IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

STEPHEN EDWARD HAJEK and LOI TAN VO,

Defendants and Appellants.

CAPITAL CASE
S049626

Santa Clara County Superior Court No. 148113
The Honorable Daniel E. Creed, Judge

RESPONDENT'S BRIEF

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, **v.** **STEPHEN EDWARD HAJEK and LOI TAN VO,** Defendants and Appellants.	**CAPITAL CASE** S049626

STATEMENT OF THE CASE

By an information filed on July 1, 1991, the District Attorney of Santa Clara County charged appellants with murder (Pen. Code, § 187, count 1),[1/] four counts of premeditated attempted murder (§§ 664, 187, counts 2-5), kidnapping (§ 207, subd. (a), count 6), three counts of false imprisonment (§§ 236, 237, counts 7-9), robbery (§§ 211, 212.5, subd. (a), count 10), first degree burglary (§§ 459, 460.1, count 11), and dissuading a witness with force (§ 136.1, subd. (c)(1), count 12, charged against Hajek only). With respect to count one, the information further charged four special circumstances: murder by lying in wait (§ 190.2, subd. (a)(15)), murder while committing burglary (§ 190.2, subd. (a)(17), murder while committing robbery (§ 190.2, subd. (a)(17)), and murder with torture (§ 190.2, subd. (a)(18)). With respect to counts one through nine, the information further alleged that appellant Hajek had personally used a firearm (pellet gun) (§ 12022.5, subd. (a)) and that appellant Vo had personally used a deadly and dangerous weapon (knife) (§ 12022, subd. (b)). (4 CT 978-989; 6 CT 1442-1452.)

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1. Unless otherwise specified, all statutory references are to the Penal Code.

On August 28, 1992, in response to appellants' motion to dismiss, the trial court struck all of the special circumstances except torture-murder. (5 CT 1349.) The People appealed, and on October 29, 1993, the Sixth District Court of Appeal re-instated the burglary-murder, robbery-murder, and lying-in-wait special circumstances. (6 CT 1437.)

On March 2, 1994, the People re-filed the information. (6 CT 1442-1453.) Trial began on February 14, 1995. (6 CT 1646.) On May 4, 1995, the court struck the burglary-murder and robbery-murder special allegations. (7 CT 1815; 21 RT 5280.) On May 22, 1995, the jury found appellants guilty on all counts, found the weapons allegations true, and found the remaining two special circumstances true. It determined the murder, the robbery, and the burglary in counts 1, 10, and 11, respectively, to be in the first degree. (8 CT 2098-2113.) On June 28, 1995, the jury returned verdicts of death as to both appellants. (10 CT 2664-2665.)

On October 12, 1995, the court denied appellants' motions for a new trial and motions to modify the verdict. (11 CT 2827-2828.) On October 18, 1995, it sentenced both appellants to death. In addition, appellant Hajek received a prison term of life plus 21 years, appellant Vo of life plus 9 years. (11 CT 2882-2915.) Appeal is automatic.

STATEMENT OF FACTS

Appellants Hajek and Vo devised a plan to kill 15-year-old Ellen Wang's family as they forced her to watch, and then to kill her afterward The pair went to Ellen's house and confined members of her family as they awaited Ellen's return and then took her mother to attempt to locate Ellen themselves. During those hours, they killed Ellen's 73-year-old grandmother, Su Hung, a visitor who spoke no English, by strangling her and slashing her throat. Before anyone else was killed, police arrived and apprehended Hajek and Vo as they fled the

house.

Appellants hatched the scheme when their friend Lori became embroiled in a fight a few days before with other girls in which Hajek intervened. Among the other girls was Ellen Wang, who noticed a broken ignition in Hajek's vehicle and shouted out in a public parking lot during the affray that his vehicle was stolen. It was.

Prosecution Case—Guilt Phase

The Altercation With Hajek

In January 1991, Ellen Wang, age 15, lived in San Jose with her parents, her grandmother Su Hung, and Ellen's 10-year-old sister Alice. (13 RT 3049, 3051.) On Monday, January 14, at about 4:30 or 5:00 p.m., Ellen and a few of her girlfriends, who were between 13 and 15 years old, went to Long's Drugs on Blossom Hill Road and Snell. (13 RT 3079-3081, 3084.) As they were leaving, they saw Lori Nguyen and appellant Hajek sitting in front of Baskin Robbins eating ice cream. (13 RT 3081.) Ellen and Lori were best friends during their freshman year of high school, but had a falling out. Ellen subsequently transferred to a different high school for her sophomore year, and the two were no longer friends. (13 RT 3082-3083.) Ellen did not know Hajek. (13 RT 3085, 3102.)

Tina, one of the girls Ellen was with, said something to Lori in an unfriendly tone as the group walked by. (13 RT 3085-3087.) Lori responded in like tone.[2/] (13 RT 3086-3087.) Ellen and her friends then went into Fry's, in the same shopping plaza. (13 RT 3081, 3087.) They emerged about 10 minutes later and began walking home. (13 RT 3088.) In the parking lot,

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2. Tina testified that she saw Lori whispering something to Hajek and giving her and her friends dirty looks, so she called Lori a bitch. Lori responded in kind. (14 RT 3402-3403.)

Hajek drove up in a white van with Lori in the passenger seat and stopped next to the girls. (13 RT 3088-3089.) Tina again confronted Lori, asking, "What are you looking at?" Lori responded, "I can look at anything I want to," and began getting out of the van. (13 RT 3089-3090; 14 RT 3393.) Tina stood in her way and the two began fighting in the open doorway of the van, punching, scratching, and pulling each other's hair while Ellen looked on from a few feet away. (13 RT 3090-3091; 14 RT 3393, 3405.) Tina's sister Jacee intervened, attempting to pull the girls apart, but wound up fighting Lori in her sister's stead. (13 RT 3092-3093; 14 RT 3393, 3405.) When Ellen approached to assist Jacee, she saw that the van had an empty hole where the ignition was supposed to be and screamed out, "The car is picked," meaning stolen.[3] (13 RT 3093-3094; 14 RT 3394, 3405.) Hajek immediately exited the van, picked Ellen up and threw her into some bushes. (13 RT 3094-3095; 14 RT 3395, 3405.) Ellen cursed at him, and he cursed back. (13 RT 3096, 3406-3407.) Ellen's friend Ngoc told Hajek this was a girl fight and he should not get involved. (13 RT 3095, 3097; 14 RT 3396.) The fight ended shortly thereafter. Hajek and Lori drove off in the van, and Ellen and her friends walked home.[4] (13 RT 3095-3097.)

Later that evening, Ngoc called Ellen, gave her Hajek's phone number, and told her that Hajek wanted her to call him. (13 RT 3099.) Ellen called and asked Hajek if he had a problem with her. The two ended up swearing at each other again and Ellen hung up on him. (13 RT 3100.) The call lasted only a couple of minutes, and no threats were made. (13 RT 3100-3101, 3152.) Ellen

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3. On cross-examination, Ellen admitted that two years before this incident, she was found in a stolen car with her friend Ha Thai. (13 RT 3138.)

4. Tina testified her friend Rachel made an anonymous call to the police to report the fight and stolen car, but the police said it was too late for them to do anything about it. (14 RT 3407.)

did not think much of it. (13 RT 3101.) Hajek, though angry, was coherent. (13 RT 3101-3102.)

On Friday morning, January 18, Ellen's mother dropped her off at school. (13 RT 3104.) Ellen played hooky and went to her friend's house. (13 RT 3104-3105.) Later that afternoon, she went to Tina's house, where she received a message that her mother had called to say that there were two guys looking for her and that she should not go home. (13 RT 3105, 3148.) Ellen went home anyway to see what was going on. (13 RT 3105.) As she neared her house, she saw a lot of police cars and was stopped by an officer. (13 RT 3106.) Ellen felt that something bad had happened and became emotional, swearing and asking where her family was, and what race the two guys were who were looking for her. (13 RT 3106, 3149.) The officer asked her to calm down and had her sit in the patrol car for 15 to 30 minutes. (13 RT 3107.) She was uncooperative with the police because she was confused and no one would tell her what was happening. (13 RT 3108.) At the police station, she was put in a room alone. (13 RT 3108.) She refused to be photographed and initially lied about skipping school because she did not want her parents to know. (13 RT 3108.) She passed Hajek being escorted by officers at the station, and he gave her a dirty look. (13 RT 3109.)

A week or two later, Ellen's family moved to a different house. (13 RT 3109.) On May 16, 1991, the post office forwarded a letter addressed to Ellen's mother; it read, "Dear bitch, Show in court and you will die just like your grandma." (13 RT 3115, 3212; Court Exh. 54.) It was signed, "Shoga, man of power." (13 RT 3116.) The parties stipulated that the letter bore Hajek's palm print. (18 RT 4200.)

Lori Nguyen testified that she was on unfriendly terms with Ellen, Tina, and Jacee in January 1991. (17 RT 4023, 4025-4026.) On January 14, Lori and Hajek were eating ice cream at Baskin Robbins when Ellen and her friends

approached them. (17 RT 4027-4028.) Jacee asked Lori whether she had called them bitches. Not wanting to cause trouble, Lori said no, and she and Hajek went to his van and began to leave. (17 RT 4028-4031, 4055.)

As they waited in traffic to get out of the parking lot, Tina opened the passenger side door next to Lori and accused Lori of "dogging" her, meaning looking at her in a mean way. (17 RT 403-4033.) She and Lori began to fight. (17 RT 4033-4034.) Jacee jumped in, pulled Tina away, and began to fight Lori herself. (17 RT 4035-4036.) Ellen jumped in as well, punching Lori in the head. (17 RT 4036, 4057.) Hajek pulled Ellen away and told her the fight was between Tina and Jacee. (17 RT 4037.) Ellen then yelled out that the car was picked.[5/] (17 RT 4038.) Lori and Hajek drove to Hajek's house, where they listened to music and calmed down. (17 RT 4038-4040, 4059.) Hajek was angry, but did not tell Lori that he wanted to kill Ellen. (17 RT 4040-4041.)

A few minutes later, Ngoc called Hajek. (17 RT 4109.) Later, Hajek called Jacee and the two of them spoke. Afterward, Jacee apologized to Lori and Lori accepted.[6/] (17 RT 4060, 4109-4110; 14 RT 3398.) Jacee also said that Ellen wanted to fight Lori. Lori replied, "That's her problem." (17 RT 4110.) Shortly after that, Hajek began getting "crank" calls from Ellen. (17 RT 4042.) Hajek told Lori that Ellen called him a stupid white boy and that Ellen said she was going to get her friends in the Eagles gang to kill him. (17 RT 4061-4062.) Hajek was angry and swore at Ellen on the phone, saying he was going to get her too. (17 RT 4063-4064.) Vo was present for some of these calls. (17 RT 4111, 4131.) Lori did not recall Hajek calling Ngoc and asking her to ask Ellen

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5. Lori admitted at trial that the van was stolen, but denied she knew that at the time even though a screwdriver was in the ignition. (17 RT 4042-4045.)

6. Tina testified that she also spoke to Hajek when he called her and Jacee's house. He asked her why she and her friends hated Lori. Tina did not recall her response. (14 RT 3408.)

to call him. (17 RT 4062-4063.)

After an hour later, Lori went home. Later that night, Hajek called and said that Ellen was continuing to "crank call" him. (17 RT 4065-4066.) Lori testified that Hajek never said anything about killing Ellen's family with the help of Vo and Norman Leung ("Bucket"). (17 RT 4065.) Lori did not recall whether she gave Hajek Ellen's address. (17 RT 4068.) She did not see Hajek between the time she left his house on January 14 and the date of the murder. (17 RT 4129.)

When interviewed by the police on January 24, 1991, Lori said she and Hajek drove away from the fight in Vo's blue car rather than the stolen van. (17 RT 4047-4049, 4106.) She testified at trial that Hajek never said things that did not make sense, but sometimes acted goofy and spoke in a baby voice. He also liked to pretend to be one of the Japanese animation characters he used to admire. (17 RT 4071-4074, 4097-4098, 4102.) He also wanted to be Asian: he dressed and did his hair in Asian style, pretended to speak in an Asian language, called himself the "white nip," and sometimes seemed to forget that he was white. (17 RT 4075, 4089, 4099, 4102.) When asked if Hajek had an interest in satanic things, Lori testified that he admired Ozzie Osborne and liked to light incense. (17 RT 4090, 4121.) She had never heard him talking about wanting to conduct satanic rituals or kill someone as part of his satanic beliefs. (17 RT 4091.)

Lori met Hajek through her friend Ngoc. Hajek introduced her to Shawn Mach, who became her boyfriend. She met Vo (who sometimes went by Robbie), and Bucket through Mach. (17 RT 4072-4073, 4076-4079, 4093-4095.) In January 1991, she and Hajek were close friends. (17 RT 4078.) Hajek once told her that he was adopted, that nobody wanted him, and that he wanted to kill himself. (17 RT 4076, 4100.) Lori was unaware that he had been in a mental hospital in 1989 and 1990, but knew that he had seen a

psychologist. (17 RT 4099-4100.) According to Lori, Hajek and Vo had an equal relationship; neither led the other. (17 RT 4085.)

Lori continued to write letters and communicate with Hajek and Vo after their arrest, but claimed they never talked about the case. (17 RT 4046.) She told them that she loved them lots and lots and sent photos of herself. (17 RT 4079-4081.) Vo wrote letters to Lori saying he loved her. (17 RT 4086-4087.) Lori believed both Hajek and Vo had stronger feelings for her than she did for them. (17 RT 4096.)

As to the instant murder, Lori testified that Hajek told her he went to Ellen's house because he wanted to talk to her parents about stopping her crank calls. Vo said he was just tagging along with Hajek. (17 RT 4088.)

Victim And Percipient Witness Testimony

Ellen's mother Cary Wang worked as a travel agent in January 1991. (13 RT 3157.) Cary Wang's 73-year-old mother, a visitor from Taiwan who spoke no English, was staying with the family. (13 RT 3051-3052, 3159.) On the morning of January 18, Cary took Ellen to school, returned home for a short time, and then left for work around 9:00 a.m., telling her mother and daughter Alice, whose school was closed that day, that she would return at lunch time. (13 RT 3160-3161.) When Cary returned between 11:30 a.m. and noon, she found Alice sitting on the couch with Hajek. Carey asked, "Who is that?" (13 RT 3161, 3163.) Just then, Vo emerged from the restroom, covered Cary's mouth with his hand, held a knife to her neck, and instructed her not to scream or he would kill her whole family. (13 RT 3161-3162, 3164.) Vo said that he was looking for Ellen. (13 RT 3162.) Both men wore black gloves. (13 RT 3164-3165.) Alice told Cary they had guns, and later in private told her they had pointed one at Alice's head. (13 RT 3167.) Hajek told Cary that he had two guns and would kill her family if she called the police. Although Hajek put

his hand in his pants pocket, Cary never actually saw any guns. (13 RT 3168, 3201.)

Cary told Vo that she would give him whatever he wanted if he did not hurt her family. (13 RT 3162.) Eventually, Vo put down the knife, and he and Cary sat at the dining room table. (13 RT 3163.) Cary told the men her children were the same age as they and that if they needed money, she could help them. Vo replied that Ellen had argued with his cousin at school and that he was looking for her to teach her a little lesson. (13 RT 3166, 3175-3177.) Cary recalled that a few days earlier, Ellen had told her about a fight she had gotten into in front of Long's Drugs. Ellen said that a man had assaulted her friend and that when Ellen tried to intervene, she was scratched on the neck. (13 RT 3177.) According to Cary, Vo behaved in a hostile manner in the house. Hajek was mostly very quiet, but as far as she could tell, acting normally. (13 RT 3178-3179.) Most of the time, Vo told Hajek what to do. (13 RT 3181.)

Cary's mother was upstairs, and Cary begged the men two or three times to let her check on her mother's safety because she had high blood pressure. (13 RT 3168.) The first time, Vo sent Hajek up to look in on her. (13 RT 3169-3170.) He returned after a few minutes and said that her mother was reading the newspaper. Cary did not hear any noise while Hajek was upstairs. (13 RT 3169, 3171-3172.) Ten minutes later, they allowed only Alice to go up with Hajek. (13 RT 3169, 3171-3173.) Cary asked Alice to change into her clothes as well because she was still wearing pajamas. (13 RT 3173.) Alice returned after a few minutes with her clothes on and reported that her grandmother was sleeping. (13 RT 3173-3174.) Again Cary heard nothing while the two were upstairs. (13 RT 3173.)

After awhile, Vo asked Cary to go to the school with him to find Ellen. (13 RT 3166-3167, 3174.) Cary requested permission to cancel some appointments. (13 RT 3179.) She said she had emergency airline tickets she

was supposed to deliver to a customer and that her mother was supposed to see a doctor about her high blood pressure. (13 RT 3180.) Vo permitted her to call but instructed her to speak in English. (13 RT 3180.) Cary called her husband, Tong Wang, and said, "I need to cancel an appointment." Her husband, confused, asked, "What appointments, what time?" Cary replied, "1:00 o'clock," and he again responded in a confused manner. (13 RT 3180, 3185.) Cary then called her office and spoke to Sofia Kuo. She said there was an emergency at home, similar to something that happened before, hoping Sofia would recall that Cary's house had been burglarized two years before. She also told Sofia to cancel her appointments. (13 RT 3186.)

Vo left the house with Cary in her car around 1:15 p.m. (13 RT 3175, 3189.) Vo was still wearing gloves when they left. (13 RT 3183.) While Cary was driving to Ellen's school, Vo told her he had a gun and not to move, but Cary did not see the gun. (13 RT 3189.) At school, they asked for Ellen and found out she was absent; then, at Cary's request, went to Cary's office to drop off the emergency airline tickets. (13 RT 3190.) Paul, who worked next door, asked Cary about Vo's identity. Cary replied quickly in Taiwanese to call the police; Paul appeared to understand. (13 RT 3190.)

On the way home, Vo and Cary passed a police car, and Vo asked if she had called the police. He had her call her house and spoke to someone on the phone. (13 RT 3191-3192.) When they arrived, Vo had her park in the garage and close the door. (13 RT 3192.) It was around 2:00 p.m. Cary's husband Tony was home by this time and sitting at the dining table playing cards with Hajek. (13 RT 3193.) When Vo said they needed to tie him up, Tony offered to give him money and jewelry if that was what they wanted, but Vo just laughed. At Vo's direction, Hajek took Tony upstairs to tie him up. Hajek returned and said that Tony wanted to talk to Vo. (13 RT 3194-3195.) While Vo was upstairs, Hajek asked Cary if she was okay. Cary said she had a

headache. She took two Tylenols, had Alice bring her some water, and lay down on the couch. (13 RT 3195.) During this time, one of Paul's coworkers, Mr. Cho, called the house. He told Cary, who answered the phone, to answer only "yes" or "no," and asked if she needed the police right away. She said "yes," he said he understood, and they hung up. (13 RT 3196-3197.) A few minutes later, the doorbell rang. (13 RT 3197.)

Hajek asked Alice to go to the door with him, but Cary, knowing it was the police, told Alice in Chinese to come with her. The two of them ran out the garage door, told the police the culprits were inside, and then went to a neighbor's house to use the phone. (13 RT 3202.)

Cary testified that she never saw Vo and Hajek go upstairs at the same time while they were in the house and never saw either of them take any weapons upstairs. (13 RT 3197.) She estimated that Hajek went upstairs two or three times during the time he was in her house and that Vo went upstairs three or four times. (13 RT 3199.) She did not see either defendant with a gun. (13 RT 3258.) She saw Vo with a knife only when she first entered the house and he held the knife to her neck. He later put the knife down in the kitchen. The only time she saw Hajek with a knife was when he used one to cut the rope before taking Tony upstairs. (13 RT 3224.)

Alice Wang testified that Hajek and Vo came to the house around 10:15 a.m. (14 RT 3271-3272.) Her grandmother, Su Hung, was upstairs sleeping. (14 RT 3272.) When Alice answered the door, Vo asked to see Ellen. (14 RT 3272.) Alice replied that she was not home. (14 RT 3272, 3274.) Vo handed her a sweater with a thermal undershirt inside and said it was for Ellen. Alice took it and put it on the stairs. (14 RT 3275.) Shortly after that, Hajek and Vo rang the doorbell again, and Vo said they wanted to leave Ellen a note as well. By this time, Alice's grandmother was in the kitchen cooking. Alice gave the men a piece of paper and a pen; the two entered the house without being

asked.[7] (14 RT 3276-3277, 3279-3280.) Vo wrote something, which Alice put on top of the sweater without reading. (14 RT 3280.) Hajek then pointed a gun clipped onto his pants at her back. He said he had a gun and asked her to get her grandmother.[8] (14 RT 3281-3282.)

Alice had to use the bathroom; at Vo's direction, her grandmother went with Alice to the downstairs bathroom. (14 RT 3285, 3339.) When Alice came out, Hajek had put the gun in his waistband. Alice retrieved a rope from the laundry room, which Vo cut with a scissor or knife, and used to tie up her grandmother. (14 RT 3285-3288, 3340.) Vo also blindfolded her with a towel. (14 RT 3302.) Her grandmother was trembling but compliant. (14 RT 3303.)

Hajek stayed downstairs with Alice while Vo took her grandmother upstairs, returning after several minutes. (14 RT 3288-3289.) Some time later, Hajek took Alice to the bathroom upstairs, where she stayed for what seemed like a long time before she was allowed out. (14 TR 3290-3291.) While in the bathroom, Alice heard a clattering sound in the hallway like marbles or coins being jingled. (14 RT 3291-3292.) Vo eventually took her out and brought her downstairs. Ten minutes later, Hajek came down.[9] (14 RT 3293.) Alice did not hear anything going on upstairs while she was downstairs with Vo. (14 RT 3294.)

At some point, Alice's mother called. Alice answered the telephone and spoke English at the men's direction. (14 RT 3295.) Her mother said she was coming to pick up Alice's grandmother to take her to the hair salon. (14 RT

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7. On cross-examination, Alice said she invited the men in to write the note. (14 RT 3364.)

8. On cross-examination, Alice said that Vo was the one who told her they had a gun, but Hajek was the one holding it. (14 RT 3339.)

9. On cross-examination, Alice said that Hajek was the one who took her downstairs, leaving Vo upstairs with her grandmother. (14 RT 3345-3347.)

3295-3296.) She also asked Alice if anything was wrong, perhaps because Alice was speaking in English. Alice, scared, said no. (14 RT 3296-3297.) When they later heard the sound of the garage door opening, Vo directed Alice to sit on the couch. Vo retrieved a knife from the kitchen and hid in the downstairs bathroom. (14 RT 3297-3299.) When Alice's mother entered the house, Vo emerged, clamped a hand over her mouth, and held a knife to her from behind. (14 RT 3300-3301.) Vo was wearing black gloves. Alice did not think Hajek was wearing gloves. (14 RT 3301.) Vo later put the knife back in the knife holder in the kitchen. (14 RT 3362-3363.)

Before her mother left to go to the school with Vo, Alice was permitted to go with Hajek to check on her grandmother from the doorway of her bedroom. (14 RT 3305-3306, 3368.) Alice could not see her face because she was holding a newspaper.[10] (14 RT 3307.) Her grandmother's hands were moving a little; they were not tied as they were when she was first taken upstairs. (14 RT 3366.) Alice did not speak to her grandmother. (14 RT 3307.) She changed out of her pajamas in the bathroom and went back downstairs. (14 RT 3308.) At the men's direction, she told her mother that her grandmother was all right even though she could not really tell whether she was or not.[11] (14 RT 3318-3320.)

Alice played cards with Hajek while her mother and Vo were out. (14 RT 3312.) When her father came home and saw them, he looked surprised. (14

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10. On cross-examination, she said that her grandmother was not blindfolded at this time. (14 RT 3367-3368.) She also said she went up a second time with Hajek, that her grandmother appeared to be sleeping on the bed, and that at Hajek's direction, she told her parents her grandmother was okay. (14 RT 3368-3370.)

11. On cross-examination, Alice said this incident happened after both of her parents were home and that Hajek had never checked on her grandmother while she was alone with him or after her father got home but before her mother returned. (14 RT 3355, 3358-3359.)

RT 3313-3314.) Alice told him Hajek had a gun but not to be scared. (14 RT 3314.) Her father remained calm, and the three of them played cards. At one point, Hajek took a phone call and shortly after that, her mother and Vo returned home. (14 RT 3314-3315.) Either Hajek or Vo tied her father up and took him upstairs. (14 RT 3316-3318.)

When the police knocked on the door, Hajek pulled out a gun, pointed it at Alice, and told her to answer the door. (14 RT 3320.) She looked through the peephole and saw it was the police. Hajek asked who it was and she said she did not know. When he went to look, she ran out through the garage door and saw her mother talking to the police. (14 RT 3321.)

Alice identified a pair of black gloves on the dining room table as Vo's. (14 RT 3322-3323.) She did not recognize the second set of gloves found on the scene. (14 RT 3327-3328.)

Other than the gun Hajek initially pointed at her and took out when the police arrived, and the knife Vo held to her mother when she first came home, Alice did not see anyone use weapons. (14 RT 3311, 3341-3342, 3360.) Both Hajek and Vo went upstairs a number of times; Alice did not know how many. They never went upstairs together, leaving her alone. (14 RT 3351, 3365.)

Tony Wang testified his wife called him around noon on January 18 and asked him to go home and pick up an airline ticket. Her voice sounded strange. She sounded like she was in trouble, so he left work and went to her office, where Sophia and Paul told him she had been in with a man and then left. (16 RT 3848-3850.) When Tony got home, he saw Alice and Hajek at the dining room table playing cards. Alice told him in Chinese that they were not allowed to go upstairs or use the telephone and that Hajek had a gun. She said that another man had taken Cary to school to look for Ellen and that her grandmother was upstairs asleep. Hajek was looking at Tony while Alice was talking and had his hand in his pocket. Tony never actually saw a gun that day.

(16 RT 3851-3852, 3856.)

Tony asked Hajek what he wanted. Hajek replied that there was trouble between his girlfriend and Ellen and that he wanted her brought home so that he could scare her. (16 RT 3853, 3856-3857.) Tony played cards with Alice and Hajek while waiting for his wife to return. Hajek played with one hand, keeping the other in his pocket. He was wearing a glove. (16 RT 3854, 3885.) The phone rang twice while they were waiting. The first time Cary called and told Tony that Ellen was not at school. Tony told her to just come home. The second time Alice answered and then gave the phone to Hajek. (16 RT 3857.)

When Cary and Vo returned home, Tony offered them money, but they said they wanted to wait. (16 RT 3858.) Vo said that Ellen and her friend had beat up his cousin and that he wanted to scare her. (16 RT 3861-3862.) During the course of the afternoon, both men went upstairs separately a number of times. (16 RT 3859.) One time, Alice went upstairs with either Hajek or Vo and reported that her grandmother was reading the newspaper.[12/] (16 RT 3860, 3891.)

About half an hour after Cary returned home, Vo called Hajek over and the two had a discussion. (16 RT 3880-3881.) Vo then tied Tony's hands behind his back with a rope and Hajek took him upstairs to the master bedroom. (16 RT 3863-3865, 3870, 3888.) Vo told Tony that he had done this kind of thing many times before and that if Tony called the police, he would kill his whole family. (16 RT 3865.) Hajek tied Tony's feet to the bedpost and threatened to kill him if he screamed. (16 RT 3866, 3889.) Tony asked to speak to Vo because he thought it would be easier to negotiate with another Asian person. (16 RT 3889.) Hajek left, and Vo came up and pulled over a chair. He spoke to Tony for a bit, then gagged him and threatened to kill him again. (16 RT

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12. On cross-examination, Tony said Alice went up with Hajek and said her grandmother was sleeping. (16 RT 3891-3892.)

3868-3869, 3890.) He was not wearing gloves this time. (16 RT 3882.) Later, Tony heard someone knocking on the door followed by the sound of people running, his wife calling to Alice to run, and the garage door opening. (16 RT 3869.)

Appellants' Arrest

San Jose police officer Raymond Wendling was the first officer to arrive at the Wang's home. (16 RT 3794.) He knocked at the door and loudly announced, "San Jose Police." (16 RT 3794.) Thirty seconds later, the garage door opened, and Cary ran out. She was frightened and agitated, yelling that the people were still inside. (16 RT 3794-3795.) Shortly thereafter, the door between the garage and inside of the house opened. An individual with black hair peeked out and then retreated quickly, shutting the door. (16 RT 3796.)

Officer Anderson, the second officer to arrive, went to the back door. (16 RT 3795, 3991, 3994.) After several minutes, Hajek exited the sliding glass door and ran. He was carrying a black revolver in his right hand. (16 RT 3798, 3995-3996, 3998.) He stopped in response to Anderson's shouted commands, put his hands in the air, and threw the gun, shouting, "It's a pellet gun."[13/] (16 RT 3998, 4002.) A second individual who emerged after Hajek, ran back inside as Anderson started shouting. (16 RT 3999.) Hajek identified Vo to police as Robbie. (16 RT 3799-3800, 4003.) A yellow screwdriver, a bank card belonging to someone else, and a pair of dice were on Hajek's person. (16 RT 3800; 14 RT 3476-3477.) Officer Wendling testified that Hajek was wearing gloves. (16 RT 3801.) Anderson did not recall whether Hajek was wearing gloves. (16 RT 4010.)

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13. The gun was later confirmed to be a pellet gun with the left grip missing. (16 RT 3799-3799; 14 RT 3441-3443.)

Officer David Harrison was en route from the front of the house to the back to join Anderson and Wendling when Vo came running out the laundry room door. Harrison pointed his shotgun at him and told him to stop. Vo spun around and started to run back into the laundry room, but stumbled and fell. Harrison followed him in, pointed the shotgun at him, and told him not to move. Officer Anderson then came in, handcuffed Vo, and took him out front. (14 RT 3376, 4004-4005.) Vo had no weapons in his hands. (14 RT 3376.) A screwdriver, set of keys with a handcuff key, gum, a lighter, and loose change were found on his person. (16 RT 4005; 14 RT 3477-3478.)

Officers Harrison and Schmidt entered the house and announced their presence. (14 RT 3376.) They found Tony Wang upstairs in the master bedroom. He was seated on the bed with his hands and feet tied and mouth gagged. (14 RT 3377.) When they removed the gag, he expressed concern for his mother-in-law's safety. (14 RT 3377.) In Su Hung's bedroom, the comforter had been pulled off to the end of the bed. Harrison stepped over it and searched the closet, but found no one else upstairs. (14 RT 3378.) He returned to Tony, and Schmidt left to continue searching. (14 RT 3378.) A minute later, Schmidt yelled that he had found her. Su Hung lay on the floor of her bedroom covered with blood. The comforter had covered her body. (14 RT 3379.) Her throat was slashed and her mouth was gagged with a towel. (14 RT 3380.) Her hands were tied behind her. (14 RT 3463.) Harrison saw that she was dead and canceled the ambulance call. (14 RT 3381.)

Officer Anderson transported Ellen to the police station around 5:00 p.m. (16 RT 4012.) Ellen had not been told what had happened, but she had figured out that something had happened to her grandmother. (16 RT 4012-4013.) She asked Anderson, "Who did it?" and "What race were they?" When he did not respond, she said, "I will kill the fuckers." (16 RT 4013.) Ellen was uncooperative with the police, refused to have her picture taken and demanded

a lawyer. (16 RT 4013.)

A black leather jacket with stains on the left cuff and a pair of black and grey gloves, the left one bloodstained, were seized from Hajek. (14 RT 3423-3425, 3427-3428, 3432-3433, 3513.) A sweatshirt with a stain on the front was collected from Vo. (14 RT 3434.) At the police station, Vo identified himself as Larry Lai. (14 RT 3430.)

Homicide detectives Walter Robinson and Ed Escobar interviewed Hajek at the police station at 3:28 a.m. and again at 6:37 a.m. (16 RT 3822-3823, 3828-3830, 3835.) Robinson described Hajek as lucid, coherent, under self-control, and at times, light-hearted. (16 RT 3823-3824.)

Sometime after 6:00 a.m., when both appellants had been interviewed, they were placed together in an interview room equipped with a recording device. (16 RT 3810-3811, 3813-3814.) The tape was played for the jury. (16 RT 3816; Court Exh. 53.) The sound quality was poor and much of the conversation was unintelligible. (16 RT 3816.) Homicide detective Walter Robinson identified certain snippets as Hajek speaking. (16 RT 3817-3818.) On the tape, Hajek told Vo how he had passed Ellen in the hall at the police station: "Fuck, I wanted to kick Ellen so bad. Walk by her in the fucking hall. Fucking dog. Fucking Chinese bitch." (Exh. 53.) Vo expressed concern that his name would appear in the newspaper.

Physical Evidence

Hajek's white minivan was located around the corner from the Wang home. (14 RT 3417-3418.) The ignition had been removed, and a screwdriver was in the center console. (14 RT 3474.) Also in the console was a plastic grip for a pistol, which matched the pellet gun thrown to the ground by Hajek at the Wang home. Two knives were found in the glove box. (14 RT 3473; 15 RT 3592-3593, 3622.) Also found in the car were a Baskin-Robbins birthday card,

packaging for a pair of leather bike gloves, and on the floor near the passenger seat, a strand of dark hair, eight to twelve inches in length. (14 RT 3475-3476.)

In the laundry room of the Wang's house, police found a brown paper bag containing five bottles of cooking oil and $278 in cash. (14 RT 3445.) A pair of black knit gloves were seized from the kitchen table. (14 RT 3451.) Pieces of rope were scattered inside the garage and throughout the house, including on the family room sofa and floor, on the stairs leading to the bedrooms, around Su Hung's neck and wrist, on the bed in the master bedroom, and on the kitchen counter. (14 RT 3451-3454.) A pair of scissors was found on the floor of the master bedroom. (14 RT 3461.) A wet knife was in the kitchen sink. (14 RT 3455-3456.) A black bag containing a navy blue turtleneck, CD's, cassette tapes, computer disks, a portable CD player, a gameboy, a clock radio, and rolls of quarters was found on the landing at the top of the stairs. (14 RT 3459-3460.) A piece of stereo equipment was found on Alice's bed. (14 RT 3461-3462.) A disconnected telephone was on Ellen's bed. (14 RT 3495-3496.) A foreign language newspaper was found in Su Hung's room. (14 RT 3505.)

The pellet gun thrown by Hajek contained no cartridge or pellets. (14 RT 3509-3510, 3624.) A firearms expert explained that although a pellet gun resembles a real gun, and could cause injury, it lacks the lethal force of a handgun. (14 RT 3623, 3626.)

According to Officer Dotzler of the homicide crime team, a person standing in the family room or dining nook would not necessarily be able to see someone going up and down the stairs inside the home. (14 RT 3494.)

Blood Evidence

The prosecution's serology expert testified that the bloodstain on Hajek's glove was too small to determine ABO blood type. (15 RT 3582, 3587.) He

was able to determine the PGM subtype, however, which indicated that it came from neither Hajek nor Vo. The subtype was consistent with Su Hung's blood, but too common for the expert to conclude the blood was in fact hers. (15 RT 3587-3588, 3613-3614, 3618, 3633.)

The stain on Hajek's jacket tested positive for blood, but the sample was too small for additional testing. (15 RT 3588-3589.) Based on the relative locations of the blood on Hajek's glove and jacket, it is possible that one stain was transferred from the other, most likely from the glove to the jacket. (15 RT 3633, 3634-3635.) Aside from the glove and jacket, none of the other clothing obtained from Hajek or Vo tested positive for blood. (15 RT 3590, 3606.) The knife found in the kitchen sink tested positive for blood, but it could not be determined whether it was human or animal, fresh or old. (15 RT 3590-3592.) The gloves found on the Wang's kitchen counter tested negative for blood. (15 RT 3631.)

A second serology expert retained by the prosecution analyzed the blood on Hajek's glove for genetic markers in the GM and KM systems. (15 RT 3732-3735.) Under both systems, which are independent of one another and independent of the PGM subtype, Su Hung was a possible contributor of the blood, whereas Hajek and Vo could be ruled out definitively. (15 RT 3738-3739, 3742-3743, 3764-3765.) The expert calculated that one in 570 people possesses the particular combination of PGM, GM, and KM groupings possessed by Su Hung and found in the blood on the glove. (15 RT 3743-3746, 3754-3755, 3774.)

Medical Evidence

When the police evidence technicians arrived at the Wang residence sometime after 4:00 p.m., Su Hung's body was not yet cold. Her fingers were beginning to stiffen but rigor mortis had not yet set in. (14 RT 3467.) Her

hands were closed into fists. (14 RT 3467.) Aspirated blood (blood forced out by air) was found on her right pant leg above her knee. (14 RT 3468-3469.) There was a little bit of dripped blood on the floor near her body and on one of her slippers. (14 RT 3469.) The quilt from her room had bloodstains consistent with it having been placed over the victim's body. (14 RT 3505.)

Angelo Ozoa, the chief medical examiner for the coroner's office, testified there were two major injuries to Su Hung's head and neck that caused her death: a ligature around her neck and a slash on the front of her neck. (16 RT 3954-3955, 3961, 3976.) The ligature was apparently caused by a cord that was still wound loosely around the victim's neck. There was an indentation around the neck where the cord had been applied. (16 RT 3954.) There were also petechial hemorrhages all over the face, eyelids, and lining around the eyeball indicating some kind of pressure had been applied around the neck, cutting off the flow of blood from the head back to the heart. (16 RT 3954-3957, 3977.) The thyroid cartilage inside the neck (the "Adam's apple") was fractured, also indicating that some external force had been applied to the neck. (16 RT 3955.) The slash on the front of the neck, produced by a sharp-bladed instrument, was three and one-half inches long, and three-quarters of an inch deep. It cut completely through the trachea and partially cut the external jugular vein on the right side. (16 RT 3955, 3965.) There were two superficial cuts along the side of the main wound. (16 RT 3959.)

In addition to the two principal wounds, a stab wound one inch long and one inch deep was on the front of the left shoulder. It was not immediately life-threatening. There were five superficial perforations measuring less than one-half inch on the left side of the front of the chest, and a bruise on the right side of the chin produced by blunt force, possibly by a fist. (16 RT 3957-3958, 3960.) There were no wounds on the victim's hands or arms to indicate she had been fighting or put up a struggle. (16 RT 3960.) There were ligature marks

on the wrists, and the left wrist had a bracelet that was broken in two places. (16 RT 3961.) Aside from these findings, Dr. Ozoa noted that the victim was poorly nourished and had some scarring to her lungs indicating she previously had some type of pulmonary disease that had resolved itself. (16 RT 3973-3974.)

In Dr. Ozoa's opinion, the perpetrator first strangled the victim, then slashed her neck. (16 RT 3961, 3969.) The petechiae indicated she was alive with significant blood pressure when she was strangled. (16 RT 3961-3962.) She was also still alive when her throat was slashed and when she was stabbed in the shoulder, as indicated by the substantial amount of blood she let. (16 RT 3962-3963, 3969.) A person whose trachea is slashed can choke to death on their own blood. Here, however, there was no significant blood in the victim's lungs, indicating that she died very shortly after her throat was cut. (16 RT 3967-3968, 3982, 3985.) The doctor could not determine whether the five superficial cuts on the victim's chest were inflicted when she was alive or dead. (16 RT 3963-3964, 3976.)

Dr. Ozoa could not estimate how long it would take for a person to die from strangulation. It could take seconds or minutes because the pressure from the ligature itself could produce a number of effects. It could obstruct the blood flow going up to the head or back to the heart. It could also stimulate the vagus nerve, causing the heart rate to decrease or stop all together. To die from loss of air would take about five minutes. (16 RT 3970, 3980-3981.) Dr. Ozoa could not give an opinion on how long a person would feel pain from strangulation prior to death because pain is subjective and because strangulation can produce unconsciousness and an unconscious person does not feel pain. (16 RT 3970-3971, 3983-3984.) It was possible that the victim in this case was alive but unconscious when her throat was cut. (16 RT 3984-3985.) Loss of consciousness from strangulation can be immediate or it can take minutes. (16

RT 3970, 3983.)

According to Dr. Ozoa, the longer a person survives while being strangled, the greater the time there is for petechia to form. "So in a very rough sense, the number of petechiae I see could be correlated part to, number one, the amount of pressure applied and also the length of time before the person dies." (16 RT 3979.) However, the doctor could not give any kind of estimate as to how long it took the victim to die based on the pattern of petechiae. (16 RT 3980.) Death could occur within seconds or within minutes. (16 RT 3980-3981.)

Evidence of Vo's Motive

Vo's brother McRobin received at least 10 phone calls from Hajek in 1991 after Hajek was placed in custody; McRobin visited him in jail at least 10 times. (14 RT 3531; 15 RT 3545.) McRobin asked Hajek what happened at the Wang residence, but Hajek "just played off about he didn't really want to talk about it." (14 RT 3531-3532.) According to McRobin, Hajek behaved normally during their calls and visits and did not appear depressed. (15 RT 3546-3547.)

A few weeks after Vo's arrest, police searched the home the brothers shared. (15 RT 3547.) McRobin identified Vo's writing in a diary seized from the house. (15 RT 3548; Ct Exh. 80.) The entry for January 1 noted, "Two of my fellow brother has been caught. The third was spare. The hunters has gotten lucky for the night the star guided them. My number was good to me tonight." (Ct. Exh. 80.) The entry for January 12 read, "Lori beginning to drift farther/farther away—Love her so much—going to lose her—can sense it." (Ct. Exh. 80.) The entry continued, "Steve is much more than a brother—always fun to be with. Very bad day but Steve always make it better." (Ct. Exh. 80.) The entry for January 14 read, in pertinent part, "Problem is money. I don't have enough/wish I did." (Ct. Exh. 80.)

McRobin also identified a letter signed by Vo which was seized from the house. (15 RT 3548-3551, Ct. Exh. 94.) The letter, which appeared to be addressed to Shawn Mach and was written in anticipation of Vo's own death, began, "Well something must have happen to me in order for you to read this. Why you ask I did that job? Because you need the money & me. . . . Both you & me know Lori can make it, she just need a chance. You're the only one. But one draw back is the money you need now." (Ct. Exh. 94.) Vo also discussed his intense love for Lori at length in the letter and how Hajek and Norman Leung were like brothers to him. (Ct. Exh. 94.) McRobin also identified two letters addressed to Lori in which Vo expressed his love for her. (15 RT 3551-3553; Ct. Exh. 95.)

Hajek's Conversation With Tevya Moriarty

Tevya Moriarty, 17 years old at the time of the crimes, worked with Hajek at Home Express during the summer of 1990. (15 RT 3638.) Most of the other young men at the store were not interested in Hajek's company. They thought he was unattractive and weird. (15 RT 3672, 3675.) He wanted people to like him though, and tried hard to win their approval, giving out cigarettes and money. (15 RT 3672.)

Moriarty trained Hajek as a cashier. Hajek did not appear to have problems understanding her or appear to have any mental or emotional problems. (15 RT 3642, 3644, 3676.) The two were not close, but Hajek called Moriarty on the phone after work on two or three occasions, and a couple of times before Christmas. (15 RT 3640-3641, 3643, 3677.)

