 194.) Trinh has provided no persuasive reason for this Court to depart from its opinion in *Taylor*.

Trinh argues that section 190.4, subdivision (b) violates equal protection and due process because it contains no "standards" that trial courts should use in deciding whether to allow a third penalty trial. (AOB 197-198.) As Trinh acknowledges, many provisions of the Penal Code vest trial courts with sentencing discretion but do not contain standards governing its exercise. (AOB 197.) This Court has held that the absence of such standards does not render the statutes constitutionally infirm. (*In re Anderson* (1969) 69 Cal.2d 613, 626.) As this Court explained, "Since every person charged with the offense has the same chance for leniency as well as the same possibility of receiving the maximum sentence, there is nothing discriminatory in the statute[s]." (*Ibid.*, internal quotations omitted.) The same is true here. Trinh had the same opportunity to convince the court to grant him life without the possibility of parole as would every other defendant facing a third penalty trial. He had the same opportunity to convince the jury to show him leniency as does every other capital defendant. Trinh has therefore not shown a violation of his due process or equal protection rights.

## VII. THE TRIAL COURT PROPERLY ALLOWED THE PROSECUTION TO PRESENT VICTIM IMPACT TESTIMONY

In Argument VII of his opening brief, Trinh challenges testimony by members of the victims' families regarding the impact the crimes had on their lives. Trinh complains that the testimony was overbroad, irrelevant

and cumulative. (AOB 200-229.) Specifically, he contends no more than one witness per victim is constitutionally permissible and only testimony as to the effects of his crimes which was foreseeable to Trinh should be allowed. (AOB 218-225.) This Court has repeatedly rejected claims similar to Trinh's, and should do so again here.

Section 190.3, subdivision (a) ("Factor (a)"), allows the jury to consider, as a factor in aggravation, "the circumstances of the crime of which the defendant was convicted[.]" This Court has held that unless it invites a purely irrational response, evidence of the effect of a capital murder on a victim's loved ones and on the community is admissible under Factor (a) as a circumstance of the crime. (*People v. Burney, supra*, 47 Cal.4th at p. 258.) The federal constitution precludes victim impact evidence only if it is so unduly prejudicial that it renders the defendant's trial fundamentally unfair. (*Ibid.*, citing *Payne v. Tennessee* (1991) 501 U.S. 808, 825 [111 S.Ct 2597, 115 L.Ed.2d 720].) Likewise, under state law, victim impact evidence is admissible as long as it "is not so inflammatory as to elicit from the jury an irrational or emotional response untethered to the facts of the case." (*People v. Pollock* (2004) 32 Cal.4th 1153, 1180.) A trial court's decision regarding the admissibility and scope of victim impact evidence is reviewed for abuse of discretion. (*People v. Brady* (2010) 50 Cal.4th 547, 575.)

At the start of the penalty phase retrial, Trinh's counsel filed a motion to limit victim impact testimony and the number of witnesses testifying as victim impact witnesses. Counsel complained about particular testimony certain witnesses gave at the second penalty phase trial. Counsel also objected to the prosecutor asking witnesses, "Is there anything else you want to tell us?", "How did you learn he had been murdered?", and "What was the hardest thing to do after you found out he was murdered?" The defense

also asked the court to limit the number of victim impact witnesses, noting that eleven testified in the second penalty phase trial. (6 CT 1625-1678.)

At a hearing held on February 24, 2003, defense counsel complained that there were too many people listed as possible victim impact witnesses with regard to victim Rosetti. The prosecutor responded that the victim impact witnesses took only ten minutes apiece and the total victim impact evidence comprised an hour of testimony. (21 RT 4787.) The court asked the prosecutor to address the nature of the testimony and how it would differ from witness to witness. The prosecutor explained that the witnesses represented three generations. There would be testimony from Vince Rosetti's mother, his two daughters, his sister and his brother. Each would have a different viewpoint on the loss. The court told the prosecutor they could testify, but it was not necessary for them to repeat what others said. (21 RT 4788.) Further, they should stay away from comments which were irrelevant or inflammatory. (21 RT 4788-4789.) The court noted that in the last trial, the prosecutor had asked them, "How did you learn of the murder?" Such areas of inquiry, the court continued, were irrelevant. Additionally, some of the witnesses had made comments about Trinh and how he committed the crime. These remarks went beyond the scope of permissible victim impact evidence. (21 RT 4789.) Further, the court stated, the family members talked about what happened at the funeral, which was irrelevant and highly emotional. (21 RT 4791-4792.) And if a witness were asked, "What was the hardest thing to do after you found out he was murdered"? or "Anything else you need to tell us?", an objection would be sustained. "So," the court continued, "I would either eliminate that question or change it." However, the court explained, because the Rosettis had a big family and Vince Rosetti was a unique individual, the court was not going to artificially limit the number of victim impact witnesses to two or three. (21 RT 4792.)

In the penalty phase, the jury heard from a total of nine witnesses regarding victim impact from the three murders and attempted murder that Trinh committed 3½ years earlier.[13] (23 RT 5412; 24 RT 5611, 5617, 5621, 5626, 5630, 5635, 5638, 5659.) Marlene Mustaffa's husband testified regarding the impact of her murder. (24 RT 5611-5616.) Vince Rosetti's mother, two daughters and his three siblings testified as to the impact of his murder. (24 RT 5617-5637.) Ron Robertson's wife and son testified about the impact of his murder. (24 RT 5638-5661.) Mila Salvador testified about the impact of Trinh's attempt to murder her. (23 RT 5412.)

Specifically, Dave Mustaffa, Marlene Mustaffa's husband, briefly testified to his life with Marlene and the impact from her death. He met Marlene when he was in high school; he was 15 years old and she was 12 years old. He described their falling instantly in love. After high school, they went their separate ways, each marrying different people. In the 1980's, they reconnected and were married in 1981. (24 RT 5611-5612.) Dave described Marlene as a loving person, devoted to her children and grandchildren. Everybody loved her. (24 RT 5612-5613.) Before her death, they planned to retire and move to Oregon. (24 RT 5613.) Dave testified that Marlene's death has ruined his life and counseling has not helped him with his loss. (24 RT 5614-5615.) Dave misses their time together, their travels, and their talks. Her death has also adversely affected their children and grandchildren. (24 RT 5616.)

Members of Vince Rosetti's family testified briefly regarding their loss. His sister Debra Marshall described him as someone with a great sense of humor who enjoyed life, was generous, and was there for

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[13] The victim impact testimony was provided on March 6, 2003, and the murders and attempted murder occurred on September 14, 1999. (5 RT 1196-1198; 24 RT 5616.)

everyone. (24 RT 5617.) She misses his jokes and experiences an emptiness and a void now that he is gone. Her family will never be the same. After Vince's death, her daughter quit school and her youngest son still cannot talk about what happened. Things have not gotten easier over time for the family. (24 RT 5619-5620.) Vince's brother, Mike Rosetti, testified that Vince was a Vietnam veteran who served in the Army's medical division for 15 months. (24 RT 5621-5622.) Because Vince was Mike's only brother, they spent a lot of time together and frequently shared their problems with one another. He misses having someone to talk to. Since Vince's death, the family doesn't laugh like it used to. (24 RT 5623.) Vince's daughter, Angela Rosetti-Smith testified that Vince was the first person she would call if she had good news or if she needed advice. He was a friend as well as a father. (24 RT 5626.) Major events, such as graduations, weddings and births, are extremely difficult without him. (24 RT 5627.) Smith misses going over to his house, taking walks with him, going out to breakfast together, and calling him on the phone to tell him about her day. (24 RT 5627.) Vince's daughter Becky Rosetti was living with him when he died. (24 RT 5630.) Because of his death, Becky lost someone who she looks up to, and who cared a lot about her. (24 RT 5631.) Becky described her relationship with Vince as "special." She noted that when she marries her father will not be at her wedding and he will never see his grandchildren. All that Becky had with him was gone because Trinh robbed her of her future with him. (24 RT 5632.) Like her sister, Becky missed the walks they used to take together. (24 RT 5634.) Vince's mother, Agnes Rosetti described Vince as a wonderful guy. He always tried to make his parents happy. He would tell jokes. He always said, "I love you" and "God bless you." (24 RT 5635.) Before Vince died, Agnes woke up happy and enjoyed the day. (24 RT 5626.) Now, she is constantly sad and tired. (24 RT 5636-5637.) On Mother's Day, Vince

would bring her flowers. Now she brings flowers to the cemetery. Her husband is such a wreck that he could not come to court. (24 RT 5637.)

Ron Robertson's wife, Suzanne Robertson, testified she had dated Ron for several years before they married. (24 RT 5638.) They were married for 18 years. Ron served as a pilot in the Vietnam war. (24 RT 5639.) The couple had three children. (26 RT 5638.) When Ron died, his son Brian was 16, his son Derek was 15, and his daughter Colleen was 13. (24 RT 5640.) Ron was a loving father who was completely devoted to his family. (24 RT 5639-5640.) He kept his children interested in sports and out of trouble. Now, the children are involved with drugs and alcohol. The household is chaotic. (24 RT 5640.) Colleen had participated in competitive soccer and could have received a scholarship but dropped out after Ron died. (24 RT 5642.) Brian still cannot come to court, go to the cemetery, talk about Ron, or talk to his friends. None of the children are willing to participate in counseling. (24 RT 5641-5642.) Ron's son, Derek Robertson, gave similar descriptions about the loss of family structure. (24 RT 5659-5660.) Derek was supposed to play his first high school football game of the season the night of September 15, but missed the game because Ron was killed the previous day. Derek misses having Ron wake him every morning for school. Derek would do anything to get him back. Derek still feels a lot of anger and hate over what happened to his father. (24 RT 5661.)

Mila Salvador testified that since the shootings, she has been on disability. (23 RT 5411.) She is taking medication for post traumatic stress disorder. (23 RT 5411-5412.) For several months, she was unable to leave the house. She still has nightmares about the events of September 14. She is unable to return to West Anaheim Hospital. She can drive around the parking lot, but cannot go any farther toward returning to her place of employment. (23 RT 5412.)

Trinh complains that the victim impact evidence exceeded constitutionally permissible limits because it was not narrowly focused on the effects of the crimes reasonably known to him, or to those which were disclosed by the evidence properly received during the guilt phase. (AOB 218-219, 222-223, 224-225.) As Trinh acknowledges (AOB 219), his claim has been rejected by this Court. (E.g., *People v. Carrington* (2009) 47 Cal.4th 145, 196-197; *People v. Bramit* (2009) 46 Cal.4th 1221, 1240; *People v. Zamudio* (2008) 43 Cal.4th 327, 364-365.) There is no requirement limiting victim-impact evidence to matters within the defendant's knowledge at the time of his crimes. (*People v. Carrington, supra*, 47 Cal.4th at pp. 196-197.) This Court should decline Trinh's request to revisit the issue.

Trinh also claims that the victim impact evidence was "unfairly inflammatory" and "cumulative" because, in Trinh's opinion, only one impact witness should testify per victim. Further, Trinh continues, that one witness must limit her testimony to the effects of the death on the victim's immediate family members. (AOB 219-222, 223-224.) As Trinh admits (AOB 219-220), this Court has refused to place such limitations on victim impact testimony. (E.g. *People v. Brady, supra*, 50 Cal.4th at pp. 573-581 [where victim was police officer, trial court properly allowed two days of testimony from four of his sisters, his fiancée, the treating physician at the hospital, two fellow officers, and his police chief, regarding his childhood hardships, his lifelong desire to be a police officer, his achievements, his engagement and future plans, his death, his funeral service, and the aftereffects of his death; as well as two videotapes and numerous photographs]; *People v. Taylor, supra*, 48 Cal.4th at pp. 644-647 [eight witnesses, including six family members, allowed to testify regarding effect single victim's death had on them individually and on community]; *People v. Jurado* (2006) 38 Cal.4th 72, 132 [testimony by mother-in-law about impact

of murder on victim's young daughter, and testimony of victim's parents regarding impact on their other two children and grandchild, properly admitted].) This Court should decline Trinh's request to revisit the issue.