Hajek called Moriarty again on January 17 around 8:15 p.m. (15 RT 3644.) They talked until shortly before 9:00 p.m. (15 RT 3645.) At one point, Moriarty asked if Hajek was going out with anybody. Hajek said he was dating an Asian girl and told a story about how she got into a fight with a group of 20

girls the week before while they were getting ice cream. (15 RT 3646, 3648.) He said he and his girlfriend left, but the other girls came up to the van and continued the fight. Hajek got out and pushed one of the girls, causing her to fall into the bushes. (15 RT 3646-3647.) The girl told him he should keep his nose out of their business. (15 RT 3649.)

Hajek went on to tell Moriarty that he wanted to get back at the girl who had picked the fight with his girlfriend. (15 RT 3650-3651.) He said he was going to go to the girl's house, kill her family in front of her, and then look in her eyes as he killed her. (15 RT 3651-3652.) He said he was going to make the incident look like a robbery. (15 RT 3653, 3683.) He also mentioned that he had a gun. (15 RT 3655, 3684.) Hajek said all of this in an upbeat, happy manner as if it were a normal conversation, making Moriarty wonder if he was drunk or high on drugs. (15 RT 3652, 3654, 3678-3679, 3682.) When Moriarty asked him if he was serious, he paused and then went on with the conversation without answering. (15 RT 3653.) Moriarty continued to listen, afraid of provoking Hajek. (15 RT 3653.) According to Moriarty, Hajek only used the term "I" in discussing the actual killings. (15 RT 3656; 16 RT 3787-3788.) In an interview with police on January 21, 1991, however, she said he talked about going over to the victim's house with two others. (15 RT 3665, 3685; 16 RT 3790-3791.) She also testified at the preliminary hearing that he possibly talked about more than one person being involved. (16 RT 3789-3790.)

Hajek also told Moriarty that he did not like going to his parents' house. He said they always locked their dog in the bathroom because they were afraid he was going to sacrifice it. (15 RT 3666, 3681-3682.) Moriarty recalled that Hajek listened to Ozzie Osborne's music. (15 RT 3666-3667, 3681.) He was also interested in Asian people and Asian culture, particularly Japanese animation. (15 RT 3667.) He never told Moriarty that he believed himself to

be Asian. (15 RT 3667.)

Moriarty did not know whether to believe Hajek's threats and did not call the police after their call. (15 RT 3654, 3668.) The following evening she heard a description of the crime on the evening news and told her parents, "I know who did that." (15 RT 3668.) After confirming that Hajek was involved, she called the police. (15 RT 3669.)

Denial of Involvement by Bucket

Norman Leung, also known as Bucket, was arrested with Hajek in a minivan on January 1, 1991. (16 RT 3939-3940, 3942.) Bucket did not recall Hajek mentioning a fight he got into on January 14, 1991, or asking him to go with him and Vo to the Wangs' house to help him get revenge on Ellen Wang for that fight. (16 RT 3927.) Bucket also did not recall getting letters from Hajek threatening him if he spoke to the police or going into hiding because he was scared, but acknowledged it was possible this occurred. (16 RT 3928-3930.) According to Bucket, Hajek hung around with Asians, but never claimed to be Asian and did not appear to have mental problems. (16 RT 3922-3923.) Bucket visited Hajek in jail after his arrest, but Hajek did not tell him why he got arrested for murder. (16 RT 3932-3933.)

Defense Case—Hajek

Linda and Bob Hajek adopted Hajek in 1974 when he was two years old. (18 RT 4024.) At the time, they lived in Florida on the air force base where Mr. Hajek worked. (18 RT 4025-4026.) Hajek had been categorized as a hard to place child. He had been abandoned by his natural mother at birth and had been in three foster homes before being placed with the Hajeks. The social worker who placed him with the Hajeks believed he had been abused. (18 RT 4208-4209, 4637-4638.)

When he first came to live with Linda and Bob, Hajek was very withdrawn. If anyone touched his face, he would bite. Loud noises sent him into a screaming panic. He required special support shoes to walk. He was very afraid of being dirty. (18 RT 4213-4214.) On one occasion, he cowered when he accidentally dropped a piece of food, covering his body as if afraid he would be beaten. (18 RT 4215.) Whenever the social worker visited, he would become very agitated, as if afraid he would be taken away. (18 RT 4214-4215.)

When Hajek was five, his family moved to Texas briefly, and then to San Jose. (18 RT 4216.) By this time, he was wearing regular shoes. His behavior was much more normal though there continued to be some problems like bedwetting through age 12 and resentment and anger towards his mother for no apparent reason. (18 RT 4218-4220, 4223.) At age 13, he began behaving very silly and would get carried away mimicking people. In high school, he became involved in ROTC. (18 RT 4224-4225.)

At age 16, Hajek became very angry and explosive, particularly toward his mother, and also began behaving in a childish manner. (18 RT 4227.) He became heavily interested in Japanese animation and would pretend to be a certain character. He socialized primarily with Asian teenagers like Shawn Mach and Norman Leung, dressed Asian style, ate Asian food, pretended to speak Vietnamese, and even asserted that he was Asian. (18 RT 4228-4229, 4238.) He had a truancy problem at school. (18 RT 4234.) He also had his first contact with the juvenile system. He was charged with indecent exposure after he streaked through the family's neighborhood.[14/] (18 RT 4226.) When his parents went to see him at juvenile hall, he was so angry he could not calm down so they agreed to leave him there for psychiatric evaluation. (18 RT 4231-4232.) Over the next year, he was arrested for additional misdemeanors,

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14. Prior to this, he had been cited and released on one occasion for possession of nunchucks. (18 RT 4321-4322, 4349.)

including driving a stolen car and being in possession of a stolen bank card, and assaulting his coworker at Round Table Pizza by punching him and breaking his nose. (18 RT 4232, 4291-4292, 4294.) During this time, he received counseling and worked to pay restitution for his crimes. (18 RT 4233.) He was also hospitalized for a month in late 1989 and early 1990 and prescribed lithium when his anger and paranoia became acute. (18 RT 4235, 4242-4243, 4246, 4261, 4392.)

After Hajek's release from the hospital, his behavior improved. He continued to attend therapy weekly for several months and got his G.E.D. (18 RT 4243-4245, 4393.) Things took a turn for the worse in October 1990 when Shawn Mach, who had been living in Los Angeles, returned to town. Hajek moved in with him and did whatever Mach asked him to do. (18 RT 4246-4247.) Hajek's mother called him every day. On January 1, 1991, he moved back to her house after he was arrested for being in another stolen minivan with a loaded shotgun, but he was hardly ever home. (18 RT 4248, 4305-4306.) On one occasion, his mother learned he was sleeping in a car in San Jose, telling everyone she threw him out. When she went to see him, he was confused and depressed and his clothes were in tatters. (18 RT 4249.)

On the evening of January 17, Hajek was acting very silly, talking like a baby and saying ridiculous things. His mother made him go to his room because she had company and was embarrassed. (18 RT 4250-4251, 4264.) The following day, he went out with Vo and was arrested. (18 RT 4248, 4251.) The Hajeks learned about the arrest from the television news. (18 RT 4252.) Linda Hajek cooperated with the police, giving them a list of Hajek's friends and their phone numbers. (18 RT 4253, 4327.) His mother believed his behavior had improved greatly over the four years he had been in custody. (18 RT 4252.)

The officer who arrested Hajek for indecent exposure testified that Hajek was uncontrollably angry for no apparent reason and made threats toward his mother, the police, and his neighbors. (18 RT 4340-4341.) The officer noted in his report that he might have psychiatric problems, but did not take him to the mental hospital because he was not so far out of control that he qualified as a danger to himself or others under Welfare and Institutions Code section 5150. (18 RT 4342-4343.) His mother denied that he had been outside or nude at all. (18 RT 4344.)

Hajek's probation officer and his psychologist both noted that when Hajek was placed on probation he was very angry and disturbed; his reality testing was poor in that he did not draw the same conclusions from an event as an ordinary person. He misinterpreted things, took things very personally, had a low frustration tolerance, and commonly blamed other people for his crimes. (18 RT 4406-4407, 4412, 4453-4454, 4470, 4477, 4479-4480; 19 RT 4482.) His psychologist recommended hospitalization in late 1989, finding him to be pre-schizophrenic and possibly suicidal. (18 RT 4484-4485; 19 RT 4527.)

Hajek's doctors at the hospital described him as frightened, angry, and under the delusion that he was Asian and could speak a foreign language. (19 RT 4524-4525, 4527-4528.) His reality testing was poor and his decisions were influenced by emotion. (19 RT 4579-4580.) Schizophrenia was ruled out as a diagnosis. (19 RT 4527.) He improved markedly with lithium, becoming more rational, less angry, and able to identify individuals with whom it was risky for him to associate. (19 RT 4533-4534, 4582.) By the time he was released he was cooperative and no longer a danger to himself or others. (19 RT 4535.) Hajek's probation officer similarly testified that by June 1990, when she dismissed his probation, Hajek's anger and attitude had improved, and he appeared able to control himself. (18 RT 4446-4448.) She did not see him as a hardcore delinquent, but as a youth with serious emotional problems. (18 RT

4436-4437.) His psychiatrist at the hospital likewise attributed his behavior to mental illness, specifically manic-depressive disorder, rather than delinquency. (19 RT 4586-4589.) Such a disorder is characterized by periods of irritable agitation, paranoia, and impulsivity. (19 RT 4609, 4617-4618.) It might also include pressured and incoherent speech, inappropriate giggling, and jitteriness. (19 RT 4625-4626.) The disorder would not preclude the person from making plans for the future. (19 RT 4627.)

Psychologist Rahn Minagawa testified as an expert for the defense in child and adolescent psychopathy. Dr. Minagawa diagnosed Hajek with cyclothymic disorder, a mood disorder related to bipolar disorder, and also with borderline personality disorder with antisocial traits. (19 RT 4655, 20 RT 4819.) Cyclothymic disorder has the same characteristics as bipolar or manic-depressive disorder, but is less severe. (19 RT 4656.) The person has mood swings, feeling depressed, bored, and worthless at times, sometimes leading to self-medication with drugs, and at other times, feeling grandiose, sleeping little, exhibiting psycho-motor agitation, being inappropriately happy or angry, and possibly suffering from paranoia or delusions. (19 RT 4657-4658, 4660-4661.) In Minagawa's opinion, Hajek was in this latter phase in the period between January 17 and January 21, 1991. (19 RT 4655-4656, 4735, 20 RT 4894.)

In support of his opinion, Minagawa noted that on January 17, Hajek called Moriarty, blabbering and talking about horrific things in a happy voice. (19 RT 4736; 20 RT 4895.) On January 18, the day of the murder, when he ran out of the house, he initially failed to stop when he heard the police officer yell. When he heard the officer actually cock the gun, however, he did stop, indicating he was not so out of touch with reality that he did not understand something bad was going to happen if he failed to respond. According to Minagawa, this suggested Hajek was in a hypomanic state. Unlike a person in a manic state, which is more severe, a person in a hypomanic state is able to respond at times

to commands. (19 RT 4737.) Minagawa was unable to point to any evidence of hypomanic or manic behavior while Hajek was in the Wang residence. (20 RT 4896.)

Hajek's conduct at the police station when he and Vo were recorded in the same room also demonstrated that he was in a hypomanic state. He was giggling, his speech was pressured, and he switched rapidly from subject to subject. (19 RT 4737-4738; 20 RT 4895.) Two days later, on January 21, jail records indicated he was banging on a light while standing on top of a table, saying he was happy because he was getting a visit that day. Later that morning, he complained of being suicidal.[15/] (19 RT 4683, 4738; 20 RT 4895.)

In late February, Hajek reported being angry, particularly at Tevya Moriarty, and saying he felt like hurting her. (19 RT 4687, 20 RT 4814.) Believing Hajek had dysthemia, a lesser form of depression, the jail treated him with Prozac. (19 RT 4686-4688.) In May or June 1991, Hajek wrote a threatening letter to the Wang family consistent with a person who has cyclothymic disorder who is not being appropriately medicated. (19 RT 4728-4729.) He also wrote a series of letters to Vo in which he exhibited grandiosity, paranoia, and flight of thought. (19 RT 4731-4733; 20 RT 4897-4898.)

In August 1991, the jail switched him to Lithium, and he began stabilizing. (19 RT 4689.) He stayed on that more or less continuously thereafter, except for a period in May 1992 when they discontinued the drug because they could not find his consent form. A few days later, he pulled the sink off the wall and flooded his cell. Once restarted on the medication, he regained control once

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15. In the same time period, Hajek also indicated he wanted to contact the mother of the person he killed and told jail personnel, "I'm going to prove I'm crazy." (20 RT 4810, 4812.) However, Minagawa did not believe Hajek was malingering based on all the information he reviewed and the number of mental health professionals who had come to similar conclusions over time about him. (20 RT 4880.)

again. (19 RT 4690-4691.) His flood of letters to Vo stopped by September 1991. (19 RT 4734.)

According to Minagawa, the presence of a hypomanic episode does not preclude the ability to plan. (19 RT 4742.) It does impair judgment and can even form the basis for involuntary commitment for being a danger to oneself or others. (19 RT 4744-4745.) Dr. Minagawa acknowledged that Hajek satisfied most, though not all, of the criteria for antisocial personality disorder. (19 RT 4777, 4792.) Hajek did not qualify for that disorder because there was no evidence he suffered from a conduct disorder prior to the age of 15 and because age 18 was too young to give that diagnosis. (20 RT 4828.) Hajek wrote about Satanism, but many adolescents are interested in Ozzie Osborne and fantasy. This does not mean they all suffer from antisocial personality disorder or act on the music they hear. Frequently, they are just trying to differentiate themselves from their parents or find a way to upset them. (19 RT 4787; 20 RT 4898-4901.) Moreover, most of Hajek's antisocial behavior occurred when he was off medication and potentially having a hypomanic episode, which did not reflect his true character. (20 RT 4870-4871.) On medication, he was cooperative and did not act out inappropriately. (20 RT 4908.) Indeed, during the course of Hajek's time in custody, jail personnel had changed his diagnosis from dysthymia and antisocial personality disorder upon admission in January 1991, to cyclothymic disorder in August 1991, and ultimately to bipolar disorder. (20 RT 4874-4875.)

MMPI testing conducted on Hajek by Minagawa on August 16, 1992, indicated he was a type C offender in the Megargee system. The computer-generated report described people in this class as having antisocial, aggressive, and hostile attitudes toward others, engaging in violent crimes, and usually having an extensive criminal record. (19 RT 4789.) Another computerized analysis of a personality test conducted on August 16, 1993 indicated that

people in Hajek's class exhibit provocative interpersonal behavior, indifference to the welfare of others, and a deficient social conscience. (19 RT 4790.) A third test conducted in January 1995, after Hajek had been medicated for three and a half years, indicated Hajek was a type F offender in the Megargee system. According to the analysis, individuals matching this profile lose emotional control and engage in extreme violent or antisocial behavior. They may need to be segregated from more vulnerable inmates and are not good candidates for community-based programs. (19 RT 4791-4792.)

Defense Case—Vo

Other Acts Committed By Hajek

James O'Brien testified that he and Hajek were both working at Round Table Pizza on June 30, 1989. (20 RT 4926-4927.) At the end of his shift, O'Brien went outside to unlock his bicycle. (20 RT 4927.) Hajek approached him and said something about not liking the time O'Brien finished working. Hajek then hit him in the face. (20 RT 4928, 4930, 4932.) O'Brien tried to get away, but Hajek chased him, and hit him a couple more times, breaking O'Brien's nose. (20 RT 4929-4930.) O'Brien escaped when Hajek ran head-on into a delivery vehicle and fell. (20 RT 4929.) Prior to that day, Hajek had always seemed friendly to O'Brien. There had never been any problems between the two. (20 RT 4930-4932.)

Correctional officer Douglas Vander Esch was working in the maximum security housing unit of the Santa Clara County Jail on May 16, 1992. (20 RT 4936-4937.) Hajek, who was assigned to the unit, asked to speak to a sergeant about his housing classification. (20 RT 4939-4940, 4980.) Esch instructed him to fill out a grievance form for him to give to the sergeant. (20 RT 4940.) Hajek replied, "No, I don't want a request form. I never get an answer." Esch told him he would let a sergeant know Hajek wanted to talk to him. Hajek was

in the common room when this conversation took place. His demeanor was calm and after Esch gave his response, Hajek walked away. (20 RT 4941-4942, 4974, 4980.) A few seconds later, Esch heard the sound of breaking glass. (20 RT 4942-4943, 4960.) He found Hajek standing in the shower area of the day room holding a metal mop ringer in his hand. There was broken glass all over the floor. (20 RT 4943-4944, 4965.) Hajek told Esch, "I bet I can see a sergeant right now." (20 RT 4944, 4962.) When a sergeant, who heard the commotion, walked in, Hajek said, "See, I knew I could get a fucking sergeant." (20 RT 4945, 4962.) When Hajek was asked to return to his cell, he initially refused, but when the emergency response team entered with batons and protective gear, he complied. (20 RT 4970-4971.)

Vo's Testimony

Testifying in his own defense, Vo claimed he accompanied Hajek to scare Ellen into leaving Hajek alone. Vo's role was to provide backup in case Ellen's friends were around and things got hostile.

Hajek and Lori told Vo about the fight with Ellen and her friends the night that it happened. (20 RT 5030-5034.) Hajek was angry at Ellen for drawing attention to his stolen van. (20 RT 5034.) Vo had never met or spoken to Ellen before. (20 RT 5041.)

While Vo was at Hajek's house, Hajek received five to ten "crank" calls. The caller either hung up when Hajek answered or yelled into the phone. (20 RT 5034-5035.) Hajek believed Ellen was the caller and was cursing her, but did not suggest doing anything to stop her. (20 RT 5035-5036.) Lori's anger was directed more at Tina and Jackie. (20 RT 5038.) Over the next few days, Hajek said that he continued to get crank calls, often late at night. (20 RT 5038-5039.)

On January 18, Hajek came to Vo's apartment at 7:00 a.m. and woke him up. Hajek said he was supposed to meet Ellen at school to talk about the "crank" calls and that he wanted Vo to come with him. (20 RT 4982-4983, 4286-4287, 5042, 5064, 5080.) Vo understood their objective was to scare Ellen into leaving Hajek alone. (20 RT 4987; 21 RT 5252.) He understood himself to be tagging along in the event the confrontation became hostile. (20 RT 4987, 5065-5067; 21 RT 5203.) There was no plan to hurt anyone, but Vo was willing to let Hajek slap Ellen around if he so chose. (20 RT 5096.) Vo denied having any independent motive to confront Ellen, such as avenging Lori. (21 RT 5203.) Hajek never said he intended to kill Ellen or do anything to Ellen's family. (20 RT 4987-4988, 4992.) Prior to that morning, they never discussed trying to meet with Ellen. (20 RT 5056.) Vo knew that Hajek had an inoperable pellet gun with him. (20 RT 5006, 5082-5083.) However, there was never a plan to kill anyone. (21 RT 5187, 5216.)

After making a couple of stops, the pair went to Ellen's school, waited outside for a while, and when they did not see her, went to her house. (20 RT 4983-4984, 5081.) Alice said that Ellen was not home. They did not believe her, and as a ruse, gave Alice Vo's sweatshirt with the thermal shirt underneath to give to Ellen, hoping to draw her out. (20 RT 4984-4095, 5086-5087, 5089-5090; 21 RT 5222.) Vo wrote a note for Ellen, and the pair waited inside the house for a while. (20 RT 4986; 21 RT 5223.) They were both wearing gloves because they were driving Hajek's stolen van and did not want their fingerprints in it. (20 RT 5001-5004, 5041, 5062, 5066.) Vo found the gloves around his house; he assumed they belonged to one of his family members. (20 RT 5059-5060; 21 RT 5219.) He did not see Hajek open a new package of gloves and knew nothing about the packaging found in the van. (20 RT 5062-5063; 21 RT 5219-5220.) It did not occur to Vo to take his gloves off before entering the Wang residence. (20 RT 5001.) Once inside, he did take them off and they

were off when he was arrested. (21 RT 5185.)

Su Hung was in the kitchen when the pair first entered. (20 RT 4991.) Hajek pointed the pellet gun at her. (20 RT 5005-5006, 5087, 5099.) Although she was old and smaller than Vo, she looked angry and hostile so Vo tied her up and took her upstairs. (20 RT 4991, 4993-5000, 5097; 21 RT 5112-5115, 5224-5225.) Alice was getting upset while Vo was doing this so Hajek took her downstairs to watch TV. (21 RT 5225.) Vo did not kill the victim, however, or play any part in her killing. (20 RT 4992; 21 RT 5253.) He did not know about the killing until after it had happened. (21 RT 5158.) The last time he saw the victim alive was before Cary Wang came home. (21 RT 5238.)

According to Vo, he and Hajek left Alice in the bathroom and did a sweep of the house to disconnect the phones and search for any guns or alarms. (21 RT 5133-5134.) At one point, Vo saw Hajek looking through a photo album in Ellen's room. (21 RT 5135.) Neither of them gathered up items and put them in a suitcase. (21 RT 5136.) Vo never rummaged through any drawers or took any money. (21 RT 5189, 5192.) He did not know how $278 in cash ended up in the laundry room from where he later attempted to escape. (21 RT 5192.)

After his sweep, Vo picked up Alice from the bathroom and went downstairs with her, leaving Hajek upstairs in Ellen's room. Hajek came down about 10 minutes later. (21 RT 5137-5139.) Hajek went upstairs one or two additional times for about 10 minutes, saying he was checking on Su Hung. (21 RT 5141.) Vo got tired of waiting for Ellen and told Hajek several times that he wanted to leave, but Hajek kept saying he wanted to wait for her so Vo stayed. (21 RT 5140.)

At one point, Cary Wang called to say she was coming home. Alice took the call and told Hajek and Vo her mother was on the way. They decided to hold Cary prisoner until Ellen returned home. (21 RT 5142-5146.) When Cary

arrived shortly thereafter, Vo pulled a knife on her from behind, put his hand over her mouth to keep her from screaming, and told her if she remained quiet no one would get hurt. (20 RT 4988, 5075; 21 RT 5151-5152.) When he saw how frightened she was, he felt bad and put the knife away. (20 RT 4989; 21 RT 5154-5155.) Cary was concerned about her mother so Hajek volunteered to go check on her. When he returned, he said she was sleeping. (21 RT 5157.) Later, Alice went upstairs and checked on her as well. (21 RT 5158.) According to Vo, neither he nor Hajek threatened to kill Cary's family. (21 RT 5152-5153, 5230.)

According to Vo, Cary was the one who suggested going to school to look for Ellen. (20 RT 4989-4990; 21 RT 5163.) On the way home, after looking for her unsuccessfully, Cary asked to go by her office. Vo allowed her to do so. (20 RT 4990; 21 RT 5165.) When they got back to the house, Tony was there. (21 RT 5168.) Vo reported that Ellen was not at school. Hajek finally admitted that he did not know whether she was going to show. Vo again said they should leave, but Hajek did not want to. (21 RT 5168-5170.) At Vo's direction, Hajek tied Tony up and took him upstairs. (21 RT 5171-5172, 5233.) Tony asked to see Vo. Hajek relayed the message and told Vo that Su Hung was dead. (21 RT 5172-5173.) Vo went upstairs and saw the comforter on the ground. He lifted it up and saw Hung's body. He was shocked by what had occurred. (21 RT 5174-5176.) He went from Hung's room to the master bedroom, where Tony was incessantly talking. Afraid and irritated, Vo gagged him. (21 RT 5172, 5175-5177, 5234.) Two minutes later, the police knocked at the door. (21 RT 5178, 5183.) Vo did not surrender because he was panicked and confused. (21 RT 5178, 5184.) He gave the police a false name because he was afraid of the media. (21 RT 5179.)

Vo did not remember his conversation with Hajek at the police station. He heard Hajek talking on the tape about a man in San Francisco who killed some

people and raised a Twinkie defense. He also heard Hajek say that claiming he was crazy would be a natural thing for him and that Vo had encouraged him to do that. Vo denied he had in fact said that, however. (21 RT 5195.) He did not recall saying, "At least you have an excuse. You went to the crazy farm." (21 RT 5200.) Vo did not remember discussing with Hajek whether they should both plead guilty. If he did, he must have meant pleading guilty to false imprisonment, not homicide. (21 RT 5196.) Vo acknowledged that he may have been whispering on the tape because he knew there was a likelihood the room was bugged. (21 RT 5245.)

Vo said he met Hajek during his senior year in high school. The two became best friends. (20 RT 5012, 5015.) He knew that Hajek was odd, but was unaware of his mental history. (20 RT 5017-5018, 5052-5053; 21 RT 5200-5202.) Vo was also good friends with Bucket and Lori Nguyen. (20 RT 5019-5020.) He had romantic feelings for Lori when he first met her, but she made it clear she only wanted a friendship, and he was okay with that. (20 RT 5024.) Nevertheless, Vo acknowledged writing a letter in December 1990 professing his love for Lori. (21 RT 5205-5206, 5209-5210; Court Exh. 95.) He did not recall expressing his concern about Lori when he and Hajek were at the police station together. (21 RT 5207.) Lori had nothing to do with his actions on January 18. (21 RT 5210-5212.)

Vo was aware that Hajek and Bucket were arrested on January 1, 1991. (20 RT 5026.) He wrote in his diary that he got lucky that night because he was supposed to have gone out with them that night. (20 RT 5027-5028; Court Exh. 80.) Vo was not working in January 1991, but denied that he was in need of money and planned to rob the Wangs. (20 RT 5029, 5078-5079.)

After their arrest, Hajek wrote Vo numerous letters which the police eventually seized. (20 RT 5043.) Vo blamed Hajek for the trouble he was in and wanted nothing to do with him, but wrote him letters and kept up the

pretense of a friendship because he wanted to get information he could give to his attorney and use against Hajek. (20 RT 5044-5046; 21 RT 5248-5249.) When they wrote to each other they used code names. (20 RT 5046-5047.) In one letter, Hajek wrote that the DA had evidence aside from Tevya Moriarty that he and Vo planned to go to the Wang residence. He said he believed Bucket had told the police about how they had asked him to go with them the day before but Bucket had refused. He surmised that this was the reason the police did not pursue the case in which he and Bucket got arrested for being in possession of a stolen vehicle. (20 RT 5047-5048; Court Exh. 78.) In another letter, Hajek asked Vo, "Are you mad because I got you involved? Why did you go anyways? You could have said, 'It's not my problem' like Bucket. So why?" (20 RT 5050, 5052; Court Exh. 65.) Vo denied that he had asked Bucket to accompany them or that Hajek had asked in his presence. (20 RT 5043, 5049.)

Penalty Phase—Prosecution Evidence

Ellen Wang testified that she missed her grandmother and blamed herself for her death. (23 RT 5724.) Su Hung took care of Ellen until Ellen was five years old. When Ellen was eight, her family moved from Taiwan to the United States. Ellen remained close to her grandmother. They spoke on the telephone weekly. Hung came to visit every year, staying for three to six months. (23 RT 5718-5719.) Hung was 73 years old, and still very active before her death. (23 RT 5719.) She had six children, including Ellen's mother, and 14 grandchildren. (23 RT 5719-5720.) After Hung died, the family stayed in a hotel for a while and then rented a house, because going back to their family home brought back too many bad memories. (23 RT 5723.) They eventually sold the house at a loss. Ellen's mother sold her business as well. Cary and her husband separated, and Cary moved back to Taiwan. (23 RT 5726.) Ellen did

not go to school for two to three months after the murder because her mother was afraid. (23 RT 5723-5724.) Ellen still thought about Hung daily. Her mother still cried when she thought about her or saw her picture. (23 RT 5728-5729.)

Penalty Phase—Hajek's Evidence

June Fountain, the social worker who placed Hajek with his adoptive parents, met Hajek when he was 20 months old. (23 RT 5740.) By that time, Hajek had already been in two different foster homes. Hajek had been abandoned at the hospital by his mother. He was initially placed as a foster child with an older couple who cared for him until he was almost one year old. (23 RT 5741.) The couple wanted to adopt him, but agency policy at the time prohibited foster parents from adopting children placed with them. (23 RT 5741, 5742.) Instead, he was abruptly taken from the couple's home and placed in a second foster home. There he remained until Fountain placed him for adoption with the Rector family. (23 RT 5742-5743.)

The Rectors had a six-year-old daughter, but wanted a son. (23 RT 5744.) Initially, Hajek did well with the family, but after a few months, Fountain learned that Mrs. Rector was pregnant and had not revealed this information to her at the time of Hajek's placement. (23 RT 5749-5752.) Had Fountain known this, she would not have placed Hajek with the Rectors because he needed attention and constancy in his environment. (23 RT 5752.) After the baby, a son, was born, Mr. Rector asked to make an appointment with Fountain, stating that the family was having problems, that Rector had lost his job, and that Hajek and his daughter were fighting. (23 RT 5756-5757.) Recognizing that they were going to ask for Hajek's removal, Fountain began searching for another family for him and settled on Linda and Bob Hajek. (23 RT 5756, 5758.) When she saw the Rectors, it was clear the family was

rejecting him and that he had been emotionally abused. (23 RT 5766, 5782-5783.) Mrs. Rector seemed angry at Hajek, saying he would not talk or play, would cry if he was touched, and had regressed in his potty training. (23 RT 5759.) She told Fountain that Hajek should be out of the home before she did something she would be sorry for and really hurt him. (23 RT 5761.)

Hajek was placed with the Linda and Bob Hajek in January 1975. His adoption was finalized in December of that year. (23 RT 5787.) The couple was cooperative with the agency and supportive of his needs. (23 RT 5787-5788.) Fountain did not review any records of his care after his placement with the Hajeks. (23 RT 5789.) She was told by defense counsel that these records were missing. (23 RT 5790.)

Dr. Minagawa testified that the effect of trauma between the ages of zero and five typically reemerges during adolescence and early adulthood. (23 RT 5843.) In his opinion, Hajek's borderline personality disorder resulted from his early childhood trauma. (23 RT 5847.) Minagawa had earlier testified that Hajek was suffering from cyclothymic disorder, a genetically based mood disorder, at the time of Su Hung's murder. (23 RT 5857, 5879.) In his opinion, the disorder had progressed by the time of trial into full bipolar disorder. (23 RT 5857-5858.) Jail records showed that he had to be given increasing levels of lithium to control his behavior. (23 RT 5875.)

Hajek had apparently stopped taking medication sometime in 1990. According to Minagawa, some people do this to avoid the unwanted side effects of lithium, which can include gastric disturbances, muscle tremors, shortness of breath, dry mouth, and blurred vision. Others think they are better and do not need it any more. (23 RT 5877-5878.)

When Minagawa interviewed Hajek about the crime, he admitted going to the Wang house to get back at Ellen, but denied killing Su Hung. (23 RT 5892, 5895.) Minagawa had reviewed a letter in which Hajek described his dream of

raping and sodomizing Ellen, but did not believe he warranted a diagnosis of sexual sadism as that disorder requires the commission of an actual sexual act that incorporates sadistic qualities. (23 RT 5916, 5921.)

Robert and Linda Hajek had been visiting their son weekly in jail in the four and a half years between his arrest and trial. During that time, Hajek had become more mature, his mental state had become more stable with medication, and he had taken an interest in religion. (23 RT 5942, 5945, 5948-5949.) Hajek's former schoolteacher, who was also a minister, said Hajek had expressed his regret for traumatizing Alice and felt he deserved to give his life for what had happened, although he did not really want to die. (23 RT 5965-5966.)

Penalty Phase—Vo's Evidence

Several of Vo's friends, former teachers, and coworkers from the National Guard testified to his peaceable, trustworthy, and otherwise good character, and his abusive home life. (24 RT 5974-5985, 6028-6136, 6184-6191.) Several correctional officers and other personnel from the Santa Clara jail testified that Vo was a well-behaved inmate who served as one of the jail trustees, entrusted with serving food to other inmates, cleaning up, and other chores. (24 RT 5985-6018, 6021-6027.) James Park, a retired psychologist from the California Department of Corrections, opined that Vo would be a nonviolent prisoner and would do productive and useful work if given a sentence of life without the possibility of parole. (24 RT 6170.)

Vo was the fourth of Tan Viet Vo's eight children. (25 RT 6204-6205.) The family emigrated from Vietnam in 1975 when Vo was three or four years old. (25 RT 6209, 6219.) At the time, Tan had been working for the American government for 10 years and the family was well-to-do. (25 RT 6208-6209.) They were evacuated for safety reasons by the United States on 30 minutes'

notice when Saigon fell to the Communists. (25 RT 6209, 6223-6224.) They were sent to refugee camps in Guam and Arkansas, and were later sponsored by a businessman who provided them with a job and housing in Tennessee. (25 RT 6210-6211.) Later, they moved to Kentucky and then to San Jose, where Tan found part time employment as a school crossing guard and security guard. (25 RT 6213-6214, 6237.) According to Tan, all the places the family had lived were comfortable and his family was happy. (25 RT 6216-6217.)

Vo's brothers Dexster and Sparkman testified that their living conditions in the refugee camps in Guam and Arkansas poor and crowded. (25 RT 6225-6228.) In San Jose, they lived in a small shack and the kids would sleep wherever they could find space. (25 RT 6233-6234.) According to Vo's brothers, their father was very strict and would whip them with his belt to punish them. (25 RT 6237-6239, 6243, 6284.) Their parents fought regularly, screaming and throwing things. (25 RT 6240, 6281.) On one occasion, their mother tried to hurt herself. (25 RT 6248-6250, 6272.) Dexster dealt with the turmoil by trying to stay away from home as much as possible and eventually joining the military. (25 RT 6246, 6252.) Vo fought a lot with his father during his last two years of high school and moved down to Los Angeles for a while as a result. (25 RT 6260-6261.)

Vo's mother testified that she only learned of Vo's arrest toward the end of 1994. (25 RT 6332.) She said she and her husband were not living in the same area as Vo. Although she called the house Vo was sharing with his siblings, she did not speak directly to him. Her other children kept what had happened from her. (25 RT 6333-6334.) When she found out and asked Vo why he did not tell her about his arrest, he said he did not want to sadden her. (25 RT 6335.)

An expert in Vietnamese-American immigration testified about two waves of Vietnamese immigration into the United States. Vo's parents were in the

first wave, which consisted primarily of high ranking officials working for the United States government who were forced to leave for fear of persecution by the Communist regime that took over their country. (25 RT 6293-6294.) American policy called for the refugees to be dispersed throughout the country. This had the effect of eliminating the refugees' support system. (25 RT 6296.) The Vietnamese men were forced to take menial jobs, resulting in a loss of social status, and for the first time, many of the women were forced to find jobs to support the family, which created a lot of tension at home because the men were no longer the heads of the household. (25 RT 6297-6300.) Other tensions were created by the parents being forced to rely on their children as interpreters and by the American focus on individualism and speaking one's mind, which conflicted with the Vietnamese tradition of children obeying their parents unquestioningly. These tensions sometimes resulted in drinking, fighting with friends and colleagues, reasserted dominance in other family matters such as putting excessive academic pressure on children, and domestic violence. (25 RT 6300-6303.)

Penalty Phase—Rebuttal

The court took judicial notice that on January 1, 1991, Hajek took a 1986 Toyota minivan belonging to Be Tan Cao without her consent and with the intent to deprive the owner of possession of the vehicle. At the time of the commission of the offense, Hajek was armed with a shotgun. (25 RT 6344-6345.)

ARGUMENT

I.

CALIFORNIA'S DEATH PENALTY STATUTE DOES NOT ALLOW PROSECUTORS STANDARDLESS DISCRETION IN CHARGING IN VIOLATION OF EQUAL PROTECTION

Appellants contend that California's death penalty statute is unconstitutional because it allows prosecutors standardless discretion in deciding which defendants will face a capital charge, resulting in disparate imposition of the death penalty throughout the state in violation of equal protection principles. (Hajek AOB 40-47 [Arg. I]; Vo AOB 401-404 [Arg. 27].)[16/] This Court has repeatedly rejected such claims. (*People v. Bennett* (2009) 45 Cal.4th 577, 629; *People v. Salcido* (2008) 44 Cal.4th 93, 168; *People v. Richardson* (2008) 43 Cal.4th 959, 1036; *People v. Rundle* (2008) 43 Cal.4th 76, 199; *People v. Prince* (2007) 40 Cal.4th 1179, 1298; *People v. Snow* (2003) 30 Cal.4th 43, 126; *People v. Keenan* (1988) 46 Cal.4th 478, 505-506.) Though Hajek compares the facts of this case with those of six other murder cases in which the Santa Clara District Attorney's Office did not pursue the death penalty (Hajek AOB 47-51), this Court has also repeatedly held that comparative intercase proportionality review is not constitutionally required. (*People v. Snow*, *supra*, 30 Cal.4th at p. 126.) Appellants provide no compelling reason for revisiting this Court's prior holdings.

II.

THE COURT DID NOT ERR IN DENYING APPELLANTS' MOTION TO SEVER THEIR TRIALS

Prior to trial, Vo filed a motion to sever his trial from Hajek's. (6 CT 1536-1540; 1 RT 95-106.) Hajek's counsel orally joined in the motion. (6 CT 1548;

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16. To assist the Court in locating the corresponding arguments of the parties, we have attached a Table of Arguments to the back of this brief.

1 RT 106.) The court denied the motion. (6 CT 1565; 1 RT 170.) Hajek and Vo both challenge the ruling. (Hajek AOB 52-67 [Arg. II]; Vo AOB 123-159 [Arg. 1].)

Section 1098 provides, "When two or more defendants are jointly charged with any public offense, whether felony or misdemeanor, they must be tried jointly, unless the court order[s] separate trials." "In light of this legislative preference for joinder, separate trials are usually ordered only "'in the face of an incriminating confession, prejudicial association with codefendants, likely confusion resulting from evidence on multiple counts, conflicting defenses, or the possibility that at a separate trial a codefendant would give exonerating testimony."'" (*People v. Box* (2000) 23 Cal.4th 1153, 1195.) The legislative preference for joint trials stems from the fact they "promote economy and efficiency" and "'serve the interests of justice by avoiding the scandal and inequity of inconsistent verdicts.'" (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 40, citing *Zafiro v. United States* (1993) 506 U.S. 534, 537.) The trial court is presented with the "classic case" for a joint trial when defendants are charged with having committed common crimes involving common events and victims. (*Coffman and Marlow*, *supra*, at p. 41, citing *People v. Keenan* (1988) 46 Cal.3d 478, 499-500.) "A trial court's ruling on a severance motion is reviewed for abuse of discretion on the basis of the facts known to the court at the time of the ruling." (*Box*, *supra*, at p. 1195)

"Even if a trial court abuses its discretion in failing to grant severance, reversal is required only upon a showing that, to a reasonable probability, the defendant would have received a more favorable result in a separate trial." (*People v. Coffman and Marlow*, *supra*, 34 Cal.4th at p. 41, citing *People v. Keenan*, *supra*, 46 Cal.3d at p. 503.) Even if a trial court properly denies a motion to sever, after trial, "the reviewing court may nevertheless reverse a conviction where, because of the consolidation, a gross unfairness has occurred

such as to deprive the defendant of a fair trial or due process of law." (*People v. Cleveland* (2004) 32 Cal.4th 704, 726.)

This was a classic case for a joint trial. Hajek and Vo were charged with committing common crimes involving common events against common victims. The few exceptions, such as Hajek being charged with dissuading a witness and the special allegations that Hajek used a pellet gun and Vo a knife, were minor and unlikely to cause confusion in light of the uncontradicted evidence on these matters.[17/] There was no prejudicial association with codefendants as both Hajek and Vo took an active role in the commission of the crimes and the case against both was strong. (*People v. Coffman and Marlow*, *supra*, 34 Cal.4th at p. 43.) Neither defendant gave a confession, and there was no indication either would exonerate the other if tried separately.

Furthermore, contrary to appellants' assertions, their defenses did not conflict. Hajek's primary defense was that he was guilty only of second degree murder, because his mental illness kept him from being able to premeditate and deliberate, or form the specific intent for murder by means of torture or lying in wait.[18/] (22 RT 5420, 5424, 5455-5469, 5474-5475, 5496.) Vo's defense was that Hajek killed Su Hung on his own and without the prior knowledge of Vo, who accompanied Hajek solely to confront and possibly assault Ellen. (22 RT 5538-5539, 5543-5546.) Far from requiring them to choose between the defendants, the two defense theories permitted the jury to accept both.

In any event, """"antagonistic defenses do not per se require severance, even if the defendants are hostile or attempt to cast the blame on each other."""

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17. Indeed, Hajek's counsel conceded he was guilty of the witness dissuading count. (22 RT 5424, 5426.)

18. Although his counsel did also suggest that he might not have been the actual killer (22 RT 5426-5427, 5451-5452), the contention was half-hearted at best, and implausible in light of the blood on Hajek's glove.

(*People v. Coffman and Marlow*, *supra*, 34 Cal.4th at p. 41; accord, *People v. Box*, *supra*, 23 Cal.4th at p. 1196; *People v. Cummings* (1993) 4 Cal.4th 1233, 1287.) Were that the case, "'it would negate the legislative preference for joint trials and separate trials "would appear to be mandatory in almost every case."'" (*Coffman and Marlow*, *supra*, at p. 41.) Rather, antagonistic defenses only warrant severance where "' the conflict is so prejudicial that [the] defenses are irreconcilable, and the jury will unjustifiably infer that this conflict *alone* demonstrates that both are guilty.'" (*Ibid.*) "When, however, there exists sufficient independent evidence against the moving defendant, it is not the conflict alone that demonstrates his or her guilt, and antagonistic defenses do not compel severance." (*Ibid.*) Although conflicting defenses may justify severance, no California decision has ever found an abuse of discretion or reversed the judgment solely on that basis. (*Ibid.*; see also *People v. Avila* (2006) 38 Cal.4th 491, 575.)

Here, although the evidence did not establish with certainty whether Su Hung was killed by Hajek, Vo, or both, it did amply establish that appellants, working in concert, invaded the Wang home, held the family hostage, and made threats and committed other hostile acts against them, all the while conferring with one another. During the course of the incident, Su Hung was killed. As in *Box* and *Cummings,* the circumstances of the victim's murder, and the identity of the killer, were in dispute. "That each [defendant] was involved in the incident was undisputed, however, and the prosecution had offered evidence sufficient to support verdicts convicting both defendants . . . . [T]his was not a case in which only one defendant could be guilty . . . . Here the prosecution theory was that both defendants participated in, and were guilty of, the murder." (*Box*, *supra*, at p. 1197, quoting *Cummings*, *supra*, 4 Cal.4th at p. 1287.) "The jury was presented with a straightforward decision regarding both defendants' relative culpability; its verdict finding each defendant guilty as charged reveals

it accepted neither defense." (*Box*, *supra*, at p. 1197.)

Hajek claims that joinder allowed Vo to present prejudicial evidence and argument of uncharged misconduct by Hajek, namely, his breaking the nose of his pizza parlor coworker and his unprovoked attack on jail property. (Hajek AOB 56-60.) Assuming arguendo that this evidence would have been inadmissible in a separate trial against Hajek, that alone would still not justify severance. The fact that one defendant's evidence damages another's defense does not result in a denial of a fair trial. (*People v. Turner* (1984) 37 Cal.3d 302, 313.) The benefits of a joint trial must be weighed against the likelihood of "substantial" prejudice to the defendant. (*People v. Keenan*, *supra*, 46 Cal.3d at p. 500.) The pizza parlor and jail incidents Hajek complains of pale in comparison to his admitted involvement in Hung's murder and the crimes against the Wang family. As in *Keenan*, the "other crimes" evidence was "unlikely to alter the verdict by unfairly bolstering an otherwise weak case." (*Id.* at pp. 501-502.)

Vo claims that Hajek's defense made Vo seem more culpable because Vo suffered no mental defect. (Vo AOB 147.) This improperly assumes the jury did not consider each case separately. Hajek and Vo had different defenses, and the jury was instructed at both the guilt and penalty phases to consider each defendant separately. (7 CT 1852; 10 CT 2651.) Hajek raised a mental defense. Vo claimed that Hajek killed on his own and that Vo was unaware of his plan to do so. Vo did not need a mental defense to succeed on his theory. That the defendants had different defenses does not mean that each was prejudiced by the inability to claim the other's.

Vo also claims that much of the prosecution's evidence would have been inadmissible against him in a separate trial. (Vo AOB 144-145 & fn. 74.) Not so. Hajek and Lori's altercation with Ellen and her friends, and Ellen's subsequent crank calls to Hajek in Vo's presence, provided the motive for both

appellants' subsequent actions against the Wangs. Hajek committed the crimes to get revenge on Ellen on his and Lori's behalf; Vo committed them to get revenge on Ellen on behalf of his best friend and the girl with whom was in love. By his own admission, he went to the Wangs' house to assist Hajek in confronting Ellen and possibly assaulting her.

Hajek's admission to Tevya Moriarty of his intent to commit murder was likewise admissible against Vo. As argued more fully in Argument V.B., *post*, although Vo was not present when the statement was made, he accompanied Hajek to the Wang's house when Hajek executed his plan, and once there, acted in concert with him and in apparent conformity with the plan, suggesting that he was knowingly participating in it as well. This conclusion was buttressed by Vo's conduct after the crime, which included flight, lying to the police about his identity, and continuing to maintain a relationship with Hajek following their arrest. The statement would have been admissible against Vo even in a separate trial because it was relevant to prove his criminal intent.

Finally, Vo wrote in his diary about Hajek's arrest for being in possession of a stolen vehicle and a loaded shotgun two weeks before the instant crimes, saying he got lucky. Vo admitted at trial that he was supposed to have gone out with Hajek and Bucket that night. Assuming, arguendo, that evidence would have been inadmissible in a separate trial against Vo, its admission did not "substantially" prejudice him since he was not in fact involved in that incident and the incident itself was minor compared to crimes at issue in the instant case.

Both appellants also claim they were prejudiced at the penalty phase by their joint trial. Vo focuses on Dr. Minagawa's testimony in the penalty phase (23 RT 5892) that Hajek admitted going to the Wang house to get back at Ellen, but denied killing Su Hung. (Vo AOB 157.) According to Vo, this inculpated him as the killer, an accusation that Vo was unable to challenge through cross-

examination of Hajek, in violation of the Sixth Amendment right to confront witnesses against him. *Bruton v. United States* (1968) 391 U.S. 123, held that a defendant's confrontation clause rights are violated when the powerfully incriminating confession or admission of a nontestifying codefendant is introduced at their joint trial, even though the jury is instructed to consider the confession only against the codefendant.[19] Assuming the rule even applies to a nontestifying codefendant's *denial* of guilt, Vo's right to confrontation was not violated for several reasons.

First, the confrontation clause applies to testimonial hearsay admitted against the defendant. (*Crawford v. Washington* (2004) 541 U.S. 36, 51.) Hajek's statement to his own expert psychiatrist was not a "formal statement to government officers" (*ibid.*) and thus does not qualify as testimonial. Second, the statement was not admitted for the truth (i.e., to show that Hajek was not the killer or that Vo was), but to show the basis for the psychiatrist's expert opinion. (See CALJIC No. 2.10; 8 CT 2060.) The confrontation clause "does not bar the use of testimonial statements not admitted for purposes other than establishing the truth of the matter asserted." (*Crawford*, *supra*, at p. 59, fn. 9.) Finally, Hajek merely denied that he killed the victim; he did not name Vo as the killer. In *Richardson* v. *Marsh* (1987) 481 U.S. 200, the Supreme Court held that the *Bruton* rule is not violated when "the confession is redacted to eliminate not only the defendant's name, but any reference to his or her existence," and proper limiting instructions are given. In other words, the *Bruton* rule is not violated where the confession is not incriminating on its face,

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19. The California Supreme Court reached a similar conclusion on nonconstitutional grounds earlier in *People* v. *Aranda* (1965) 63 Cal.2d 518, 528-530. However, the "truth-in-evidence" provision of Proposition 8 (Cal. Const., art. I, § 28, subd. (d)) abrogated *Aranda* to the extent it required the exclusion of relevant evidence that need not be excluded under federal constitutional law. (*People* v. *Fletcher* (1996) 13 Cal.4th 451, 465.)

but becomes so only when linked with evidence introduced at trial. (*Id.* at p. 208.) That is the situation here. Hajek's denial was not incriminating on its face to anyone. *Bruton* is thus inapplicable.

Hajek claims that he was prejudiced by the joint trial in the penalty phase because Vo called more mitigation witnesses than he did. (Hajek AOB 61-62.) He cites no cases to support his prejudice-by-headcount theory. It is the quality of the witnesses that matters, not their number. The jury was instructed on this very concept at both the guilt and penalty phases of the trial. (7 CT 1847; 10 CT 2638 [instructing jury pursuant to CALJIC No. 2.22 not to simply count the number of witnesses who have testified on opposing sides of an issue, but to evaluate the convincing force of the evidence].) Clearly, the lengthy testimony by Hajek's witnesses about his childhood and mental health issues was comparable to Vo's parade of character witnesses.[20] Neither of those sets of witnesses were ultimately persuasive to the jury.

Similarly, James Park's testimony that Vo would be a model prisoner if sentenced to life without parole did not detract from Hajek's penalty defense by suggesting that Hajek would not be a model. Hajek's defense was different from Vo's. The case for leniency was not that Hajek would lead a productive, nonviolent life because of his good character, but that his past behavior resulted from a mental illness that could be controlled with appropriate medication. (25 RT 6432-6436.) Park thus testified on cross-examination that the prison system did evaluate and medicate mentally ill prisoners, noting, "our prison psychiatrists are very good at that." (24 RT 6181.)

Finally, Hajek's charge that the joint trial allowed the prosecutor to introduce "highly prejudicial" evidence suggesting that Hajek was a gang

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20. Indeed, as noted earlier, Vo claims that Hajek's mental defense made Vo appear more culpable because he suffered no such defect, thus demonstrating that prejudice is in the eye of the beholder.

member (Hajek AOB 63-64) is hyperbole. In responding to the question whether Vo had any gangster friends, one of Vo's good character witnesses responded, "No, he knew some people, not friends, not close friends, but I know he knew some people like Steve [Hajek]." (24 RT 6115.) The court immediately struck the answer and admonished the jury to disregard it. (*Ibid.*) There was no other reference in the entire trial suggesting Hajek was a gang member. This isolated and stricken remark could not result in gross unfairness so as to deprive Hajek of a fair penalty trial.

Finally, weighing against appellants' inadequate showing of the need for severance was the "'realistic benefits from a consolidated trial.'" (*Hardy*, *supra*, 2 Cal.4th at 169, citations omitted.) Nearly all the evidence in this case was admissible against both defendants. The witnesses only had to testify once, and the court only had to conduct one trial. On balance, these benefits vastly outweigh appellants' speculative claim of prejudice from, inter alia, antagonistic defenses and certain limited evidence arguably applicable to only one or the other. The trial court did not abuse its discretion in denying severance and in hindsight no gross unfairness actually resulted from its decision. Appellants' rights under the state and federal constitutions were not violated.

III.

VO WAS NOT DENIED HIS CONSTITUTIONAL RIGHTS DUE TO DELAY IN APPOINTMENT OF SECOND COUNSEL, DENIAL OF HIS MOTIONS TO CONTINUE THE TRIAL, AND INADEQUATE FUNDING

Vo contends he was deprived of his rights to effective assistance of counsel, due process, and a fair trial "by three interlocking errors by the trial court": (1) denial of and delay in appointing second counsel; (2) denial of Vo's motion to continue the trial to give counsel time to prepare; and (3) an inadequate funding system for conflict cases resulting in denial and delay of critical funding for his case. (AOB Vo 160-223 [Arg. 2].) None of the contentions have merit,

individually or cumulatively.

A. The Trial Court Did Not Err In Initially Denying Vo's Request For *Keenan* Counsel

"An indigent criminal defendant's right to a second attorney in a capital case is statutory, not constitutional. Appointment is permitted in the discretion of the trial court under [Penal Code] section 987, subdivision (d)." (*People v. Doolin* (2009) 45 Cal.4th 390, 431.) "If it appears that a second attorney may lend important assistance in preparing for trial or presenting the case, the court should rule favorably on [a] request. Indeed, in general, under a showing of genuine need . . . a presumption arises that a second attorney is required." (*Keenan v. Superior Court* (1982) 31 Cal.3d 424, 434.) "'The initial burden, however, is on the defendant to present a specific factual showing as to why the appointment of a second attorney is necessary to his defense against the capital charges.' [Citation.] An 'abstract assertion' regarding the burden on defense counsel 'cannot be used as a substitute for a showing of genuine need.'" (*People v. Staten* (2000) 24 Cal.4th 434, 447.)

The circumstances of Vo's request for *Keenan* counsel are as follows. On September 13, 1991, Vo's counsel executed a declaration requesting appointment of a second attorney. (4 CT 1010-1012, 1028-1029.) The request was denied by Judge Thomas Hastings on September 20, 1991. (4 CT 1012.) A second declaration executed on October 10, 1991, was denied on October 22, 1991. (4 CT 1006-1009, 1028-1029.) On November 20, 1991, at Vo's request, the court held a hearing on the subject. (4 CT 1003-1004.) Counsel argued that appointment of a second attorney was appropriate for the following reasons: the case involved two codefendants and the evidence did not establish which one was the killer or the circumstances of the killing; there were at least 40 witnesses to be interviewed, many of whom did not speak English; counsel anticipated filing a motion to dismiss for insufficient evidence, a motion to

sever Vo's trial from Hajek's, and a motion arguing that the District Attorney's Office had not followed its own policy in seeking the death penalty in this case; there would be blood evidence; counsel would need a psychiatric expert to examine Vo and advise counsel on how to address Hajek's anticipated mental defense; and penalty phase preparation would be difficult because Vo was a refugee from Vietnam. (4 CT 1030-1037.)

Judge Hastings again denied the request for a second attorney. He noted that appointing second counsel was discretionary, and that *Keenan v. Superior Court*, *supra*, 31 Cal.3d 424, a case in which this Court found it an abuse of discretion to deny second counsel, was distinguishable. It involved a unique situation where "there was a very critical time issue involved for the lawyer to get prepared after his appointment, and he indicated there is no way he could prepare within the time frame involved, he needed help with respect to specific-type lawyer services . . . ." (4 CT 1040.) In the instant case, by contrast, "time has been waived, these defendants were arraigned in August of this year, the matter isn't even set for trial yet . . . ." (*Ibid.*)

Moreover, counsel had failed to state adequate reasons for needing a second attorney. The court found the motions to dismiss for insufficient evidence and to sever the trials were motions counsel himself should draft because counsel had handled the preliminary examination and was familiar with the issues. There was no time issue and counsel would not be forced to go to trial until those issues had been resolved and he was prepared. (4 CT 1041-1042.) Counsel had an investigator to interview the 40 witnesses and obtain information about Vo's background with the assistance of his parents, who resided locally, and the court said it would consider appointing a paralegal to assist counsel in assimilating the interviews and preparing a trial notebook. (4 CT 1042-1043.) Judge Hastings found the showing by Mr. Blackman, Vo's attorney, was "simply conclusionary: that it's a complicated case. And it might

very well be, but you were appointed because you are an experienced lawyer capable of handling a complicated case in Santa Clara County." (4 CT 1044.)

Vo's attorney ultimately filed a motion to dismiss on his own and succeeded in obtaining dismissal of all of the special circumstances except torture murder. (5 CT 1173-1186, 1342-1346,1349; see 6 CT 1423.) Around March 14, 1994, after the prosecution's successful appeal reinstated those allegations (see 6 CT 1421-1438), the court approved Vo's request for a second attorney. (See 1 RT 51; RT [4/22/94] 3-4.) The appointed attorney, Mary Ann Bachers, began working on the case around April 1994 (RT [4/22/94 3-4]), but developed health problems requiring her to withdraw in December 1994. (1 RT 56-57; 6 CT 1507.) Replacement *Keenan* counsel, Jeane Dekelver, was appointed on February 10, 1995. (See 10 CT 2741.) Trial commenced on February 14, 1995. (6 CT 1646.)

The decision whether to grant a request to appoint second counsel is reviewed for abuse of discretion. (*People v. Roldan* (2005) 35 Cal.4th 646, 688.) "A trial court will not be found to have abused its discretion unless it 'exercised its discretion in an arbitrary, capricious, or patently absurd manner that results in a manifest miscarriage of justice.'" (*Ibid.*)

No abuse appears here. The court reasonably concluded that counsel, an experienced attorney who had been practicing for over 20 years and had tried "probably a dozen murder cases," including two death penalty cases (4 CT 1037), and who was under no time pressure to prepare the case, did not require the assistance of a second attorney at public expense for a case which had not even been set for trial. Counsel's explanations of why he needed assistance were reasonably rejected by the court, which noted that the pretrial motions were more logically drafted by him than a second attorney unfamiliar with the facts and that he had the assistance of an investigator to help interview the witnesses. Indeed, counsel's success on the motion to dismiss is testament to

his abilities. Ultimately, however, the trial judge approved counsel's request for a second attorney, and did so some 10 months in advance of the trial, giving Vo's defense team ample time to prepare. Accordingly, the court properly exercised its discretion with respect to Vo's requests for *Keenan* counsel. It denied the motion initially because a genuine need had not been demonstrated, but granted it eventually, well in advance of trial.

Assuming, arguendo, the court erred in not appointing *Keenan* counsel sooner, any error was harmless as there is no reasonable probability Vo would have achieved a more favorable outcome absent the error. (*People v. Doolin*, *supra*, 45 Cal.4th at p. 432.) As noted, second counsel was appointed well in advance of trial, although she was later replaced for health reasons. Moreover, notwithstanding counsel's protestation that he was unprepared, the record shows he presented an impressive defense. At the guilt phase, Vo testified that he accompanied Hajek to the Wangs' house to confront Ellen about her crank calls to Hajek, and that Hajek killed the victim on his own. He supported his theory that Hajek was prone to sudden fits of rage by presenting evidence that he had broken the nose of his pizza parlor coworker for no apparent reason and had destroyed jail property in a violent outburst when his request to speak to a sergeant was not immediately honored. At the penalty phase, counsel called numerous friends, former teachers, and coworkers, who testified about Vo's good character and abusive home life, correctional officers and instructors who testified about Vo's exemplary conduct in custody, family members who testified about the family's home life and experience as refugees, a cultural expert who explained the history of Vietnamese immigration to the United States and its social effects, and an expert who opined that Vo would be a nonviolent and productive prisoner if sentenced to life in prison without possibility of parole.

In sum, there is no reasonable probability Vo would have fared better had

Keenan counsel been appointed sooner. His defense was hampered not by the lack of second counsel, but by the extensive evidence of his guilt. As discussed more fully in Argument V.B., *post*, Vo had a motive to commit the crimes to avenge his best friend and the girl with whom he was in love. Acting on that motive, he arrived at the Wang house with Hajek and acted in concert with him the entire time they were there, expressing no surprise at the unfolding of events and taking an active role in threatening and incapacitating the victims. His conduct after the crime, which included flight, lying to the police about his identity, and continuing to maintain a relationship with Hajek following their arrest, likewise demonstrated that he was not an innocent party caught up in the misdeeds of his companion, but Hajek's partner in crime.

B. The Trial Court Properly Exercised Its Discretion by Refusing to Grant Vo's Request for a Continuance After the Case Had Been Pending for Over Three Years

1. Factual Background

On October 28, 1994, more than three years after the July 1991, filing of the information (4 CT 978), and almost four years after the commission of the crime and appellants' arrest, trial was set for January 17, 1995. (6 CT 1492.) Vo's counsel agreed to the date, saying "we still have penalty phase investigation that we are currently involved in," but he hoped and anticipated to be ready by that date. (RT [10/28/94] 1.)

a. January 1995 Request for Continuance

On December 16, 1994, Vo's counsel presented the court with a doctor's note stating that *Keenan* counsel Mary Ann Bachers was disabled and unable to continue working on the case. (1 RT 1-2; 6 CT 1507-1508.) Counsel learned of the problem one week prior. (1 RT 3.) He indicated he would not be ready for trial until he could locate another *Keenan* counsel and bring that

attorney up to speed on the case so that he or she could continue on where Ms. Bachers had left off. (1 RT 2.) The prosecutor and Hajek's counsel both objected to continuing the case, noting that January would be the four-year anniversary of the crime, and that Vo had previously continued the case to deal with the penalty issues and had had sufficient time to be prepared. (1 RT 4.) The court left the January 17 trial date in place, but agreed to hear counsel's reasons in camera after January 1. (1 RT 5.)

At the next court date on January 6, 1995, Vo's counsel advised the court, "I'm still trying to get second counsel, still trying to bring the penalty phase preparation up to speed." (1 RT 9.) The court noted it had stood ready to sign an appointment for replacement *Keenan* counsel since the last court date. Vo's counsel replied that he was having trouble finding someone willing to take the case on short notice. (1 RT 9-10.) With respect to the penalty phase preparation, he had met with the Center for Juvenile and Criminal Justice (CJCJ), provided them with information from Ms. Bachers, and set up an appointment for them to meet Vo the following week. (1 RT 11.) The court scheduled an in camera hearing for January 17, 1995, but noted that it was disinclined to grant a continuance and was distressed that Vo's counsel had let a month go by without finding replacement *Keenan* counsel. (1 RT 10, 39.)

On January 17, 1995, in an in camera proceeding, Vo's counsel made a formal request for continuance and summarized the history of the case as follows. The homicide occurred on January 18, 1991. Vo's counsel, Mr. Blackman, was appointed on February 22, 1991, conducted the preliminary hearing from June 3 to June 18, 1991, and entered a not guilty plea for Vo on July 15, 1991. (1 RT 45.) The prosecution elected to seek the death penalty on September 5, 1991. (1 RT 46.)

After that, "a lot of time went by. Nobody seemed to be in a particular rush on the case. It was complicated from everybody's standpoint." (1 RT 47.) On

June 5, 1992, Mr. Blackman met with the prosecutors, and was told they remained firm in their decision to seek the death penalty. (1 RT 47.) On August 28, 1992, the court granted the defense motion pursuant to Penal Code section 995 and dismissed three of the four special circumstances. (1 RT 47.) The People appealed, the Sixth District Court of Appeal reversed, the remittitur issued on December 29, 1993, and the case returned to superior court in January 1994. (1 RT 47-48, 50.) According to Mr. Blackman, while the case was pending on appeal, "[w]e just didn't do anything, because the focus of the attention at that point was to see what happened in the Court of Appeals." (1 RT 48.) In his view, "the death issues and the penalty phase issues, by virtue of that appeal, were put in a suspension." (1 RT 48.)

Blackman did, however, represent Vo in a separate case filed on June 11, 1992, in which Hajek and Vo were charged with robbery and kidnapping. (1 RT 48.) Following a court trial in August 1993, Vo was found not guilty of the robbery and kidnapping charges, but guilty of violating Vehicle Code section 10851, the subject vehicle being the minivan found around the corner from the Wang home on the day of the homicide. (1 RT 50.)

In March 1994, after the capital case resumed, Blackman received court authorization to hire Dr. Berg, a psychologist and penalty phase expert. (1 RT 50-51.) He also got approval to retain *Keenan* counsel, after having been denied in 1991. (1 RT 51.) He hired Mary Ann Bachers, who began work on the case around May 1994, and was assigned to assist with the pretrial motions and instructions, and in particular, to work on the penalty phase investigation. (1 RT 52-53.) Blackman explained, "And again, it wasn't until the beginning of 1994 that we were faced with the real, the reality of a death process in this case because it wasn't till then that the court of appeals had decided that issue against us. So it seemed premature and highly open to criticism for me to go through a penalty phase preparation when the case is up on appeal." (1 RT 52.)

The court challenged this statement, noting that the torture-murder special circumstance remained intact, so that the defense potentially would have to go to penalty phase regardless of whether the People succeeded in appealing the dismissal of the other special circumstances. (1 RT 52.) Blackman's only response was that he believed torture-murder to be the weakest of the special circumstances, and rightly or wrongly had decided await the outcome of the appeal before working on the penalty phase preparation, a task he assigned to the now-unavailable Ms. Bachers. (1 RT 52-54.)

Blackman acknowledged that an investigator, Tom Davis, worked for him, but said that Davis was working exclusively on the guilt-phase issues. (1 RT 57-58.) Ms. Bachers was interviewing the witnesses for the penalty phase herself. (1 RT 57.) The court noted that attorneys did not commonly conduct interviews because if the witness had to be impeached, the interviewer might have to testify. (1 RT 58.) Blackman responded, "We thought because of [Bachers's] particular interviewing skills and abilities she had that this was the correct thing to do." (1 RT 59.)

After learning about the problem with Bachers, Blackman hired CJCJ on December 30, 1994. He had turned over Bachers's material to them, and they met with Vo twice. They were to develop the social material on Vo and share it with Dr. Berg. (1 RT 59-60.) "So at this point this case is not ready from a penalty phase perspective." (1 RT 60.) Blackman was also still trying to find an attorney to replace Bachers as *Keenan* counsel, but it was difficult to find attorneys willing to work on capital cases at all, much less one where there was extreme time pressure. (1 RT 63-64.)

The court denied the request for continuance as follows:

> Today is the 17th of January and tomorrow will be the fourth anniversary of when this alleged crime occurred. [¶] I have read the transcript of the proceedings on November 20th, 1991, that was heard before Judge Hastings when he denied the request for *Keenan* counsel. All the arguments you're putting forth were the same arguments you put

> forth at that time and you were concerned about the 995 and being prepared for the 995. I don't think this case will ever be prepared, Mr. Blackman, and all the information you need for a competent guilt phase and penalty phase investigation is at your finger tips. It can be done. It will be done. Request for continuance is denied.

(1 RT 66-67.)

Replacement *Keenan* counsel, Jeane Dekelver, was appointed on February 10, 1995. (See 10 CT 2741.) Trial commenced on February 14, 1995. (6 CT 1646.) The jury found Vo guilty on all counts on May 22, 1995. (8 CT 2106-2113.) The court scheduled the penalty phase to begin two weeks later, on June 6, 1995. (22 RT 5647.) Vo's counsel indicated he was still not ready to proceed with the penalty phase and that his experts had still not been paid. (22 RT 5640.) The court said that it would deal with the payment issue and that the two-week break would give the defense time to be ready. (22 RT 5641.) It also scheduled Hajek to put his penalty evidence on before Vo, which gave counsel additional time. (22 RT 5641, 5647.)

b. June 1995 Request for Continuance

On June 5, 1995, Vo made a motion for new counsel pursuant to *People v. Marsden* (1970) 2 Cal.3d 118, which the court denied. (22 RT 5651-5655, 5667.) During the course of the *Marsden* hearing, Vo also expressed his belief that ever since the court had denied Blackman's motion for continuance, it seemed to harbor animosity toward Blackman, which Vo believed affected the trial. (22 RT 5655.) The court acknowledged that it was unhappy with counsel's motion for a continuance. "I felt four years was adequate amount of time to present the case. I did express displeasure in the fact that counsel did not announce ready to go to trial." (22 RT 5655.) Vo replied that it was true that they were not prepared, though he did not understand why. (22 RT 5655.)

Blackman again moved for a continuance, stating he was still not ready to proceed with the penalty phase. (22 RT 5657, 5664, 5668.) The court denied

the motion (22 RT 5666), noting again that the case was four years old, that counsel had had sufficient time to prepare, and that the court was "of the firm belief that had I not pushed this case out to trial it never would be ready for trial." (22 RT 5657, 5659, 5668.) The court acknowledged that counsel had *Keenan* counsel problems, "but there's a real question whether a *Keenan* counsel is really appropriate in this case," because the facts were straightforward despite some unusual legal issues. (22 RT 5658.) Blackman responded that the complexity of the case came from the relationship between the facts and the law, that Bachers's departure a month before the start of the trial had left him with no penalty phase, that even with help from CJCJ and replacement counsel Dekelver, they were still "playing catch up," and that problems about payment for the experts was making it difficult for them to keep working. (22 RT 5658-5663.) The court expressed sympathy about the problems Blackman was having (22 RT 5666), but remained of the view that the case "would never be ready unless the court demanded the case go out." (22 RT 5667.) It also denied Blackman's request that the court appoint another attorney to represent Vo to advise him as to what additional steps should be taken "so that Mr. Vo does not get harmed by the collection of problems that exist." (22 RT 5671.)

2. The Court Properly Exercised Its Discretion In Denying Vo's Motions To Continue The Case

"[T]he trial court has broad discretion to determine whether good cause exists to grant a continuance of the trial. [Citations.] A showing of good cause requires a demonstration that counsel and the defendant have prepared for trial with due diligence. [Citations.]" (*People v. Jenkins* (2000) 22 Cal.4th 900, 1037.) "The party challenging a ruling on a continuance bears the burden of establishing an abuse of discretion, and an order denying a continuance is seldom successfully attacked." (*People v. Beames* (2007) 40 Cal.4th 907, 920.)

The court properly exercised its discretion in denying Vo's January 17, 1995, motion to continue. While a trial court's discretion over continuances "may not be exercised so as to deprive the defendant or his attorney of a reasonable opportunity to prepare (*People v. Sakarias* (2000) 22 Cal.4th 596, 646), the court's ruling here had no such effect. On the contrary, counsel's recounting of the history of the case demonstrated that he had not exercised due diligence in preparing for the case.[21/]

Counsel's stated reason for a continuance was to prepare the penalty phase, a task he had assigned to Ms. Bachers, who was no longer available. At the time of the request, however, counsel had represented Vo for almost four years. Although some of this time was taken up by Vo's court trial for robbery and kidnapping, much of it, according to counsel, was not utilized for preparing the defense in this case. From mid-1991 to mid-1992, "[n]obody seemed to be in a particular rush." (1 RT 47.) From August 1992, when the motion to dismiss some of the special circumstances was granted, until the end of 1993, when the Court of Appeal reinstated them and the case returned to superior court, the defense "just didn't do anything" to prepare for the penalty phase. (1 RT 48; see 1 RT 52.) Yet, one special circumstance had remained, appointment of *Keenan* counsel had been denied, and counsel had known as he said at the *Keenan* counsel hearing, that penalty phase preparation would be "complicated and time consuming" (4 CT 1034), because Vo was a refugee from Vietnam.

Work apparently began in earnest in early 1994. At that point, Mr. Blackman hired *Keenan* counsel Mary Ann Bachers and psychologist Dr. Berg

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21. Appellant asserts that it only matters whether he was diligent, not whether counsel was diligent. (Vo AOB 217.) Case law, however, requires diligence by both the defendant and his counsel. (*People v. Doolin*, *supra*, 45 Cal.4th at p. 450; *People v. Riggs* (2008) 44 Cal.4th 248, 296; *People v. Roldan*, *supra*, 35 Cal.4th at p. 670; *People v. Jenkins*, *supra*, 22 Cal.4th at p. 1037.)

to prepare the penalty phase. Although an investigator was at his disposal, counsel had Bachers interview potential penalty phase witnesses by herself. In October 1994, after Bachers and Berg had been working on the case for more than six months, the court set the trial date with counsel's consent. Trial was set for mid-January, giving the defense two months to finish preparing. Sometime in between, Bachers apparently became disabled. While this undoubtedly inconvenienced Mr. Blackman, the bulk of the penalty phase work should have been, and presumably had been, done by then. In light of the amount of time the case had been pending, the amount of time counsel had apparently wasted, and the ability of Dr. Berg with the assistance of the investigator and/or replacement *Keenan* counsel, which the court stood ready to authorize, to complete whatever remained to be done while the trial was ongoing, the court's decision to deny an open-ended continuance for further penalty phase preparation did not "exceed[] the bounds of reason, all circumstances being considered." (*People v. Beames*, *supra*, 40 Cal.4th at p. 920.)

> Nor did it violate due process to deny the continuance.
>
> Although "a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality [,] . . . [t]here are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process." [Citation.] Instead, "[t]he answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied." [Citations.]

(*Beames*, *supra*, at p. 921.) As explained above, the circumstances here did not justify further delaying trial on this four-year-old homicide.

The court also exercised its discretion properly in denying Vo's June 5, 1995, motion to continue. In ruling on such a motion in the midst of trial, the judge "must consider not only the benefit which the moving party anticipates but also the likelihood that such benefit will result, the burden on other

witnesses, jurors and the court and, above all, whether substantial justice will be accomplished or defeated by a granting of the motion." (*People v. Zapien* (1993) 4 Cal.4th 929, 972.)

The court properly balanced these considerations in denying Vo's request to continue the penalty phase. The trial had lasted almost four months, well over the eight-week estimate the court had given the jurors (2 RT 342), one juror (Juror Williams) had already asked to be excused due to a scheduling conflict (22 RT 5642-5643), and Hajek's counsel expressed the desire that there not be a significant break before the start of the penalty phase (22 RT 5641), presumably so that the case would not get cold in the jurors' minds. The court was already scheduling a two-week break before starting the penalty phase to accommodate witness scheduling and its own vacation, which would give Vo additional time to prepare. It also scheduled Hajek's penalty defense ahead of Vo's, giving him yet more time.

Moreover, as argued above, Vo had years to prepare his defense, before and after the appointment of Mary Ann Bachers as *Keenan* counsel. Jeane Dekelver stepped in at the start of the trial in February 1995, picking up where Ms. Bachers had left off. In addition to the six plus months Bachers spent preparing, Dekelver had the length of the guilt phase trial—some four months—and the interlude before the start of Vo's penalty presentation, which ultimately began on June 12, 1995 (9 CT 2400), three weeks after the guilt-phase verdicts, to prepare. Under the circumstances, it did not exceed the bounds of reason to deny the request for continuance.

Any error in denying either of Vo's motions to continue was also harmless. The records discloses no actual prejudice flowing from the absence of a continuance. On the contrary, it shows that Vo was able to locate and call in his defense some 33 witnesses. These witnesses included friends, former teachers, and coworkers, who testified to his peaceable, trustworthy, and otherwise good

character, and his abusive home life (24 RT 5974-5985, 6028-6136, 6184-6191); family members, who testified about his family history and home life (25 RT 6204-6286); correctional officers and instructors, who testified about Vo's exemplary conduct in custody (24 RT 5985-6027; 25 RT 6193-6203); a retired prison psychologist, who opined that Vo would be a nonviolent, productive prisoner if spared (24 RT 6137-6183); and a sociology professor, who offered expert testimony about the history of Vietnamese immigration to this country and its sociological effects, which included domestic violence (25 RT 6286-6313). It is difficult to conceive what additional non-cumulative evidence Vo could have offered.

Vo suggests that had the continuance been granted, he would have been able to present the family history compiled by Vincent Schiraldi of CJCJ as part of the penalty phase, instead of afterward in support of his motion to preclude the death penalty. (Vo AOB 221; 11 CT 2791-2819.) As Vo's counsel acknowledged below, however, Mr. Schiraldi's declaration "goes through in a somewhat more summary fashion the various items of evidence and information that have come to the court about Mr. Vo . . . ." (10/12/95 RT 3.) It was, in other words, cumulative and comprised of inadmissible hearsay. Examination of the document bears this out.

C. Vo's Contentions Regarding Funding Do Not Warrant Reversal

1. Factual Background

On April 26, 1995, Vo's counsel complained to the trial judge that expense authorization requests he submitted for work to be done by his private investigator, CJCJ, and Dr. Berg had been significantly cut, and that *Keenan* counsel Dekelver had not been paid for the last month of work. Counsel represented that this made it difficult for Vo's defense to prepare for the penalty phase. (19 RT 4520-4521.) The trial judge spoke to Judge Komar, the "987

judge" (see § 987.9, subd. (a)) assigned to review expense requests for the case, who said that he approved the requested amounts in full. He asked counsel to see Judge Komar to resolve the problem. (19 RT 4526.)

On May 10, 1995, after Vo's counsel complained that the expense requests had still not been paid, the trial judge held a hearing with the conflicts administrator, who said the claims had not yet been submitted to the county. (22 RT 5603.) She explained that there were two issues: an internal issue with conflicts administration that she anticipated would be resolved by Friday, and the external issue of funding by the county. (22 RT 5605.) With respect to the latter, the administrator explained funds were drawn off the conflicts budget to pay for a particularly large case, the Nuestra Familia case, but she understood that those funds would be replenished to pay for other conflicts cases. (22 RT 5606.)

On May 16, 1995, Mr. Blackman reported that he had not been paid for a month, that Ms. Dekelver had not been paid for two months, and that money was still owing to CJCJ and Dr. Berg. (22 RT 5609.) He advised the court that "at this point the defense is at a complete standstill. We are unable to proceed with the balance of the preparation for the penalty phase because CJCJ and Dr. Berg have indicated to me that they are so uncomfortable about the payment situation that they are unable—not because they don't want to, but they are unable for their own financial reasons . . . to go forward on a case where there is not a reasonable expectation of full payment." (22 RT 5609-5610.) The conflicts administrator reported that the internal problem she discussed at the last hearing had been resolved, but there was no money in the conflicts account because of the Nuestra Familia case, which was now under review by the board of supervisors. She said her understanding was that the treasury would allow some payment between then and May 23, when the board of supervisors next met, although the money had not been officially transferred to the conflicts

account, but the preference was to delay payment until after the 23rd. (22 RT 5611-5613.) The trial judge directed the conflicts administrator to convey to the county that she had been ordered to make the necessary arrangements so that the case could proceed uninterrupted. (22 RT 5615.) She said that she would submit the attorney claims, which she had with her, immediately after the hearing, and would retrieve and submit the claims for CJCJ and Dr. Berg that week. (22 RT 5615.) When Mr. Blackman represented that he had explained the funding problems to CJCJ and Berg, and that they were refusing to do anything further until they had payment in hand, the trial judge noted that it was his understanding that some payment had been made to them, and that if that was their attitude, they may be required to appear at a hearing before the 987 judge. (22 RT 5616.)

On June 5, 1995, in the course of explaining why he needed a continuance before beginning the penalty phase, Mr. Blackman stated again that money was still owing to the attorneys and experts. (22 RT 5661.) When the trial judge asked if he had appeared before the 987 judge in the last two weeks, Blackman said he had not because he had been told by the conflicts administrator that they were working on it. (22 RT 5662.) "So I've asked these people to keep working and have submitted another payment for authorization of $10,000 that has not been acted on." (22 RT 5663.) He told the court that the severe economic issues the defense was facing impaired their ability to move forward. (22 RT 5663.) The court expressed sympathy about the problems Blackman was having getting paid (22 RT 5666), but reiterated that the case "would never be ready unless the court demanded the case go out." (22 RT 5667.)

Later that day, the court told Blackman that he had spoken to Judge Komar, and that the 987 judge was now Judge Hastings. He ordered Blackman to appear before Judge Hastings for two reasons. "One is to give approval on the expert, the expert fees, and two is for an audit of your billings as to over the

four years as to why you are not prepared to proceed." (22 RT 5705.) Blackman objected on the ground that he believed Judge Hastings was personally biased against him and because he believed that "[Hastings] is in a conflict of interest position because he is the so-called 987 judge but is also on the board of directors of the conflicts administration program." (22 RT 5705.) The court replied that any complaints should be addressed to Judge Komar, who was the one who assigned Judge Hastings to the matter. (22 RT 5706.)

On June 7, 1995, Judge Hastings refused to recuse himself at Mr. Blackman's request. The judge said that his prior rulings denying *Keenan* counsel, which counsel could have challenged by filing a writ petition, and money for a polygraph test, which would be inadmissible in court, did not mean he was biased against counsel. (6/7/95 RT 3-5.) It was not a conflict of interest for the judge to act as a 987 judge while sitting on the board of directors for the conflicts administration program because the budget for conflicts was set by the county, not the court or conflicts administration. (6/7/95 RT 7.)

Judge Hastings then addressed Blackman's pending requests for funds for Dr. Berg and CJCJ, who had previously been paid $6725 and $15,5000, respectively. (6/7/95 RT 12, 23-24.) Blackman requested $6000 for Berg to testify in court,[22/] interview Vo, and continue receiving and considering information from penalty phase witness interviews conducted by CJCJ. (9 CT 2229-2230; 6/7/95 RT 15.) After asking Blackman specifically how many hours each of these tasks would take and multiplying that by Dr. Berg's hourly rate, Judge Hastings authorized $2625. (9 CT 2232; 6/7/95 RT 15-20, 28.)

Blackman requested $10,000 for CJCJ to interview witnesses to develop the theme that Vo suffered a "very dysfunctional family life, probably connected

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22. Berg did not ultimately testify because counsel refused to comply with the trial court's order to turn over discoverable material possessed by the witness. (See Argument IV, *post.*)

to post-traumatic stress syndrome relating to the family's evaluation from Saigon in the final days of the Vietnam War and exacerbated by various placements and experiences after the family arrived in the continental United States."[23/] (9 CT 2222, 2224.) Judge Hastings noted that CJCJ had previously received $4,000 "for essentially the same type of purposes and reasons that you want the money today" and noted that Blackman had in fact employed "some of the exact same terminology" in his previous declaration. (6/7/95 RT 30-31; see 9 CT 2284, 2288-2289, 2291, 2295-2297.) Blackman replied that he had in fact received $8,000 for these services, but wanted to interview some additional witnesses and re-interview all the previous witnesses before they testified "because it's a death penalty case." (6/7/95 RT 31-32.) The judge refused to authorize money for re-interviews, explaining:

> You don't use the buzzword "capital case" and get a blank check. There still requires a showing. You have to indicate to the court why you think it's reasonable and necessary in the defense of the defendant. You can't say, well, it's a capital case, so instead of interviewing the person once I can do it twice or three times and pay the investigator for three times instead of one time.

(6/7/95 RT 32-33.)

The judge noted that the penalty phase did not involve "a big contested issue of fact." (6/7/95 RT 33.) Rather, the witnesses were there to "tell the jury in mitigation why the defendant shouldn't be executed." (6/7/95 RT 33.)

> But the public doesn't expect these witnesses will be interviewed two and three times and pay these investigators two and three times to do it and then have the C.J.C.J. people sit down with you, Ms. Dekelver and Mr. Berg to talk about that and then to finally make a resolution as to

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23. By way of a CJCJ memorandum filed in court the day of the hearing, Blackman also requested an additional $10,075 for CJCJ on top of the $10,000 previously requested and pending before the court, to see the case through completion. (9 CT 2234-2236; 6/7/95 RT 28.) The court refused to rule on the $10,075 requested that day because it had not yet had the opportunity to review that. (6/7/95 RT 28.)

whether or not in fact all four of you are in unanimous agreement as to whether or not that person is going to be a witness.

(6/7/95 RT 33.)

The judge told Blackman, "So if they've been interviewed, so be it; you, as a lawyer, make a decision, read their interviews, get an input as to whether Mr. Vo wants them." (6/7/95 RT 34.) Judge Hastings thereafter authorized interviews for all of the new witnesses Blackman identified, plus seven hours for expert witness Vincent Schiraldi to prepare for and testify in court[24], for a total of $812.50. (6/7/95 34-37, 41-42; 9 CT 2226, 2233.) Blackman advised the court that much of the $10,000 he sought in his previous declaration and the additional $10,075 he requested that day had already been spent because of the trial judge's order that the defense be prepared for the penalty phase without continuance. He suggested the court subtract out the amount it felt was duplicative effort. (6/7/95 RT 38, 40.) The court responded that it was only ruling on payment for work to be done and that Blackman would have to go through conflicts administration for already-completed work "and they'll rule on it as to whether or not it's an appropriate after-the-fact request." (6/7/95 RT 39.) It questioned, however, "[i]f the work has been done, how is that holding you up in your defense of Mr. Vo . . .? . . . How does that affect you if they haven't been paid? You have the reports." (6/7/95 RT 40; see also *ibid.* ["I can't understand how you can stand there and tell me that even though the work has been done you can't continue to represent Mr. Vo . . . ."].)

2. Vo's Contentions Regarding Funding Do Not Warrant Reversal

Section 987.9, subdivision (a) provides that in a capital case, an indigent defendant, through his counsel, may request the court for funds to pay investigators, experts, and others for the preparation or presentation of the

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24. Mr. Schiraldi did not in fact testify.

defense. The application must be by affidavit and must specify that the funds are reasonably necessary for the preparation or presentation of the defense. A judge other than the trial judge shall rule on the reasonableness of the request and disburse an appropriate amount of money. "In making the ruling, the court shall be guided by the need to provide a complete and full defense for the defendant." (Pen. Code, § 987.9, subd. (a).) "An appellate court reviews a trial court's ruling on an application for authorization to incur expenses to prepare or present a defense for abuse of discretion. [Citations.]" (*People v. Alvarez* (1996) 14 Cal.4th 155, 234.)

Vo asserts that pursuant to local practice in Santa Clara County, funding in cases represented by the conflict counsel was administered by the Conflicts Administrator. He contends that practice violates state law, which does not allow for that responsibility to be delegated. (Vo AOB 206.) Vo did not raise such an objection below, thereby forfeiting the claim on appeal. (*People v. Saunders* (1993) 5 Cal.4th 580, 589-590.) As a result of his silence below, the record is devoid of detailed information about the specific role and duties of the Conflicts Administrator, making it difficult to respond to his claim that there was an improper delegation of responsibility. From what we can garner from the limited record, it appears that funding for ancillary services needed to be authorized by the 987 judge after review of the defense attorney's affidavit, consistent with the statute. (See, e.g., 6/7/95 RT 17-42.) After the bills were submitted by the defense attorney, the Conflicts Administrator reviewed them to ensure they met the guidelines for payment, and then forwarded them to the county, which disbursed the actual payment. (See, e.g., 22 RT 5603-5604; 22 RT 5614-5615.) It does not appear that the Conflicts Administrator possessed any decisionmaking authority over whether to fund particular services or how much to fund them for. Rather, its function appears to have been purely administrative.

Vo also contends that "the Office of the Conflicts Administrator itself had a conflict of interest because of the press and expense of other cases, which made funds unavailable to appellant." (Vo AOB 187; see also Vo AOB 203.) Again the claim is forfeited for failure to object on this basis below. From the limited record available, it also appears to be unmeritorious. As Judge Hastings explained at the June 7, 1995, hearing, the county was responsible for setting the budget and making the payments; the conflicts administration program had nothing to do with it. (6/7/95 RT 7.)