Trinh's complaint that the victim impact evidence was prejudicial is unavailing. This Court's analysis of the victim impact evidence presented in *People v. Russell* (2010) 50 Cal.4th 1228 shows the absence of merit to Trinh's complaint. In *Russell*, the victims were police officers. During the penalty phase, the first victim's wife testified about the effect his death had on her and their children. The victim's father-in-law spoke of the victim's kind nature. The victim's brother-in-law testified about the devastating impact of the victim's death on the victim's son and about the son's destructive behavior following the victim's death. The victim's mother testified about the heart attack she suffered just weeks after the victim was killed. The second victim's wife testified about her relationship with her husband, as well as the impact his death had on the family. The victim's niece testified about her correspondence with the victim. The victim's son testified about grieving for the victim and about the changes to his family following the victim's death. A fellow officer described the reaction of the victim's family when he informed them that the victim had been killed. Additionally, 57 photographs of the victims and their families were introduced into evidence. (*Id.* at p. 1264.) On his automatic appeal to this Court, the defendant contended that the victim impact evidence was cumulative, excessive, unduly prejudicial, and partially inadmissible, violating Factor (a), and his state and federal constitutional rights. (*Ibid.*) This Court rejected the argument. This Court stated that it had repeatedly found admissible and relevant testimony about the character of the victim and others' personal experiences with the victim, to show the uniqueness of the victim as a human being, and the effect of the loss on the family and on the community. (*Id.* at pp. 1264-1265.)

Here, the trial court properly exercised its discretion in determining the scope of permissible victim impact testimony. Before allowing the testimony, the court asked the prosecutor to explain what it would cover. (21 RT 4788.) The court told the prosecutor not to present testimony which was cumulative, inflammatory or irrelevant. (21 RT 4788-4789.) Specifically, the court precluded the prosecutor from asking the witnesses how they learned of the murder, what happened at the loved one's funeral, what they thought of Trinh, and what they thought about the crimes. (21 RT 4791-4792.) To avoid prejudicing the jury, the court ruled that the prosecutor could not ask them "What was the hardest thing for you after you found out (s)he was murdered" or "Is there anything else you need to tell us." However, consistent with this Court's precedent, the trial court simply refused to place arbitrary limits on the number of impact witnesses per victim. (21 RT 4792.)

Furthermore, the victim impact evidence presented here was not unduly prejudicial. The jury was not shown any filmed tributes or other emotional video-taped evidence. (Cf. *People v. Kelly* (2007) 42 Cal.4th 763, 794-796.) While the defense penalty phase case was extensive, the testimony of the victim impact witnesses, combined, comprised only 43 pages of reporter's transcript. (23 RT 5411-5412; 24 RT 5611-5661.) The victim impact witnesses exercised admirable emotional restraint, presented material relevant to the penalty determination because it humanized the victims, and gave testimony that assisted jurors in understanding "the loss to the victims' famil[ies] and to society which had resulted from [Trinh's] homicides." (*People v. Zamudio, supra*, 43 Cal.4th at p. 367.)

Moreover, the jury was not exposed to inflammatory rhetoric that "divert[ed its] attention from its proper role or invited an irrational, purely subjective response." (*People v. Edwards* (1991) 54 Cal.3d 787, 836.) In fact, the court ensured there would be no such testimony by ruling, in

advance, that the witnesses could not testify concerning their feelings about the crimes or about appellant. (27 RT 4791-4792.) Each witness offered the jury a unique perspective. Dave Mustaffa (Marlene Mustaffa's husband) talked about meeting Marlene, the plans they had for the future, her devotion to her family, and the impact of her death on his life. (24 RT 5611-5616.) Debra Marshall (Vince Rosetti's sister) described Vince's personality. (24 RT 5617.) She discussed the impact his death had on her and on the family. (26 RT 5617-5620.) Mike Rosetti (Vince's brother) described how Vince's death had affected him and the family. (24 RT 5621-5623.) Angela Rosetti-Smith and Becky Rosetti (Vince's daughters) talked about the time they spent with Vince, their relationship with him, and the impact of his death on them personally. (24 RT 5626-5627, 5630-5634.) Agnes Rosetti (Vince's mother) described the impact of Vince's death from a parent's point of view. (24 RT 5635-5637.) Suzanne Robertson (Ron Robertson's wife) talked about meeting Ron, the type of parent he was, and the effect his death had on the entire family. (24 RT 5638-5642.) Finally, Derek Robertson (Ron's son) discussed the impact of Ron's death on him personally. (24 RT 5659-5661.) Indeed, Trinh points to nothing particularly objectionable about any of this testimony other than his disagreement with the law on victim impact evidence and the failure of the prosecution's case to fall within the more narrow limits he feels should be placed on its scope. (AOB 222-227.)

Trinh cannot establish that the testimony the jurors heard, was so prejudicial that it rendered his trial fundamentally unfair. (*People v. Cowan* (2010) 50 Cal.4th 401, 484.) The focus on the victims' lives and the pain their deaths causes their families was "rather typical" of the type of victim impact evidence this Court routinely permits. (E.g., *People v. Burney, supra*, 47 Cal.4th at p. 258; *People v. Kelly, supra*, 42 Cal.4th at p. 793.) The testimony expressed sadness, not outrage, over the victims' deaths, and

there was no "clarion call for vengeance." (*People v. Kelly, supra*, 42 Cal.4th at p. 797.) Although jurors may never by influenced by passion or prejudice, in considering the impact of a defendant's crimes, they may "exercise sympathy for the defendant's murder victims and . . . their bereaved family members. [Citation.]" (*People v. Zamudio, supra*, 43 Cal.4th at pp. 368-369, internal quotations omitted.)

## VIII. THERE WAS NO PREJUDICIAL PROSECUTORIAL MISCONDUCT

In Argument VIII of his opening brief, Trinh contends the prosecutor committed misconduct during the third penalty trial by asking the victim-impact witnesses questions the court had previously ruled improper. Trinh alleges that because of the misconduct, reversal of the death sentence is required. (AOB 230-238.) The contention lacks merit. There was no misconduct. Moreover, Trinh's claim fails for lack of prejudice.

"Improper remarks by a prosecutor can so infect the trial with unfairness as to make the resulting conviction a denial of due process." (*Darden v. Wainwright* (1986) 477 U.S. 168, 181 [106 S.Ct. 2464, 91 L.Ed.2d 144]; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642 [94 S.Ct. 1868, 40 L.Ed.2d 431].) However, conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial error under state law only if it involves "the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury." (*People v. Espinoza* (1992) 3 Cal.4th 806, 820.)