Vo's main complaint regarding funding is that Judge Hastings "flatly rejected counsel's representation that he needed to re-interview witnesses he intended to present" at the penalty phase based on a "deep misunderstanding of the nature of mitigation, its importance to the critical determination of whether a defendant should live or die and counsel's proper role in assessing that evidence." (Vo AOB 179, 207.) Judge Hastings properly exercised his discretion in refusing to authorize funds for witnesses who had already been interviewed to be re-interviewed. As the judge correctly pointed out, the penalty phase did not involved a "big contested issue of fact" such that it was reasonably necessary to conduct multiple interviews of the same witness. (6/7/95 RT 33.) Most of the witnesses, rather, were friends and family who would give information about Vo's social history and character, and explain to the jury why he should be granted leniency. One interview was sufficient to obtain the necessary information and make the determination whether to call the person as a witness. Not one of the numerous cases Vo cites for the proposition that counsel has a duty to investigate, and the defendant has a right to present, a broad range of mitigating evidence (Vo AOB 208-212), holds that an indigent defendant is entitled, at public expense, to interview the same witnesses more than once as a matter of course. In the few instances where Vo's attorney was able to explain why a second interview would be helpful, the court authorized

the funds. (See 6/7/95 RT 36-37.)

Assuming, arguendo, it was error to disallow previously-interviewed witnesses to be re-interviewed, there is no reasonable possibility Vo would have achieved a more favorable outcome absent the error. (*People v. Alvarez, supra*, 14 Cal.4th at p. 234.) It is mere conjecture that Vo would have obtained more favorable information from these witnesses than what he had already obtained in his previous interviews.

Vo also claims the county's delay in paying the defense team violated his rights to due process and equal protection. (Vo AOB 187-190.) These delays were no doubt inconvenient and frustrating. Vo, however, was not prejudiced by them. Although the delays put counsel in the uncomfortable position of having to press the contractors to continue working without payment for work they had already performed, he was apparently successful in doing so. The issue whether the bills for that work should be submitted to Judge Hastings or as an after-the-fact request to the conflicts administration (see 6/7/95 RT 40, 42) did not affect Vo's defense or ability to proceed with the penalty phase. As Judge Hastings pointed out, Blackman's representation to the trial judge that he could not proceed because of funding issues made no sense: "I can't understand how you can stand there and tell me that even though the work has been done you can't continue to represent Mr. Vo, even though the work has been done. What you're talking about really is submitting to conflicts an after-the-fact request for monies for work performed . . . ." (6/7/95 RT 40.)

Finally, there is no merit to Vo's claim that the delay in payment to counsel gave rise to a conflict of interest because it forced counsel to choose between their own financial interests and the interests of their client. (Vo AOB 187-188.) A similar theory was rejected in *People v. Castillo* (1991) 233 Cal.App.3d 36. There, privately retained counsel who expected to be paid by the defendants' relatives, but learned shortly before trial that further payments

were unlikely, asked to have their status changed from retained to appointed so that they could be paid. (*Id.* at p. 51-52.) The court denied the requests. (*Id.* at p. 52.) On appeal, the defendants alleged that the court forcing their attorneys to go to trial without a realistic expectation of compensation gave rise to a conflict of interest. (*Id.* at p. 58.) The Court of Appeal held that the adequacy of compensation, in and of itself, does not create a prohibited conflict of interest between attorney and client. (*Id.* at p. 61.)

> In this case, the attorneys received no compensation from public funds at all, and were obliged to look to their clients and their families for compensation, a prospect each credibly reported to be unlikely. Whatever may be said about the abstract fairness of this situation, it did not produce a cognizable conflict of interest. If either attorney failed to provide adequate representation, for any reason, that fact is properly taken into account on its own merits, because such inadequacy implicates constitutional considerations. No documentation of such inadequacy has been made.

(*Id.* at p. 61.)

If the situation in *Castillo*, where counsel did not expect to be paid at all, did not rise to a conflict of interest, then that here did not either. Notwithstanding the hardship Vo's attorneys suffered from being paid late, there is no evidence they failed to adequately represent their client. On the contrary, as discussed in Argument III.A., *ante*, the record shows they mounted an impressive defense. Their lack of success stems not from substandard lawyering, but from the insurmountable evidence of Vo's guilt.

IV.

THE TRIAL COURT DID NOT VIOLATE VO'S CONSTITUTIONAL RIGHTS BY DENYING COUNSEL'S REQUEST TO WITHDRAW AND EXCLUDING DR. BERG'S TESTIMONY

Vo contends that the trial court violated his right to be represented by unconflicted counsel when it denied his counsel's request to withdraw from the

case, and violated his right to defend when it excluded defense witness Dr. Berg from testifying. (AOB Vo 223-231 [Arg. 3].) He is mistaken.

A. Factual Background

During Vo's penalty phase case, the prosecutor and Hajek's counsel both complained that they had received late notice of Vo's intent to call Dr. Berg as a witness. (20 RT 4851, 4855, 4945-4946.) Hajek's counsel told the court, "I want to know if there's a report from Dr. Berg. I would like that report given to me now and I would also like the opportunity to speak with Dr. Berg before any of this is presented." (20 RT 4946.) Vo's counsel responded that he had no reports from Dr. Berg, but was happy to give the doctor's number to the prosecutor and Hajek's counsel so that they could speak to him. (20 RT 4948.) The court noted that it had ordered Hajek's counsel to turn over her psychological expert's report early on, and that it appeared Vo's counsel was attempting to sandbag the other parties. (20 RT 4948.) Vo's counsel denied this, explaining, "This particular subject did not even come to light until the CJCJ people started talking to family members about the abuse that went on in my client's family. That made me start thinking and talking to these people about this very narrow area of what affect [sic] would that abuse have on Mr. Vo and his siblings and what affect [sic] would that have on Mr. Vo in his relationship with Mr. Hajek that would cause Mr. Vo to stay in the location of the homicide for as long as he did." (20 RT 4948-4949.) Counsel claimed that it was not until the week before, after speaking to appellant's brother Sparkman and reviewing the information with Dr. Berg, that he decided call Dr. Berg as a witness. (20 RT 4949.)

The following day, Hajek's counsel advised the court that she had spoken to Dr. Berg and obtained 20 pages of handwritten notes from him. In going through them, it was apparent that the doctor had conducted psychological

testing on Vo, including the MMPI-2. Joined by the prosecutor, she requested that the raw data and tests be turned over as discoverable material. (20 RT 4954-4955.)

Vo's counsel objected, taking the position that "if the doctor is not going to rely on it and not going to use it, it is not discoverable." (20 RT 4955.) He explained, "As I indicated yesterday, this is a very, very narrow area of testimony that the doctor will not rely on or make references to in the opinions he expresses. He will not rely on or make reference to the test results whatsoever. So it's not properly discoverable. His testimony will not relate to it. It's completely outside the scope of what will be offered to the jury." (20 RT 4955.) Hajek's counsel disagreed, noting the psychologist was clearly being called as an expert, and "we have the right to have material which can be used to impeach his opinion." (20 RT 4956.) The court agreed with Hajek's counsel and ordered Dr. Berg's information turned over. (20 RT 4957.) After consulting with Dr. Berg, Vo's counsel refused, arguing again that Dr. Berg's testimony would be limited to the narrow issue of why Vo stayed in the residence, and that the court's order to disclose all of the psychiatric information was improper and outside the scope of the discovery rules. (20 RT 4958.)

The court excluded Dr. Berg from testifying. (20 RT 4958.) It made a finding that Vo's counsel had not complied with discovery in good faith, that the case had been in preparation for four years but not one bit of discovery was turned over to the other parties, and that it believed Vo's counsel was "attempting to hold the court hostage." (20 RT 4959.) At that point, Vo's counsel declared a conflict of interest and asked the court to "appoint a lawyer for my client so he is represented by an attorney before the court who has some respect of the court so he is not subjected to a disparate treatment because of what the court believes as to my handling of this matter." (20 RT 4959.) The

court denied the motion. (20 RT 4959.)

B. The Court Acted Properly in Denying Counsel's Request to Withdraw and Excluding Dr. Berg's Testimony

A trial court's ruling to deny an attorney's motion to withdraw will be reversed only on a clear showing of abuse of discretion. (*People v. Sanchez* (1995) 12 Cal.4th 1, 37; *People v. Mickey* (1991) 54 Cal.3d 612, 661.) No abuse appears here.

Vo's counsel moved to withdraw on the ground that he had a conflict of interest, apparently based on the court's exclusion of Dr. Berg's testimony and its finding that counsel was acting in bad faith. The court properly denied the motion because there was no conflict. "Under the state and federal Constitutions, a criminal defendant has the right to the *effective* assistance of counsel, which includes the right to representation that is free from conflicts of interest. [Citation.] Conflicts of interest arise in '"all situations in which an attorney's loyalty to, or efforts on behalf of, a client are threatened by his responsibilities to another client or a third person or by his own interests."' [Citation.]" (*People v. Horton* (1995) 11 Cal.4th 1068, 1106.) Here, however, counsel's loyalty to Vo was not threatened. Acting in Vo's best interest, counsel attempted to introduce Dr. Berg's testimony. The court excluded it because counsel, after violating the rules of discovery in the first instance, refused to comply with a court order to turn over Dr. Berg's materials.[25/] Counsel's duty to abide by the rules of discovery and obey court orders, even if not to his client's advantage, does not give rise to a conflict of interest. The trial court's anger at counsel and finding of bad faith likewise caused no division of counsel's loyalty toward Vo. On the contrary, the record shows counsel remained fully committed to vigorously defending his client.

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25. Counsel refused to turn over the materials on the ground that they were not discoverable. Vo does not challenge the court's ruling to the contrary.

Nor does the record bear out counsel's assertion that his client was receiving "disparate treatment" because of the court's hostility toward counsel. The court excluded the testimony by Dr. Berg because counsel refused to turn over the witness's discoverable material, which would put the other parties at an unfair disadvantage in cross-examining him. Any other party that behaved in such a manner would have received the same response. There is no evidence the court's ruling regarding Dr. Berg or any of the court's other rulings stemmed from a dislike of counsel or a belief that counsel had mishandled the case.

Vo's contention that the court's ruling excluding Dr. Berg deprived him of a fair opportunity to present a defense is likewise without merit. "Few rights are more fundamental than that of an accused to present witnesses in his own defense. [Citations.] [But i]n the exercise of this right, the accused, as is required of the State, must comply with the established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." (*Chambers v. Mississippi* (1973) 410 U.S. 284, 302.) Thus, "[a]pplication of the ordinary rules of evidence . . . does not impermissibly infringe on a defendant's right to present a defense." (*People v. Mincey* (1992) 2 Cal.4th 408, 440.) Likewise, excluding a defense witness when the accused refuses to comply with a discovery order does not abridge the latter's right to present a defense.

V.

THE TRIAL COURT PROPERLY DENIED APPELLANTS' MOTION TO DISMISS THE ATTEMPTED MURDER CHARGES

Appellants contend the court erred in denying their motions for acquittal pursuant to section 1118.1 on counts two through five, which charged them with premeditated attempted murder of Cary Wang, Alice Wang, Tony Wang, and Ellen Wang. (Hajek AOB 111-119 [Arg. VII]; Vo AOB 316-324 [Arg.

11].) Respondent submits that appellants' motions, made after the close of the prosecution's case-in-chief, were properly rejected.[26]

Section 1118.1 permits the court to order a judgment of acquittal of one or more charges on grounds of insufficient evidence. Under section 1118.1, the trial court applies the same standard as an appellate court reviewing the sufficiency of the evidence. The court must consider whether there is any substantial evidence of the existence of each element of the offense charged, sufficient for a reasonable trier of fact to find the defendant guilty beyond a reasonable doubt. (*People v. Cole* (2004) 33 Cal.4th 1158, 1212-1213.) Substantial evidence includes circumstantial evidence and the reasonable inferences flowing therefrom. (*People v. Vang* (2001) 87 Cal.App.4th 554, 563; *People v. Cole* (1994) 23 Cal.App.4th 1672, 1678.) The court must "'presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.'" (*People v. Pensinger* (1991) 52 Cal.3d 1210, 1237.) The reviewing court independently reviews the trial court's ruling under section 1118.1 that the evidence is sufficient to support a conviction. (*Cole, supra*, 33 Cal.4th at p. 1213.)[27]

"Attempted murder requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing." (*People v. Superior Court (Decker)* (2007) 41 Cal.4th 1, 7.) "[T]he overt act

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26. Appellants' written motions, which addressed not only the attempted murder charges, but also the kidnaping charges as to Cary Wang, and the lying-in-wait, torture, robbery, and burglary special circumstances, are found at 7 CT 1741-1775. The prosecutor responded to the motions orally. The transcripts of the hearings and other discussions of the motions can be found at 17 RT 4190-4194, 18 RT 4368-4380, 19 RT 4793-4794, 20 RT 4795-4797, and 21 RT 5264-5284.

27. It is unclear whether Vo is arguing that the trial court erred in denying the motion for acquittal or that the evidence was insufficient to support the attempted murder convictions. Our response is the same either way.

must go beyond mere preparation and show that the killer is putting his or her plan into action; it need not be the last proximate or ultimate step toward commission of the crime or crimes [citation], nor need it satisfy any element of the crime. [Citation.] However . . . '[b]etween preparation for the attempt and the attempt itself, there is a wide difference. The preparation consists in devising or arranging the means or measures necessary for the commission of the offense; the attempt is the direct movement toward the commission after the preparations are made.' [Citation.]" (*Id.* at p. 8.) Although there is no definitive test distinguishing all preparations from all attempts, the Supreme Court has "long recognized that '[w]henever the design of a person to commit crime is clearly shown, slight acts in furtherance of the design will constitute an attempt.'" (*Ibid.*)

A. Overt Acts

There is no question that appellants' actions crossed the threshold between mere preparation and an actual attempt. They went to the Wang's residence, wearing gloves and armed with a pellet gun, and gained admittance to the house on a ruse. Upon entering, they held Alice Wang and Su Hung hostage, and at some point killed the latter. They also held Cary and Tony Wang hostage when they returned home. During the time they were in the house, appellants, acting in concert, made threats and committed hostile acts against each of the Wangs: they pointed a gun at Alice and locked her in the bathroom; held a knife to Cary's throat and drove her to school to look for Ellen; and separated Tony from the family by putting him in the master bedroom, where they tied and gagged him.

Although Ellen was not home, there was substantial evidence that appellants sought her murder as well. She was the primary target of their rage, because of her fight with Hajek and Lori Nguyen, both of whom were close friends with Vo. Searching for her was the reason for their entering the Wang house in the

first place. Inside, appellants laid in wait for her, and even went out searching for her, albeit in vain. That is ample evidence to sustain the trial court's finding that appellants not only intended Ellen's murder, but put their plan into action.

Hajek denies there were any direct but ineffectual acts toward accomplishing the intended killings, asserting that appellants were at the Wang house for hours without taking action to kill anyone except Su Hung. (Hajek AOB 113.) Appellants did not have to start strangling or stabbing the other victims to be guilty of attempted murder. Hajek inappositely cites *People v. Adami* (1973) 36 Cal.App.3d 452 to show "just how far a defendant must go to be guilty of attempted murder." (Hajek AOB 116.) There, the court found the defendant's hiring an assassin to kill his wife, providing the killer with information about the victim, and giving him a downpayment for the job "consisted solely of solicitation or mere preparation." (*Id.* at p. 457.) This Court, however, disapproved *Adami*, "perceiv[ing] several flaws in [its] analysis." (*People v. Superior Court* (*Decker*), *supra*, 41 Cal.4th at p. 10.) Chief among these was that "the opinion makes no mention of the slight-acts rule, which has long been the rule for attempted crimes in California. Indeed, *Adami*'s progeny make no pretense of reconciling their analysis with the slight-acts rule and instead explicitly reject it. [Citations.]." (*Ibid.*)

Appellants committed far more than slight acts in furtherance of their design to kill the Wang family. They drove to the family's home, entered on a ruse, held the family hostage, committed other threatening acts against them, and actually killed one of the captives. As this Court recognized in *Decker*, "Conduct that qualifies as mere preparation and conduct that qualifies as a direct but ineffectual act toward commission of the crime exist on a continuum, '"since all acts leading up to the ultimate consummation of a crime are by their very nature preparatory."' [Citation.] The difference between them 'is a question of a degree.' [Citation.]" (*Id.* at p. 12.) In this case, Hajek's going to

Vo's home to pick him up and purchasing the gloves might be characterized as preparatory. Once they proceeded to the victim's home, the place where the offenses were to be committed, it is clear they were putting their plan into action. (*People v. Lanzit* (1924) 70 Cal.App. 498, 506 ["The proximity of the overt acts to or their remoteness from the place where the substantive offense is to be committed enters largely into the question of whether the actual transaction has been commenced or not."].)

People v. Parrish (1948) 87 Cal.App.2d 853 is similar. There, the court found defendant's driving to the victim's house with a loaded gun and sending an accomplice inside to start the killing with the intent to join him later satisfied the overt-act requirement of attempted murder. Appellants' acts here went much further. Unlike the defendant in *Parrish*, they actually entered the victims' home, confronted them, held them captive, and carried out their murderous plan against one of the family members. This was more than sufficient to satisfy the overt act requirement.

B. Intent To Kill

There was also sufficient evidence that appellants intended to kill the Wang family. The most direct evidence was Hajek's statements to Tevya Moriarty. Hajek contends, however, that apart from his statements, there was no independent evidence of attempted murder against the Wangs. (Hajek AOB 114-115.) That is, he contends that the evidence was insufficient to establish the corpus delicti. He did not raise this argument in his section 1118.1 motion and has therefore forfeited it for purposes of appeal. (*People v. Sally* (1993) 12 Cal.App.4th 1621, 1628.) It is also without merit.

"'" The corpus delicti of a crime consists of two elements, the fact of the injury or loss or harm, and the existence of a criminal agency as its cause."'" (*People v. Zapien* (1993) 4 Cal.4th 929, 986.) "[T]he corpus delicti *rule* requires that the prosecution establish the corpus delicti of a crime by evidence

independent of the defendant's extrajudicial inculpatory statements . . . ." (*People v. Ochoa* (1998) 19 Cal.4th 353, 450.) "The independent evidence may be circumstantial, and need only be a 'a slight or prima facie showing' permitting an inference of injury, loss, or harm from a criminal agency, after which the defendant's statements may be considered to strengthen the case on all issues." (*People v. Alvarez* (2002) 27 Cal.4th 1161, 1181.) The independent evidence need not establish that the defendant was the perpetrator or eliminate the inference that additional or different crimes were intended. (*People v. Ray* (1996) 13 Cal.4th 313, 342.)

The purpose of the rule is "to ensure that one will not be falsely convicted, by his or her untested words alone, of a crime that never happened." (*People v. Alvarez* (2002) 27 Cal.4th 1, 1161, 1169.) It applies to inculpatory preoffense statements of intent like that at issue here as well as to actual admissions and confessions. (*Id.* at pp. 1170-1171.)

As discussed above, there was ample evidence that a crime was committed against the Wangs. Appellants went to the Wang house armed and wearing gloves, parking their van around the corner so it would not be seen. They lied their way into the house, confronted the victims, and committed a variety of threatening acts against them, laid in wait for and went out looking for Ellen, their primary target, and actually killed one member of the family. Because a jury could reasonably infer from this independent evidence that Hajek went to the Wang residence with the intent to kill Ellen and her family, the corpus delicti rule was satisfied with respect to the attempted murder charges. That the evidence did not eliminate the inference that additional or different crimes were intended does not warrant a different conclusion. (Cf. *People v. Ray*, *supra*, 1 Cal.4th at p. 342.)

There was also sufficient evidence that Vo intended to kill the Wangs. He had a motive to get revenge on Ellen for fighting with his best friend and the

girl he was in love with, and making crank calls afterward. Executing that motive, he went to the Wang household in Hajek's company and acted in concert with him throughout the incident. Among other things, Vo handed Alice the sweater and wrote the note as a means of gaining entry into the house, tied up and blindfolded Su Hung and took her up to the bedroom, held a knife to Cary's throat and later had her drive to school to look for Ellen, tied Tony's hands and gagged his mouth, and made threats to Cary and Tony, saying he would kill them and their family if they did not do as he said. One member of the family, Su Hung, was in fact killed during the course of the day.

Vo's companion Hajek had earlier told a witness that he intended to kill Ellen's family and then kill her, and that he was going to make the incident look like a robbery. Hajek subsequently executed his plan in the company of Vo, who expressed no surprise at the unfolding of events. On the contrary, all of Vo's actions were in conjunction with Hajek and appeared to be in conformity with Hajek's plan, suggesting that Vo was knowingly participating in it as well.[28/] This conclusion was buttressed by Vo's conduct after the crime, which included flight, lying to the police about his identity, and continuing to maintain a relationship with Hajek following their arrest.

From all of this evidence, a rational juror could conclude beyond a reasonable doubt that Vo, like Hajek, had the specific intent to kill the Wangs. Accordingly, the trial court properly denied appellants' motions for acquittal pursuant to Penal Code section 1118.1.

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28. Indeed, Cary perceived Vo as the more hostile of the two appellants and as the leader of the pair. (13 RT 3178-3179, 3181.)

VI.

THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE LYING-IN-WAIT SPECIAL CIRCUMSTANCE FINDING AND LYING-IN-WAIT FIRST DEGREE MURDER AND THE SPECIAL CIRCUMSTANCE IS CONSTITUTIONAL

The trial court instructed the jury on the following theories of first-degree murder: premeditated murder, felony murder based on burglary, murder perpetrated by means of torture, and murder perpetrated by means of lying in wait. (8 CT 2017-2021.) It also instructed on the following special circumstances: torture and lying in wait. (8 CT 2028-2029, 2031-2033.)

Appellants contend the evidence was insufficient to support the lying-in-wait special circumstance finding or lying in wait as a theory of first degree murder, and that the trial court erred in denying their motions for acquittal under section 1118.1 (Hajek AOB 68-78 [Arg. III]; Vo AOB 307-316 [Arg. 10]; see also Vo AOB 294-296 [Arg. 8.E.].) Vo additionally contends that the lying in wait special circumstance is unconstitutionally vague and overbroad. (Vo AOB 311-315 [Arg. 10.C.].) We disagree.

A. There Was Sufficient Evidence to Support the Lying-in-Wait Special Circumstance and Lying-in-Wait First Degree Murder

Prior to trial, both defendants filed motions to dismiss the lying-in-wait special circumstance under section 995. (5 CT 1181-1182, 1197-1200.) The court granted the motion, and the People appealed. (5 CT 1349, 1351.) The Court of Appeal reversed and the allegation was reinstated. (6 RT 1429-1432.) At the end of the prosecution's case-in-chief, both defendants moved under Penal Code section 1118.1 for a judgment of acquittal as to the lying-in-wait special circumstance. (7 CT 1741-1775.) This time, the court denied the motion. (7 CT 1815; 21 RT 5273-5274.)

As noted earlier, in ruling on a section 1118.1 motion, the trial court applies the same standard of review applied by an appellate court reviewing a case in

which the sufficiency of evidence is questioned: whether, viewing the record in the light most favorable to the judgment, there is substantial evidence from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 319; *People v. Johnson* (1980) 26 Cal.3d 557, 578.) "A sufficiency of evidence challenge to a special circumstance finding is reviewed under the same test applied to a conviction." (*People v. Stevens* (2007) 41 Cal.4th 182, 201.) The appellate court independently reviews the trial court's ruling under section 1118.1 that the evidence was sufficient to support the conviction. (*People v. Cole*, *supra,* 33 Cal.4th at p. 1213.) It likewise independently reviews whether the evidence is sufficient under the federal and state constitutional due process clauses. (*Ibid.*)

The requirements of lying-in-wait first degree murder under section 189 are slightly different from the requirements of the lying-in-wait special circumstance under section 190.2. The lying-in-wait special circumstance contains more stringent requirements. If "the evidence supports the special circumstance, it necessarily supports the theory of first degree murder." (*People v. Hillhouse* (2002) 27 Cal.4th 469, 500.)

The lying-in-wait special circumstance requires "an intentional killing, committed under circumstances that included a physical concealment or concealment of purpose; a substantial period of watching and waiting for an opportune time to act; and, immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage." (*People v. Stevens*, *supra*, 41 Cal.4th at p. 201; accord, *People v. Hillhouse*, *supra*, 27 Cal.4th at p. 500; *People v. Morales* (1989) 48 Cal.3d 527, 554-555.) "The purpose of the watching and waiting element is to distinguish those cases in which a defendant acts insidiously from those in which he acts out of rash impulse. [Citation.] This period need not continue for any particular length '"of time provided that its duration is such as to show a state of mind equivalent to premeditation of

deliberation."' [Citation.] '"'"The element of concealment is satisfied by a showing that a defendant's true intent and purpose were concealed by his actions or conduct. It is not required that he be literally concealed from view before he attacks the victim."'" [Citation.] The factors of concealing murderous intent, and striking from a position of advantage and surprise, 'are the hallmark of a murder by lying in wait.' [Citation.]" (*Stevens*, *supra*, at p. 202, footnote omitted.)

The evidence abundantly established that appellants satisfied all the elements of lying in wait. They concealed their murderous purpose by using a ruse to gain entry to the Wang household, saying they wanted to talk to or leave a note for Ellen. Once inside, they continued to conceal their purpose. Although they incapacitated Su Hung by tying her hands and blindfolding her, and isolated her from Alice by bringing her to her bedroom, they did not harm her, threaten her, or give her reason to believe their hostile intent extended beyond Ellen.[29/]

There was also ample evidence from which the jury could infer appellants waited and watched for an opportune time to act, and thereafter sprung a surprise attack on Su Hung from a position of advantage. Their plan to begin with, as Hajek revealed to Tevya Moriarty, was to kill the family in front of Ellen, who was not home when appellants arrived at the Wang house.[30/]

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29. Though concealment need only be shown as to Su Hung, the murder victim, appellants also did not reveal their intent to Cary or Tony Wang once they returned home. Vo made conditional threats to kill the family if they screamed or called the police, but did not reveal his and Hajek's plan to kill everyone in the household eventually even if they complied with his demands. Instead, appellants maintained all along that their purpose in coming to the Wang household was to confront Ellen.

30. Although Vo was not present when this statement was made, he accompanied Hajek to the Wang's house when Hajek executed his plan, and once there, acted in concert with him and in apparent conformity with the plan,

Therefore, rather than kill Su Hung immediately upon entering the house, they brought her upstairs, separating her from Alice and the other family members when they came home. Isolating the victim in this manner made her more vulnerable and enabled appellants to wait for an opportune time to act. Appellants then left Su Hung alone for a period of time, during which time they created a false sense of security by untying her hands and removing her blindfold, permitting her to read a newspaper and take a nap. They subsequently bound her hands once again and gagged her mouth with a towel, thus ensuring she was at "maximum vulnerability" (*People v. Edwards* (1991) 54 Cal.3d 787, 825) when they killed her. That the attack was a surprise can be inferred from the entire course of appellants' actions, which included concealing their purpose by not killing Su Hung right away and lulling her into a false sense of security before changing course and killing her after binding and gagging her.

Hajek argues that the trial judge, in rejecting the section 1118.1 motion, stated that there was no evidence of a surprise attack other than the fact that Mrs. Hung was bound when the killing occurred. (Hajek AOB 71; 21 RT 5272.) He urges that this Court should defer to the trial judge's assessment on this point. (Hajek AOB 72.) No such deference is due; the reviewing court independently reviews the trial court's ruling under section 1118.1 and the sufficiency of the evidence for state and federal constitutional purposes. The

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suggesting that he was knowingly participating in it as well. Contrary to Vo's assertion, application of the lying-in-wait murder theory to him did not "amount[] to strict liability for being present in the Wang home with co-defendant Hajek." (Vo AOB 295.) As argued more fully in Argument V.B., *ante*, Vo arrived at the household with Hajek, tricked Alice into letting them into the house, expressed no surprise when Hajek pulled out a gun, held the family hostage, made threats, and when confronted by police, attempted to flee and gave a false name. Following arrest, he continued to maintain contact with Hajek. This amounts to substantial evidence that Vo knew of, and was working with Hajek in executing, the plan Hajek expressed to Moriarty.

standard of review requires that the record be viewed in the light most favorable to the judgment. (*People v. Pensinger*, *supra*, 52 Cal.3d at p. 1237.) As explained above, the record supports the inference that the attack on Su Hung was a surprise because, prior to the killing, appellants concealed their purpose for a substantial period of time, creating the impression that they were only there to confront Ellen, not to harm her family. For this reason, the trial court, notwithstanding its remarks, correctly denied the section 1118.1 motion.[31/]

Hajek argues that because it could not be established exactly when Su Hung was killed, the evidence does not establish that the killing took place during the period of concealment and watchful waiting—that there was no "cognizable interruption" (*People v. Morales*, *supra*, 48 Cal.3d at p. 558) between the watchful waiting and the actual killing. (Hajek AOB 74.) As the Court of Appeal found in reinstating the special circumstance, "defendants' acts must be viewed as a single course of conduct." (6 CT 1429.) It included their entering the home, concealing their murderous purpose, waiting to kill Su Hung until she was in a helpless position, and then attacking her by surprise. That there was no need for watchful waiting because she was old and frail and could easily be overpowered by appellants (Hajek AOB 75) is immaterial. Whether or not necessary, the evidence established that appellants opted to wait and watch for an opportune time to kill the victim—a time when she was isolated, bound, and gagged, and ideally, when Ellen was home, though circumstances did not so permit.

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31. It appears the trial court found appellants satisfied the criteria for lying in wait because they killed Su Hung while lying in wait for Ellen. (21 RT 5272.) We do not subscribe to this theory. Nevertheless, for the reasons discussed above, the trial court correctly found sufficient evidence of lying in wait. (*People v. Geier* (2007) 41 Cal.3d 555, 602 ["[A] ruling or decision, itself correct in law, will not be disturbed on appeal merely because given for the wrong reason."].)

Assuming, arguendo, the evidence was insufficient to support conviction for murder perpetrated by means of lying in wait, appellants' first degree murder convictions remain valid. Where the jury considers a factually sufficient and a factually insufficient ground for conviction, the conviction will be affirmed unless there is an affirmative indication that the jury relied on the invalid ground. (*People v. Marks* (2003) 31 Cal.4th 197, 232; *People v. Guiton* (1993) 4 Cal.4th 1116, 1129-1130.) As discussed in the next argument, substantial evidence supported the prosecution's theory of murder perpetrated by means of torture. As discussed in Argument XIX, *post*, there was also substantial evidence supporting the prosecution's theory of felony-murder based on burglary. Finally, there was abundant evidence supporting the theory of premeditated murder. Indeed, Hajek does not contend otherwise, and would be hard pressed to do so in light of his declaration of intent to Tevya Moriarty and subsequent conduct at the Wang residence.

Vo does claim that he had no intent to kill and had no advance knowledge of Hajek's plan. (Vo AOB 290.) As explained in Argument V.B., *ante*, his actions before, during, and after the crime demonstrate otherwise. Because review of the entire record does not affirmatively demonstrate a reasonable probability that the jury in fact found appellants guilty solely on the allegedly unsupported theory of lying-in-wait murder, the murder convictions must be affirmed.[32/] (*Guiton*, *supra*, 4 Cal.4th at p. 1130.)

Reversal of the lying-in-wait special circumstance likewise does not require reversal of the judgment of death. The jury properly found one other special circumstance (torture-murder) that rendered appellants eligible for the death penalty. In determining penalty, it properly considered that finding and the facts and circumstances surrounding Su Hung's murder. These encompassed

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32. Hajek concedes that the record does not establish which first-degree murder theory the jury relied upon in convicting him. (Hajek AOB 85, fn. 37.)

a shockingly evil plan to kill an entire family because of a teenage squabble in which no one got hurt, and the devastating impact of the victim's death on her family, including her daughter's separating from her husband and moving out of the country and her granddaughter's abiding belief that she was to blame for this terrible tragedy. Moreover, "all of the facts and circumstances admissible to establish [the lying-in-wait special circumstance] were also properly adduced as aggravating facts bearing upon the 'circumstances of the crime' sentencing factor" under section 190.3, subdivision (a). (*Brown v. Sanders* (2006) 546 U.S. 212, 224.) Any special weight the jury may have given to the facts and circumstances relevant to the lying-in-wait special circumstance was "'merely a consequence of the statutory label "aggravating circumstanc[e]"'"—an impact the United States Supreme Court has deemed inconsequential. (*Id.* at pp. 224-225.)

Finally, "[n]othing occurring during the penalty phase would have led the jury to place undue emphasis on the invalid special-circumstance finding[]." (*People v. Silva* (1988) 45 Cal.3d 604, 633.) The prosecutor did not argue that death was warranted based on the number of special circumstances that had been found true. Instead, the prosecutor focused on the underlying circumstances of the murder and the appellants' lack of remorse and evil characters as exemplified by Hajek's venomous response to seeing Ellen at the police station (25 RT 6391), his telling Vo hours after the murder that he planned to raise a mental defense (25 RT 6392), his sending a threatening letter to Cary from jail (25 RT 6392), his letters boasting about being a terrorist and talking about Hitler and Satan in positive terms (25 RT 6393-6394), his recounting to Dr. Minagawa his dream about raping and sodomizing Ellen (25 RT 6394), his being stopped days before the crime in a stolen van with a loaded shotgun (25 RT 6403), and his telling Tevya Moriarty that he wanted to look into Ellen's eyes as he killed her family (25 RT 6415). With respect to Vo, the

prosecutor emphasized his role as the leader of the operation (25 RT 6397), his putting a knife to Cary's throat and threatening to kill her family if she screamed or called the police (25 RT 6398), his kidnaping of Cary (25 RT 6398), and his concern immediately after the crime not over the killing but the possibility of his name being in the newspaper (25 RT 6390). Appellants' unforeseen lethal attack on an elderly woman they had never met would have been aggravating evidence regardless of whether lying in wait had been alleged as a special circumstance. The allegedly erroneous inclusion of the allegation therefore could not have affected the jury's penalty verdict.

Citing *Stringer v. Black* (1992) 503 U.S. 222, Hajek contends that California is a "weighing" state and therefore, the death judgment must be reversed unless this court finds the error harmless beyond a reasonable doubt or independently reweighs the sentencing factors. (Hajek AOB 90 & fn. 38.) In *Brown v. Sanders*, *supra*, 546 U.S. 212, which issued after Hajek's opening brief had been filed, the United States Supreme Court noted that California was actually a non-weighing state. (*Id.* at p. 222.) In any event, the high court rejected the weighing/non-weighing dichotomy in favor of the following rule, applicable to all: "An invalidated sentencing factor (whether an eligibility factor or not) will render the sentence unconstitutional by reason of its adding an improper element to the aggravation scale in the weighing process *unless* one of the other sentencing factors enables the sentencer to give aggravating weight to the same facts and circumstances." (*Id.* at p. 220, fn. omitted.) It thereafter found that the invalidation of two of the four special circumstances in the case before it did not render the death sentence unconstitutional because the remaining two special circumstances rendered the defendant eligible for the death penalty and the evidence admitted to establish the invalid circumstances was nevertheless admissible and properly considered by the jury as bearing upon the "circumstances of the crime" sentencing factor (§ 190.3, subd. (a)).

(*Id.* at p. 224; accord, *People v. Mungia* (2008) 44 Cal.4th 1101, 1137 [no likelihood that the jury's consideration of the mere existence of the reversed torture-murder special circumstance tipped the balance toward death in light of its proper consideration of two other valid special circumstances, the facts and circumstances of the murder, and the defendant's criminal record].) As argued above, the same reasoning applies here.

B. The Lying-in-Wait Special Circumstance Is Constitutional

Vo contends that the lying-in-wait special circumstance is vague, fails to narrow the class of persons eligible for the death penalty, and provides no principled means for distinguishing cases deserving of the death penalty. (Vo AOB 313.) This Court has repeatedly rejected these claims. (*People v. Cruz* (2008) 44 Cal.4th 636, 678; *People v. Lewis* (2008) 43 Cal.4th 415, 515-516, [citing cases].) Although Vo places reliance on Justice Mosk's concurrence and dissent in *People v. Morales*, *supra*, 48 Cal.3d 527 (Vo AOB 312), the majority in that case rejected the defendant's constitutional challenge to the lying-in-wait special circumstance (*id.* at p. 557).

Vo also appears to contend that the lying-in-wait special circumstance instruction erroneously permitted the jury to find the special circumstance true as to him if it found that "a" defendant intentionally killed the victim and the murder was committed while "a" defendant was lying in wait. (Vo AOB 313; see 7 CT 1906.) That is, the instruction did not require a finding of personal culpability on Vo's part but permitted the jury to find the special circumstance true against him if it found that Hajek had the intent to kill and laid in wait. Both appellants make a similar argument with respect to the torture special circumstance instruction's use of the indefinite article "a" instead of "the." (See Argument XXI, *post.*) As argued more fully there, there is no reasonable likelihood the jury applied the challenged instruction in an unconstitutional manner when the instruction is considered in the context of the entire charge.

(*Estelle v. McGuire* (1991) 502 U.S. 62, 72.) Several instructions made clear the need for a finding of personal culpability on the part of each defendant. The verdict form for the lying-in-wait special circumstance likewise required the jury to find that "the defendant, LOI TAN VO, intentionally killed Su Hung while lying in wait . . . ." (8 CT 2107.) Under the circumstances, there is no reasonable likelihood the jury applied the complained-of instruction in an unconstitutional manner.

VII.

THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE TORTURE-MURDER SPECIAL CIRCUMSTANCE FINDING AND TORTURE-MURDER AS A THEORY OF FIRST DEGREE MURDER AND THE SPECIAL CIRCUMSTANCE IS CONSTITUTIONAL

Appellants next contend there was insufficient evidence to support the torture-murder special circumstance finding or torture-murder as a theory of first degree murder.[33] (Hajek AOB 79-91 [Arg. IV]; Vo AOB 298-306 [Arg. 9]; see also Vo AOB 291-294 [Arg. 8.D.].) Vo additionally contends that the torture-murder special circumstance is unconstitutionally vague and overbroad. (Vo AOB 302-306 [Arg. 9.C.].) We disagree.

A. The Evidence Was Sufficient to Support the Torture-Murder Special Circumstance and Torture-Murder First Degree Murder

The record discloses substantial evidence from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*Jackson v. Virginia*, *supra*, 443 U.S. at p. 319; *People v. Johnson*, *supra*, 26 Cal.3d at p.

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33. Both appellants moved for a judgment of acquittal under Penal Code section 1118.1 on the ground that there was insufficient evidence to support the torture-murder special circumstance. (7 CT 1741-1775.) The trial court denied the motions. (7 CT 1815.) On appeal, they contend the evidence was insufficient to support both the torture-murder special circumstance and torture-murder as a theory of first degree murder.

578.) This is not a case where it appears "'that upon no hypothesis whatever is there sufficient substantial evidence'" to support the conviction or special circumstance finding. (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

Section 189 makes a murder perpetrated by means of torture a murder of the first degree. "Murder by torture requires a killing committed with a willful, deliberate, and premeditated intent to inflict extreme and prolonged pain for the purpose of revenge, extortion, persuasion, or for any other sadistic purpose. It need not be proven that the victim actually suffered pain. However, there must be a causal relationship between the torturous act and death." (*People v. Chatman* (2006) 38 Cal.4th 344, 389-390.) An intent to torture "'may be inferred from the circumstances of the crime, the nature of the killing, and the condition of the victim's body.'" (*People v. Cole* (2004) 33 Cal.4th 1158, 1213-1214.) "To find the torture-murder special circumstance true, the jury had to find that '[t]he murder was intentional and involved the infliction of torture.' (§ 190.2, subd. (a)(18).)" (*People v. Elliot* (2005) 378 Cal.4th 453, 469.)

Appellants argue there was insufficient evidence the killer intended to inflict extreme and prolonged pain beyond the pain associated with dying. (Hajek AOB 85; Vo AOB 302.) The evidence is to the contrary. The victim was attacked by three different methods. She was struck in the chin by blunt force (possibly a blow by fist), strangled with a cord, and stabbed with a sharp instrument in the neck, shoulder, and chest. (16 RT 3954-3955, 3957, 3960.) This multifaceted attack to various parts of the victim's body clearly reflect an intention not merely to kill, but to inflict extreme pain as well. The nature of the victim's wounds also support this conclusion. In addition to the deep incision to her neck, which contributed to her death, the victim suffered two superficial cuts to the neck alongside the main wound, a non-life-threatening stab wound to the shoulder, and five superficial cuts to the chest. (16 RT 3957-3959.) She was bound and gagged when the police found her (14 RT 3380,

3463), and there were no wounds on her hands or arms to indicate she had put up a struggle (16 RT 3960), suggesting these additional lacerations were unnecessary if the goal were only death.

Hajek erroneously asserts that the five cuts to the chest "apparently were made after the victim was dead." (Hajek AOB 86.) Dr. Ozoa actually testified that he *could not determine* whether those punctures were inflicted before or after death because the lack of bleeding around them could indicate either that she was dead or that the wounds were too superficial to cause significant bleeding. (16 RT 3964-3965.) The jury could determine, however, that the defendants would have no reason to lacerate the victim repeatedly once she was dead. The same holds true for the two superficial cuts to the victim's neck, the timing about which Ozoa was not asked to express an opinion. Significantly, however, the doctor testified that the victim was definitely alive when she was stabbed in the shoulder, an area of the body plainly devoid of vital organs.

Hajek's conversation with Tevya Moriarty in which he outlined his plan also supported the theory that his intent was to torture as well as kill. According to Tevya, Hajek wanted to get revenge on Ellen by killing her family in front of her and then looking into Ellen's eyes as he killed her. (15 RT 3651-3652.) In short, the motive for the killing was revenge. Although appellants killed Su Hung before Ellen was there to bear witness, the jury could reasonably infer from Hajek's statement that the goal was to maximize the victims', and therefore Ellen's, suffering, not to dispense a quick and painless death. Vo's action in concert with Hajek throughout the incident, from their arrival together to their continued communications from jail following arrest, suggest that he was aware of the plan and working in conjunction with Hajek to execute it.

Hajek discusses cases in which the victim's injuries supported a finding of torturous intent and argues that injuries suffered by Su Hung were not "in the 'same league.'" (Hajek AOB 87-88.) Although the facts here may not be as extreme as those in the cases Hajek chooses for comparison, they do include two critical factors this Court has found significant in the past: evidence of the deliberate infliction of nonfatal wounds to the victim—here, at least one, and as many as eight, stab wounds to various parts of the victim's body while she was still alive, plus a blow to her chin—and evidence of motive to inflict pain in addition to the pain of death. (*People v. Mungia* (2008) 44 Cal.4th 1101, 1138.) Because every murder does not involve these factors, Hajek's claim that if his conviction is affirmed, "virtually any murder will qualify as a torture murder" (Hajek AOB 88) is exaggerated.

Finally, Hajek argues that the prosecutor's statements during closing argument were not supported by the testimony of Dr. Ozoa. (Hajek AOB 84-85.) This, of course, is not a substantial evidence argument, but a prosecutorial misconduct argument—one that Hajek forfeited by failing to object and request admonition when the offending remarks were made. (*People v. Gionis* (1995) 9 Cal.4th 1196, 1215; see 21 RT 5361.)