A prosecutor is entitled to vigorously argue his case (*People v. Bandhauer* (1967) 66 Cal.2d 524, 529), and is afforded wide latitude in argument (*People v. Milner* (1988) 45 Cal.3d 227, 245). A prosecutor may fully argue his views as to what the evidence shows, discuss the force and effect of the evidence, and argue the inferences and conclusions to be drawn therefrom. (*People v. Szeto* (1981) 29 Cal.3d 20, 34.) Moreover, "a

court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations." (*Boyde v. California* (1990) 494 U.S. 370, 385 [110 S.Ct. 1190, 108 L.Ed.2d 316].)

Further, "to preserve for appeal a claim of prosecutorial misconduct, the defense must make a timely objection at trial and request an admonition; otherwise, the point is reviewable only if an admonition would not have otherwise cured the harm caused by the misconduct." (*People v. Earp, supra*, 20 Cal.4th at p. 858.)

Finally, even if the reviewing court determines that an objection and admonition would not have sufficed, reversal is warranted only if, "on the whole record the harm resulted in a miscarriage of justice . . . ." (*People v. Bell* (1989) 49 Cal.3d 502, 535.)

Trinh's complaint centers around questions the prosecutor asked various victim impact witnesses. After Dave Mustaffa testified about the plans he and Marlene had to move to Oregon, the following exchange occurred:

Q.: Where were you when you learned she had been killed?

A.: I was at work, and they called me on the radio and told me to come up to the office, that they needed to talk to me. And when I got up - -

Defense Counsel: Your Honor, I would respectfully object.

A.: - - They took me in the back.

Court: The objection is sustained.

Q.: After you learned that your wife was killed, what was the hardest thing for you to do initially?

Defense Counsel: I would object, Your Honor. I am sorry. But I think that is an improper form.

The Court: Rephrase your last question.

Q.: Tell us how your wife's death has impacted you.

(24 RT 5614.)

After Debbie Marshall testified that Vince Rosetti was intelligent and an all-around great person, the following exchange occurred:

Q.: After you learned of Vince's death, what was the hardest thing for you?

Defense Counsel: Objection, Your Honor, improper form.

Court: Sustained.

Q.: What was the impact of his death on you?

(24 RT 5618.)

After Mike Rosetti testified that he last talked to Vince the morning before Vince's death, the following exchange occurred:

Q.: After you learned of his death, what was the hardest thing for you?

Defense Counsel: Objection, Your Honor, improper form.

Court: Sustained.

Q.: Tell us how your brother's death has impacted you.

(24 RT 5622.)

At the end of Mike's testimony, another exchange occurred as follows:

Q.: Is there anything else that you need to tell us?

Defense Counsel: Objection, improper form.

Court: Sustained.

Q.: Thank you very much, Sir.

(24 RT 5625.)

After Angela Rosetti-Smith testified that Vince was a friend and that she loved him, the following exchange occurred:

Q.: Initially what was the hardest thing for you after your dad was killed?

Defense Counsel: Objection, Your Honor, improper form.

Court: Sustained.

Q.: Tell us how your dad's murder impacted you.

(24 RT 5626-5627.)

After Becky Rosetti testified that Vince was asleep when she came home the night of September 13, and she never saw him again, the following exchange occurred:

Q.: Initially after your dad was killed, what was the hardest thing for you - -

Defense Counsel: Objection, Your Honor, improper form.

Court: Sustained.

Q.: Tell us about the impact of your dad's murder on yourself.

(24 RT 5631.)

Finally, after Suzanne Robertson testified the household has been chaotic since Ron Robertson's death, the following exchange occurred:

Q.: What is the hardest thing for you now?

A.: I think that - -

Defense Counsel: Objection - -

The Witness: This is a never-ending story. I am real tired of your objections.

Q.: Ma'am - -

Court: Sustained.

Q.: Suzanne, tell us how this has impacted your family.

(24 RT 5641.)

Contrary to Trinh's assertion (AOB 231-233), the prosecutor did not repeatedly and intentionally elicit inadmissible evidence. The trial court had listed specific questions which the prosecutor should either rephrase or eliminate. Those questions were as follows: (1) "How did you learn of the murder?" (2) "What was the hardest thing for you to do after you found out he was murdered?" (3) "What happened at the funeral?" (4) "Anything else you need to tell us?" and (5) any questions calling for opinions about

Trinh or his crimes. (21 RT 4788-4792.) Of all these questions, the prosecutor asked five witnesses what was hardest for them (but did not use the word "murder") (24 RT 5614, 5618, 5622, 5626, 5631) and asked one witness if there was anything else he needed to say (24 RT 5625). These questions, while perhaps inartfully phrased, did not constitute misconduct. In asking the questions, the prosecutor was eliciting testimony regarding the impact the crimes had on the victims and their families. When the prosecutor rephrased the questions, that testimony was presented to the jury. Thus, nothing in the record suggests the prosecutor sought to present testimony he knew was inadmissible. (*People v. Hawthorne* (2009) 46 Cal.4th 67, 98.) "Although it is misconduct for a prosecutor intentionally to elicit inadmissible testimony [citation], merely eliciting evidence is not misconduct." (*People v. Chatman* (2006) 38 Cal.4th 344, 379-380.)

In any event, Trinh was not prejudiced by the purported misconduct. Trinh asserts that the mere asking of the questions constituted prejudicial error (AOB 234-238), but the law does not support Trinh's position. When prosecutorial misconduct occurs, the defendant must establish that it is prejudicial. (*People v. Williams* (1997) 16 Cal.4th 153, 255.) To be prejudicial, there must be a reasonable probability that the prosecutorial misconduct influenced the penalty verdict. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1019.) When objections to questions are sustained, it is assumed any prejudice is cured. (*People v. Dykes* (2009) 46 Cal.4th 731, 764.)

*People v. Foster* (2010) 50 Cal.4th 1301 is analogous to the present case. In *Foster*, the defendant set forth seven questions asked by the prosecutor and noted that the court had sustained objections to those questions. The defendant asserted that by asking the questions, the prosecutor committed misconduct. This Court disagreed. This Court concluded that the defendant failed to show that "the trial court's rulings

were inadequate to abate any prejudice. [Citation.]" (*Id.* at p. 1351.) Similarly, in *People v. Tate* (2010) 49 Cal.4th 635, this Court found no basis for reversal when, with one exception, "each [improper question] was squelched by a successful defense objection before any answer was forthcoming." (*Id.* at p. 692.)

Here, likewise, when the prosecutor asked Dave Mustaffa where he was when he learned Marlene had been killed, a defense objection was sustained. When the prosecutor asked him what was hardest for him, a defense objection was sustained. (24 RT 5614.) When the prosecutor asked Debbie Marshall what was hardest for her, a defense objection was sustained. (24 RT 5618.) When the prosecutor asked Mike Rosetti the same question, a defense objection was sustained. (24 RT 5622.) When the prosecutor asked Mike Rosetti if there was anything else he wanted to say, a defense objection was sustained. (24 RT 5625.) When the prosecutor asked Angela Rosetti-Smith what was hardest for her, a defense objection was sustained. (24 RT 5626-5627.) When the prosecutor started to ask Becky Rosetti the same question, a defense objection was sustained. (24 RT 5631.) When the prosecutor asked Suzanne Robertson what was hardest for her, a defense objection was sustained. (24 RT 5641.) Additionally, the trial court instructed the jury pursuant to CALJIC No. 1.02 [Statements of Counsel—Evidence Stricken Out—Insinuations of Questions—Stipulated Facts]. This instruction advised jurors that questions were not evidence, and that they should not consider for any purpose evidence that was rejected or stricken by the court. (27 RT 6376-6377; 8 CT 2029.) It is presumed the jurors followed this direction by the Court. (*People v. Delgado* (1993) 5 Cal.4th 312, 331.) Accordingly, any error was non-prejudicial.

## IX. THE TRIAL COURT PROPERLY DENIED TRINH'S MOTION FOR A NEW TRIAL

In Argument IX of his opening brief, Trinh contends the trial court erred in denying his motion for a new trial to the extent it was based on: (1) prosecutorial misconduct in asking questions of victim impact witnesses; (2) alleged spectator misconduct by Derek Robertson; and (3) the asserted unconstitutionality of having a third penalty phase trial. (AOB 239-249.) Trinh's contention is meritless. The trial court properly exercised its discretion in determining there were no bases for a new trial.

Section 1181, subdivision (5) gives the trial court authority to grant the defendant a new trial "[w]hen the court has misdirected the jury in a matter of law, or has erred in the decision of any question of law arising during the course of the trial, and when the district attorney or other counsel prosecuting the case has been guilty of prejudicial misconduct during the trial thereof before a jury[.]" "The trial court has broad discretion in ruling on a new trial motion, and its ruling will be disturbed only for clear abuse of that discretion. [Citation]." (*People v. Verdugo* (2010) 50 Cal.4th 263, 308.)

On April 9, 2003, defense counsel filed a motion for a new trial. As pertinent here, counsel argued that the prosecutor committed misconduct by deliberately asking questions of each victim impact witness which the court had previously ruled improper. Counsel listed several questions which she found objectionable: (A) inquiries to family members about what the "hardest thing" was for them upon learning of their loved one's death; (B) a question to Dave Mustaffa, "Where were you when you learned she had been killed?"; and (C) volunteered information by Angela Rosetti-Smith and Suzanne Robertson, to which objections were sustained. Further, counsel asserted, a new trial was warranted because, when she made an

objection to one of the prosecutor's questions, Derek Robertson, who was in the audience, yelled out to her, "Shut up bitch!" Finally, counsel again asserted that the court should not have permitted a third penalty trial. (8 CT 2120-2140.)

In its written response, the prosecution argued that there was no prejudicial misconduct. All of the questions about which Trinh complained resulted in defense objections which were sustained. As to the outburst by Derek Robertson, there was no evidence the jury heard it. Furthermore, any juror would expect a murder victim's family member to be unhappy with a criminal defense lawyer. The jury was instructed not to consider such extraneous matters and is presumed to have followed the instructions. (8 CT 2161-2162.)

At a hearing held on April 14, 2003, the court stated that insofar as the prosecutorial misconduct claim was concerned, the court sustained objections to all of the challenged questions. The prosecutor then rephrased them. Thus, there was no showing of prejudice. (27 RT 6407.) Defense counsel complained that asking the questions itself was prejudicial, because it forced the defense to object. (27 RT 647-6408.) She expressed concern that the jury might have negative feelings towards the defense for objecting. The court disagreed. The court noted that the same questions were proper when asked in a slightly different form. Furthermore, the prosecutor was not acting in bad faith or trying to get inadmissible information before the jury. (27 RT 6408.)

Discussing the alleged comment by Derek Robertson, the court stated it did not hear anything. (27 RT 6408.) Furthermore, counsel did not bring it up at the time. (27 RT 6408-6409.) Defense counsel responded that she might have cited some conduct on the record, albeit different conduct. She also acknowledged that she did not repeat any specific words which Derek allegedly said. The court replied that it was concerned because of

testimony Derek gave at the prior trials, so it watched the audience and jury as best as it could. The jury focused on counsel and the witnesses; jurors were not looking at the audience. (27 RT 6409.) The court added that if there was anything prejudicial to the defense, it would have been raised sooner. The court continued, "That is why I am surprised it comes up so much later." (27 RT 6410.)

Finally, discussing Trinh's argument that it was unconstitutional to try him a third time, the court found the argument without legal support. (27 RT 6414.) Accordingly, the court denied the motion for new trial. (27 RT 6414-6415.)

Summarizing the claim he made in Argument XIII, Trinh asserts that the prosecutor committed prejudicial misconduct. (AOB 243-244.) Trinh is mistaken. In each instance, objections were sustained and the questions were not answered. (24 RT 5614, 5618, 5622, 5625-5627, 5631, 5641.) Thus, "no conceivable prejudice ensued." (*People v. Dykes, supra*, 46 Cal.4th at p. 763.) Additionally, the jury was instructed that counsel's questions were not evidence, the evidence consisted of testimony from the witness stand. (27 RT 6376-6377; 8 CT 2029.) The jury is presumed to have followed this instruction. (*People v. Sanchez* (2001) 26 Cal.4th 834, 852.)

Summarizing the claim he made in Argument VI, Trinh asserts that the court should have granted a new trial because section 190.4, subdivision (b), permitting a penalty retrial, violated his Eighth Amendment rights and right to due process. (AOB 246-248.) As previously noted (see Argument VI, *supra*), this Court has rejected Trinh's contention. (*People v. Taylor, supra*, 48 Cal.4th at p. 635.)