Vo contends the evidence was insufficient because it did not show that he, as opposed to Hajek, intended to kill or torture the victim, or that he personally committed either the murder or the torture. (Vo AOB 302.) The latter is immaterial. The jury did not have to find that Vo personally killed or personally tortured the victim in order to convict him of torture-murder or return a true finding on the torture-murder special circumstance. As the instructions correctly informed the jury, the law regards an aider and abettor as a principal in the crime, equally guilty as a direct perpetrator. (7 CT 1881 [CALJIC No. 3.00]; § 31.) A torture-murder special circumstance may also be found true against an aider and abettor so long as he acted with the intent to

kill. (7 CT 1903, 1908 [CALJIC No. 8.80.1, 8.81.18]; § 190.2, subd. (c).)

Contrary to Vo's assertion, substantial evidence supports the jury's conclusion that Vo, along with Hajek, harbored the intent to kill. As argued more fully in Argument V.B., *ante*, Vo had a motive to get revenge on Ellen for fighting with his best friend and the girl he was in love with, and making crank calls afterward. Executing that motive and acting in conformity with Hajek's expressed plan to kill Ellen's family in revenge and make the incident look like a robbery, he went to the Wang household in Hajek's company and acted in concert with him throughout the incident, gaining entry into the house by false pretenses, holding the family hostage, making threats, and when confronted by police, attempting to flee and giving a false name. Following arrest, he continued to maintain contact with Hajek, notwithstanding his claim at trial that Hajek acted on his own, without Vo's knowledge, in killing the victim. From all of this evidence, a rational juror could conclude beyond a reasonable doubt that Vo, like Hajek, had the specific intent to kill Su Hung.[34/] The same evidence, along with the nature and number of the victim's wounds, supported the jury's conclusion that Vo, like Hajek, had the specific intent to torture the victim.

Assuming the evidence does not support the conviction for murder perpetrated by means of torture, appellants' first degree murder convictions remain valid in light of the remaining factually sufficient grounds to support the verdicts. (*People v. Marks*, *supra*, 31 Cal.4th at p. 232; *People v. Guiton*, *supra*, 4 Cal.4th at pp. 1129-1130.) As explained in the preceding argument, substantial evidence supported the prosecution's theories of murder perpetrated by means of lying in wait, felony-murder based on burglary, and premeditated

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34. For this reason, Vo's claim that he could not properly be convicted on a theory of accomplice liability because there was no substantial evidence he shared the perpetrator's intent fails. (Vo AOB 289-290 [Arg. 8.B.].)

murder. Because review of the entire record does not affirmatively demonstrate a reasonable probability that the jury in fact found appellants guilty solely on the allegedly unsupported theory of murder perpetrated by means of torture, the murder convictions must be affirmed. (*Guiton*, *supra*, 4 Cal.4th at p. 1130; see Hajek AOB 85, fn. 37.)

The judgment of death also need not be reversed if the evidence supporting the torture-murder special circumstance is found lacking. The jury properly considered one other valid special circumstance finding (lying in wait) that rendered appellants eligible for the death penalty. In determining penalty, it properly considered that finding and the facts and circumstances surrounding Su Hung's murder, including its devastating impact on her family. Moreover, "all the facts and circumstances admissible to establish [the torture-murder special circumstance] were also properly adduced as aggravating facts bearing upon the 'circumstances of the crime' sentencing factor." (*Brown v. Sanders*, *supra*, 546 U.S. at p. 224.) Finally, for the reasons discussed in the previous argument, "[n]othing occurring during the penalty phase would have led the jury to place undue emphasis on the invalid special-circumstance finding[]." (*People v. Silva*, *supra*, 45 Cal.3d at p. 633.) The prosecutor did not argue that death was warranted based on the number of special circumstances that had been found true, but on the underlying circumstances of the murder and the defendants' lack of remorse and evil characters. Because the gruesome nature of the murder would have been aggravating evidence regardless of whether torture-murder had been alleged as a special circumstance, inclusion of the allegation, even if erroneous, could not have affected the jury's penalty verdict.

B. The Torture-Murder Special Circumstance Is Constitutional

Vo contends that the torture-murder special circumstance is vague, fails to narrow the class of persons eligible for the death penalty, and fails to provide a principled means for distinguishing which cases are deserving of the death

penalty. (Vo AOB 302-303.) Vo recognizes that this Court has rejected facial challenges to the constitutionality of the special circumstance. (Vo AOB 303-304, citing *People v. Davenport* (1985) 41 Cal.3d 247; see also *People v. Cole*, *supra*, 33 Cal.4th at p. 1234; *People v. Barnett* (1998) 17 Cal.4th 1044, 1162-1163.) He contends, however, that it is unconstitutional as applied to him because the instructions permitted the jury to find the special circumstance true as to him if it found that "a" defendant intended to kill and did in fact inflict extreme pain and suffering on the victim. (Vo AOB 305; see 7 CT 1908.) Both appellants raise the same argument in a separate claim alleging instructional error. (See Argument XXI, *post.*) We refer the Court to our response there.

VIII.

THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE KNIFE-USE ENHANCEMENTS AGAINST VO

Vo contends the evidence was insufficient to support the jury's findings that he used a knife in the commission of counts 3 through 5 (attempted murders of Alice, Tony, and Ellen), 6 (kidnaping of Cary), and 9 (false imprisonment of Tony). (Vo AOB 337-340 [Arg. 14].) We disagree.

Section 12022, subdivision (b)(1) provides for a one-year sentence enhancement for any person who "personally uses a deadly or dangerous weapon in the commission of a felony or attempted felony." "'Use' means, among other things, 'to carry out a purpose or action by means of,' to 'make instrumental to an end or process,' and to 'apply to advantage.' (*People v. Chambers* (1972) 7 Cal.3d 666, 672, quoting Webster's New Internat. Dict. (3d ed. 1961).) As used in the statute, the term should be broadly construed to curtail the increased risk of serious injury that comes from using a deadly weapon in the commission of a crime. (Cf. *Ibid.*; *People v. Granado* (1996) 49

Cal.App.4th 317, 322.) Likewise, "'a broad construction of the phrase 'in the commission of' advances the purpose of enhancements which provide for additional punishment when a weapon is used. . . ." (*People v. Jones* (2001) 25 Cal.4th 98, 111.) "In the case of a weapons-use enhancement, such use may be deemed to occur 'in the commission of' the offense if it occurred *before, during, or after* the technical completion of the felonious . . . act. The operative question is whether the . . . offense posed a greater threat of harm—i.e., was more culpable—because the defendant used a deadly weapon to threaten or maintain control over his victim." (*Id.* at pp. 109-110.)

Applying these principles here, the evidence is sufficient to support the challenged knife-use enhancements against Vo. As explained in the preceding argument, appellants' actions crossed the threshold from mere preparation to attempted murder when they proceeded to the Wang household to carry out the plan, as revealed by Hajek to Tevya Moriarty, to kill Ellen and her family. A jury could reasonably infer Vo's complicity in the plan from his action in concert with Hajek throughout the course of the incident. While the attempted murders were still ongoing, having neither reached completion nor ended in appellants' escape or arrest, Vo held a knife to Cary Wang's neck and threatened to kill her whole family if she screamed. Alice witnessed the assault. Cary agreed to comply with Vo's demands if he would not hurt her family. Later, Vo put the knife down in the kitchen. Some time after that, he asked Cary to take him to the school to look for Ellen. While Cary was driving, Vo told her he had a gun.

Plainly, the above evidence supports the jury's finding that Vo used a knife in the commission of the kidnap and attempted murder of Cary. His holding the knife to her neck enabled him to establish control over her and keep her from resisting or escaping. Indeed, Cary quickly agreed to do as Vo wanted if he would not hurt her family. Although he did not begin the actual process of

killing Cary (not having located Ellen to bear witness as planned), he reduced her to a "sitting duck," to be finished off when convenient. Later, when he asked Cary to drive him to school to search for Ellen, she readily complied. Although he had put down the knife by then, he won her submission by his earlier actions. His earlier threat with the knife worked to his advantage again in the car, when he kept her in frightened compliance by telling her that he had a gun. In light of what happened earlier, she had no reason to disbelieve him.

Vo's holding the knife to Cary's neck also supports the jury's finding that he used a knife in the commission of the attempted murders against Alice, Tony, and Ellen, and the false imprisonment of Tony. By maintaining control over Cary, Vo put himself in a position where he could more easily and efficiently carry out his plan to kill Ellen when she returned home. It likewise facilitated his crimes against Alice and Tony.

A weapon "may be used '"in the commission of"' a given crime even if the use is directed toward someone other than the victim of that crime." (*People v. Granado* (1996) 49 Cal.App.4th 317, 329-330.) In *Granado*, the defendant took a gun from his waistband and displayed it at one of his two robbery victims. The second victim ran away just as or after the defendant drew his gun and was chased by the defendant's companion, who was wielding a machete. The court found the evidence sufficient to sustain the jury's finding that the defendant had used a firearm in the commission of the attempted robbery against the second victim. It held that "a defendant uses a gun 'in the commission of' a crime when he or she employs the gun to neutralize the victim's companions, bystanders, or other persons who might otherwise interfere with the successful completion of the crime." (*Id.* at p. 330.) Applying the rule in the case before it, the court concluded, "Even if Wilfredo did not notice the gun, it was deployed to control the conduct of both victims. At the very least, it 'effectively glued' Walter to his location [citation],

prevented him from going to Wilfredo's assistance, and thereby aided defendant's machete-wielding partner in the ongoing attempt to rob Wilfredo." (*Ibid.*)

Alice, of course, did notice the knife. Though Vo directed it at her mother, the jury could find that his action served to control Alice as well by frightening her into continued submission. This, too, would be an appropriate basis for finding the knife-use allegation true as to the attempted murder against Alice. The same goes for Tony, who when told by Alice when he returned home that appellants had guns and a knife (16 RT 3876), offered no resistance when he was bound, gagged, and taken upstairs. Based on this evidence, the jury could reasonably conclude that Vo's threatening Cary with the knife facilitated the attempted murder and false imprisonment of Tony not only by controlling Cary, but by controlling Tony as well.

IX.

THE NINE FIREARM-USE ENHANCEMENTS AGAINST HAJEK SHOULD BE REVERSED AND REPLACED WITH NINE ENHANCEMENTS FOR USING A DEADLY WEAPON

The jury found true allegations that Hajek had used a firearm, to wit, a pellet gun, in the commission of counts one through nine. The court sentenced him to concurrent five-year prison terms for the enhancements associated with counts one through six, and stayed the remaining enhancements pursuant to Penal Code section 654. Citing *People v. Vasquez* (1992) 7 Cal.App.4th 763, Hajek contends that all nine firearm-use enhancements must be reversed because the Legislature changed the definition of the word "firearm" to exclude pellet guns after he committed his crimes but before final disposition of his case. (Hajek 2nd Supp. AOB 18-23 [Arg. XXXIV].) Respondent submits the firearm-use enhancements should be reduced to the necessarily included enhancement for use of a deadly weapon pursuant to Penal Code section 12022,

subdivision (b). (*People v. Schaefer* (1993) 18 Cal.App.4th 950.)

The instant crimes were committed in 1991. At the time, pellet guns were included in the statutory definition of "firearm." (Stats. 1988, ch. 1605, § 3, p. 5821 [former § 12001.1].) Effective January 1, 1992, however, the Legislature repealed section 12001.1 (Stats. 1991, ch. 950, § 4) and amended section 12001 to delete such weapons, with exceptions not relevant here. In *Vasquez*, the court held that the repeal required reversal of enhancements based on the defendant's committing crimes while being armed with and using a "firearm" under Penal Code sections 12022, subdivision (a) and 12022.5, subdivision (a). Although the defendant's crimes pre-dated these changes in the law, under *In re Estrada* (1965) 63 Cal.2d 740, 746-748 and *People v. Rossi* (1976) 18 Cal.3d 295, 299-304, the court found that he was entitled to the benefit of the change because his case had not yet reached final judgment.[35/]

In *People v. Schaefer*, *supra*, 18 Cal.App.4th 950, the same court that decided *Vasquez* noted that "*Vasquez* does not eliminate the law holding a pellet gun to be a deadly or dangerous weapon within the meaning of Penal Code section 12022, subdivision (b)." (*Schaefer*, *supra*, at p. 951, citing *People v. Montalvo* (1981) 117 Cal.App.3d 790, 797.) Accordingly, it struck six Penal Code section 12022.5 enhancements admitted by the defendant in that case pursuant to *Vasquez*, but made each a violation of Penal Code section 12022, subdivision (b). (See also *People v. Dixon* (2007) 153 Cal.App.4th 985, 1001-1002 [charge that defendant had personally used a firearm (Pen. Code, § 12022.53, subd. (b)) gave him adequate notice of the lesser-included enhancement of personal use of a deadly weapon (Pen. Code, § 12022, subd. (b)), and his jury trial waiver as to the former was a waiver as to the latter].)

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35. A judgment is final for these purposes when it has reached final disposition in the highest court authorized to review the case. (*People v. Nasalga* (1996) 12 Cal.4th 784, 789, fn. 5.)

Likewise here, Hajek is entitled to the benefit of *Vasquez* and should have his nine firearm-use enhancements replaced with one-year enhancements for use of a deadly weapon.

X.

A PERSON MAY BE VICARIOUSLY LIABLE FOR A SUBSTANTIVE CRIME BASED ON AN UNCHARGED CONSPIRACY THEORY AND THERE WAS SUFFICIENT EVIDENCE OF A CONSPIRACY HERE

Although appellants were not charged with conspiracy, one of the prosecution's theories of liability was that the pair had conspired to commit burglary and murder and were thus liable for one another's acts in furtherance of the conspiracy. (7 CT 1858.) Appellants contend it is improper to base criminal liability on an uncharged conspiracy. (Hajek AOB 92-100 [Arg. V]; Vo AOB 249-276 [Arg. 6].) Vo additionally appears to contend that there was insufficient evidence of a conspiracy. (Vo AOB 265-270 [Arg. 6.D.], 290-291 [Arg. 8.C.].) They are mistaken.

A. It Is Proper to Rely on an Uncharged Conspiracy as a Theory of Liability

Appellants objected to the conspiracy instructions on the ground that there was insufficient evidence of a conspiracy (21 RT 5285-5287), not on the ground that an uncharged conspiracy cannot be a theory of liability. Erroneously claiming he raised the instant issue, Hajek cites his objection to the admission of certain letters on the ground that they did not establish a conspiracy. (Hajek AOB 93, citing 16 RT 3900.) Vo also objected to these letters, arguing they were not admissible as coconspirator statements and that there was insufficient evidence of a conspiracy. (Hajek AOB 93, citing 16 RT 3903.) Neither argued, as they do now, that an uncharged conspiracy could not be used as a theory of criminal liability for murder. The present claim is thus

forfeited.

It is also without merit. "It is long and firmly established that an uncharged conspiracy may properly be used to prove criminal liability for acts of a coconspirator. [Citations.] 'Failure to charge conspiracy as a separate offense does not preclude the People from proving that those substantive offenses which are charged were committed in furtherance of a criminal conspiracy. [citation]; nor, it follows, does it preclude the giving of jury instructions based on a conspiracy theory [citations].' [Citation.]" (*People v. Belmontes* (1988) 45 Cal.3d 744, 788-789; accord, *People v. Salcedo* (1994) 30 Cal.App.4th 209, 215-216.) Contrary to appellants' assertions (Hajek AOB 92-95; Vo AOB 263-264), this rule neither deprives the defendant of adequate notice of the charges (*People v. Gallego* (1990) 52 Cal.3d 115, 188) nor contravenes section 31's definition of the principals in a crime (*People v. Durham* (1969) 70 Cal.2d 171, 184, fn. 11). Nor were appellants deprived of due process, as Vo contends (Vo AOB 270-272), because the instructions failed to require the prosecution to prove, or the jury to find, the existence or scope of the conspiracy beyond a reasonable doubt. (*Belmontes*, *supra*, 45 Cal.3d at pp. 789-790; *People v. Jourdain* (1980) 111 Cal.App.3d 396, 403-404.)

Hajek also argues that relying on an uncharged conspiracy as a basis for criminal liability creates a mandatory conclusive presumption that a person who joins an uncharged conspiracy to commit a substantive offense "acted as a principal by either directly committing the crime or aiding and abetting in its commission." (Hajek AOB 98.) No such presumption is involved. As *Durham* explained, anyone concerned in the commission of a crime, however slight such concern may be, is liable as a principal under section 31. (*Durham*, *supra*, at p. 184. fn. 11.) A person who specifically intends to agree to commit an offense and specifically intends to commit the elements of that offense (7 CT 1858) meets that standard.

B. There Was Sufficient Evidence of a Conspiracy in this Case

Vo contends there was insufficient evidence of a conspiracy. Not so. Even in the absence of conspiracy charges, the jury may be instructed on the law of conspiracy upon a prima facie showing of the existence of a conspiracy by independent evidence. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1134.) "The prima facie showing may be circumstantial [citation], and may be by means of any competent evidence which tends to show that a conspiracy existed. [Citation.]'" (*Ibid.*) "Evidence is sufficient to prove a conspiracy to commit a crime 'if it supports an inference that the parties positively or tacitly came to a mutual understanding to commit a crime. [Citation.] The existence of a conspiracy may be inferred from the conduct, relationship, interests, and activities of the alleged conspirators before and during the alleged conspiracy. [Citations.]'" (*Id.* at p. 1135.) "'[I]t is not necessary to prove that the parties met and actually agreed to perform the unlawful act or that they had previously arranged a detailed plan for its execution.'" (*People v. Pitts* (1990) 223 Cal.App.3d 606, 891.)

The trial court correctly concluded there was sufficient prima facie evidence here that Hajek and Vo conspired to commit burglary and murder. Hajek told Tevya Moriarty that he intended to kill Ellen and her family in retaliation for the fight with him and Lori and that he planned to make it look like a robbery. Executing that motive, he went to the Wang family's home, accompanied by Vo. Although Vo was not involved in the fight, he too had a motive to retaliate against Ellen for fighting with Hajek, his best friend, and Lori, the girl he loved. He also needed money, as he stated in a recent diary entry, an assertion supported by the fact that he had no job at the time; he also stated in a letter to Shawn Mach that he did the "job" for money.

Hajek and Vo arrived at the Wang residence in Hajek's stolen van, which they parked around the corner from the house. Both were wearing gloves.

Hajek was armed with a pellet gun, which Vo admitted knowing about. Vo had a key to a pair of handcuffs in his possession. Acting together, the pair gained admittance on false pretenses, held the family hostage, and made threats and committed other hostile acts against them, all the while conferring with one another. During the course of the incident, one of the family members was killed. Valuable items such as electronics and cash were collected and put in bags. When the police arrived, both appellants attempted to flee. After arrest, they continued to maintain contact with one another.

The foregoing evidence, viewed as a whole, amply supports the trial court's decision to instruct on the principles of conspiracy. (Cf. *People v. Jurado* (2006) 38 Cal.4th 72, 121 [sufficient evidence of conspiracy based on codefendant's shared motive, presence at scene, and post-crime conduct such as failing to separate from defendant, failing to report crime, and lying]; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1135 [prima facie evidence of conspiracy to rob shown where defendant and accomplice forcibly entered apartment together with weapons and attacked the two occupants, and accomplice acted on defendant's commands to "finish" the victim with whom he was fighting and flee before the police arrived].) Contrary to Vo's assertion that "[a]t no time did the trial court decide the scope of the alleged conspiracy" (Vo AOB 267), its instructions specified burglary and murder as the target offenses (7 CT 1858), and the prosecutor limited his argument accordingly (21 RT 5369-5370 [discussing conspiracy to commit burglary], 5373 [arguing Hajek's statement to Tevya Moriarty is evidence of conspiracy to commit murder].)[36/]

Vo also complains that evidence bearing on the conspiracy was allowed in advance of a ruling. (Vo AOB 267.) This could not have prejudiced him,

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36. Though Vo suggests otherwise (Vo AOB 269), the trial court made an express finding on the existence of the conspiracy. (17 RT 4143, 4165; 21 RT 5263.)

however, since the court correctly found sufficient evidence of the conspiracy as shown above. To the extent Vo complains that some documentary evidence discussed by witnesses ultimately was not admitted into evidence (Vo AOB 255-256), the burden was on him to move to strike the corresponding testimony. (Evid. Code, § 403, subd. (b).) His failure to do so forfeits the claim on appeal. (Evid. Code, § 353, subd. (a).)

Vo claims that jurors were not instructed specifically which evidence was admitted for what charges or allegations. (Vo AOB 259.) A court has no instructional duty to allocate the evidence among the charges and Vo cites no authority holding otherwise. To the extent his complaint is that the court's limiting instruction was too general, it was incumbent upon him to request a more specific one. (Evid. Code, § 355; see *People v. Bryden* (1998) 63 Cal.App.4th 159, 176-177; *People v. Klvana* (1992) 11 Cal.App.4th 1679, 1708, fn. 20; *Gherman v. Colburn* (1977) 72 Cal.App.3d 544, 580.) Finally, Vo's claim that the prosecutor made incorrect or confusing arguments with regard to the conspiracy theory of liability (Vo AOB 259) is forfeited for failure to timely object on grounds of prosecutorial misconduct and request an admonition from the court. (*People v. Gionis*, *supra*, 9 Cal.4th at p. 1215.)

For all of these reasons, the court's decision to instruct on conspiracy principles, and the manner in which it did so, are not grounds for reversing Vo's convictions under either the state or federal constitution.[37/]

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37. Vo's arguments concerning the correctness of the conspiracy instructions (Vo AOB 272-276), along with Hajek's, are addressed separately, in Argument XXIII, *post*.

XI.

VO'S RIGHTS UNDER THE CONFRONTATION CLAUSE WERE NOT DENIED BY TEVYA MORIARTY'S TESTIMONY REGARDING HER CONVERSATION WITH APPELLANT HAJEK

Vo contends the trial court violated his Sixth Amendment right to confront witnesses against him by permitting Tevya Moriarty to testify about the conversation she had with Hajek prior to the crimes. (AOB Vo 232-237 [Arg. 4].) He is mistaken.

A. Factual Background

Tevya Moriarty testified that Hajek called her the night before the crime and told her about a fight between his girlfriend and another girl. (15 RT 3644-3649.) He said that he wanted to get back at the other girl, and that he planned to go to the girl's house, kill her family in front of her, and then look in her eyes as he killed her. (15 RT 3650-3652.) According to Moriarty, Hajek only used the term "I" in discussing the actual killings. (15 RT 3656; 16 RT 3787-3788.) In an interview with police on January 21, 1991, however, she said he talked about going over to the victim's house with two others. (15 RT 3665, 3685; 16 RT 3790-3791.) She also testified at the preliminary hearing that he possibly talked about more than one person being involved. (16 RT 3789-3790.)

Prior to trial, Vo sought to have Moriarty's testimony about Hajek's statement limited "to the singular "'he' rather than 'they,'" based on the *Aranda-Bruton* rule. (1 RT 229, 232; 6 RT 1580-1581.) The trial court denied the motion. (1 RT 232.)

B. Vo Was Not Prejudicially Denied His Rights Under the Confrontation Clause

In *Bruton v. United States*, *supra*, 391 U.S. 123, the Supreme Court held that a defendant's confrontation clause rights are violated when the facially and

powerfully incriminating confession or admission of a nontestifying codefendant is introduced at their joint trial.[38] The confrontation clause itself, however, only applies to the admission of *testimonial* hearsay against the defendant. (*Crawford v. Washington*, *supra*, 541 U.S. at p. 51; *People v. Cage* (2007) 40 Cal.4th 965, 981.) Hajek's statement to Moriarty did not qualify as such. It was "a casual remark to an acquaintance," not a "formal statement to government officers." (*Crawford*, *supra*, at p. 51.) And, because it was made before the crime even occurred, it was plainly not made in order to "establish or prove past events potentially relevant to later criminal prosecution." (*Davis v. Washington* (2006) 547 U.S. 813, 822; see also *Crawford*, *supra*, at p. 51 [defining testimony as "'[a] solemn declaration or affirmation made for the purpose of proving some fact'"].)

Moreover, Hajek's statement to Moriarty did not facially incriminate Vo. Moriarty testified that she only recalled Hajek talking about himself. Although she previously told police that he talked about going to the victim's house with two others, he did not name any specific individuals. The conclusion that Vo was one of unnamed people requires inference from the statement itself and linkage with other evidence. Such a mild reference is too vague to constitute a violation of the confrontation clause. (Cf. *Richardson v. Marsh*, *supra*, 481 U.S. at p. 208.)

Finally, any alleged error is harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Lewis* (2008) 43 Cal.4th 415, 456.) The evidence showed that Vo had a motive to get revenge on Ellen for fighting with Hajek, his best friend, and Lori, the girl with whom he was in

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38. As noted, this Court reached a similar conclusion on nonconstitutional grounds in *People* v. *Aranda*, *supra*, 63 Cal.2d at pp. 528-530. *Aranda* has been abrogated to the extent it requires the exclusion of relevant evidence that need not be excluded under federal constitutional law. (*People* v. *Fletcher*, *supra*, 13 Cal.4th at p. 465.)

love. Acting on that motive, he accompanied Hajek to the Wangs' house wearing gloves and acted in concert with him throughout the incident. Among other things, Vo obtained entry into the home by a ruse, tied up and blindfolded the murder victim and took her up to her room, held a knife to Cary Wang's throat and drove her to school to look for Ellen, tied Tony Wang's hands and gagged his mouth, and verbally threatened both Cary and Tony, saying he would kill them and their family if they did not do as he said. He attempted to flee when the police arrived and upon arrest gave a false name. He also continued to maintain contact with Hajek. In light of this ample evidence of Vo's guilt, any error in permitting Moriarty to be impeached with her prior statement that Hajek talked about going to the victim's house with two other unnamed people was harmless.

XII.

THE TRIAL COURT PROPERLY ADMITTED THE AUDIOTAPE OF THE CONVERSATION BETWEEN HAJEK AND VO AT THE POLICE STATION

Appellants contend the trial court erred in admitting the audiotape of their conversation at the police station following their arrest. (Hajek AOB 120-132 [Arg. VIII]; Vo AOB 238-249 [Arg. 5].) They are mistaken.

A. Factual Background

Prior to trial, Hajek objected to admission of the audiotape as "inadmissible under Evidence Code section 352 and irrelevant as inaudible." (6 CT 1614.) He also objected to the transcript of the conversation prepared by the prosecutor as inaccurate. (*Ibid.*) At the hearing, counsel urged the tape be excluded because, even after enhancement, large portions of it were inaudible. (12 RT 2951.) Vo objected as well, arguing that giving the jury such an inaudible tape put it in a position of speculation and surmise. (12 RT 2952.) With respect to

the transcript, Hajek's counsel stated, "[I]t would be my position that there be no transcript given to the jurors at all. That if the court is going to admit the tape, let the jurors conclude what they're going to from it. Given its state, it would seem to me that they will be the best judges of what is on there." (*Ibid.*) The court ruled the tape admissible, but excluded the transcript because it was not absolutely accurate. (12 RT 2953.)

At trial, the prosecutor authenticated the tape through Detective Walter Robinson, who testified the defendants were placed in a room together after they had been interviewed individually. (16 RT 3814, 3830-3831.) Robinson and Sergeant Escobar listened in on their conversation surreptitiously. (16 RT 3831-3832.) The conversation was also taped. (16 RT 3815, 3831.) Although the tape was enhanced to improve audibility, Robinson acknowledged that "[t]he sound quality overall is fairly poor. A good deal of the . . . conversation was actually whispering between the two defendants. So there are parts of the tape that are [i]ndiscernible or inaudible. Actually what you're hearing is maybe 50 to 75 percent of the actual conversation that's occurring. At points you can here some mumbling or whispering, but it is inaudible and unintelligible." (16 RT 3815-3816.) The prosecutor then played six snippets of the tape and asked Robinson to identify the speaker. Robinson identified all six as Hajek. (16 RT 3817-3818.) He acknowledged on cross-examination that in general, Hajek was speaking in an audible tone of voice whereas Vo was whispering. (16 RT 3844-3845.)

On May 11, 1995, the second day of its guilt phase deliberations, the jury asked if it was possible to get a transcript of the taped conversation between Hajek and Vo. (7 CT 1823.) The court denied the request in writing the same day, noting, "The transcript was not received in evidence." (7 CT 1824.) The jury returned its guilty verdicts on May 22, 1995.

After the jury returned its death verdicts, both defendants moved for a new

trial based in part on the court's admission of the tape. (10 CT 2753, 2769.) Hajek's motion was supported by a declaration by Brenda Wilson, a paralegal employed by the public defender's office. Wilson stated that she interviewed three jurors who stated that they heard both defendants say, "We killed her," several times on the tape and that they returned a verdict of death in part based on those statements. (10 CT 2756-2757.) Vo's motion was supported by declarations by his defense counsel, James Blackman, and *Keenan* counsel Jeane Dekelver.[39] Blackman stated that he interviewed a juror who reported that "[a] number of jurors placed great weight upon their perception that Vo made admissions on the tape to the effect that he and Hajek had killed the victim," and the jurors had given great weight to this perception in both the guilt and penalty phases. (10 CT 2774.) Dekelver stated that five jurors stayed and spoke with her and others after the death verdict was rendered. (10 CT 2741.) According to Dekelver, the jurors stated they heard Vo say "we killed her" several times on the tape. They heard this only during the penalty phase deliberations, when they were provided with a different and better tape player than the one they had during the guilt phase. The statements affected their penalty phase verdict. (10 CT 2742.)

The prosecutor opposed the motions for new trial because they were based on inadmissible declarations by members of the defense team and because evidence about the jurors' subjective reasoning processes is inadmissible under Evidence Code section 1150. (10/12/95 RT 17.) At the hearing, the court permitted the defense to present testimony from two of the jurors, Alice Miller and Linda Frahm, subject to a motion to strike. Ms. Miller testified that the jury listened to the tape of the defendants' conversation during both the guilt and penalty phases. When they played the tape during the guilt phase, they did not hear Vo state, "We killed her." (10/12/95 RT 18.) During the penalty phase,

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39. *Keenan v. Superior Court*, *supra*, 31 Cal.3d 424.

they were provided with a different tape player. This time, when they played the tape, they heard Vo state three times, "We killed her." (10/12/95 RT 19.) Ms. Frahm also testified that she heard Vo say, "We killed her," at least twice on the tape when the jurors played it during the penalty phase. (10/12/95 RT 23.)[40/]

Following the hearing, the court denied the motions for new trial. (10/12/95 RT 30.)

B. The Trial Court Did Not Abuse Its Discretion in Admitting the Tape

Hajek contends "the trial judge erred in the first instance by admitting into evidence this tape recording because it was of such poor quality that it constituted unreliable evidence." (Hajek AOB 124.) He is mistaken. "'The fact . . . that "a recording may not be clear in its entirety does not itself require exclusion from evidence, 'since a witness may testify to a part of a conversation if that is all he heard and it appears to be intelligible.'"'" (*People v. Hall* (1980) 112 Cal.App.3d 123, 126; accord, *People v. Siripongs* (1988) 45 Cal.3d 548, 574.) A recording is admissible so long as enough of it is intelligible to be relevant without creating an inference of speculation or unfairness. (*People v. Demery* (1980) 104 Cal.App.3d 548, 559; accord, *People v. Polk* (1996) 47 Cal.App.4th 944, 952.) "Thus, a partially unintelligible tape is admissible unless the audible portions of the tape are so incomplete the tape's relevance is destroyed." (*Polk*, *supra*, at p. 952.) In the admission or rejection of such

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40. Both jurors also testified about the effect of the statements on their deliberations. As the prosecutor argued, that testimony was inadmissible under Evidence Code section 1150, subdivision (a), which provides that although otherwise admissible evidence may be received as to statements made, or conduct, conditions, or events occurring within the jury room, "[n]o evidence is admissible to show the effect of such statement, conduct, condition, or event upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined."

evidence the trial court has a broad discretion; absent a manifest abuse of that discretion resulting in a miscarriage of justice, its decision will not be overturned on appeal." (*Hall, supra*, at p. 127.)

No abuse appears here. It is undisputed that although parts of the tape were inaudible, other parts were audible. Indeed, Detective Robinson testified that in general, Hajek spoke in an audible tone of voice on the tape. (16 RT 3844-3845.) The portions of the tape that were understandable were clearly relevant and created no inference of speculation or unfairness: Hajek stated to Vo that they were murderers, expressed his continuing anger at Ellen, demonstrated his lack of remorse, and plotted with Vo about how to deal with the charges they would be facing. Accordingly, the trial court properly exercised its discretion in admitting the tape, and appellants' due process and Eighth Amendment rights were not violated.

Hajek argues that the judge's exclusion of the transcript offered by the prosecutor and the jury's later request during deliberations for a transcript established the inaudible nature of the tape. (Hajek AOB 126, 127.) It has been conceded from the start, however, that portions of the tape are inaudible. That in itself did not require exclusion, as explained above, because other parts of the tape were audible and clearly relevant. The transcript was excluded at Hajek's request. Counsel preferred the jurors to "conclude what they're going to from it" on their own since they were "the best judges of what is on there." (12 RT 2951.)

C. The Trial Court Did Not Abuse Its Discretion in Denying Appellants' Motion for New Trial

Hajek contends that "[a]nother factor tending to establish that admission of the audiotape constituted an abuse of discretion is the testimony of two of the jurors at the hearing on the defense motion for a new trial." (Hajek AOB 128.) Because this information did not come to light until after the trial, it does not

bear on the question of whether the trial court was correct to admit the tape in the first instance. Rather, it goes to the question of whether the trial court properly denied the motions for new trial. Respondent submits that here too, the trial court did not abuse its discretion.

When a verdict has been rendered against the defendant, he may move for a new trial on various statutory grounds, including that the court "has erred in the decision of any question of law arising during the course of the trial," and that the verdict "is contrary to law or evidence." (§ 1181, subd. (5), (6); see 10 CT 2753, 2766.) "A trial court may grant a motion for new trial only if the defendant demonstrates reversible error." (*People v. Guerra* (2006) 37 Cal.4th 1067, 1159.) "On appeal, a trial court's ruling on a motion for new trial is reviewed for abuse of discretion." (*Id.* at p. 1159.)

Here, neither of appellants' stated grounds for requesting a new trial had merit. As explained above, several portions of the tape were concededly audible and relevant. The testimony of Ms. Miller and Ms. Frahm did not detract from the court's ruling.[41] On the contrary, it supported it by showing that more of the tape was audible and relevant than the jury realized in the guilt phase.

Appellants contend the statements allegedly heard by the jurors were not in fact on the tape. (Hajek AOB 128, 129; Vo AOB 248.) It was for the jury, however, to determine what the facts were. As the parties agreed, many statements on the tape were difficult to discern. It is not inconceivable that the jury, after listening to the tape repeatedly on two different players, heard the challenged statements. Appellants have certainly not disproved the statements were made, or that their hearing was sharper than the jurors'. Hajek suggests

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41. As the prosecutor pointed out, the declarations by the paralegal from Hajek's defense team and the two defense attorneys representing Vo asserting what certain jurors told them constituted inadmissible hearsay and thus could not be considered for purposes of ruling on the new trial motions.

the situation is akin to the state introducing a blue sweater and arguing that it is for the jurors to decide whether or not it was purple. (Hajek AOB 130.) The analogy might be apt if all the voices on the tape were clearly audible. Because they were not, any issue about what the jurors heard is a question of fact for the jury, not a question of law for the court. Moreover, because all presumptions must be drawn in favor of the court's ruling (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564), it must be presumed that the jury could conclude the challenged statements were in fact made.

Even if the reported statements had not in fact been recorded on the tape, appellants would be left in the same position as when the court ruled in the first place. They have not shown that the tape, though believed audible when the court ruled, was actually inaudible, making its ruling error. Once again, several portions of the tape were clearly audible and relevant. The tape did not need to be audible in its entirety to be admissible.

Nor is the verdict contrary to the evidence. Certainly no new trial was warranted as to the guilt phase as the two testifying jurors agreed that the disputed statements were not heard until the penalty phase deliberations. Nor is a new trial warranted as to the penalty phase. The court's role in ruling on a motion for new trial based on insufficient evidence is to weigh the evidence independently, not to determine whether the jury weighed it correctly as appellants' argument suggests.

> While it is the exclusive province of the jury to find the facts, it is the duty of the trial court to see that this function is intelligently and justly performed, and in the exercise of its supervisory power over the verdict, the court, on motion for a new trial, should consider the probative force of the evidence and satisfy itself that the evidence as a whole is sufficient to sustain the verdict. [Citations.] It has been stated that a defendant is entitled to two decisions on the evidence, one by the jury and the other by the court on motion for a new trial. [Citations.] This does not mean, however, that the court should disregard the verdict or that it should decide what result it would have reached if the case had been tried without a jury, but instead that it should consider the proper

> weight to be accorded to the evidence and then decide whether or not, in its opinion, there is sufficient credible evidence to support the verdict. [Citations.]

(*People v. Robarge* (1953) 41 Cal.2d 628, 633.)

Thus here, the court's job was to look at the evidence as a whole, including the contested tape, and determine whether it was sufficient to sustain the jury's verdict. Whether and how the jury considered the tape, and how much if any weight it gave to it, was irrelevant to the court's inquiry.

Presuming, as we must, that the trial court was well aware of, and correctly fulfilled its role (*People v. Diaz* (1992) 3 Cal.4th 495, 567; Evid. Code, § 664), it acted well within its discretion in denying the new trial motion. Even aside from the tape, there was abundant evidence of both appellants' guilt. (See Arguments V-VII, *ante*.) The clearly audible portions of the tape provide further evidence of Hajek's guilt. And, because appellants have failed to demonstrate that the remarks heard by the jury were *not* in fact on the tape, and all presumptions on appeal must be drawn in favor of the trial court's ruling (*Denham v. Superior Court*, *supra*, 2 Cal.3d at p. 564), the presumption is that Vo made the challenged statements.

For the first time on appeal, Vo raises juror misconduct as a third theory for why his new trial motion should have been granted. Specifically, he contends that the jury's hearing a heretofore inaudible portion of the tape was tantamount to jury misconduct, which deprived him of his right to due process notice and an opportunity to be heard, the assistance of counsel, the opportunity to defend, and a reliable verdict. (Vo AOB 248.) Vo's failure to raise this theory in his new trial motion forfeits the claim on appeal. (*People v. Mascotti* (2008) 163 Cal.App.4th 504, 508.) Nor did the jury commit misconduct. It did not make an independent investigation of the facts, receive evidence from outside the trial, or conduct an unauthorized experiment as Vo appears to contend. (See Vo AOB 248 [alleging that jury's "extra-record attempt at reconstructing the

contents of inaudible portions of the audio tape" was tantamount to jury misconduct].) It simply listened to a tape that was admitted into evidence. The fact that it heard something Vo claims he did not hear on the tape recording does not establish misconduct.

D. The Tape Was Properly Admitted Against Vo

Because Vo could not cross-examine Hajek about Hajek's statements on the audiotape, Vo contends that admission of the tape against him violated the *Aranda-Bruton* rule.[42] (Vo AOB 245.) That rule precludes the admission of a facially incriminating confession or admission by a nontestifying codefendant in a joint trial. The contention has no merit.

First, Vo did not object to the tape on *Aranda-Bruton* or confrontation clause grounds below, thereby forfeiting the claim on appeal. (Evid. Code, § 353, subd. (a).) Second, Hajek's statements to Vo did not implicate Vo's Sixth Amendment right to confront Hajek because they were not testimonial. That is, they were not "statements, made with some formality, which, viewed objectively, [were] for the primary purpose of establishing or proving facts for possible use in a criminal trial." (*People v. Cage*, *supra*, 40 Cal.4th at p. 984, fn. 14.) Nor does the *Aranda-Bruton* doctrine appear to apply. It is unclear to which statements on the tape Vo objects. Vo's own statements are of course not subject to the *Aranda-Bruton* rule, and according to Vo, "[t]he extrajudicial admissions made by co-defendant Hajek on that tape were highly inculpatory *as to Mr. Hajek*" (Vo AOB 245), taking them outside the rule's purview as well. To the extent Vo is complaining that Hajek's statements implicated Vo, Vo's silence in the face of the remarks constituted adoptive admissions. Such admissions do not offend the confrontation clause. (*People v. Combs* (2004)

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42. *People* v. *Aranda*, *supra*, 63 Cal.2d 518; *Bruton v. United States*, *supra*, 391 U.S. 123.

34 Cal.4th 821, 842.)

Even assuming arguendo that the admission of the audiotape was erroneous, any error was harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24; *People v. Lewis*, *supra*, 43 Cal.4th at p. 456.) Even aside from the tape, there was abundant evidence of Vo's guilt. (See Arguments V-VII, *ante*.) Moreover, the jurors apparently heard Vo himself say, "We killed her," and the trial court implicitly accepted this finding. Any similar statements by Hajek were thus cumulative.

E. Under the Circumstances Here, the Trial Court Was Not Required to Have the Audiotape Transcribed; Defense Counsel's Stipulation on this Matter Did Not Constitute Ineffective Assistance of Counsel

Vo stipulated to not transcribing the recording of the tape as it was played for the jury. (16 RT 3785.) He nevertheless contends that the trial court violated his right to due process and reliable procedures in a capital case by not requiring the same. Alternatively, he contends that counsel's stipulation constituted ineffective assistance. (Vo AOB 246; *Strickland v. Washington* (1984) 466 U.S. 668, 686.) As argued in Argument XXXIV, *post*, Vo's burden is to establish that the complained-of omissions resulted in a record so deficient as to make the appellate process unreliable. (*People v. Harris* (2008) 43 Cal.4th 1269, 1283.) He cannot do so because the tape was and is available. Nor did counsel fall below an objective standard of reasonableness under prevailing professional norms by stipulating that the tape need not be transcribed. (*Strickland*, *supra*, at p. 688.) Reasonable counsel could conclude that because Vo's voice was largely inaudible, the jury might miss much of what he said in playing the tape, whereas a transcript would highlight every word. Indeed, the tactic appeared to have paid off. The jurors heard less during the guilt phase deliberations than the penalty deliberations. Nor is there a reasonable probability that but for counsel's stipulation, the result of the

proceeding would have been different. (*Id.* at p. 694.) Even if the court had supplied a transcript that did not contain the admissions by Vo the jury apparently heard, the jurors would not be bound by the transcript but by what they heard. The evidence was the tape, not the transcript. (See *People v. Cook* (2006) 39 Cal.4th 566, 577, fn. 2; *People v. Sims* (1993) 5 Cal.4th 405, 448; *People v. Polk*, *supra*, 47 Cal.App.4th at p. 952.)

XIII.