Finally, Trinh claims the court should have granted him a new trial because of misconduct by spectator Derek Robertson. (AOB 244-246.) The motion was properly denied for lack of a showing of prejudice. To obtain relief for spectator misconduct, the defendant must demonstrate that

he was prejudiced thereby. (*People v. Cornwall* (2005) 37 Cal.4th 50, 86-87, disapproved on other grounds in *People v. Doolin, supra*, 45 Cal.4th at p. 421, fn. 22; *People v. Panah* (2005) 35 Cal.4th 395, 451.) A federal constitutional violation will not be found unless "what the jury 'saw was so inherently prejudicial as to pose an unacceptable threat to defendant's right to a fair trial.'" (*People v. Chatman, supra*, 38 Cal.4th at p. 369, quoting *Holbrook v. Flynn* (1986) 475 U.S. 560, 572 [106 S.Ct. 1340, 89 L.Ed.2d 525].) "A trial court is afforded broad discretion in determining whether the conduct of a spectator is prejudicial." (*People v. Lucero* (1988) 44 Cal.3d 1006, 1022.)

In *People v. Cornwell, supra,* 37 Cal.4th 50, the defendant brought a motion for a new trial, alleging spectator misconduct. Attached to the motion were declarations from a defense investigator, the defense attorney, and the defendant's wife. According to these declarations, during the defense closing argument, spectators had burst into the courtroom, rolled their eyes and sighed audibly. (*Id.* at p. 84.) Two spectators had engaged in "constant whispered remarks, snickers, laughter and gasps of disbelief" during the testimony of various defense witnesses. (*Id.* at pp. 84-85.) When one witness was testifying, a spectator made comments about that testimony to the spectator behind her. She also expressed audible agreement with a portion of the prosecutor's closing argument. The prosecutor opposed the motion for a new trial, arguing that even if all of the defense allegations were true, the defendant was not prejudiced by the spectators' conduct. (*Id.* at p. 85.) The trial court agreed with the prosecutor and denied the motion for a new trial without an evidentiary hearing. (*Id.* at p. 86.) This Court upheld the ruling. This Court noted that the from the trial court's own observations of the jury, it had correctly concluded that the incidents were "innocuous, or at most trivial." (*Id.* at p. 87, footnote omitted.) Moreover, "defendant d[id] not claim that the

spectators actually attempted to convey information to the jury; there was no dramatic, anguished outburst, and the spectator conduct, even taking defendant's claims at face value, was not particularly disruptive or likely to influence the jury." (*Ibid.*) Thus, this Court concluded, the defendant had not met his burden of establishing prejudice. (*Ibid.*)

In the present case, the alleged spectator misconduct was even more trivial than that at issue in *Cornwell*. While *Cornwell* involved a number of incidents, in this case there was only one. Furthermore, the comment occurred not during testimony or closing argument, but rather, while defense counsel was objecting to a question posed by the prosecutor. Jurors expect family members of a victim to be anguished and frustrated with the defense. (See *People v. Chatman, supra*, 38 Cal.4th at p. 369.) No outside information was conveyed to the jury. Additionally, as the trial court noted, the defense did not seek remedial action at the time the misconduct occurred. (27 RT 6408-6410.) Had the problem been as severe as Trinh now claims, he would have immediately asked the court to admonish the jury to disregard Derek's remark. Finally, from its own observations, the court was satisfied that the jury was paying attention to counsel and the witnesses, not to the spectators. (27 RT 6409.) Accordingly, the comment by Derek, if any, did not prejudice Trinh.

## X. THE TRIAL COURT PROPERLY DENIED TRINH'S POST-VERDICT, NON-STATUTORY MOTION REQUESTING A SENTENCE OF LIFE WITHOUT THE POSSIBILITY OF PAROLE

In Argument X of his opening brief, Trinh contends the trial court erred in denying his post-verdict, non-statutory motion requesting a sentence of life without the possibility of parole. (AOB 250-268.) Trinh's contention lacks merit. The motion was properly denied as it was without legal support.

On April 9, 2003, Trinh's counsel filed a motion entitled, "Motion for the Court to Impose a Sentence of Life Without the Possibility of Parole Based Upon the Improper Granting of a Third Penalty Phase Trial." Counsel argued the third trial violated Trinh's right to a fair and reliable determination of the appropriate penalty. Specifically, counsel claimed that the third trial was unfair because Trinh, by his testimony, assured himself of an unfavorable verdict. (8 CT 2153-2158.) In its response, the prosecutor argued that invited error barred any claim Trinh caused a death verdict by his testimony. Furthermore, criminal defendants are entitled to ask a jury to sentence them to death. Finally, the jury was instructed not to impose the death penalty simply because Trinh asked for it. (8 CT 2162-2163.) At argument held before sentencing, defense counsel submitted on the paperwork. The court denied the motion. (27 RT 6415.)

Trinh expands upon the argument he made in the trial court. Although convoluted and unclear, Trinh appears to contend that the State was precluded from trying him for a third time because the prosecution knew the trial would be fundamentally unfair and "unreliable." Such unfairness, Trinh continues, resulted from the fact that in each trial, Trinh gave testimony which increasingly defeated his own interests, and invited the jury to sentence him to death. Trinh notes that defendants are precluded from pleading guilty to charges carrying the death penalty, are afforded an automatic motion to reduce the sentence, and are given an appeal as a matter of right. By analogy, Trinh asserts, a trial in which the defendant testifies and asks for a death sentence cannot pass constitutional muster. (AOB 252-266.) Trinh's claim is foreclosed by this Court's decisions in *People v. Guzman* (1988) 45 Cal.3d 915, overruled on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13 and *People v. Webb* (1993) 6 Cal.4th 494.

In *People v. Guzman, supra*, 45 Cal.3d 915, during the penalty phase, the defendant insisted on testifying in his own behalf. During that testimony, the defendant asked the jury to sentence him to death. (*Id.* at p. 929.) The defendant then proceeded to give a lengthy explanation for his crimes. (*Id.* at pp. 929-933.) On appeal, the defendant claimed that the resulting death sentence was "unreliable" because his death-preference testimony may have diminished the jury's sense of responsibility. (*Id.* at p. 962.) This Court disagreed. This Court held that in light of the fact that the prosecutor did not mention the testimony during closing argument, and given the fact the jury understood its discretion to impose a sentence of life without the possibility of parole, the sentence did not contravene the state's interest in promoting the reliability of capital sentencing proceedings. (*Id.* at p. 963.)