VO WAS NOT DENIED HIS CONFRONTATION CLAUSE RIGHTS BY THE ADMISSION OF HAJEK'S STATEMENTS AND WRITINGS

Vo contends that he was denied his confrontation clause rights by the admission of numerous statements and writings by Hajek that implicated him. (Vo AOB 276-285 [Arg. 7].) He merely identifies various pieces of evidence in a blanket challenge that employs generic boilerplate on the *Aranda-Bruton* and *Crawford* rules. He leaves it to this Court to individually analyze each item. Such a perfunctory presentation can be considered a forfeiture of the argument. (*People v. Lindberg* (2008) 45 Cal.4th 1, 51, fn. 14.)

To the extent it is preserved, the claim is redundant. Much of the evidence and testimony is challenged by Vo elsewhere. For example, Vo contends his rights were violated by Tevya Moriarty's testimony that Hajek may have used the word "they" in discussing the plan to murder Ellen and her family. (Vo AOB 278.) As discussed in our response to his individual claim on this topic (see Argument XI, *ante*), his confrontation rights were not abridged because Hajek's statement to Moriarty was not testimonial, making the confrontation clause inapplicable. Nor did the statement facially incriminate Vo, as necessary for the *Aranda-Bruton* rule to apply.

Vo also complains about the trial court's admission of the tape-recorded conversation between him and Hajek at the police station following their arrest.

(Vo AOB 279.) As discussed elsewhere (see Argument XII.D., *ante*), his confrontation clause claim is forfeited for failure to object, inapplicable because his statements to Hajek are not testimonial, insufficiently clear as to which statements on the tape he is challenging, and meritless because adoptive admissions do not implicate the confrontation clause.

Also included in Vo's umbrella confrontation clause claim is his complaint that during the penalty phase, Hajek's expert, Dr. Minagawa, testified that Hajek admitted going to the Wang house to get back at Ellen, but denied killing Su Hung (23 RT 5892)—testimony which, according to Vo, was "tantamount to Hajek's accusation that Vo was the killer." (Vo AOB 280.) Vo cited this incident in support of his argument that the trial court erred in refusing to grant his motion to sever his trial from Hajek's. (Vo AOB 157.) As explained in our response to that contention (see Argument II, *ante*), Hajek's statement to Minagawa was not testimonial, was not admitted for the truth of the matter, and did not facially incriminate Vo. Moreover, Vo did not move to strike the now challenged testimony when it was given, forfeiting the present claim.[43/] The court also protected Vo from any potential prejudice by instructing the jury, in response to Vo's hearsay objection to the prosecutor's next question, "This testimony is strictly limited to Mr. Hajek and is not being received as to Mr. Vo." (23 RT 5893.)

Vo also contends his confrontation clause rights were violated by the admission or use of various letters written to him by Hajek. (Vo AOB 279.) He is wrong. To begin with, he did not object to the admission of Exhibit 64.

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43. During a break shortly thereafter, Vo moved for a mistrial and severance of his penalty phase trial from Hajek's based in part on the testimony that Hajek had denied the killing. (23 RT 5909-5911, 5913.) This after-the-fact motion was no substitute for a timely objection. Moreover, Vo was not entitled to a separate penalty trial; at most he was entitled to exclusion of the offending statement.

Instead, his attorney told the court, "From my client's perspective, we would ask that 64 be admitted." (17 RT 4162.) In response to Hajek's request for clarification as to whether the letter was being admitted as to him alone or as to both defendants, the court answered, "It's admissible as to both." (*Ibid.*) Vo did not object, thereby forfeiting any claim of error on appeal.

Exhibits 63 and 79, as Vo acknowledges, were not admitted into evidence, and thus cannot serve as the basis of a confrontation clause claim. Nor, for that matter, did Vo object to the admission of either exhibit, thereby forfeiting any right to claim error. With respect to Exhibit 63, Vo's attorney told the court, "From my client's perspective, we would ask the court admit Exhibit 63." (17 RT 4159.) When asked for his position on the admission of Exhibit 79, counsel again lodged no objection, responding simply, "Submitted." (17 RT 4178.) Vo nevertheless maintains that his right of cross-examination was violated vis-a-vis these letters because their contents were the subject of examination by the prosecutor. He fails to identify the relevant portions of the record where this took place, along with his objection thereto. Accordingly, the claim is not cognizable. (Cal. Rules of Court, rule 8.204(a)(1)(C).)

The remaining exhibits Vo complains of—Exhibits 65, 72, 73, and 78—were admitted into evidence over his objection on *Aranda-Bruton* grounds and thus properly preserved for appeal.[44] (17 RT 4165-4167 [Exhibit 65], 4170-4171 [Exhibit 72], 4172-4173 [Exhibit 73], 4177-4178 [Exhibit 78], 4178-4179 [Vo's counsel clarifying that his objections are on *Aranda-Bruton* grounds].) The claims themselves, however, are not meritorious

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44. The court admitted only the third page of Exhibit 65. (17 RT 4167.) Vo's contention that his rights were violated vis-a-vis the first two pages as well because the prosecutor questioned witnesses regarding their content is unsupported by any citation to the record and therefore not cognizable. (Cal. Rules of Court, rule 8.204(a)(1)(C).)

As discussed previously, *Bruton v. United States*, *supra*, 391 U.S. 123 held that a defendant's confrontation clause rights are violated when the facially and powerfully incriminating confession or admission of a nontestifying codefendant is introduced at their joint trial. The confrontation clause itself, however, only applies to the admission of *testimonial* statements against the defendant. (*Crawford v. Washington*, *supra*, 541 U.S. at p. 51; *Whorton v. Bockting* (2007) 549 U.S. 406, 420; *Davis v. Washington*, *supra*, 547 U.S. at p. 821; *People v. Cage*, *supra*, 40 Cal.4th at p. 981.) Because none of Hajek's statements in his letters to Vo were testimonial, i.e., none were made "for the primary purpose of establishing or proving facts for possible use in a criminal trial," Vo had no federal constitutional right to confront or cross-examine Hajek regarding the statements.[45] (*People v. Cage*, *supra*, 40 Cal.4th at p. 984, fn. 14; accord, *Davis v. Washington*, *supra*, 547 U.S. at p. 822.)

Moreover, the challenged letters do not facially and powerfully incriminate Vo. In Exhibit 72, Hajek ruminates about whether the evidence against them establishes attempted murder, but does not reveal any new information about the circumstances of the crime or whether he or Vo actually had an intent to kill:

> In order to prove attempted murder, there must be a showing that some kind of act to kill the victim was done. Now of course, being untied, walking around and using the phone, is not really what I think of as just about to be killed. How 'bout you? And even though you can have the specific intent to kill, until an act which is more than preparation, and is directed towards the killing, there cannot be proof of attempted murder. So if anyone was going to kill the Wangs, they were only preparing to do so. Make sense? And if my main goal was to kill Ellen, there was no way we could do any act towards killing the family. Specially since I had (supposedly) said to (Tevya) that we were going to wait if we had everybody—then kill. Ellen was supposed to be last. So that means that we were only preparing to kill everyone. So that means we can't be

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45. This is of course true of Exhibits 64, 63, and 79, discussed previously, as well.

convicted of attempted murder! sound good to you?

(Exh. 72, p. 1.)

In Exhibit 73, Hajek states, "And what do you mean tagged along and boom in jail? I won't say anymore. As for the case—WE ARE DOOMED!" If anything, this suggests Vo did not subscribe to Hajek's plan to kill—that he was just tagging along with Hajek, as he testified at trial, and was now being accused of murder.

In Exhibit 78, Hajek discusses how he and Vo asked Bucket to accompany them the day before the crime and surmises that Bucket has told this to the police. In Exhibit 65, he again references this invitation to Bucket, asking Vo if he was mad Hajek got him involved and telling him he could have said "it's not my problem" like Bucket. These statements were not "powerfully incriminating." They suggested appellants went to the Wang household with a plan, but did not reveal what that plan was; certainly they did not admit an intent to kill.

That Hajek and Vo were acting in concert was never in question. The two worked together to gain entry into the house under false pretenses. Vo expressed no surprise when Hajek pulled out his pellet gun, and Vo was the one who tied up and blindfolded the murder victim, held a knife to Cary's throat, kidnapped Cary to search for Ellen, tied Tony's hands behind his back and gagged his mouth, and threatened to kill the family. Thus, to extent Hajek's letters incriminated Vo by admitting the existence of a plan, they were merely cumulative of other evidence. Indeed, Vo himself testified that the two had a plan though he maintained it was only to confront and possibly assault Ellen. The main issue was whether the plan was to kill the Wangs, a matter on which the letters shed no light.

Assuming, arguendo, the admission of any of Hajek's letters violated Vo's rights under the confrontation clause, the error was harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.) As discussed above, the letters at most established the existence of a plan, on which there was ample other evidence. They said nothing of the plan's scope. Moreover, as discussed previously, there was abundant evidence supporting Vo's convictions of murder and attempted murder. Exclusion of Hajek's letters would not have altered the outcome of the trial in Vo's favor.

XIV.

THE TRIAL COURT PROPERLY ADMITTED PHOTOGRAPHS OF THE CRIME SCENE, MURDER VICTIM, AND AUTOPSY

Vo, joined by Hajek, contends the trial court prejudicially erred in permitting the prosecution to present photographs of the crime scene, murder victim, and autopsy. (Vo AOB 330-337 [Arg. 13]; Hajek 2nd Supp. AOB 3-4.) He contends that the photographs were irrelevant, cumulative, more prejudicial than probative, misused by the prosecutor, and violative of due process. We disagree.

A. Factual Background

Vo filed an in limine motion to exclude photographs of the victim at the scene of the crime and at the autopsy, contending they were irrelevant and subject to exclusion under Evidence Code section 352. (6 CT 1540.) At the hearing on the motion, counsel specified that his objections were to photographs J-1 to J-7, J-19, and J-22. (1 RT 317-318.) Hajek's counsel joined in the motion as to these nine photographs. (1 RT 319.) While recognizing "that the court has a wide discretion in this whole area" (1 RT 317), counsel argued that the challenged photographs were inflammatory and prejudicial, and in the case of J-22, duplicative. Appellants noted that the

photographs could be described verbally for the record by the police and coroner, and argued that admitting them would violate their right to due process. (1 RT 317-319.) The prosecutor responded:

> I would submit that they are relevant to prove the special circumstances of torture. The victim in this case was strangled and then had her throat slashed, and that's in itself, you know, the strangulation apparently did not cause her death, but it was gratuitous. And I think that should be shown to the jury that she was made to suffer that way. And in addition, the pictures of her torso should be shown which show infliction of six extra stab wounds on her chest. And I submit that the photos are also relevant to show mechanism of her death by having her throat slit.
>
> They are not particularly gruesome. They don't show any autopsy dismemberment or anything like that. I think they are very relevant to show the crime scene also. And the testimony is that, for instance, the victim's position of her body viewed by one of the family members alleges that she was alive for a good portion of the time. She was on the bed reading the papers. And these photos show her at the scene of the crime that she's been—her body has been moved. she obviously could in no way be mistaken for being alive.

(1 RT 320-321; see also 1 RT 258.)

The court took the matter under submission. The following day, it tentatively ruled that it would admit the photographs under the authority of *People v. Crittendon* (1994) 9 Cal.4th 83. (2 RT 323.) Although it invited counsel to read the case and submit further arguments before the court issued a final ruling, the parties do not appear to have revisited the issue.

Seven photographs of the victim, marked as Court Exhibits 16-22, were admitted at trial. Exhibits 16 and 17 were crime scene photos discussed by the officers who responded to the scene. They depicted two views of the bedroom where the victim was found and the position of the victim on the floor with a red towel around her neck and aspirated blood on her pant leg. (14 RT 3379-3380, 3462-3463, 3469.) Exhibit 18, also discussed by the officers, was another crime scene photo depicting a close-up of the victim as she appeared when the comforter covering her body was first removed. It showed the red

towel over her mouth, the visible wound to her neck, and the position of the rope that was around her neck. (14 RT 3380, 3466.) The coroner used this photo as well to discuss the furrow on the victim's neck left by the pressure of the rope. (16 RT 3957.) Exhibits 19 through 22 were autopsy photos discussed by the coroner. Exhibit 19 depicted the victim at the coroner's office, lying on a stainless steel operating table. (16 RT 3950.) Exhibit 20 showed the back side of the victim's body. (*Ibid.*) Exhibit 21 was a close-up of the victim's wrists. (*Ibid.*) Exhibit 22 depicted the cut on the victim's throat. (16 RT 3955.)

B. Forfeiture

Because the exhibit numbers at trial do not correspond to those discussed at the hearing on the in limine motion, it is unclear whether any of the photographs ultimately admitted were ones objected to by the defense prior to trial. Significantly, however, the defense failed to object to any of the foregoing photographs either at the time they were discussed by the relevant witnesses or at the close of trial. Indeed, defense counsel agreed that the photographs *were* admissible. Hajek's counsel advised the court at the close of trial, "Your Honor, as to exhibits numbers one through 56, my understanding is that some of those exhibits already have been entered into evidence. But on behalf of Mr. Hajek if the district attorney is offering those, I have no objection to their admissibility. My objections would start at number 57." (17 RT 4134.) Vo's counsel echoed: "That would be our position also. For the record, we offer no objection to the government's motion as to exhibits one through 56." (*Ibid.*) Under the circumstances, appellants' present objections to the photographs have been forfeited or abandoned. (Evid. Code, § 353, subd. (a); *People v. Farnham* (2002) 28 Cal.4th 107, 185.)

C. The Photographs Were Properly Admitted

Assuming, arguendo, the claim is not forfeited, the photographs were properly admitted. ""'The admission of photographs of a victim lies within the broad discretion of the trial court when a claim is made that they are unduly gruesome or inflammatory."'" (*People v. Farnham*, *supra*, 28 Cal.4th at p. 185.) On appeal, the trial court's ruling is reviewed for abuse of discretion. (*Ibid.*)

No abuse appears here. "'Generally, photographs that show the manner in which a victim was wounded are relevant to the determination of malice, aggravation and penalty. [Citations.] Here, the [crime scene and] autopsy photographs not only showed criminal activity that involved the use of force or violence, but they aided [the coroner] in his explanation to the jury regarding the . . . nature of the wounds inflicted upon the victim prior to death." (*Farnham*, *supra*, at p. 185.) They were also "highly probative of the prosecution's theory that [Su Hung] was the victim of a torture murder." (*Ibid.*; accord, *People v. Heard* (2003) 31 Cal.4th 946, 972-978 [32 photographs of crime scene and victim's body relevant to establish her injuries and the savageness of the attack, the fact that a murder had occurred, and the means by which the defendant accomplished the fatal assault]; *People v. Crittenden*, *supra*, 9 Cal.4th at pp. 132-133 [24 photographs of crime scenes and two victims' bodies relevant to establish manner in which the victims were killed, including the nature and placement of the victims' wounds; to establish premeditation, deliberation, and intent to torture; and to clarify testimony of medical examiner].)

The photographs were not impermissibly cumulative as Vo suggests because witnesses testified to the appearance of the crime scene and the victim's injuries. (Vo AOB 334-335.) "Photographs are not cumulative simply because they illustrate facts otherwise presented through testimony." (*Farnham*, *supra*,

at p. 185.) "The prosecutor """was not obliged to prove these details solely from the testimony of live witnesses' [citation] or to accept antiseptic stipulations in lieu of photographic evidence. "[T]he jury was entitled to see how the physical details of the scene and the bod[ies] supported the prosecution theory of [first degree murder]."""" (*Crittenden*, *supra*, at p. 133; see also *id.* at pp. 134-135 ["We often have rejected the contention that photographs of a murder victim must be excluded as cumulative simply because testimony also has been introduced to prove the facts that the photographs are intended to establish."].)

Nor were the photographs unduly gruesome or inflammatory. As the prosecutor noted, they showed the victim's wounds and how she appeared at the scene, but did not show her cut open or dismembered for purposes of autopsy. They were also not great in number. In *Farnham*, this Court upheld the introduction of 32 photographs of the victim's body and injuries, concluding that "while the number of photographs admitted here was relatively large and several were superficially similar, they provided different views of [the victim's] wounds that corroborated [the medical examiner's] testimony and were helpful to a full understanding of the prosecution's torture-murder theory." (*Farnham*, *supra*, at pp. 185-186; see also *Crittenden*, *supra*, at pp. 132-136 [upholding admission of 24 photographs].) The photographs admitted in this case were far fewer in number and relevant for the same reasons. Although unpleasant, they were not "unduly shocking or inflammatory." (*Crittenden*, *supra*, at p. 134.) Nor did they "include multiple exposures of very similar views." (*Ibid.*) For these reasons, the trial court properly exercised its discretion in admitting them and appellants' due process rights were not violated. (See *Crittenden*, *supra*, at p. 135, fn. 10.)

Contrary to appellants' contention, the court did not fail in its duty to give "individualized consideration [to] each challenged piece of evidence." (Vo

AOB 335.) The trial court was not required to "provide detailed and precise descriptions of the weighing process it engaged in as to each photograph, pursuant to Evidence Code section 352." (*Crittenden*, *supra*, at p. 135.) The court viewed the challenged photographs at the hearing on Vo's motion to exclude and heard argument from the parties as to their relevance and potential for prejudice. It took the matter under submission and denied the motion to exclude the following day, not in blind reliance on *Crittenden*, but in light of what had occurred at the hearing the day before, knowing that "it was required to engage in the weighing process required by Evidence Code section 352." (*Crittenden*, *supra*, at p. 135.)

Any error in admitting the photographs was also harmless. "The photographs at issue did not disclose to the jury any information that was not presented in detail through the testimony of the witnesses. Although the photographs were unpleasant, they were not unusually disturbing or unduly gruesome, and were no more inflammatory than the graphic testimony provided by a number of the prosecution's witnesses." (*People v. Heard*, *supra*, 31 Cal.4th at p. 978.) Here, those witnesses included the officers who responded to the scene of the crime and the coroner, who described the victim's injuries in detail.

As for appellants' claim that the prosecutor improperly used the photographs to argue that Hajek did not kill the victim in an explosion of rage, but in a cold, calculating manner (Vo AOB 333), their failure to timely object on grounds of prosecutorial misconduct and request an admonition from the court bars their contentions on appeal. (*Farnham*, *supra*, at p. 186.) In any event, the prosecutor's argument constituted fair comment on the evidence as it was based on inferences that could reasonably be drawn from the photographs and other evidence. (*Ibid.*) The prosecutor's reference to the photographs, made for the first time in rebuttal, was also so brief and mild that it could not

possibly have prejudiced appellants.[46/]

XV.

EVIDENCE OF SO-CALLED SATAN WORSHIP WAS PROPERLY ADMITTED

Hajek contends the trial court erred in permitting the prosecution to introduce evidence about his alleged interest in Satan worship. (Hajek AOB 133-145 [Arg. IX].) Specifically, he objects to testimony given by Lori Nguyen and a letter Hajek wrote to Vo after the crime in which he mentioned Satan and the devil. The claim should be rejected.

A. The Disputed Evidence

1. Lori Nguyen's Testimony

During the prosecutor's examination of Lori Nguyen, the following exchange took place:

> Q: Did Mr. Hajek ever tell you about his interest in Satanism or Satanic things?
>
> A: Yes.

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46. Appellants' exaggerated account of how the prosecutor exploited the "horrific" photographs is exposed when one quotes the offending argument, which appellants fail to do: "And if you look at the—beyond just the wounds themselves—and I apologize if you get offended by the actual pictures of the victim, and that's the reason those pictures are admitted—I mean to look at the killing itself, it was in no way an out of control explosion of rage killing. This theory is contradicted by the actual facts." (21 RT 5564.) He went on to argue, *from the testimonial evidence*, that the killing was methodical. A short while later, the prosecutor referred to the photographs for the second and last time when he stated: "How does a person get strangled by a rope? Has to be a great deal of pressure to tighten the noose. Hard enough to break the cartilage in your neck. As autopsy photos show and Dr. Ozoa described, it wasn't just a momentary tightening. It left a furrow in her skin, a groove, by continued pressure and force on that rope." (21 RT 5566.)

Q: What did he tell you in that regard?

Mr. Blackman [Vo's counsel]: I object on the grounds this would be hearsay.

Ms. Greenwood [Hajek's counsel]: I'm not certain it is relevant.

Mr. Waite [prosecutor]: Well, I think it's going to be relevant to his mental state and his motivation.

Ms. Greenwood: If he wants to get into it, let him get into it. I don't care.

The Court: The objection will be overruled. But it is a statement by Mr. Hajek and it does not flop over to Mr. Vo.

By Mr. Waite:

Q: What did he tell you about his interest in Satan?

A: He just likes Ozzie Osborne.

Q: That's a rock group?

A: Yes.

Q: Anything else?

A: Well, he likes to light incense a lot.

Q: Is he interested in Satanic rituals?

Ms. Greenwood: That assumes this young woman even knows what a Satanic ritual is.

The Court: Sustained.

Ms. Greenwood: Thank you.

By Mr. Waite:

Q: Ever hear Mr. Hajek talking about wanting to do Satanic rituals?

A: No.

Q: Ever hear him say he wanted to kill someone as part of his Satanic beliefs?

Ms. Greenwood: I'll object at this point.

The Court: Sustained.

By Mr. Waite:

Q: Did he ever say he would kill the people in this case, Ellen Wang's grandmother, for this reason?

Ms. Greenwood: Objection, there is no good faith.

The Court: Read back the question.

(Whereupon, the reporter read back the question.)

The Court: That objection is overruled. You may answer.

The Witness: No.

(17 RT 4090-4091.)

2. Exhibit 64

At the end of the prosecution's case-in-chief, the parties discussed the admissibility of Exhibit 64, a two-page letter Hajek wrote to Vo from jail, in which he stated, inter alia, "The Devil made me do it! Satan! I'm still trying to get a Satanic Bible in here." The prosecutor argued that the letter was relevant for a number of reasons. With respect to the Satan reference, the prosecutor noted, "It does reveal his state of mind and is relevant for what he did, the killing, in this case." (17 RT 4160.) When asked his position, Vo's counsel stated, "From my client's perspective, we would ask that 64 be admitted." (17 RT 4162.)

Hajek's counsel conceded that some of the statements in the letter were relevant to Hajek's mental defense, but said that "we have an issue as to whether the entire letter is going to come in or not." (17 RT 4161.) She argued that all of Hajek's letters should be examined to see whether there was inflammatory evidence that did not tend to prove a disputed issue, in which case it should be excluded under Evidence Code section 352 and to ensure reliability because it was a capital case. (17 RT 4161.) She continued, "I think the problem I have in particular with the District Attorney in his wanting to go into the Satanic references in my client's letters is that the District Attorney's theory of the case is not that this was a Satanic ritual killing." (17 RT 4161.) Rather, the prosecutor was simply trying to get the jury to seize on something that made Hajek look bad. (17 RT 4162.) The court admitted the letter in its entirety.

B. Evidence of So-Called Satan Worship Was Properly Admitted; Any Alleged Error Was Not Prejudicial as to Hajek

As noted above, Hajek did not object initially when the prosecutor asked Lori Nguyen if she knew about his interest in Satanism. When the prosecutor told the court such evidence was relevant to his mental state and motivation, Hajek's counsel replied, "If he wants to get into it, let him get into it. I don't care." (17 RT 4090.) Having forfeited his objection below, appellant cannot claim now that the prosecutor's questions about his interest in Satan and Satanic rituals were improper.

Hajek did object when the prosecutor asked Nguyen whether Hajek told her he intended to kill the Wangs as part of his Satanic beliefs, arguing he had no good faith basis for asking the question. The objection, however, was properly overruled. "[A] prosecutor may not '"ask questions of a witness that suggest facts harmful to a defendant, absent a good faith belief that such facts exist."'" [Citation.] (*People v. Young* (2005) 34 Cal.4th 1149, 1186.) In this case, to establish misconduct, Hajek had to show that the prosecutor lacked evidence

that he committed the crimes against the Wangs as part of his Satanic beliefs. The prosecutor did have such evidence, however, namely, Hajek's admission in his letter that "[t]he devil made me do it! Satan!" (People's Exh. 64.) Having said this to Vo, it is not inconceivable that he would have said something similar to Nguyen, another close friend.[47/] Hence, the question was proper.

Assuming, arguendo, the questions were improper, Hajek was not prejudiced. Although Nguyen answered affirmatively the question whether Hajek told her about his interest in Satanism—the question counsel forfeited by expressly declining to object—she was unable to point to anything Hajek said or did to display this interest beyond listening to Ozzie Osborne, a popular rock musician, and lighting incense. The jury was hardly likely to hold such innocent activity against Hajek, especially in light of the overwhelming direct evidence of his involvement in the murder and attempted murders. As for the question whether Hajek told Nguyen he intended to kill the Wangs because of his Satanic beliefs, her answer was no, prompting the prosecutor to give up and move on to a different line of questioning. Any taint from the questions themselves was also dispelled by Dr. Minagawa, who testified persuasively that many adolescents are interested in Ozzie Osborne and Satanic material, that it is not an indicator of antisocial personality disorder, and that most kids rarely act on the music they hear. (19 RT 4787; 20 RT 4898-4901.)

Nor did the trial court err in admitting Exhibit 64. Hajek argues the letter was irrelevant and should have been excluded under section 352. (Hajek AOB 136-137.) He is mistaken. The trial court is vested with wide discretion in

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47. Hajek also objected, without stating any ground, to a prior question asking whether Hajek ever told Nguyen he wanted to kill someone as part of his Satanic beliefs. The question was proper for the reasons discussed above. In any event, that particular objection was sustained and Nguyen did not answer so there was no possibility of harm to Hajek.

determining whether evidence is relevant and its determination will not be overturned on appeal absent abuse resulting in prejudice. (*People v. Kelly* (1992) 1 Cal.4th 495, 523; *People v. Green* (1980) 27 Cal.3d 1, 19.) Relevant evidence is evidence which has "any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) Hajek's statement in the letter that "[T]he devil made me do it! Satan!" is plainly relevant to his motive for committing the crime and his consciousness of guilt. Hajek argues the prosecutor failed to establish any connection between his interest in devil worship and the killing of Su Hung. (Hajek AOB 136.) The letter itself establishes the connection. That this may not have been Hajek's only or even primary motivation is of no moment. The statement had some tendency in reason to explain Hajek's conduct and to prove that he was in fact guilty. It was not admitted, as Hajek contends, simply to show that he was evil.

Hajek also argues that the evidence constitutes improper propensity evidence under Evidence Code section 1101, subdivision (a). (Hajek AOB 138.) The claim is forfeited for failure to object on this ground below. (Evid. Code, § 353, subd. (a).) It is also without merit. Hajek's admissions in the letter were not evidence of prior bad acts to show conduct on a specified occasion. (See Evid. Code, § 1101, subd. (a) [prohibiting character evidence in the form of an opinion, evidence of reputation, or evidence of specified instances of the defendant's conduct when offered to prove his conduct on a specified occasion].) Moreover, such acts are admissible when relevant to prove something other than criminal disposition. (Evid. Code, § 1101, subd. (b).) As explained above, the admissions here were relevant to prove motive and consciousness of guilt.

The trial court also exercised its discretion properly by refusing to exclude the evidence under Evidence Code section 352. That section grants the trial

court the authority to exclude evidence if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time or create a substantial danger of undue prejudice. Prejudicial evidence in this context is evidence "which uniquely tends to evoke an emotional bias against defendant as an individual and which has very little effect on the issues." (*People v. Yu* (1983) 143 Cal.App.3d 358, 377.) The lower court's determination to admit evidence over a section 352 objection will not be disturbed on appeal unless it exceeds the bounds of reason. (*People v. Olguin* (1994) 31 Cal.App.4th 1355, 1369; *People v. Funes* (1994) 23 Cal.App.4th 1506, 1519.) It did not do so here. Because the challenged statement bore on Hajek's motive for the crimes and evidenced consciousness of guilt, it had probative value. The potential prejudicial impact on the jury, on the other hand, was not significant. The evidence took minimal time to present and was not a major focus of the trial. As defense counsel pointed out, "the District Attorney's theory of the case is not that this was a Satanic ritual killing." (17 RT 4161.)

For similar reasons, there is no reasonable probability Hajek would have achieved a more favorable outcome absent the challenged evidence, assuming it was error to admit it. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) It comprised a minimal portion of the prosecution's evidence and attention, and was vastly outweighed by the overwhelming direct evidence of Hajek's participation in the crimes against the Wangs and the fight with Ellen that preceded. Indeed, Hajek acknowledges that "[a]ccording to the State, the core reason for the defendants' decision to go to the Wang's house, which ultimately resulted in the murder of Su Hung, was to avenge Ellen Wang's mistreatment of appellant and Lori Nguyen." (Hajek AOB 143-144.) That was the theory the prosecutor concentrated on in presenting his evidence and arguing to the jury. Any persuasive force the challenged evidence had was also significantly

undercut by Dr. Minagawa's common-sense observation that adolescents frequently show interest in material adults would find inappropriate, "[b]ut fortunately, kids don't always act, and in fact, relatively rarely act on the music that they hear. And it's more of a what we call a phase as part of their development." (20 RT 4899.) Under the circumstances, there is no reasonable probability the jury would have reached a different verdict in either the guilt or penalty phase had Exhibit 64 been excluded or sanitized of Satanic reference. For the same reasons, Hajek's state and federal rights to due process and a fair trial were not compromised.[48]

C. There Is No Basis for Vo's Claim of Error

Vo also contends the trial court erred in admitting evidence of Hajek's interest in Satan worship, and further contends it was error not to provide limiting instructions prohibiting the jury from using this evidence against him. (Vo AOB 324-330 [Arg. 12].) Vo's claim is misplaced. First, as to Exhibit 64, at the close of the prosecution's case, Vo's counsel advised the court, "From my client's perspective, we would ask that 64 be admitted." (17 RT 4162.) Thus, any alleged error was invited. (See *People v. Lucero* (2000) 23 Cal.4th 692, 723.) Second, as to Lori Nguyen's testimony, the trial court overruled Vo's hearsay objection with the caveat that "it is a statement by Mr. Hajek and it does not flop over to Mr. Vo." (17 RT 4090.) The court, then, instructed the jury that the challenged testimony was not to be considered against Vo. Regardless, Vo's failure to request clarification or amplification of the court's limiting

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48. Hajek's contention that the prosecutor improperly used the so-called Satan worship evidence in his penalty phase closing argument (Hajek AOB 144-145) does not bear on the admissibility of the evidence, but on the separate question of whether there was prosecutorial misconduct, an issue raised in Hajek's Second Supplemental Opening Brief (Hajek 2nd Supp. AOB 12-14). As we explain in our response to that argument, *post*, the claim, if cognizable, is forfeited and meritless.

instruction forfeits his claim on appeal. (See *People v. Valdez* (2004) 32 Cal.4th 73, 113.) Vo has no cause for complaint as he did not request a limiting instruction in the first instance, and the trial court had no duty to give one sua sponte. (*People v. Macias* (1997) 16 Cal.4th 739, 746, fn. 3; Evid. Code, § 355.)

XVI.

ADMISSION OF UNCHARGED CONDUCT BY HAJEK DID NOT PREJUDICE HIM

Hajek contends the trial court erred in permitting Vo to introduce evidence concerning (1) his destruction of jail property, and (2) his assault on a coworker at Round Table Pizza. (Hajek AOB 146-152 [Arg. X].) Respondent submits that Hajek could not have been prejudiced by the admission of this evidence.

A. Factual Background

Prior to trial, Hajek filed a motion to preclude the prosecutor from introducing certain evidence, including the incident in which he destroyed jail property.[49] (6 CT 1613.) The prosecutor responded that he did not intend to present this evidence. (Brief Regarding Admissibility of Specific Evidence [Response to Hajek's Motion #7] at p. 12; 2 RT 324; 12 RT 2947.) Vo's counsel indicated that he would offer it, but reserved argument until a later time. (2 RT 327; 12 RT 2948.)

The prosecutor did not present evidence of either the jail incident or the Round Table incident in his case-in-chief. Both incidents were discussed during Hajek's defense case, however. Hajek's mother testified that her son in his teenage years became "very explosive, angry, easily frustrated, [and] very childish." (18 RT 4227; see also 18 RT 4238.) He also became involved in the juvenile justice system and was arrested for indecent exposure and two other

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49. The motion did not address the Round Table assault.

misdemeanors. (18 RT 4226, 4232.)

During cross-examination by the prosecutor, Hajek's mother gave additional details about her son's contact with law enforcement with no objection by the defense. At age 15, he was arrested for having illegal weapons and displaying them in a threatening manner. (18 RT 4279.) Hajek told his mother that the weapons were ornamental nunchucks that he planned to use to decorate his room; he denied threatening anyone with them. (18 RT 4280-4281.) He was also arrested for driving a stolen car and being in possession of a stolen bank card. (18 RT 4291.) He told his mother that he and his friend believed the car was abandoned and that his friend took it for a joyride and then gave it to Hajek to drive home. (18 RT 4291-4292.) Finally, Hajek's mother testified without objection from the defense that her son had fought with a coworker at Round Table Pizza, breaking the coworker's nose. Hajek told her that he and the other boy were arguing over a tape and that the other boy pushed him first. (18 RT 4294-4295.) Hajek, however, was fired from his job because of the fight. (18 RT 4296.) All of the above incidents were also elicited by Hajek's counsel during her examination of defense witness Sally Lowell, Hajek's former probation officer. (18 RT 4349, 4363-4364, 4390.) Lowell, like Mrs. Hajek, testified on cross-examination that Hajek claimed the Round Table incident started when the victim tried to take a tape away from him. (18 RT 4402, 4426-4427.)

The jail incident was discussed by Hajek's expert witness, psychologist Rahn Minagawa, who opined that Hajek suffered from cyclothymic disorder. Minagawa noted that Hajek's behavior stabilized when the jail put him on Lithium in August 1991. In May 1992, however, when the jail stopped medicating him for a period of time due to misplacement of his consent form, he suffered another manic episode during which he inflicted substantial damage to jail property, including pulling a sink off the wall and smashing a television.

(19 RT 4690-4691.)

Before Vo's case-in-chief, Hajek's counsel objected to Vo's intention to call the victim of the Round Table assault and the correctional officer who witnessed the jail vandalism incident:

> I do take a position as to proving up the jail acting out incident and the Round Table Pizza disturbance. And the reason is because the jury has heard extensive testimony about that and it's clear that Mr. Hajek and I are not disputing those facts. So why there has to be additional testimony in order to simply confirm it when we are not denying it, in any event, and what we, in fact, put in front of the jury, I think is not necessary. And under 352, would be my belief that all it does is to prejudice Mr. Hajek because Mr. Blackman certainly wants to make whatever arguments he can from those incidents and he is free to do so. But the addition of the live witnesses is something that, at this point, is superfluous and comes into the realm, I think, of bad character evidence at that point.

(20 RT 4854.)

Vo's counsel responded that the Round Table victim would explain that the assault was not a dispute among teenagers about a tape as Mrs. Hajek described it, but an unprovoked attack by Hajek. (20 RT 4856.) Vo's counsel did not specifically address the jail incident. The court ruled that both witnesses could be called without stating the basis for its ruling. (20 RT 4857.)

James O'Brien thereafter testified that while he and Hajek were working at Round Table in June 1989, Hajek approached him outside on one occasion, said something about not liking that O'Brien got off work at the time that he did, and hit him in the face. (20 RT 4928, 4930, 4932.) O'Brien tried to get away, but Hajek chased him, and hit him a couple more times, breaking O'Brien's nose. (20 RT 4929-4930.) They never had a dispute about a tape or anything else prior to that day. (20 RT 4930, 4932.)

Correctional officer Douglas Vander Esch testified that in May 1992, Hajek asked to speak to a sergeant at the jail about his housing classification. (20 RT 4936-4940.) When told to fill out a grievance form, Hajek said he never got an

answer with a request form. (20 RT 4940, 4974.) Esch then said he would notify the sergeant that Hajek wanted to talk to him. (20 RT 4941, 4974.) Hajek walked away calmly but a few seconds later used a metal mop ringer to break or damage property in the day room, including the television, clock, telephone, sink, shower windows, and bulletin boards. (20 RT 4943-4944, 4963-4967.) Hajek told Esch, "I bet I can see a sergeant right now." (20 RT 4944, 4962.) When a sergeant, who heard the commotion, walked in, Hajek said, "See, I knew I could get a fucking sergeant." (20 RT 4945, 4962.)

B. Any Error in Admitting the Challenged Evidence Was Harmless

Hajek contends the trial court violated Evidence Code section 1101, subdivision (a) by permitting Vo to introduce the Round Table and jail incidents. That section precludes evidence of other crimes or acts committed by the defendant to prove the defendant's general propensity to commit crimes. Other crimes evidence is admissible, however, when relevant to prove some fact at issue, such as identity, opportunity, intent, knowledge, or the existence of a common plan or scheme. (Evid. Code, § 1101, subd. (b).) On appeal, a trial court's ruling pursuant to Evidence Code section 1101 is reviewed for abuse of discretion.[50] (*People v. Kipp* (1998) 18 Cal.4th 349, 369, 371.)

As noted, the court did not articulate its basis for allowing O'Brien and Esch to testify. Assuming it abused its discretion in admitting the evidence, however, there is no reasonable probability Hajek would have obtained a more favorable result absent the error. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) As Hajek's counsel acknowledged, the jury heard "extensive testimony about [the challenged incidents] and Mr. Hajek and I are not disputing those facts." (20 RT 4854.) The concession was well taken. As noted above, appellant's mother

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50. The same standard applies for reviewing a trial court's ruling under Evidence Code section 352, to which Hajek's counsel also alluded in voicing her objection.

and probation officer both testified about the Round Table incident, and Dr. Minagawa cited the jail incident as an example of how Hajek's mental illness caused him to behave. Under the circumstances, Hajek could not have been prejudiced by O'Brien's and Esch's testimony. As his own counsel recognized, this additional testimony "simply confirm[ed] . . . what we, in fact, put in front of the jury . . . ." (20 RT 4854.)

Indeed, Hajek and Vo used the challenged evidence to their advantage, albeit in different ways. Hajek attempted to show that he suffered a genuine mental illness and thus did not form the specific intent necessary for many of the charged crimes. Vo used the evidence to show that Hajek's mental illness caused him to behave impulsively and lose control. This, in turn, lent credibility to Vo's theory that Hajek was the one who killed Su Hung, and that he did so in a sudden fit of rage, not because he was carrying out a preconceived plan to commit murder. (See 1 RT 101-102 [Vo's counsel argues on the motion to sever that Vo was at the house for the limited purpose of verbally threatening and possibly assaulting Ellen, and that while in the house, Hajek lost control due to his psychiatric problems and ultimately ended up killing the victim].)

Hajek's defense was, in fact, replete with evidence supporting Vo's theory that Hajek was prone to sudden, inappropriate, and uncontrolled anger, even aside from the Round Table and jail incidents, further diminishing their significance. Hajek's mother testified that her son was "very explosive, angry, easily frustrated, [and] very childish." (18 RT 4227; see also 18 RT 4238.) Dr. Griffin, the psychologist who treated him for six months prior to his hospitalization, testified that Hajek did not perceive things the way other people did, had low frustration tolerance, and would overreact with anger and respond impulsively in situations that could be handled with discussion and reasoning. (18 RT 4477-4478, 4480.) Hajek's expert witness, Dr. Minagawa, likewise

testified that Hajek suffered from a disorder characterized by, inter alia, inappropriate anger and irritability. (19 RT 4658; see also 19 RT 4340 [officer who arrested Hajek for indecent exposure observed him to be uncontrollably angry for no apparent reason]; 19 RT 4388, 4390, 4396, 4403-4404 [probation officer testified that his increasing anger, outbursts, and lack of emotional control led her to refer him for commitment to mental hospital].) Accordingly, exclusion of the challenged testimony would not have foreclosed Vo's argument that Hajek lost control and killed the victim on his own.[51/]

Finally, the evidence against Hajek was overwhelming. He told Tevya Moriarty of his intent to commit the crime. He went to the Wang residence armed with a realistic-looking gun. He helped hold the family prisoner in their own home while waiting for Ellen, whom he had physically fought with four days earlier, to return home. While at the house, he verbally threatened Cary, twice pointed the gun at Alice, and tied up Tony. There was blood on his glove consistent with the victim's. After his arrest, he sent a threatening letter to Cary and wrote letters with damaging admissions to Vo. Under the circumstances, the evidence that he punched his coworker a year and a half earlier and destroyed some jail property would not have made a difference in the jury's verdict. That evidence was insignificant in comparison to the abundant direct evidence of his guilt for the murder of Su Hung and attempted murders of the other members of the Wang family. Any alleged error was harmless.

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51. The prosecutor, for his part, did not use the other-acts evidence to argue that Hajek was the killer. He argued both appellants participated in the killing. (22 RT 5566-5568.)

XVII.

THE TRIAL COURT PROPERLY ALLOWED NORMAN LEUNG ("BUCKET") TO TESTIFY

Hajek contends the trial court abused its discretion in refusing to hold a hearing pursuant to Evidence Code section 402 to determine whether Norman Leung ("Bucket") would be permitted to testify. (Hajek AOB 153-163 [Arg. XI].) We disagree.

A. Factual Background

Before Bucket testified, the prosecutor asked to admit three letters Hajek wrote to Vo that referred to Bucket. (16 RT 3896.) In Exhibit 78, Hajek discussed how he and Vo asked Bucket to accompany them the day before the instant crime and surmised that Bucket had told this to the police. In Exhibit 65, he again referenced the invitation to Bucket, asked if Vo was mad Hajek got him (Vo) involved, and said Vo could have said "it's not my problem" like Bucket. In Exhibit 75, Hajek admitted threatening the "Chinese coward" (Bucket) and said Bucket's parents wanted to call the police, but Bucket told them not to because he knew it would not do any good. (16 RT 3896-3899.)

The prosecutor argued that the letters were admissions as to Hajek and coconspirator statements as to both appellants under Evidence Code section 1223. (16 RT 3905.) The defense objected to the letters. Vo asked the court to take Bucket's testimony out of the presence of the jury to determine whether the prosecutor could establish a conspiracy before admitting the letters. (16 RT 3907; see also 16 RT 3910.) Hajek argued strongly against admitting the letters, saying they did not establish a conspiracy and asserting that the references to threats were not relevant to any of the issues in the case. (16 RT 3902.) Hajek's counsel questioned "why the district attorney can't simply ask Mr. Leung, were you asked to go do something with Mr. Hajek and Mr. Vo?" (16 RT 3902.) She also argued that the prosecutor should not be permitted to

confront Bucket with the letters because the prosecutor knew from his investigator's interview with Bucket that he would deny everything.

> So then what he seeks to do is get him up in front of the jury and confront him with all this stuff. And, frankly, there's no question—just by asking the questions in and of themselves, were you threatened by Mr. Hajek, isn't it a fact he asked you to participate in this, that, and the other, it is inherently prejudicial. It is exactly the type of thing that frankly can lead a jury astray, no matter how much you instruct them the questions of the attorney are not evidence. I think there's a good faith problem.

(16 RT 3908.)

The prosecutor responded that the letters were admissible on their own and that he fully expected that the witness would deny what was in them "like a scared, threatened witness would." (16 RT 3910-3911.) The court ruled that it would permit the prosecutor to ask Bucket about the content of the letters, but reserved ruling on the admissibility of the letters themselves. (16 RT 3910-3911.)