In *People v. Webb, supra*, 6 Cal.4th 494, the defendant testified in narrative form during the penalty phase. He told the jury, in graphic terms, that death was the only appropriate penalty for him. He said he began a life of crime at age sixteen. He described four murders he committed for which he had never been apprehended. He indirectly admitted the capital crimes. He testified that he had "manipulated" the prison system by setting up an art class so he could smuggle drugs into the prison, and by tricking inmates into thinking he would help them and then stabbing them. The defendant ended his remarks by saying, "Some people are salvageable, you know. I'm not. What do you do with a man that does not have any feeling? What do you do with a man that doesn't care? What do you do with a rabid dog? Put it to sleep." (*Id.* at p. 513.) The defendant contended on appeal that the trial court prejudicially undermined the reliability of the penalty verdict by allowing him to testify. (*Id.* at p. 534.) Acknowledging the claim had been rejected in *Guzman*, the defendant argued that his case was distinguishable because his testimony was "repugnant" and particularly likely to "inflame"

the jury. (*Id.* at p. 535.) This Court disagreed, stating that a defendant's testimony could not be barred or censored based on content. (*Ibid.*) Rather, the remedy was to give an appropriate limiting instruction. (*Ibid.*)

As *Guzman* and *Webb* make clear, a verdict is not arbitrary, capricious, or unreliable simply because the defendant testifies, makes inflammatory comments, and asks the jury to sentence him to death. Nor was the verdict unconstitutional in this case. Despite Trinh's wishes, the defense presented an extensive mitigating case on his behalf, and vigorously argued to the jury that the appropriate verdict was life without the possibility of parole. To counter the testimony he insisted on giving, the defense introduced his statements to the police and his testimony at the first penalty phase trial, where he expressed some degree of remorse. Further, the jury was given an instruction, CALJIC No. 8.085m, that Trinh's desires were not relevant to a decision as to the appropriate penalty in this case.[14] (27 RT 6390; 8 CT 2042.) It is presumed the jury followed this instruction and fully considered all of the penalty phase evidence. (*People v. Webb, supra*, 6 Cal.4th at p. 535.) Accordingly, no constitutional error occurred.

## XI. TRINH'S SENTENCE IS CONSTITUTIONAL

In Argument XI of his opening brief, Trinh raises a variety of perfunctory constitutional challenges to California's death penalty law. This Court has rejected all of them, and should do so again here.

In Argument XI(A), Trinh contends that section 190.2 does not meaningfully narrow those cases which are eligible for the death penalty,

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[14] As pertinent here, CALJIC No. 8.085m provided, "Despite the testimony of Mr. Trinh, the defendant in this case, it remains your obligation to decide for yourself, based on the statutory factors that I have read to you, whether death is appropriate." (27 RT 6390; 8 CT 2042.)

but instead applies to nearly all first degree murders. (AOB 272-273.) This Court has repeatedly rejected this contention. (*People v. Cowan, supra*, 50 Cal.4th at p. 508; *People v. Leonard* (2007) 40 Cal.4th 1370, 1429.) Trinh presents no persuasive reason why this Court should revisit the matter.

In Argument XI(B), Trinh contends that section 190.3, subdivision (a), is impermissibly broad, because it allows the jury to impose the death penalty merely upon the circumstances surrounding the crime, resulting in arbitrary and capricious imposition of the death penalty. (AOB 273-274.) This Court has rejected the identical argument. (*People v. Curl* (2009) 46 Cal.4th 339, 362; *People v. Loker* (2008) 44 Cal.4th 691, 755.) Trinh presents no persuasive reason why this Court should revisit the subject.

In Argument XI(C)(1), Trinh contends his death sentence is unconstitutional because it is not premised on findings made beyond a reasonable doubt. (AOB 275-277.) This Court has rejected the claim, made by Trinh, that *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435], *Ring v. Arizona* (2002) 536 U.S. 584 [122 S.Ct. 2428, 153 L.Ed.2d 556], *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403] and *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856, 166 L.Ed.2d 856], mandate that the prosecution bear the burden of proof. (*People v. Cowan, supra*, 50 Cal.4th at p. 509; *People v. Rogers* (2006) 39 Cal.4th 826, 893.) Trinh presents no persuasive reason why this Court should revisit the issue.

In Argument XI(C)(2), Trinh contends the jury should have been instructed that there was no burden of proof, or, alternatively, some burden should have been required. (AOB 277-278.) This Court has repeatedly rejected the identical contention. (*People v. Cowan, supra*, 50 Cal.4th at p. 509; *People v. Dykes, supra*, 46 Cal.4th at p. 814.) Trinh presents no persuasive reason why this Court should revisit the subject.

In Argument XI(C)(3), Trinh contends that his death sentence violated the Sixth, Eighth and Fourteenth Amendments because there was no requirement of jury unanimity with regard to aggravating factors. (AOB 278-280.) This Court has repeatedly rejected this identical claim. (*People v. Gamache, supra*, 48 Cal.4th at p. 407; *People v. Cruz, supra*, 44 Cal.4th at p. 681.) Trinh presents no persuasive reason why this Court should revisit the matter.

In Argument XI(C)(4), Trinh contends that the use of the word "so substantial" in CALJIC No. 8.88 [Penalty Trial -- Concluding Instruction] did not channel or limit the jury's discretion in a manner sufficient to minimize the risk of arbitrary and capricious sentencing. (AOB 280.) This Court has repeatedly rejected the identical argument. (*People v. Tate, supra*, 49 Cal.4th at p. 712; *People v. Friend* (2009) 47 Cal.4th 1, 90.) Trinh presents no persuasive reason why this Court should revisit the matter.

In Argument XI(C)(5), Trinh contends that the use of "warranted" in CALJIC No. 8.88 rendered the instruction unconstitutionally vague. (AOB 280-281.) This Court has repeatedly rejected the identical claim. (*People v. Friend, supra*, 47 Cal.4th at p. 90; *People v. Salcido* (2008) 44 Cal.4th 93, 117.) Trinh presents no persuasive reason why this Court should revisit the subject.

In Argument XI(C)(6), Trinh contends that the trial court should have instructed the jury there was a "presumption of life." (AOB 281-282.) This Court has repeatedly rejected the identical claim. (*People v. Gamache, supra*, 48 Cal.4th at p. 407; *People v. Kipp* (2001) 26 Cal.4th 1100, 1137.) Trinh presents no persuasive reason why this Court should revisit the matter.