Bucket thereafter testified that he did not recall Hajek asking him to go with him and Vo to the Wangs' house to get revenge on Ellen, although it was possible that he did. (16 RT 3927, 3930-3931.) Bucket also did not recall getting letters from Hajek threatening him if he talked. Nor did he recall going into hiding because he was afraid. (16 RT 3928-3930.) According to Bucket, "It may have happened, it may not have happened. I can't remember it." (16 RT 3930.)

At the close of the People's case-in-chief, the court admitted Exhibits 65 and 78, but excluded Exhibit 75. (17 RT 4167, 4175, 4178.)

B. The Trial Court Did Not Abuse Its Discretion in Permitting Bucket to Testify Without a Hearing Under Evidence Code Section 402

Hajek contends that the trial court abused its discretion by refusing Vo's request to take Bucket's testimony out of the presence of the jury. (Hajek AOB

155.) As he appears to recognize, he did not make a similar request or join in Vo's, thereby forfeiting the claim. Hajek's objection, rather, was to the admission or use of the letters. Counsel thus questioned "why the district attorney can't simply ask Mr. Leung, were you asked to go do something with Mr. Hajek and Mr. Vo?" (16 RT 3902.) Later, counsel backtracked and suggested that the prosecutor should not be able to ask Bucket at all whether he was asked to participate in the crime or whether he was threatened because such questions were themselves prejudicial. (16 RT 3908.) Since Hajek never requested a hearing pursuant to Evidence Code section 402, it is too late to piggyback on Vo's motion now.

In any event, the court did not err. While Evidence Code section 402, subdivision (b) requires a hearing out of the presence of the jury only when a defendant's confession or admission is at issue, under other circumstances, the section grants the trial court discretion in the matter.

The trial court did not abuse its discretion in refusing an evidentiary hearing here because there was no material factual dispute that required Bucket's testimony. Based on Hajek's letters, the prosecutor had a good faith basis for asking Bucket whether he was asked to accompany Hajek and Vo to the Wangs and whether Hajek threatened to harm him if he talked to the police. (*People v. Warren* (1988) 45 Cal.3d 470, 481 ["It is improper for a prosecutor to ask questions of a witness that suggest facts harmful to a defendant, absent a good faith belief such facts exist."].) The questions were also designed to elicit relevant information: evidence that Bucket was invited to accompany appellants the day before the crime would tend to prove premeditation and the existence of a conspiracy; evidence that he was subsequently threatened would tend to prove consciousness of guilt on Hajek's part and a possible incentive to lie on Bucket's part.

That the prosecutor expected Bucket to deny being involved beforehand or threatened afterward "like a scared, threatened witness would"(16 RT 3911), does not mean he was not entitled to ask the questions in the hope that once on the witness stand in front of a jury and under the solemnity of an oath, he would opt to tell the truth (that is, what the prosecutor had a good faith basis for believing was the truth). Indeed, our system of justice rests on the assumption that witnesses sworn to testify truthfully will in fact do so. Hajek had no right to keep Bucket off the witness stand or require a preview of his testimony when his own written admissions identified him as a relevant witness for the prosecution. (Cf. Evid. Code, § 911, subd. (c) ["No person has a privilege that another shall not be a witness"].)

C. Bucket's Testimony Was Not Excludable Under Evidence Code Section 352

Hajek next contends the trial court erred in not excluding Bucket's testimony under Evidence Code section 352. Once again, Vo, not Hajek, objected on this ground; that objection, moreover, was to the letters, not to Bucket's testimony. (16 RT 3903.) The present claim is, accordingly, forfeited. (Evid. Code, § 353.)

It is also without merit. Evidence Code section 352 grants the trial court the authority to exclude evidence if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time or create a substantial danger of undue prejudice. A trial court's ruling under section 352 is reviewed for abuse of discretion. (*People v. Siripongs*, *supra*, 45 Cal.3d at p. 574.) No abuse appears here. As argued in the previous section, the prosecutor's questions sought highly probative evidence regarding the premeditated nature of the crime, the existence of a conspiracy, and Hajek's consciousness of guilt. Such evidence did not create a substantial danger of undue prejudice, because it was not of the type that would evoke an emotional

bias against Hajek while having very little effect on the issues. (*People v. Yu*, *supra*, 143 Cal.App.3d at p. 377.) In any event, Bucket admitted neither the prior invitation nor the subsequent threat. Hajek's actual complaint is that the prosecutor's questions were prejudicial, but those, not being "evidence," are not subject to exclusion under section 352. They may be objected to as improper, irrelevant, and such. As we have shown, however, the questions themselves were appropriate. They simply did not yield information that helped the prosecution's case.

D. Any Error Was Harmless

Assuming, arguendo, that it was error to permit the prosecution to ask Bucket about the invitation and threat, any error was harmless. Hajek wrote about the invitation in Exhibits 65 and 78, which were admitted into evidence. Although Exhibit 75, in which he admitted threatening Bucket, was not admitted, Exhibits 76 and 77, in which he talked about having a plan to get rid of Tevya, were admitted. (19 RT 4793.) The jury also received the letter in which Hajek threatened Cary Wang (Exh. 54), which resulted in his conviction for dissuading a witness. Given these threats against other witnesses, and Hajek's conduct before, during, and after the crime, which overwhelmingly established his guilt for the crimes, there is no reasonable probability the prosecutor's questions about threats to Bucket, which Bucket denied, affected the outcome of the trial and Hajek's due process rights were not violated.

XVIII.

THE PROSECUTOR DID NOT COMMIT *DOYLE* ERROR BY QUESTIONING MCROBIN VO ABOUT WHAT HAJEK TOLD HIM

Hajek contends the prosecutor committed error under *Doyle v. Ohio* (1976) 426 U.S. 610 by eliciting evidence of his post-arrest silence about the crime. Specifically, he contends the prosecutor improperly elicited testimony that when

McRobin Vo visited Hajek in jail after his arrest, Hajek did not want to talk about what happened at the Wang residence. (Hajek AOB 164-170 [Arg. XII].) The contention has no merit.

A. Factual Background

The prosecutor called McRobin, appellant Vo's brother, during his case-in-chief. McRobin testified that he visited Hajek in jail in 1991. When he asked Hajek what had happened at the Wang residence, Hajek did not want to talk about it. (14 RT 3532.) Hajek's counsel objected to further questioning about visits and conversations between Hajek and McRobin, arguing that there was no connection between the two men and McRobin's failure to recall their conversations would make him appear like an evasive witness for no reason. (14 RT 3533.) The prosecutor replied, "I wasn't going to spend a lot of time going over specific conversations from here on out. . . . I will, however, spend some time asking him about his observations in general of Mr. Hajek's mental state and his ability to talk about these events." (14 RT 3533.) When the court asked whether the prosecutor intended to get into Hajek's failure to deny the crime to McRobin, the prosecutor replied, "No, I don't believe so. I think as far as questions about what he did and his failure to deny, I am not interested in asking anymore than I have already asked, when the only thing I would really be interested in would be his observations as to his mental state." (14 RT 3534.)

The following day, Hajek's counsel objected to further questioning about Hajek not wanting to talk about the murder with McRobin, arguing that it would violate his Fifth Amendment privilege against self-incrimination:

> In thinking it over last night, frankly, I became more and more uncomfortable because of the issue of my client essentially saying he didn't want to talk when he was speaking with Mr. [McRobin] Vo. Based on that I would at this time lodge a further objection based on the fact that I think further inquiry into this would be a violation of my

client's Fifth Amendment right against self-incrimination.

(15 RT 3535.) Counsel also argued that such evidence should be excluded under Evidence Code section 352. (15 RT 3535-3536.) The court noted that there was no state action involved and that the prosecutor was only going to ask McRobin about Hajek's affect. The prosecutor affirmed, "Yeah, just general mental state questions from now on." (15 RT 3536.) Counsel did not ask the court to strike the brief testimony the witness had already given about Hajek's reluctance to speak to him about the crime, and no further questions were asked on this point.

B. Hajek's Claim is Forfeited

Hajek contends that the prosecutor committed error under *Doyle v. Ohio*, *supra*, 426 U.S. 610 by eliciting testimony from McRobin about Hajek's post-arrest silence about the crime. The claim is forfeited. As noted above, after the question was asked and answered, counsel objected to further questioning on this subject on Fifth Amendment grounds. Although the court noted that there was no state action involved, it also noted that the prosecutor would not pursue this line of questioning. The prosecutor agreed and asked no further questions on it. Nor did he comment on Hajek's silence in closing argument. Hajek's failure to move to strike the already-given testimony precludes him from complaining about its admission on appeal. (Cf. *People v. Frank* (1990) 51 Cal.3d 718, 733 ["As the People observe, defendant waived the point, having failed to move to strike the Bruce testimony. His only objection occurred, *after* the testimony was elicited, when the People sought to admit the photos."].) The same holds true for his objection under Evidence Code section 352.

C. The Prosecutor Did Not Commit *Doyle* Error

Contrary to Hajek's position, the prosecutor's question to McRobin did not violate *Doyle v. Ohio*, *supra*, 426 U.S. 610. *Doyle* held that the government

cannot use a defendant's post-*Miranda* silence as substantive evidence of guilt. It explained that silence under these circumstances is "insolubly ambiguous" and "may be nothing more than the arrestee's exercise of these *Miranda* rights." (*Id.* at p. 617.)

Here, however, Hajek's silence was not in the face of questioning by government agents, but by a private party. The Supreme Court has held that even the "most outrageous behavior by a private party seeking to secure evidence against a defendant does not make that evidence inadmissible under the due process clause." (*Colorado v. Connelly* (1986) 479 U.S. 157, 166.) Nor does *Miranda* apply to incriminating statements made to private persons in the absence of police subterfuge or intimidation. (*Arizona v. Mauro* (1982) 481 U.S. 520, 527.)

Recognizing this, *People v. Eshelman* (1990) 225 Cal.App.3d 1513, 1520, held, "*Doyle* need not apply to defendant's silence invoked [in the presence of] a private party absent a showing that such conduct was an assertion of his rights to silence and counsel. [Citation.] On the other hand, when the evidence demonstrates that defendant's silence in front of a private party results primarily from the conscious exercise of his constitutional rights, then *Doyle* should apply." Shortly after the *Eshelman* decision, this Court held, "[W]here defendant was engaged in conversation with his own sister, it was not unreasonable to permit the jury to draw an adverse inference from his silence in response to her inquiry as to why he shot the victims. [¶] The record does not suggest that the defendant believed his conversation with his sister was being monitored, or that his silence was intended as an invocation of any constitutional right." (*People v. Medina* (1990) 51 Cal.3d 870, 890; see also *People v. Delgado* (1992) 10 Cal.App.4th 1837, 1842, fn. 2 [approving the *Eshelman* test].)

Likewise here, there was no evidence that Hajek's reluctance to talk to McRobin about the crime was an invocation of his right to silence. *Franklin v. Duncan* (N.D. Cal. 1995) 884 F.Supp. 1435, cited by Hajek, is distinguishable. The defendant there was confronted by his daughter, his accuser, in jail at the behest of the prosecutor, and his response to her suggestion that he tell the truth was to point to a sign in the visiting room indicating "Conversations May Be Monitored." The district court stated in dicta that even if the defendant had not pointed to the sign, his knowledge that the government could be monitoring his conversation rendered his silence "insolubly ambiguous" and inadmissible against him at trial under *Doyle*. (*Id.* at pp. 1447-1448.) The opinion of a lower federal court is not controlling. (*People v. Williams* (1997) 16 Cal.4th 153, 190.) Regardless, this Court should reject *Franklin*'s overbroad proposition. In any event, there is no evidence in this case that Hajek's conversations were in fact monitored, and if they were, that Hajek knew about it.[52/]

D. Any Alleged Error Was Harmless

Assuming, arguendo, that there was *Doyle* error, it was harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.) The prosecutor's dialogue with McRobin about Hajek not wanting to talk about the Wang crimes was very brief and was not mentioned in closing argument. (Compare *Franklin v. Duncan*, *supra*, 884 F.Supp. at p. 1448 [error found

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52. Nor did the prosecutor's brief questioning about what, if anything, Hajek told McRobin about the crime violate Evidence Code section 352. Hajek not wanting to talk about the crime certainly had some tendency in reason to prove consciousness of guilt. (Evid. Code, § 210.) That probative value was not substantially outweighed by the minor amount of time consumed by the questions. Nor did the evidence "uniquely tend[] to evoke an emotional bias against defendant as an individual" (*People v. Yu*, *supra*, 143 Cal.App.3d at p. 377) so as to qualify as prejudicial for purposes of section 352.

prejudicial where "the prosecution told the jury repeatedly that petitioner had remained silent in the face of an accusation of guilt"].) Moreover, the evidence of Hajek's guilt was overwhelming. He told Tevya Moriarty of his plan to kill the Wang family, his actions on the day of the crime were consistent with that plan, and his actions after arrest, including his numerous letters to Vo and threats to Cary Wang, amply demonstrate his consciousness of guilt. In light of the entire record, Hajek's reluctance to discuss the crime with his co-defendant's brother had no derogatory implication of guilt and there is no possibility it affected the outcome of the case.

XIX.

THE JURY WAS PROPERLY INSTRUCTED ON FIRST DEGREE MURDER BASED ON BURGLARY

Hajek, joined by Vo, contends the trial court erred in instructing on first degree felony murder based on burglary because the evidence showed they entered the Wang residence with the intent to commit murder. (Hajek AOB 101-110 [Arg. VI]; Vo AOB 121; see also Vo AOB 296-297 [Arg. 8.F. (arguing insufficient evidence of felony-murder)].) We disagree.

Under the merger doctrine, a felony-murder conviction cannot be predicated on the crime of assault or assault with a deadly weapon. (*People v. Ireland* (1969) 70 Cal.2d 522, 538-540.) At the time of appellants' trial, and at the time their opening briefs were filed, it was also the rule that first-degree felony-murder could not be predicated on burglary based on entry with the intent to commit assault (*People v. Sanders* (1990) 51 Cal.3d 471, 509; *People v. Wilson* (1969) 1 Cal.3d 431, 441) or murder (*People v. Garrison* (1989) 47 Cal.3d 746, 778). Although this Court recently overruled *Wilson* in *People v. Farley* (2009) 46 Cal.4th 1053, 1117-1121, and held that the felony-murder rule applies to all burglaries, including those based upon an intent to assault, the "overruling is prospective only" (*id.* at p. 1122), and does not apply to appellant's case.

Nevertheless, there was substantial evidence from which a reasonable jury could conclude that appellants entered the Wang residence with more than one intent. Based on Hajek's statements to Tevya Moriarty, the bank card found in Hajek's possession upon arrest, Vo's lack of a job and diary entry describing his need for money, Vo's letter to Shawn Mach saying he did the "job" for money, and the state of disarray in which the police found the residence, the jury could conclude that appellants intended to rob the occupants as well as murder them. As a result, the jury could properly convict appellants under a burglary-murder theory under prior law.

To ensure the jury did not convict appellants under a legally incorrect theory, the court instructed on the merger doctrine as follows: "You may not convict the defendant of first degree murder based upon the commission of burglary if the defendant entered the premises with the intent to murder. You may return a first degree verdict based on the burglary only if you find that the defendant had a non-assaultive intent when he entered." (7 CT 1923.) The prosecutor emphasized the point again in closing, explaining, "[Y]ou can't convict a defendant of first degree murder based on the commission of a burglary if the defendant entered a premises [*sic*] with the intent to murder. You may return a verdict of first degree based on burglary only if you find the defendant had a nonassaultive intent when he entered." (21 RT 5380.) Hajek's counsel discussed it as well, at some length:

> [T]his why there is no felony murder in this case. You may not convict the defendant of first degree murder based on the commission of burglary if the defendant entered the premises with the intent to murder. Why is that? Why does that make sense? Because otherwise, Mr. Waite accurately stated. He stated it is the doctrine of murder [sic]. It means every time you had somebody going into a residence to commit a killing it would automatically become a killing. That was not the intention of the felony murder law. Felony murder law was to address a situation where somebody is committing a felony and somebody is killed. It was not meant to lower the burden of proof in a situation in which the district attorney is needing to prove intentional or

premeditated murder when a person is entering into a residence.

So if a person is entering into the premises with the intent to murder, it is not a felony murder. You may return a first degree verdict based on the burglary only if you find the defendant had a non-assaultive intent when he entered. That is not the case here.

When Mr. Hajek entered into the residence based on what he told Tevya Moriarty, intent was to kill. Intent was to murder.

(22 RT 5494-5495.)

Because the evidence supported instruction on felony murder based on burglary and the jury was properly instructed on the merger doctrine, the court did not err in permitting this issue to go to the jury. Hajek notes, however, that the judge, in response to appellants' Penal Code section 1118.1 motion, dismissed the burglary-murder special circumstance. He argues that it was inherently inconsistent for the judge to dismiss the special circumstance but allow the jury to consider burglary-murder as a theory of first degree murder. (Hajek AOB 105.) As Hajek acknowledges, at the time the judge dismissed the special circumstance, he did not specify his basis for so doing. (Hajek AOB 101; 21 RT 5280.) Months later, at a posttrial hearing, however, the judge stated that the dismissal was based on "the court's belief the defendants entered the residence with the intent to commit murder." (10/12/95 RT 47.) Assuming this was in fact the basis for the dismissal, appellants received an unjustified windfall for the reasons explained above. Indeed, when the trial court dismissed the burglary-murder special circumstance prior to trial pursuant to section 995, the Sixth District Court of Appeal reinstated it. Responding to the closely-related argument that the burglary in this case was merely incidental to the murder (*People v. Green* (1980) 27 Cal.3d 1, 61; *People v. Thompson* (1980) 27 Cal.3d 303, 324), the Court of Appeal recognized that a felony-murder special circumstance may be sustained where the defendant has "independent, albeit concurrent, goals" (*People v. Clark* (1990) 50 Cal.3d 583,

609) and found the evidence at the preliminary hearing sufficient to establish dual objectives on appellants' part: an intent to kill *and* an intent to steal. (6 CT 1432, 1435-1436.) The evidence at trial supported the same conclusion. That the People were without remedy to correct the trial court's error in dismissing the special circumstance does not entitle appellants to double their gain in the name of achieving consistency.

Finally, assuming, arguendo, that the court erred in instructing on felony-murder based on burglary because the evidence only supported the theory of entry with intent to commit murder, appellants could not have been prejudiced. As noted above, the jury was instructed pursuant to *Ireland* and *Garrison* that it could not convict on a felony-murder theory based on burglary with the intent to murder. (7 CT 1923.) It was also told to disregard any instructions it found inapplicable based on the facts it found. (7 CT 1946.) Counsel addressed this point as well in closing argument. (21 RT 5380; 22 RT 5494-5495.) Accordingly, notwithstanding the possibility of a superfluous instruction on felony-murder, there is no danger the jury convicted appellants on an incorrect legal theory.

Additionally, the jury's verdicts on the attempted murder charges and its true finding on the lying-in-wait special circumstance show that it believed appellants' crimes were premeditated and deliberated. Any error in instructing on burglary-murder as a theory of first degree murder was therefore of no consequence.

XX.

THE TRIAL COURT DID NOT ERR BY IMPLICITLY OVERRULING THE DEFENSE OBJECTION THAT THE JURY INSTRUCTIONS WERE TOO CONFUSING AS TO THE MURDER THEORIES RELIED ON BY THE PROSECUTION

During the discussion of jury instructions, Vo's attorney made a "broad objection . . . as to the instructions as a whole . . . because of the number and multiplicity of theories offered by the prosecution, conspiracy, aider and abettor, felony murder . . . ." (21 RT 5286-5287.) Counsel argued that instructing on all theories would "cause irreparable confusion on the part of the jury." (*Ibid.*) Hajek joined the objection. (21 RT 5289.) The judge did not specifically respond to this "broad objection," but instructed on the various theories of liability, thereby implicitly overruling it. Though Hajek argues otherwise (Hajek AOB 171-173 [Arg. XIII]), the trial court properly overruled the objection. He cites no authority holding that instructing on multiple theories of liability is improper. Indeed, capital murder cases are commonly tried on more than one theory of liability. (See, e.g., *People v. Hansen*(1994) 9 Cal.4th 300, 307 ["The trial court instructed the jury on several theories of murder . . . ."].) The law does not require the jury to agree on a single theory to convict. (See, e.g., *People v. Carpenter* (1997) 15 Cal.4th 312, 394.) To establish reversible error, Hajek must point to errors in the instructions themselves that caused the jury to misapply the law. Absent such evidence, the court must presume the jurors were intelligent persons fully capable of understanding, correlating, and following the instructions given to them. (*People v. Archer* (1989) 215 Cal.App.3d 197, 204.)

XXI.

THE TORTURE-MURDER SPECIAL CIRCUMSTANCE INSTRUCTION WAS NOT UNCONSTITUTIONAL

Hajek, joined by Vo, contends the torture-murder special circumstance instruction given by the court violated his right to due process, trial by jury, and a reliable guilt determination because it did not require a finding of intent to kill. (Hajek AOB 174-181 [Arg. XIV]; Vo AOB 121.) He is mistaken.

The jury was instructed pursuant to CALJIC No. 8.81.18 as follows:

> To find that the special circumstance, referred to in these instructions as murder involving infliction of torture, is true, each of the following facts must be proved:
>
> (1) *A* defendant intended to kill, or with intent to kill, aided and abetted in the killing of a human being;
>
> (2) The defendant intended to inflict extreme cruel physical pain and suffering upon a living human being for the purpose of revenge, extortion, persuasion or for any sadistic purpose;
>
> (3) The torturous acts were committed while the victim was alive;
>
> (4) A defendant did in fact inflict extreme cruel physical pain and suffering upon a living human being no matter how long its duration.
>
> Awareness of pain by the deceased is not a necessary element of torture.

(7 CT 1908; 21 RT 5319-5320, italics added)

Appellants contend the use of the indefinite article "a" instead of "the" in element one allowed the jury to find the torture-murder special circumstance true as to both of them if it found that either of them had the intent to kill. That is, the instruction did not require a finding that each defendant personally intended to kill.

In *People v. Davenport* (1985) 41 Cal.3d 247, 271, this Court held that the torture-murder special circumstance requires proof that the defendant himself

intended to kill and to torture the victim. The instruction given here was thus technically erroneous. In *People v. Petznick* (2003) 114 Cal.App.4th 663, 686, the Sixth District Court of Appeal found a similar error prejudicial.[53/] Here, however, there is no reasonable likelihood the jury applied the challenged instruction in an unconstitutional manner when the instruction is considered in the context of the entire charge. (*Estelle v. McGuire* (1991) 502 U.S. 62, 72, quoting *Boyde v. California* (1990) 494 U.S. 370, 380; *People v. Prettyman* (1996) 14 Cal.4th 248, 272.) Specifically, the jury was instructed pursuant to CALJIC No. 1.11 that the word "defendant" applied "to each defendant" unless the jury was instructed otherwise. (7 CT 1878.) It was instructed on the burden of proof (7 CT 1855 [CALJIC No. 2.90]), and was told that "each fact which is essential to complete a set of circumstances necessary to establish *the defendant's* guilt must be proved beyond a reasonable doubt." (7 CT 1848 [CALJIC No. 2.01].) It was instructed with CALJIC No. 8.80.1, which stated in pertinent part:

> If you find that a defendant was not the actual killer of a human being, or if you are unable to decide whether the defendant was the actual killer or an aider and abettor or co-conspirator, you cannot find the special circumstance to be true as to that defendant unless you are satisfied beyond a reasonable doubt *that such defendant with the intent to kill* aided, abetted, counseled, commanded, induced, solicited, requested, or assisted any actor in the commission of the murder in the first degree.
>
> You must decide *separately as to each of the defendants* the existence or nonexistence of each special circumstance alleged in this case. If you cannot agree as to all the defendants, but can agree as to one, you make your finding as to the one upon which you do agree.
>
> You must decide *separately each special circumstance alleged in*

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53. The instruction in *Petznick* erroneously told the jury it could find the special circumstance true if it found "a defendant" intended to torture the victim. (*Petznick, supra*, 114 Cal.App.4th at pp. 685-686.)

> *this case as to each of the defendants*. If you cannot agree as to all of the special circumstances, but can agree as to one, you must make your finding as to the one upon which you do agree.

(7 CT 1903-1904, brackets omitted and italics added; see also 7 CT 1852 [CALJIC No. 17.00] (instructing jury to decide guilt of each defendant separately); 7 CT 1866 [CALJIC No. 6.22] (instructing jury to decide each defendant's membership in alleged conspiracy separately).)

Finally, the jury was told, pursuant to CALJIC No. 8.83.1:

> The [mental state] with which an act is done may be shown by the circumstances surrounding its commission. But you may not find a special circumstance alleged in this case to be true unless the proved surrounding circumstances are not only
>
> (1) consistent with the theory that *the defendant* had the required [mental state] but
>
> (2) cannot be reconciled with any other rational conclusion.

(7 CT 1910, italics added.)

The verdict forms for the torture-murder special circumstance also dispelled any ambiguity about the requirement that the jury find intent to kill as to each defendant. Hajek's form specifically required the jury to find that "the murder of Su Hung was intentionally committed by the defendant, STEPHEN EDWARD HAJEK . . . ." (8 CT 2099.) Vo's required the same as to him. (8 CT 2107.)

Although Hajek argues that the prosecutor exacerbated the confusion caused by the instruction in closing argument (Hajek AOB 177-179), he raised no objection, nor requested an admonition when the remarks were made, thereby forfeiting any appellate claim of error based thereon. (*People v. Gionis*, *supra*, 9 Cal.4th at p. 1215 [requiring objection and request for admonition to preserve claim of prosecutorial misconduct].) Had he done so, the prosecutor could have clarified the differences between murder perpetrated by torture and the torture-murder special circumstance. In any event, the prosecutor did not

argue or suggest that intent to kill is not necessary for a true finding on the torture-murder special circumstance. On the contrary, he told the jury, "The instruction goes on to say, *the crime of murder by torture* does not require any proof that the perpetrator intended to kill his victim or any proof that the victim was aware of pain or suffering." (21 RT 5376-5377, italics added.) That was an accurate statement of law. Hajek's counsel, on the other hand, did tell the jury that to return a true finding on the torture-murder special circumstance, "[y]ou must have an intentional killing." (22 RT 5491.)

In sum, there is no reasonable likelihood the jury applied the complained-of instruction in an unconstitutional manner when the instruction is considered in the context of the instructions as a whole and the arguments of counsel. Even if the Court should conclude otherwise, however, the judgment of death need not be reversed in light of the jury's other valid special circumstance finding (lying in wait). (Cf. *People v. Petznick*, *supra*, 114 Cal.App.4th at p. 687.)

XXII.

THE TRIAL COURT WAS NOT REQUIRED TO INSTRUCT SUA SPONTE WITH CALJIC NO. 3.18

The trial court instructed the jury on the definition of an accomplice (CALJIC No. 3.10), corroboration of the testimony of accomplices (CALJIC No. 3.11) and the sufficiency of evidence to supply corroboration (CALJIC No. 3.12). (8 CT 2062-2064.) It also instructed the jury to consider, inter alia, the existence of a bias, interest, or other motive in determining the believability of a witness. (CALJIC No. 2.20; 8 CT 1966.) Hajek did not request, and the trial court did not give, CALJIC No. 3.18, which at the time directed the jury to view an accomplice's testimony with "distrust." Hajek contends that the trial court's omission was both state law error and error of federal constitutional dimension. (Hajek AOB 182-187 [Arg. XV].) Respondent submits there was no error.

At the time of appellants' trial, CALJIC No. 3.18 (5th ed. 1988) provided: "The testimony of an accomplice *ought to be viewed with distrust.* This does not mean that you may arbitrarily disregard such testimony, but you should give to it the weight to which you find it to be entitled after examining it with care and caution and in the light of all the evidence in the case." (Italics added.) The law at the time provided that CALJIC No. 3.18 should be given sua sponte if the accomplice was called by the prosecution, but not if the accomplice was called by the defendant. (*People v. Williams* (1988) 45 Cal.3d 1268, 1314.) Neither the prosecution nor Hajek could call Vo to the stand; instead, Vo, a codefendant, testified on his own behalf. Because "[a]t the time of trial, there was no law indicating that a court must provide CALJIC No. 3.18 sua sponte when a codefendant introduce[d] accomplice testimony, and defendant did not request such an instruction," the trial court did not err in failing to give the instruction.[54/] (*People v. Abilez* (2007) 41 Cal.4th 472, 519.) Hajek's state and federal constitutional rights were not violated.

XXIII.

THE CONSPIRACY INSTRUCTIONS WERE PROPER

The trial court gave the jury a series of instructions on finding murder liability based on an uncharged conspiracy. (7 CT 1858-1866, 1897 [CALJIC Nos. 6.10.5, 6.11, 6.12, 6.13, 6.15, 6.16, 6.18, 6.22, 8.26].) Appellants contend these instructions were incomplete and confusing. (Hajek AOB 188-203 [Arg. XVI]; Vo AOB 121 [joining Hajek's argument], 272-276 [Arg. 6.F.].) They are mistaken.

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54. Since the time of appellants' trial, this Court has directed that the standard instruction specify that to the extent an accomplice gives testimony tending to incriminate the defendant, it should be viewed with caution. (*People v. Guinan* (1998) 18 Cal.4th 558, 569; see CALJIC No. 3.18 (2007); CALCRIM No. 3.34.)

A. The Trial Court Was Not Required to Identify the Overt Acts for the Jury

Hajek, joined by Vo, contends that CALJIC No. 6.10.5, the standard instruction defining conspiracy and overt act where conspiracy is not charged as a crime in the case, was deficient because it failed to identify the specific overt acts committed in furtherance of the conspiracy. (Hajek AOB 189-193 [Arg. XVI.A.]; Vo AOB 121.) The claim is forfeited. If appellants wanted the standard instruction clarified or amplified, they had an obligation to make a request for additional instruction. This, they did not do. (*People v. Hart* (1999) 20 Cal.4th 546, 622 [defendant's failure to request appropriate clarifying or amplifying language to legally correct instruction waives claim on appeal]; *People v. Daya* (1994) 29 Cal.App.4th 697, 714 ["defendant is not entitled to remain mute at trial and scream foul on appeal for the court's failure to expand, modify, and refine standardized jury instructions"].)

The claim is also meritless. Appellants cite no authority that requires the trial court to identify the overt acts of an uncharged conspiracy constituting a theory of liability. Case law reflects the opposite:

> Defendant's argument, made without the support of authority, is unpersuasive. He asks that we extend the law to require the trial court to identify specific overt acts in furtherance of a conspiracy, even when it is an uncharged crime. The California Constitution requires the trial court to instruct on every element of an offense. (*People v. Flood* (1998) 18 Cal.4th 470, 480.) The trial court informed the jury there must be proof of an agreement between two or more persons with the specific intent to agree or commit a battery as well as the commission of at least one overt act in furtherance of the agreement to find a defendant guilty of conspiracy. The court's instruction satisfied its sua sponte duty to instruct.

(*People v. Flores* (2005) 129 Cal.App.4th 174, 183-184.)

People v. Russo (2001) 25 Cal.4th 1124 and *People v. Morante* (1999) 20 Cal.4th 403, cited by Hajek (Hajek AOB 192), both involve conspiracy charged as a substantive offense, and thus are distinguishable from this case. His

citation to section 182, subdivision (b) is unhelpful for the same reason. That section requires overt acts to be pleaded and proved "[u]pon a trial for conspiracy." It does not require the same where conspiracy is used as a theory of joint liability.

As the court explained in *People v. Salcedo*, *supra*, 30 Cal.App.4th at p. 215: "The doctrine of conspiracy plays a dual role in our criminal law. First, conspiracy is a substantive offense in itself.... Second, proof of a conspiracy serves to impose criminal liability on all conspirators for crimes committed in furtherance of the conspiracy. . . . [¶] This second aspect of conspiracy—which imposes joint liability on conspirators—operates independently of the first aspect, which makes a conspiracy itself a crime." The latter permits admission of evidence of a conspiracy, and the giving of jury instructions based on a conspiracy theory, even if the defendant is not charged with the crime of conspiracy. (*People v. Belmontes*, *supra*, 45 Cal.3d at pp. 788-789.)

Because the conspiracy in this case was a theory of liability, there was no need to allege specific overt acts, just as there was no need to charge conspiracy itself as a crime. The jury was properly instructed that conspirators are jointly liable for one another's acts and declarations in furtherance of the conspiracy. (7 CT 1860.) For purposes of applying this principle, they were instructed on the definition of a conspiracy, which included the requirement that there be proof of the commission of at least one overt act, and on the meaning of the term "overt act." (7 CT 1858.) No more was required. (*People v. Flores*, *supra*, 129 Cal.App.4th at pp. 183-184.)

Hajek argues that the failure to allege specific overt acts in this case was exacerbated by the court's failure to instruct on CALJIC No. 6.21, which provides: "No act or declaration of a conspirator committed or made after the conspiracy has been terminated is binding upon coconspirators, and they are not

criminally liable for that act." (Hajek AOB 192-193). They contend that this omission permitted the jury to find that Hajek's post-arrest letters were overt acts. Neither appellant requested instruction on CALJIC No. 6.21 or complained that the conspiracy instructions were incomplete, thereby precluding any complaint on appeal.[55] In any event, other instructions informed the jury that a post-conspiracy act could not satisfy the overt act requirement (7 CT 1858, CALJIC No. 6.10.5 [defining the term "overt act"as "any step taken or act committed by one or more of the conspirators which goes beyond mere planning or agreement to commit a public offense *and which step or act is done in furtherance of the accomplishment of the object of the conspiracy*"], italics added) and that conspirators were not liable for one another's post-conspiracy acts and declarations (7 CT 1860, CALJIC No. 6.11 [Each member of a criminal conspiracy is liable for each act an bound by each declaration of every other member of the conspiracy *if said act or said declaration is in furtherance of the object of the conspiracy*"], italics added.) (See also 7 CT 1864 [CALJIC No. 6.16], 1867 [CALJIC No 6.24] .)

B. The Trial Court Properly Instructed the Jury on the Object of the Conspiracy

Hajek, joined by Vo, next contends the instructions improperly alleged the object of the conspiracy. (Hajek AOB 193-196 [Arg. XVI.B.]; Vo AOB 121.) As given, CALJIC No. 6.10.5 provided, in pertinent part, "A conspiracy is an agreement between two or more persons with the specific intent to agree to commit a public offense *such as burglary and murder . . .*" (7 CT 1858, italics added.) Appellants contend the phrase "such as," which was part of the standard instruction at the time, "suggested that burglary and murder were possible examples of offenses constituting the object of the conspiracy rather

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55. Nor can Hajek show it would have helped him for the jury to be told that his post-conspiracy acts were not binding on Vo.

than clearly setting out the alleged target crimes or objects." (Hajek AOB 194.) They note that the current version of the instruction eliminates this phrase.

Appellants forfeited the instant claim by failing to request a modification to the standard instruction. (*People v. Daya*, *supra*, 29 Cal.App.4th at p. 714.) Nor does the claim have merit. In reviewing an ambiguous or potentially confusing instruction for federal constitutional error, the court inquires "'whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the Constitution." (*Estelle v. McGuire*, *supra*, 502 U.S. at p. 72, quoting *Boyde v. California* (1990) 494 U.S. 370, 380; *People v. Prettyman* (1996) 14 Cal.4th 248, 272.) In making this determination, the court must consider the challenged instruction in the context of the instructions as a whole and the trial record. (*Estelle v. McGuire*, *supra*, 502 U.S. at p. 72.) Moreover, because this "reasonable likelihood" standard focuses on the jury's understanding of the law (*People v. Benson* (1990) 52 Cal.3d 754, 801), and because counsel's arguments influence that understanding (see *People v. Visciiotti* (1992) 2 Cal.4th 1, 59), counsel's arguments must be considered in determining whether there was prejudicial instructional error. (*People v. Garceau* (1993) 6 Cal.4th 140, 189; *People v. Kelly* (1992) 1 Cal.4th 495, 526; see also *Boyde v. California*, *supra*, 494 U.S. at pp. 383-386; *Henderson v. Kibbe* (1977) 431 U.S. 145, 152, fn. 10.)

There is no reasonable likelihood the jury misapplied the trial court's instructions here. In arguing the uncharged conspiracy theory, the prosecutor focused solely on burglary and murder, the crimes identified in the instruction. (21 RT 5369-5370 [discussing conspiracy to commit burglary]; 21 RT 5373 [arguing Hajek's statement to Tevya Moriarty is evidence of conspiracy to commit murder].) Under the circumstances, it is not reasonably likely the jury believed the phrase "such as" gave them carte blanche to choose other possible

target crimes like false imprisonment or assault, as appellants suggest.[56] (Hajek AOB 197-198.)

Appellants argue that CALJIC No. 8.26 added to the confusion caused by the "such as" phrase in CALJIC No. 6.10.5, by identifying only burglary as the object the conspiracy. (Hajek AOB 194.) Once again, they sought no modification to the standard instruction to clarify the alleged ambiguity, thereby forfeiting the claim on appeal. (*People v. Daya*, *supra*, 29 Cal.App.4th at p. 714.)

Nor was there any reasonable likelihood the jury misapplied the instructions. (*Estelle v. McGuire*, *supra*, 502 U.S. at p. 72.) CALJIC No. 8.21 [First Degree Felony-Murder] explained the concept of felony-murder to the jurors, telling them, in pertinent part:

> The unlawful killing of a human being, whether intentional, unintentional or accidental, which occurs [during the commission or attempted commission of the crime] [as a direct causal result] of burglary is murder of the first degree when the perpetrator had the specific intent to commit such crime.

(7 CT 1894.)

CALJIC No. 8.27 [First Degree Felony-Murder-Aider and Abettor] explained the concept of aiding and abetting a felony-murder:

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

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56. Moreover, in the context of this case, where appellants entered the Wangs' home to commit the crimes, a conspiracy to commit felony assault or false imprisonment would necessarily involve a conspiracy to commit burglary as well.

unintentional, or accidental.

(7 CT 1898.)

Finally, CALJIC No. 8.26 [First Degree Felony-Murder-In Pursuance Of A Conspiracy] explained the concept of felony-murder in pursuance of a conspiracy, telling the jurors:

> If a number of persons conspire together to commit burglary, and if the life of another person is taken by one or more of them in furtherance of the common design, and if such killing is done to further that common purpose or is an ordinary and probable result of the pursuit of that purpose, all of the co-conspirators are deemed in law to be equally guilty of murder of the first degree, whether the killing is intentional, unintentional, or accidental.

(7 CT 1897.)

As intelligent people capable of understanding and correlating all instructions (*People v. Tatman* (1993) 20 Cal.App.4th 1, 11), and instructed to consider the various instructions "as a whole and each in the light of all the others" (CALJIC No. 1.01; 7 CT 1838), the jury would have understood the foregoing instructions to mean that just as a person who kills unlawfully in the commission of a burglary is liable for murder, so too are a person who aids and abets a burglary during the commission of which a person is killed, and a person who conspires to commit a burglary when a killing is committed in furtherance of the conspirators' common purpose. The common language in the titles and text of the three instructions made obvious that they all related to the concept that a killing in the commission of or in furtherance of a burglary constitutes murder and that all involved are accountable therefor. CALJIC No. 6.10.5, by contrast, defined what constituted a conspiracy and offered the two possible objectives of the conspiracy in this case: burglary and murder. The latter led directly to murder liability for the conspirators; the former indirectly by way of the felony-murder doctrine.

Appellants also argue that CALJIC No. 6.11 was confusing when read in conjunction with CALJIC No 6.10.5. (Hajek AOB 195.) Again their failure to ask the court to modify the instruction to clarify the alleged confusion forfeits the claim on appeal. (*People v. Daya, supra*, 29 Cal.App.4th at p. 714.) There is also no reasonable likelihood the jury misapplied the instructions. (*Estelle v. McGuire, supra*, 502 U.S. at p. 72.) CALJIC No. 6.11 provided:

> Each member of a criminal conspiracy is liable for each act and bound by each declaration of every other member of the conspiracy if said act or said declaration is in furtherance of the object of the conspiracy.
>
> The act of one conspirator pursuant to or in furtherance of the common design of the conspiracy is the act of all conspirators.
>
> A member of a conspiracy is not only guilty of the particular crime that to [his] knowledge [his] confederates are contemplating committing, but is also liable for the natural and probable consequences of any act of a co-conspirator to further the object of the conspiracy, even though such act was not intended as a part of the original plan and even though [he] [she] was not present at the time of the commission of such act.
>
> *You must determine whether the defendant is guilty as a member of a conspiracy to commit the crime originally contemplated, and, if so, whether the crime alleged [in Count[s] 1 (murder)] was a natural and probable consequence of the originally contemplated criminal objective of the conspiracy.*

(7 CT 1860, italics added.)

Appellants contend that the italicized paragraph was confusing in light of CALJIC No. 6.10.5: "Since CALJIC No. 6.10.5 seemed to identify murder as one of the alleged objects [of the conspiracy], CALJIC No. 6.11 left the jury with the strange task of determining whether murder could be the natural and probable consequence of an agreement to commit murder." (Hajek AOB 195.) No reasonable juror would read the instruction that way. The first two paragraphs of the instruction informed the jurors that conspirators are liable for one another's acts in furtherance of the object of the conspiracy. Thus, in a

conspiracy for murder, identified in CALJIC No. 6.10.5 as one of the two possible objectives of the conspiracy in this case, one conspirator's murderous act is attributable to all of the other parties to the conspiracy. The third paragraph of CALJIC No. 6.11 informed the jury that conspirators are also liable for the natural and probable consequences of acts done in furtherance of the contemplated objective of the conspiracy. The challenged language followed up on that concept by asking the jury to determine (1) whether the defendant was guilty of conspiring to commit the crime originally contemplated, and (2) if so, whether murder was a natural and probable consequence of that crime. In context, the jury would have understood these latter paragraphs to be addressing burglary, the other possible objective of the conspiracy identified in CALJIC No. 6.10.5. Under the instruction, the jury could find appellants guilty of murder if it determined (1) that they conspired to commit burglary, and (2) that murder was a natural and probable consequence of burglary. There was no error under *People v. Prettyman*, *supra*, 14 Cal.4th 248, as appellants contend (Hajek AOB 195), because the target crime (that is, the objective of the conspiracy) was identified in CALJIC No. 6.10.5 as burglary. Although CALJIC No. 6.10.5 also identifies murder as a possible objective, no reasonable jury would interpret CALJIC No. 6.11 to be asking it to determine whether murder was a natural and probable consequence of a conspiracy to commit murder, as appellants contend. Even if it did so interpret the instruction, however, the answer, which is patently yes, would lead the jury to find appellants guilty of a murder that they found appellants conspired to commit, which is nonetheless a correct application of the law.

C. The Trial Court Was Not Required to Instruct the Jury with CALJIC No. 6.25

Hajek, joined by Vo, contends the court erred in failing to instruct the jury with CALJIC No. 6.25. (Hajek AOB 196-201 [Arg. XVI.C.]; Vo AOB 121.)