In Argument XI(D), Trinh contends that the failure to require written findings at the penalty phase is unconstitutional because the absence of such findings forecloses meaningful appellate review. (AOB 282-283.) This Court has repeatedly rejected the identical argument. (*People v.*

*Lomax* (2010) 49 Cal.4th 530, 594; *People v. Williams* (2008) 43 Cal.4th 584, 648.) Trinh presents no persuasive reason why this Court should revisit the subject.

In Argument XI(E), Trinh contends that CALJIC No. 8.85 [Penalty Trial -- Factors for Consideration] was "misleading" and "confusing" because the trial court failed to delete factors which were inapplicable to his case. (AOB 283.) This Court has repeatedly rejected the identical contention. (*People v. Hartsch, supra*, 49 Cal.4th at p. 516; *People v. McWhorter* (2009) 47 Cal.4th 318, 378.) Trinh presents no persuasive reason why this Court should revisit the matter.

In Argument XI(F), Trinh contends that California's capital sentencing scheme violates the Fifth, Sixth, Eighth and Fourteenth Amendment guarantees of due process and equal protection, because it does not require intercase proportionality review. (AOB 283-284.) This Court has repeatedly rejected the identical assertion. (*People v. Bacon* (2010) 50 Cal.4th 1082, 1129; *People v. McWhorter, supra*, 47 Cal.4th at p. 379.) Trinh presents no persuasive reason why this Court should revisit the subject.

In Argument XI(G), Trinh contends that California's capital sentencing scheme violates the equal protection clause, because it fails to afford capital defendants the same procedural protections that are given to those charged with non-capital crimes. (AOB 284-286.) This Court has repeatedly rejected the identical contention, noting that capital and non-capital defendants are not similarly-situated. (*People v. Jennings* (2010) 50 Cal.4th 616, 690; *People v. Cruz, supra*, 44 Cal.4th at p. 681.) Trinh provides no persuasive reason why this Court should revisit the matter.

Finally, in Argument XI(H), Trinh argues that California's use of the death penalty violates international law. (AOB 284-286.) This Court has repeatedly rejected the identical claim. (*People v. Avila* (2009) 46 Cal.4th

680, 725; *People v. Hillhouse* (2002) 27 Cal.4th 469, 511.) Trinh presents no persuasive reason why this Court should revisit the subject.

## XII. THERE WAS NO CUMULATIVE ERROR

In Argument XII of his opening brief, Trinh contends that reversal is required because the cumulative effect of multiple errors deprived him of a fair trial and a reliable penalty verdict. (AOB 287-291.) Trinh contends that the cumulative error of the claims raised in Arguments I through XI, taken together, warrants reversal, because the Orange County District Attorney's Office did not give him a fair trial, he was not tried by a fair and impartial jury of his peers, failure to give his Special Instruction I undermined the defense theory that the crime was committed in the heat of passion and lowered the prosecution's burden of proving the crime beyond a reasonable doubt, and the court's failure to provide written copies of CALJIC No. 2.60 and 2.61 effectively informed the jury to consider the fact he did not testify at the guilt phase as evidence of his guilt. (AOB 288-289.) Trinh is incorrect because he was accorded due process and fairness in his trial.

An appellant is entitled to a fair trial, but not a perfect when, even where he has been exposed to substantial penalties. (See *People v. Marshall* (1990) 50 Cal.3d 907, 945; *People v. Hamilton* (1988) 46 Cal.3d 123, 156; see also *Schnabel v. Florida* (1972) 405 U.S. 427, 432 [92 S.Ct. 1056, 31 L.Ed. 340]; *United States v. Hasting* (1983) 461 U.S. 499, 508-509 [103 S.Ct. 1974, 76 L.Ed.2d 96] ["[G]iven the myriad of safeguards provided to assure a fair trial, and taking into account the reality of the human fallibility of the participants, there can be no such thing as an error-free, perfect trial and . . . the Constitution does not guarantee such a trial."].)

When an appellant invokes the cumulative error doctrine, "the litmus test is whether [appellant] received due process and a fair trial." (*People v. Kronemyer* (1987) 189 Cal.App.3d 314, 329.) Therefore, any claim based

on cumulative errors must be assessed "to see if it is reasonably probable the jury would have reached a result more favorable to defendant in their absence." (*Ibid.*) Applying that analysis to the instant case, Trinh's contention should be rejected. Notwithstanding his arguments to the contrary, the record contains few, if any, errors, and no prejudicial error has been shown. To the extent any error arguably occurred, the effect was harmless. Review of the record without the speculation and interpretation offered by Trinh shows that he received a fair and untainted trial. The Constitution requires no more. Even when considered together, it is not reasonably probable that, absent any of the alleged errors, Trinh would have received a more favorable result, so any errors were harmless. Thus, even cumulatively, the alleged errors are insufficient to justify a reversal of the guilt or penalty verdicts. (*People v. Gordon* (1990) 50 Cal.3d 1223, 1278 [a defendant is entitled to a fair trial, but not a perfect one].)

## CONCLUSION

Based on the foregoing, respondent respectfully requests that this Court affirm the judgment in its entirety.

Dated: May 12, 2011

Respectfully submitted,

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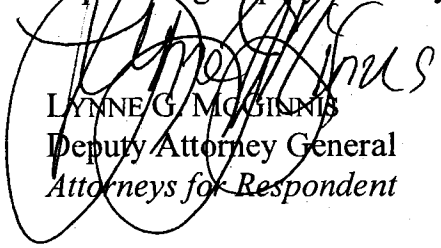

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## CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 31,193 words.

Dated: May 12, 2011

KAMALA D. HARRIS
Attorney General of California

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Deputy Attorney General
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## DECLARATION OF SERVICE

Case Name: **People v. Trinh**

No.: **S115284**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266. 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 May 13, 2011, 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 system of the Office of the Attorney General, addressed as follows:

Michael J. Hersek
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*Counsel for Appellant Trinh- 2 copies*

Hon. John J. Ryan, Judge
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On May 13, 2011, I caused thirteen (13) copies and original of the **RESPONDENT'S BRIEF** in this case to be delivered to the California Supreme Court at **350 McAllister Street, San Francisco, CA 94102-4797** by **Messenger Service.**

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 May 13, 2011, at San Diego, California.

C. Herrera
Declarant

Signature

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