The instruction provides:

> Defendant[s] [is] [are] charged [in Count[s] ___] with conspiracy to commit the crime of ___, in violation of ___ Code, § ___, and the crime of ___, in violation of ___ Code, § ___.
>
> In order to find the defendant[s] guilty of the crime of conspiracy, you must find beyond a reasonable doubt that the defendant[s] conspired to commit one or more of the crimes, and you also must unanimously agree as to which particular crime of crimes [he] [she] [they] conspired to commit.
>
> If you find the defendant[s] guilty of conspiracy, you will then include a finding on the question as to which such alleged crimes you unanimously agree the defendant conspired to commit. A form will be supplied for that purpose [for each defendant].

As appellants recognize (Hajek AOB 197), the court did not give this instruction because the "instruction is designed for use where it is *charged* that defendant conspired to commit two more felonies and the commission of such felonies constitute but one offense of conspiracy." (CALJIC No. 6.25, Use Note, italics added.) Nevertheless, they argue the instruction was warranted because the prosecution presented more than one theory of conspiracy liability. According to appellants, "To find murder under the conspiracy theory, the jury first had to determine properly that a conspiracy existed to commit a specific offense and to make that determination unanimously and based upon proof beyond a reasonable doubt." (Hajek AOB 197; see also Vo AOB 275.)

To the contrary, the jury must agree unanimously that the defendant is guilty of a specific crime, in this case, murder. (*People v. Russo, supra*, 25 Cal.4th at p. 1132.) It need not agree on the theory whereby the defendant is guilty. (*Ibid.*) As stated in *People v. Davis* (1992) 8 Cal.App.4th 28, 34:

> It matters not that jurors may disagree over the theory of the crime, for example, whether the situation involves felony murder or premeditated murder. Nor does it matter that they disagree on the theory of participation, for example, whether there was direct participation or aiding and abetting or coconspiracy. Nor does it matter that they

> disagree about the facts proving any of these theories. If each juror concludes, based on legally applicable theories supported by substantial evidence, that the defendant is guilty of the charged offense, the defendant is properly found guilty even if the jurors disagree about the particular theories or facts.
>
> *Davis* further stated:
>
> [W]here there is a single offense and a single charge, it is the task of each juror to conclude, perhaps on very different theories, whether the defendant is guilty or not guilty. It is simply of no consequence that some jurors believe the defendant is guilty based on one theory while others believe he is guilty on another even when the theories may be based on very different and even contradictory conclusions concerning, for example, the defendant's basic intent in committing the crime.

(*Id.* at pp. 44-45; accord, *People v. Santamaria* (1994) 8 Cal.4th 903, 918-919; see also *People v. Vargas* (2001) 91 Cal.App.4th 506, 558 [finding no unanimity instruction required in case where conspiracy was charged as a crime because "[p]roof that the agreement has crime as its object" is enough "regardless of whether some jurors believe that crime to be murder and others believe that crime to be something else"].)

Thus, in this case, it is of no moment whether the jurors agreed on murder, burglary, or both as the object of the conspiracy, or for that matter, whether they agreed there was a conspiracy at all. Conspiracy was not the charge. There is no unanimity requirement as to theories of liability.

Appellants are also incorrect in their assertion that the jury had to find that a conspiracy existed based on proof beyond a reasonable doubt. (Hajek AOB 197; Vo AOB 121; see also Vo AOB 275.) That would be the standard if conspiracy were charged as a crime in this case. As noted earlier, however, "an uncharged conspiracy may properly be used to prove criminal liability for acts of a coconspirator." (*People v. Belmontes*, *supra*, 45 Cal.3d at p. 788.) "Once there is proof of the existence of the conspiracy there is no error in instructing the jury on the law of conspiracy." (*People v. Rodrigues*, *supra* 8 Cal.4th at p. 1134.) Although the existence of the conspiracy must be shown by proof

independent from the statements of the alleged conspirators, "'the showing need only be prima facie evidence of the conspiracy. [Citation.] The prima facie showing may be circumstantial [citation], and may be by means of any competent evidence which tends to show that a conspiracy existed. [Citation.]" (*Ibid.*) To require proof beyond a reasonable doubt and unanimity in a case where conspiracy is being used as a theory of liability, simply because it could have been charged as a separate crime (see Hajek AOB 200), would be to eviscerate the "dual role" conspiracy plays in our criminal law (*People v. Salcedo*, *supra*, 30 Cal.App.4th at p. 215) and reject the "long and firmly established" rule (*People v. Belmontes*, *supra*, 45 Cal.3d at p. 788) permitting uncharged conspiracies to be used to prove criminal liability.

D. CALJIC Nos. 6.12 and 6.24 Did Not Conflict with CALJIC No. 6.15

Vo contends CALJIC Nos. 6.12 and 6.24 conflicted with CALJIC No. 6.15, which told the jurors, "No act or declaration of a conspirator that is an independent product of [his] own mind and is outside the common design and not a furtherance of that design is binding upon [his] co-conspirators, and they are not criminally liable for any such act" (7 CT 1863). (Vo AOB 274.) Not so. CALJIC No. 6.12 told jurors, "The formation and existence of a conspiracy may be inferred from all circumstances tending to show the common intent . . . ." (7 CT 1861.) An independent act or declaration outside the common design and not a furtherance of that design would not "tend[] to show . . . common intent." CALJIC No. 6.24 told jurors one coconspirator's statement could not be considered against the other unless, inter alia, ". . . such statement was made in furtherance of the objective of the conspiracy." (7 CT 1867.) An independent declaration "outside the common design and not a furtherance of that design" would not qualify under that standard.

As noted by the foregoing, the trial court properly instructed the jury on finding murder liability based on an uncharged conspiracy. Appellants' contrary claims should be rejected.

XXIV.

THE INSTRUCTIONS ON AIDING AND ABETTING WERE PROPER, AS WAS THE COURT'S RESPONSE TO THE JURY QUESTION

Vo, joined by Hajek, contends the instructions on aiding and abetting were confusing and permitted jurors to convict without finding that the aider and abettor possessed the specific intent required for the charged offenses. (Vo AOB 349-355 [Arg. 18]; Hajek 2nd Supp. AOB 4.) He also appears to contend that the trial court's response to a jury question touching on the aiding and abetting and conspirator liability theories was improper. (Vo AOB 352-353.) He is mistaken.

A. The Aiding and Abetting Instructions Were Proper

The court instructed the jury on aiding and abetting with CALJIC Nos. 3.00 and 3.01. CALJIC No. 3.00 provided:

> The persons concerned in the [commission] [or] [attempted commission] of a crime who are regarded by law as principals in the crime thus [committed] [or] [attempted] and equally guilty thereof include:
>
> 1. Those who directly and actively [commit] [or] [attempt to commit] the act constituting the crime, or
>
> 2. Those who aid and abet the [commission] [or] [attempted commission], of the crime.

(7 CT 1881.)

CALJIC No. 3.01 provided:

> A person aids and abets the [commission] [or] [attempted commission] of a crime when he or she,

(1) with knowledge of the unlawful purpose of the perpetrator and

(2) *with the intent or purpose of committing, encouraging, or facilitating the commission of the crime*, by act or advice aids, promotes, encourages or instigates the commission of the crime.

[A person who aids and abets the [commission] [or] [attempted commission] or a crime need not be personally present at the scene of the crime.]

[Mere presence at the scene of the crime which does not itself assist the commission of the crime does not amount to aiding and abetting.]

[Mere knowledge that a crime is being committed and the failure to prevent it does not amount to aiding and abetting.]

(7 CT 1882, italics added.)

The jury was also instructed that there must exist a union of act and mental state for conviction of the alleged crimes (7 CT 1884-1886) and told what mental states were required for the various charges and allegations (7 CT 1887, 1890, 1906, 1908, 1913, 1915, 1918, 1921, 1924-1925, 1927).

Vo contends that the aiding and abetting instructions were "sufficiently ambiguous to permit conviction upon a finding of an intentional act which aids some criminal offense, without necessarily requiring a finding of intent to encourage or facilitate each of the particular offenses charged." (Vo AOB 354.) It is impossible this could be so when the instructions expressly told the jury that an aider and abettor must act "with the intent or purpose of committing, encouraging, or facilitating the commission of the crime" (7 CT 1882). There was no so-called *Beeman* error here. (*People v. Beeman* (1984) 35 Cal.3d 547, 560 [trial court's failure to instruct that an aider and abettor must have the specific intent to aid the perpetrator's crime is error].)

B. The Trial Court's Answer to the Jury Question Was Proper

Vo points out that the jury asked a question indicating some confusion over how to apply the instructions. The question, however, was not about the aiding and abetting instructions themselves, but about the applicability of the lying-in-wait special circumstance if the jurors were unsure about appellants' respective roles in the killing. Specifically, the jury asked about the interplay between instruction 57 (CALJIC No. 8.80.1) and instruction 59 (CALJIC No. 8.81.15). As given, those instructions read, in pertinent part, as follows:

Instruction 57:

> [If you find that a defendant was not the actual killer of a human being, [or if you are unable to decide whether the defendant was the actual killer or [an aider and abettor] [or] [co-conspirator],] you cannot find the special circumstance to be true [as to that defendant] unless you are satisfied beyond a reasonable doubt that such defendant with the intent to kill [aided,] [abetted,] [counseled,] [commanded,] [induced,] [solicited,] [requested,] [or] [assisted] any actor in the commission of the murder in the first degree.] [.]

(7 CT 1903.)

Instruction 59:

> To find that the special circumstance, referred to in these instructions as murder while lying in wait, is true, each of the following facts must be proved:
>
> 1. [The] [A] defendant intentionally killed the victim, and
>
> 2. The murder was committed while [the] [a] defendant was lying in wait.

(7 CT 1906.)

The jury's question, sent in a note on May 16, 1995, the third day of guilt phase deliberations, read as follows:

> (pg. 57) ¶ 3 Under special circumstances: If "defendant" is determined to be an "aider and abettor" or a "co-conspirator" does he then become "(The)(A) defendant" on page 59, item #1 which reads:

#1. (The)(A) defendant intentionally killed the victim.

(7 CT 1825.)

The following morning, at the court's request, the foreperson explained the jury's question orally:

> THE FOREPERSON: While going through the instructions --
>
> THE COURT: Okay.
>
> THE FOREPERSON: -- there was a question a question some jurors [had] as to whether if on page 57, if a defendant met one of those three criteria, which was -- I'm trying -- one was a killer.
>
> THE COURT: Defendant was the actual killer. Two, aider and abettor or three, co-conspirator.
>
> THE FOREPERSON: Right. If the defendant fell in any one of those three categories, would then they automatically be considered the defendant under page 59? In other words, were you having to reprove number one again, which would have been -- if you could reread it for me.
>
> THE COURT: Okay. One is (The) (A), defendant intentionally killed the victim and two, the murder was committed while the defendant was lying in wait. So you're asking whether the term defendant in instruction 57 then becomes the defendant in instruction 59.
>
> THE FOREPERSON: Right. There was some question regarding some of the jurors whether that was true.

(22 RT 5619.)

The parties discussed the question out of the jury's presence. Hajek's counsel asserted "that the jury needs to be instructed or rereferred back to the section in section 57, which indicates that the—to return the finding on special circumstance in regard to any defendant there must be an intent to kill." (22 RT 5620.) Vo's counsel echoed the sentiment: "I think their confusion is somehow if they conclude a particular defendant is a co-conspirator, is that in and of itself enough to apply the special circumstance as to that co-conspirator? And the

answer is no, because they have to go a step farther than that and find based on the evidence that there must be an intent to kill on the part of that person." (22 RT 5622.)

The court thereafter answered the jury's question as follows:

> In instruction number 59 it says: A defendant intentionally killed the victim and the murder was committed while the defendant was lying in wait.
>
> The question goes to the term "defendant." And if the question is, is it automatic that the definition in paragraph 3 goes into 59, my answer is nothing is automatic. The question is each defendant must harbor a mental state and a mental state for that special circumstance to apply is intent to kill. So the special circumstance does not, is not true unless the jury finds as to one or both, each or keep them separate that each harbored an intent to kill.

(22 RT 5625-5626.)

One of the jurors (juror no. 2) asked, "So if you don't know whether the defendant actually did the killing, which it implies on page 59, that's how it was interpreted by some in the room, if the person was an aider or abettor or a co-conspirator, would that satisfy line—item 1 on page 59." (22 RT 5626-5627.) The court clarified, "The other element that you have to put in there before a defendant would fit within line 1 and 59 was: Did this person have the intent to kill? I mean, 'intent to kill' is the crucial words. If you don't have the intent to kill, the special would not be true." (22 RT 5627.) The juror replied affirmatively when asked if that answered her question.

The foreperson summarized, "So it can be an aider, abettor. Could be a co-conspirator." (22 RT 5627.) The court emphasized, "But you have to go one step further. . . . And you have to put the intent to kill. If you find—I mean it goes back to the aider, abettor instruction, you can't be an aider, abettor unless you have the intent." (22 RT 5627.) The foreperson confirmed, "That answers the question." (*Ibid.*)

After the jurors left the courtroom, counsel agreed that the court had

responded appropriately to the jury's question. Vo's counsel asserted, "I was satisfied with the court's explanation." (22 RT 5628.) Hajek's counsel agreed, "So was I, your Honor. I think they wanted to know if the person had to be the actual killer, and I think you adequately explained the requirement at that time." (22 RT 5628.)

Though appellants now suggest that the court's response was inadequate (Vo AOB 353), their express agreement at the time precludes any appellate claim arising out of the court's explanation. (*People v. Turner* (2004) 34 Cal.4th 406, 437.) In any event, the court responded to the question properly. To begin with, it did not "[m]erely provid[e] the jury once again with Instruction 59" as Vo alleges based on the summary in the clerk's minute order. (Vo AOB 353.) Instead, as an examination of the reporter's transcript reveals, the court engaged in a give-and-take dialogue with the jurors and ensured that it had answered their question before sending them back to resume deliberations.

Vo's charge that the court failed to make clear that being a conspirator was insufficient to supply the "intentional killing" requirement for the lying-in-wait special circumstance (see Vo AOB 353) is also plainly without merit. The court told the jury three times that in order to find the special circumstance true as to any defendant, it had to find that the defendant harbored an intent to kill. It emphasized that "nothing is automatic" (22 RT 5626) and in response to the foreperson's remark that the special could apply to an aider and abettor or coconspirator, again reminded the jury that it had to "go one step further" and find "intent to kill" (22 RT 5627). It explained that "'intent to kill' is the crucial words. If you don't have the intent to kill, the special would not be true." (22 RT 5627.) The foreperson and juror number two, who participated in the discussion, both confirmed at different times that the court had answered the jury's question. (22 RT 5627.) Under the circumstances, there is no

reasonable likelihood the jurors interpreted the instructions to mean they could find the special circumstance true as to either defendant without finding that he harbored an intent to kill, regardless of whether he was the actual killer, a conspirator, or an aider and abettor. (*Estelle v. McGuire*, *supra*, 502 U.S. at p. 72.) The court's repeated admonishment of the need to find an intent to kill likewise removed any possibility of jurors believing that membership in an "uncharged, unproven, amorphous conspiracy" alone was enough to support the special circumstance.[57] (Vo AOB 353.)

XXV.

THE TRIAL COURT PROPERLY INSTRUCTED THE JURY THAT IT COULD CONSIDER HAJEK'S MENTAL ILLNESS IN DETERMINING WHETHER HE HAD THE REQUIRED MENTAL STATE TO ACT AS AN AIDER AND ABETTOR

Hajek contends the trial court erred in failing to instruct the jury that mental illness could negate the knowledge and intent required for liability as an aider and abettor. (Hajek AOB 204-210 [Arg. XVII]; see *People v. Mendoza* (1998) 18 Cal.4th 1114, 1131 [Penal Code section 22 permits jury to consider voluntary intoxication in determining whether defendant harbored knowledge and intent necessary for aider and abettor liability]; see § 28 [employing similar language as section 22 with respect to evidence of mental disease]; CALJIC No. 4.21.2 [adopted in light of *Mendoza*, subsequent to appellants' trial].) He is mistaken.

Consistent with CALJIC No. 3.32, the jury was instructed as follows with respect to evidence of mental illness:

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57. Although Vo interprets the jury's note as asking whether membership in a conspiracy supplied the intent to kill necessary for the special circumstance to apply, it is unnecessary to engage in such speculation. What matters is that the court correctly stated the law and the jury declared that its question had been answered.

Evidence has been received regarding a [mental disease] [mental defect] [or] [mental disorder] of the defendant Stephen Hajer [sic] at the time of the commission of the crime charged namely, Murder and Attempted Murder in Counts 1, 2, 3, 4 and 5. You may consider such evidence solely for the purpose of determining whether the defendant Stephen Hajer [sic] actually formed the mental state, [premeditated, deliberated] which is an element of the crime charged [in Count[s] 1, 2, 3, 4 and 5, to-wit: Murder and Attempted Murder.

(7 CT 1912.)

It was additionally instructed with a modified version of CALJIC No. 4.21.1 as follows:

In the crimes of first degree premeditated and deliberated murder, torture murder, murder by means of lying in wait and attempted murder, a necessary element is the existence in the mind of the defendant of a certain mental state, namely premeditation and deliberation. The definition of this mental state is set forth elsewhere in these instructions.

If the evidence shows that a defendant was mentally ill, or suffered from a mental disease or defect at the time of the alleged crime, you should consider that fact in determining whether or not such defendant had such mental state, in other words, whether he did in fact premeditate and deliberate.

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

(7 CT 1911.)

With respect to aider and abettor liability, the jury was instructed, in pertinent part, pursuant to CALJIC No. 3.01:

A person aids and abets the [commission] [or] [attempted commission] of a crime when he or she,

(1) with knowledge of the unlawful purpose of the perpetrator and

(2) with the intent or purpose of committing, encouraging, or facilitating the commission of the crime, by act or advice aids, promotes, encourages or instigates the commission of the crime.

(7 CT 1882.)

Considering the instructions "as a whole," it is not "'reasonably likely the jury misconstrued the instructions as precluding it from considering'" mental illness in deciding aiding and abetting liability. (*People v. Mendoza, supra*, 18 Cal.4th at p. 1134.) The trial court twice instructed the jury that it could consider evidence of Hajek's mental illness in deciding whether he formed the mental state for murder and attempted murder. It further instructed that an aider and abettor must act with the intent to commit, encourage, or facilitate the perpetrator's crime. Intelligent jurors reading the instructions as a whole and applying them in a commonsense manner (*People v. Laws* (1993) 12 Cal.App.4th 786, 796) would understand them to permit consideration of evidence of mental illness in deciding whether Hajek harbored the intent necessary for aider and abettor liability. This is particularly so given that neither the prosecution nor the defense distinguished between liability as a direct perpetrator as opposed to an aider and abettor in arguing the applicability of Hajek's mental illness evidence. Although a hypertechnical reading of the instructions could lead to a different conclusion, "[i]nstructions should be interpreted, if possible, so as to support the judgment rather than defeat it if they are reasonably susceptible to such interpretation. [Citations.]" (*People v. Laskiewicz* (1986) 176 Cal.App.3d 1254, 1258.) On this record, there is no basis for assuming the jurors drew a distinction none of the attorneys arguing the case chose to draw.

Finally, even assuming, arguendo, there was any error in the instructions, it was harmless because the jury necessarily resolved the factual issue against appellant. (See *People v. Sedeno* (1974) 10 Cal.3d 703, 721, overruled in part on other grounds in *People v. Breverman* (1998) 19 Cal.4th 142, 149, and disapproved on other grounds in *People v. Flannel* (1979) 25 Cal.3d 668, 684, fn. 12 [error in omitting instruction harmless when factual question posed by that instruction was necessarily resolved adversely to the defendant under

other, properly given instructions].) Notwithstanding the instruction that it could consider evidence of mental illness in determining whether Hajek did in fact premeditate and deliberate, the jury found that the attempted murders in counts two through five were willful, premeditated, and deliberated. (8 CT 2099-2101.) It also found true the lying-in-wait special circumstance as to count one, which requires premeditation and deliberation. (8 CT 2099; see 7 CT 1906.) Thus, the jury found that mental illness did not prevent Hajek from premeditating and deliberating the murder of Su Hung and attempting to murder the other members of the Wang family. Accordingly, it not reasonably probable Hajek would have achieved a more favorable result had the jury been specifically directed to consider his mental illness with respect to aider and abettor liability. (*Mendoza*, *supra*, 18 Cal.4th at pp. 1134-1135; *People v. Watson*, *supra*, 46 Cal.2d at p. 836.)

XXVI.

THE TRIAL COURT PROPERLY INSTRUCTED THE JURY WITH CALJIC NO. 2.51 AS TO MOTIVE

Without objection, the trial court instructed the jury with CALJIC No. 2.51, the standard instruction regarding motive evidence.[58] (7 CT 1942.) On appeal, both appellants contends the instruction violated their rights to due process, a fair trial, and a reliable capital verdict by permitting the jury to find guilt based on motive alone, shifting the burden of proof to him to prove innocence, and lessening the prosecution's burden of proof. (Hajek AOB 211-220 [Arg. XVIII]; Vo AOB 359-362 [Arg. 20].) The contention is forfeited by appellants'

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58. The instruction provided, "Motive is not an element of the crime charged and need not be shown. However, you may consider motive or lack of motive as a circumstance in this case. Presence of motive may tend to establish guilt. Absence of motive may tend to establish innocence. You will therefore give its presence or absence, as the case may be, the weight to which you find it to be entitled."

failure to object or request clarification. (*People v. Wilson* (2008) 43 Cal.4th 1, 22.) In any event, this Court has rejected similar claims in prior decisions.

> CALJIC No. 2.51 does not impermissibly allow the jury to find guilt based upon evidence of motive alone, despite the absence of an explicit statement to that effect. (*People v. Jurado* (2006) 38 Cal.4th 72, 124-125; *People v. Snow* (2003) 30 Cal.4th 43, 98 ["the instruction tells the jury that motive is not an element of the crime charged (murder) and need not be shown, which leaves little conceptual room for the idea that motive could establish *all* the elements of murder"].) Nor does it improperly shift the burden to the defense to prove innocence. (*People v. Prieto* (2003) 30 Cal.4th 226, 254 ["no reasonable juror would misconstrue CALJIC No. 2.51 as 'a standard of proof instruction apart from the reasonable doubt standard set forth clearly in CALJIC No. 2.90'"].) Finally, the instruction, which states that motive is not an element of the "crime charged," does not conflict with the special circumstance instruction in such a manner that there is any reasonable likelihood that the jury would have been confused, and would have improperly decided the truth of the special circumstance allegation. (*People v. Crew* (2003) 31 Cal.4th 822, 852; *People v. Noguera* (1992) 4 Cal.4th 599, 637 [rejecting similar claim concerning financial gain special circumstance "on the commonsense ground that . . . the '"crime charged" was murder and any reasonable juror would have understood the instruction as referring to this substantive offense only and not to any special circumstance allegation'"].)

(*People v. Rigg* (2008) 44 Cal.4th 248, 314.)

Hajek argues that the motive instruction stood out from the flight instruction, which immediately followed and which provided that proof of flight did not by itself establish guilt. (Hajek AOB 214.) That other instructions convey the same concept in different or more explicit terms, however, does not invalidate CALJIC No. 2.51 or this Court's opinions upholding it. Moreover, as stated in *People v. Petznick, supra*, 114 Cal.App.4th at page 685, the motive instruction differs from the flight instruction "because it is given for the additional purpose of clarifying that motive is not an element of a crime." Given this distinction, "there is nothing particularly startling or anomalous about the fact that it is phrased differently" than the flight

instruction. (*Ibid.*)

Hajek argues that the instruction negated the requirement in the first degree murder by torture instruction that the infliction of pain be for "the purpose of revenge, extortion, persuasion or for any sadistic purpose" (CALJIC No. 8.24). (Hajek AOB 216-217.) This Court has previously rejected this claim, as has the Court of Appeal. (*People v. Whisenhunt* (2008) 44 Cal.4th 174, 218; *People v. Lynn* (1984) 159 Cal.App.3d 715, 728.) "'Motive describes the reason a person chooses to commit a crime. The reason, however, is different from a required mental state such as intent . . . .'" (*Whisenhunt, supra*, at p. 218.)

For similar reasons, it was not beyond the jury's capacity to distinguish motive from the specific intent element of burglary. (Hajek AOB 216-217.) The jury was correctly instructed that the burglary in this case required "the specific intent to commit False Imprisonment, Murder, or Robbery . . . ." (7 CT 1918.) That appellants had motive to commit these crimes (i.e., to get revenge on Ellen) was relevant to, though not determinative of, the issue whether they entered the Wang house to commit them. CALJIC No. 2.51 thus told the jurors they were entitled, but not required, to consider evidence of motive as a circumstance in the case.

As for Hajek's claim that the prosecutor's opening and closing statements conflated motive with intent, thereby potentially misleading the jury (Hajek AOB 211-213), Hajek objected to none of the statements he finds so confusing in hindsight. Had he done so, and requested an admonition, the court might have given a clarifying instruction. (*People v. Gionis, supra*, 9 Cal.4th at p. 1215 [requiring objection and request for admonition to preserve claim of prosecutorial misconduct].) In any event, the prosecutor correctly told the jury that motive was not an element and did not need to be proved beyond a reasonable doubt. (21 RT 5366 ["Reasonable doubt only applies to the elements, doesn't apply to things like motive or the reason that the crime was

committed."]; 13 RT 3004 ["Things like motive are very useful but they're not an element. I will prove to you the motive in this case, motive of revenge, for a slight instance. But it is not an element and I don't have to prove it beyond a reasonable doubt."].) His discussion of appellants' purpose of revenge bore on both motive and intent because the two concepts, although not synonymous, do overlap. Indeed, that is the reason CALJIC No. 2.51 exists: it points out that motive, unlike intent, need not be proved.[59/]

XXVII.

THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON FIRST DEGREE PREMEDITATED MURDER AND FIRST DEGREE FELONY MURDER

Appellants contend that the trial court erred by instructing the jury on first degree premeditated murder and first degree felony murder because the information charged them only with second degree malice murder in violation of Penal Code section 187 without reference to section 189. (Hajek AOB 221-228 [Arg. XIX]; Vo AOB 340 [Arg. 15].) This Court has rejected that argument repeatedly. (*People v. Brasure* (2008) 42 Cal.4th 1037, 1057-1058; *People v. Morgan* (2007) 42 Cal.4th 593, 616-617; *People v. Geier* (2007) 41 Cal.4th 555, 591-592; *People v. Carey* (2007) 41 Cal.4th 109, 131-132; *People v. Hughes* (2002) 27 Cal.4th 287, 368-370.) Appellants offer no cogent reason to hold otherwise. The information here also charged appellants with robbery and burglary special circumstances, putting them on notice that the prosecution was proceeding on a felony-murder theory. (*Morgan*, *supra*, at pp. 616-617;

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59. Vo's suggestion that the motive instruction did not apply to him (Vo AOB 359-360) is without merit. Based on the evidence, a jury could reasonably conclude that Vo had a motive to kill the Wangs to get revenge on Ellen for fighting with his best friend and the girl he was in love with (see Argument V.B., *ante*), and that he had a motive to commit robbery to get money and to make it appear that was the purpose of the murders (see Argument XIX, *ante*).

Carey, *supra*, at p. 132.)

XXVIII.

THE TRIAL COURT PROPERLY USED THE WORDS "SHOULD" AND "MAY" IN THE JURY INSTRUCTIONS REGARDING EVIDENCE OF HAJEK'S MENTAL ILLNESS

Hajek contends that the instructions permitted the jurors to disregard his mental disease evidence by using the words "should" and "may" instead of "must." (Hajek AOB 229-234 [Arg. XX].) Specifically, the jury was instructed:

> In the crimes of first degree premeditated and deliberated murder, torture murder, murder by means of lying in wait and attempted murder, a necessary element is the existence in the mind of the defendant of a certain mental state, namely premeditation and deliberation. The definition of this mental state is set forth elsewhere in these instructions.
>
> If the evidence shows that a defendant was mentally ill, or suffered from a mental disease or defect at the time of the alleged crime, you *should* consider that fact in determining whether or not such defendant had such mental state, in other words, whether he did in fact premeditate and deliberate.
>
> If from all the evidence you have a reasonable doubt whether the defendant had such mental state, you must find that defendant did not have such mental state.

(7 CT 1911, italics added.)

The jury was further instructed:

> Evidence has been received regarding a [mental disease] [mental defect] [or] [mental disorder] of the defendant Stephen Hajer [*sic*] at the time of the commission of the crime charged namely, Murder and Attempted Murder in Count(s) 1, 2, 3, 4 and 5. You *may* consider such evidence solely for the purpose of determining whether the defendant Stephen Hajer [sic] actually formed the mental state, [premeditated, deliberated] which is an element of the crime charged [in Count[s] 1, 2, 3, 4 and 5, to-wit: Murder and Attempted Murder.

(7 CT 1912, italics added.)

Hajek forfeited his challenges to the foregoing instructions by failing to object in the trial court. (*People v. Rundle* (2008) 43 Cal.4th 76, 154; *People v. Welch* (1999) 20 Cal.4th 701, 757.) The claim is also without merit. There is no reasonable likelihood the instructions misled the jury to believe it could ignore Hajek's mental disease evidence. (*Boyde v. California* (1990) 494 U.S. 370, 380; *Estelle v. McGuire*, *supra*, 502 U.S. at p. 72 & fn. 4; *People v. Avena* (1996) 13 Cal.4th 394, 417.) On the contrary, the instructions at issue expressly called the jury's attention to that evidence as relevant to determining whether Hajek formed the required mental state for murder and attempted murder.

With respect to the first challenged instruction, the word "should" is commonly used "to express duty, obligation, necessity, propriety, or expediency." (Webster's 3d New International Dict. (2002) p. 2104.) The instruction at issue also directed the jury, "If *from all the evidence* you have a reasonable doubt whether the defendant had such mental state, you must find that defendant did not have such mental state." (Italics added.) (*People v. Reza* (1981) 121 Cal.App.3d 129, 133, italics added.) This language made clear that the word "should" was being used in its directory sense, and that any reasonable doubt had to be resolved in Hajek's favor.

The word "may" is also commonly used as a synonym for "shall" or "must," especially in statutes, contracts, and other legal contexts. (Webster's 3d New International Dict. (2002) p. 1396.) The word must also be understood in the context of the entire instruction, and other instructions given. (See CALJIC No. 1.01 [instructions to be considered as a whole and each in light of all the others]; 7 CT 1838.) The instruction here was a limiting instruction: it told the jury that it could use Hajek's mental illness solely to decide if he actually premeditated and deliberated. The phrase "may consider" was thus implicitly being used in contrast to what the jury "may not consider" in connection with

mental illness evidence. Read as a whole, any reasonable juror would understand the instruction as explaining when evidence of mental illness is, or is not, relevant.

Finally, nothing in the prosecutor's closing argument suggested that evidence of Hajek's mental disease was irrelevant to premeditation and deliberation. (*People v. Garceau* (1993) 6 Cal.4th 140, 189; *People v. Kelly* (1992) 2 Cal.4th 495, 526 [arguments of counsel may be considered in assessing the likelihood that jurors would misunderstand instruction].) Instead, he urged that appellant was a psychopath and criminal, and that there was no indication that whatever mental problems he had affected his behavior on the day of the crimes. (21 RT 5396-5411.) Under the circumstances, the jury could not have interpreted the challenged instructions in the manner Hajek suggests.

XXIX.

THE TRIAL COURT'S INSTRUCTIONS DID NOT UNDERMINE AND DILUTE THE REQUIREMENT OF PROOF BEYOND A REASONABLE DOUBT

Appellants contend several standard CALJIC instructions enabled the jury to convict them on a lesser standard than that constitutionally required. (Hajek AOB 235-249 [Arg. XXI]; Vo AOB 341-349 [Arg. 17].) They are mistaken.

A. Instructions On Circumstantial Evidence

Hajek contends the instructions on circumstantial evidence (CALJIC Nos. 2.02, 8.83, and 8.83.1 [7 CT 1875, 1909-1910]), which admonished the jury to accept reasonable interpretations of the evidence in favor of unreasonable interpretations, diluted the prosecution's burden of proving guilt beyond a reasonable doubt. (Hajek AOB 236-240.) Vo makes a similar complaint about

these and CALJIC No. 2.01.[60] (Vo AOB 342, 346-349.) This Court has rejected similar arguments. (*People v. Carey* (2007) 41 Cal.4th 109, 129-130; *People v. Rogers* (2006) 39 Cal.4th 826, 888-889; *People v. Guerra* (2006) 37 Cal.4th 1067, 1138-1139; *People v. Samuels* (2005) 36 Cal.4th 96, 131 [CALJIC No. 2.01 does not undermine the requirement of proof beyond a reasonable doubt]; *People v. Stewart, supra*, 33 Cal.4th at p. 521 [CALJIC Nos. 2.01 and 2.02 do not "operate[] to create an unconstitutional mandatory presumption and lessen the prosecution's burden of proof"]; *People v. Millwee* (1998) 18 Cal.4th 96, 160; *People v. Jennings* (1991) 53 Cal.3d 334, 385-386.) Appellants have provided no reason for this Court to revisit its prior holdings.

B. Other Standard Instructions

Hajek also contends that several other standard instructions given at the guilt phase individually and collectively diluted the constitutionally mandated reasonable doubt standard: CALJIC Nos. 1.00, 2.21.1, 2.21.2, 2.22, 2.27, 2.51, and 2.52 (7 CT 1836-1837, 1845-1847, 1854, 1942-1943). (Hajek AOB 240-245.) He is mistaken.

With respect to CALJIC Nos. 1.00, 2.51, and 2.52, Hajek complains that the instructions use the word "innocence," suggesting the jurors' duty was to decide whether he was guilty or innocent rather than guilty or not guilty beyond a reasonable doubt. This Court has previously rejected the argument. (*People v. Carey, supra*, 41 Cal.4th at p.130; *People v. Crew* (2003) 31 Cal.4th 822, 847.) "The instructions in question use the word 'innocence' to mean evidence less than that required to establish guilt, not to mean the defendant must establish innocence or that the prosecution has any burden other than proof beyond a reasonable doubt." (*Crew, supra*, at p. 847.) There is no reasonable

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60. The trial court provided the jury with a written copy of CALJIC No. 2.01 (7 CT 1848), although it may have failed to read this instruction aloud.

likelihood the jury would have misunderstood the instructions in the manner appellant suggests when it was repeatedly instructed on the proper burden of proof in other instructions (7 CT 1855, 1880, 1900, 1903, 1911, 1924-1925, 1954) and by counsel in closing argument (22 RT 5414-5416, 5490, 5499-5500, 5505, 5511-5512).

Hajek also argues that CALJIC Nos. 2.21.1 and 2.21.2 lessened the burden of proof. The latter, he points out, authorized the jury to reject the testimony of a witness "willfully false in one material part of his or her testimony" unless "from all the evidence, you believe the *probability of truth* favors his or her testimony in other particulars." (7 CT 1846, italics added.) This argument, too, has previously been rejected. (*People v. Carey*, *supra*, 41 Cal.4th at p. 130-131; *People v. Maury* (2003) 30 Cal.4th 342, 428-429.) The instruction is "'merely a statement of the obvious—that the jury should refrain from rejecting the whole of a witness's testimony if it believes that the probability of truth favors any part of it.'" (*Maury*, *supra*, at pp. 428-429.) It """does nothing more than explain to a jury one of the tests they may use in resolving a credibility dispute."""" (*Id.* at p. 429.) Hajek makes no substantive argument as to why CALJIC No. 2.21.1 was improper. "'[E]very brief should contain a legal argument with citation of authorities on the points made. If none is furnished on a particular point, the court may treat it as waived, and pass it without consideration. [Citations.]' [Citations.]" (*People v. Stanley* (1995) 10 Cal.4th 764, 793.) In any event, this instruction, too, has been upheld against constitutional attack. (*Carey*, *supra*, at p. 130.)

Hajek also contends that CALJIC No. 2.22 improperly directed the jury to determine each factual issue in the case by deciding which witnesses were more convincing, effectively replacing the proof-beyond-a-reasonable-doubt standard with the lesser preponderance-of-the-evidence standard. Again, this Court has previously rejected the argument. (*Carey*, *supra*, 41 Cal.4th at p. 131; *Maury*,

supra, 30 Cal.4th at p. 429.) When considered in conjunction with CALJIC Nos. 1.01 and 2.90, "'"[I]t is apparent that the jury was instructed to weigh the relative convincing force of the evidence (CALJIC No. 2.22) only as part of the process of determining whether the prosecution had met its fundamental burden of proving [defendant's] guilt beyond a reasonable doubt . . . ."'" (*Maury*, *supra*, at p. 429.)

Finally, Hajek asserts that CALJIC No. 2.27, regarding the sufficiency of the testimony of a single witness to prove a fact, erroneously suggests that the defense, as well as the prosecution, has the burden of proving facts. The Court has rejected this argument as well. (*Carey*, *supra*, 41 Cal.4th at p. 131.) Hajek offers no persuasive reason to reconsider it.

C. CALJIC No. 2.90

Vo contends that CALJIC No. 2.90, the standard instruction on reasonable doubt, is confusing and misleading. (Vo AOB 344-345.) He recognizes that the United States Supreme Court has upheld the instruction (*Victor v. Nebraska* (1994) 511 U.S. 1), but asserts there is a reasonable likelihood his jury was misled as to the standard required for conviction because the court also gave the four instructions on circumstantial evidence complained of above (CALJIC Nos. 2.01, 2.02, 8.83, 8.83.1). This Court rejected a similar claim in *People v. Carey*, *supra*, 41 Cal.4th at page 130. There is no compelling reason to revisit that holding.

XXX.

THE JURY WAS NOT REQUIRED TO AGREE UNANIMOUSLY AS TO THE THEORY OF FIRST DEGREE MURDER

Hajek, joined by Vo, contends the trial court erred in failing to instruct the jury that it had to agree unanimously on a theory of first degree murder in order

to convict him of that charge. (Hajek AOB 250-258 [Arg. XXII]; Vo AOB 341 [Arg. 16].) As appellants recognize, this Court has repeatedly rejected this claim. (*People v. Loker* (2008) 44 Cal.4th 691, 707-708; *People v. Morgan* (2007) 42 Cal.4th 593, 617; *People v. Nakahara* (2003) 30 Cal.4th 705, 712.) They offer no cogent reason for holding otherwise.

XXXI.

THE TRIAL COURT PROPERLY REFUSED HAJEK'S PINPOINT MITIGATION INSTRUCTION

During the penalty phase, Hajek requested a pinpoint instruction on mitigation that would tell the jurors:

> Evidence has been produced regarding Stehen [sic] Hajek concerning the following: his history of disrupted foster and adoptive placements; the damage caused to him by numerous moves in foster and adoptive placements; emotional abuse inflicted upon him in foster and adoptive placements; his history and treatment for mental illness; the successful treatment of his mental illness with medication; his work history; his remorse for the effects of this crime on the victims; his stabilization, maturation and change since he has been incarcerated for this offense; his parents' love for him.
>
> Any or all of the above may be considered as factors in mitigation.
>
> In this phase of the case, you may consider sympathy, pity, mercy or compassion in determining the appropriate penalty. These may be considered by you as factors in mitigation.

(10 CT 2597.)

The trial court refused the instruction save for the first sentence of the last paragraph (25 RT 6348), which was given as part of another instruction (10 CT 2641).[61] Hajek contends the court's refusal to give the entire instruction was

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61. The given instruction told the jurors: "You will now be instructed as to all of the law that applies to the penalty phase of this trial. [¶] You must determine what the facts are from the evidence received during the entire trial unless you are instructed otherwise. You must accept and follow the law that

prejudicial error.[62] (Hajek AOB 259-268 [Arg. XXIII].) As he recognizes, "this Court has often upheld the denials by trial courts of instructions, such as the one proposed by appellant, on the ground that they duplicated CALJIC No. 8.85, factor (k), and/or the definition of 'mitigation' in CALJIC No. 8.88." (Hajek AOB 261.)

Both instructions were given in this case. The former directs the jury in deciding the penalty to consider, in addition to other factors enumerated in the instruction, "[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime [and any sympathetic or other aspect of the defendant's character or record [that the defendant offers] as a basis for a sentence less than death, whether or not related to the offense for which he is on trial. You must disregard any jury instruction given to you in the guilt or innocence phase of this trial which conflicts with this principle]." (10 CT 2644.) The latter provides, in pertinent part, "A mitigating circumstance is any fact, condition or event which as such, does not constitute a justification or excuse for the crime in question, but may be considered as an extenuating circumstance in determining the appropriateness of the death penalty." (10 CT 2645.) These instructions "adequately convey[] the full range of mitigating evidence that may be considered by the jury." (*People v. Catlin* (2001) 26

I shall state to you. Disregard all other instructions given to you in other phases of this trial. *In this phase of the case, you may consider sympathy, pity, mercy or compassion in determining the appropriate penalty.* [¶] You must neither be influenced by bias nor prejudice against the defendant, nor swayed by public opinion or public feelings. Both the People and the Defendant have a right to expect that you will consider all of the evidence, follow the law, exercise your discretion conscientiously, and reach a just verdict." (10 CT 2641, italics added.)

62. Hajek also asserts inaccurately that the court failed to include even the portion to which it agreed in the written instructions. (Hajek AOB 263-265.) The jury was told, both orally and in writing, that it could consider mercy in determining the appropriate penalty. (25 RT 6377; 10 CT 2641.)

Cal.4th 81, 173-174.) This Court has rejected claims similar to Hajek's on numerous occasions. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1150 [trial court has no duty to identify mitigating factors and can properly refuse as argumentative an instruction that identifies particular evidence as mitigating]; *People v. San Nicolas* (2004) 34 Cal.4th 614, 672-673 [instruction asking jury to draw inferences favorable to defendant regarding particular items of evidence "'properly belongs not in the instructions, but in the arguments of counsel to the jury'"]; *People v. Yeoman* (2003) 31 Cal.4th 93, 151-153 [instruction noting various mitigating circumstances would replicate factor (k); court not required to give jury instructions cataloging the mitigating evidence]; *People v. Carpenter* (1997) 15 Cal.4th 312, 416 [catch-all instruction adequate].) Nothing about Hajek's case warrants reconsideration of these decisions.[63]

XXXII.

VO WAS NOT PREJUDICED BY THE GIVING OF INSTRUCTIONS RELATING TO HAJEK'S CONDUCT AND DEFENSES

Vo contends he was deprived of a fair trial because some of the instructions given to the jury bore only on Hajek's conduct and mental state defense. (Vo AOB 355-359 [Arg. 19].) As Vo points out, the jury was instructed to decide the guilt of each defendant separately. (7 CT 1852.) It was also instructed (1) that some evidence was admitted against, and could be considered against, one defendant but not the other (7 CT 1932), and (2) that some evidence was admitted for a limited purpose and could not be considered for any other purpose (7 CT 1934). Vo complains that these limiting instructions were

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63. Hajek also argues he was entitled to an instruction telling the jury that mitigating factors are unlimited. (Hajek AOB 263.) The refused instruction did not address this issue. In any event, this Court has rejected this contention as well. (*People v. San Nicolas*, *supra*, 34 Cal.4th at p. 673; *People v. Smithey* (1999) 20 Cal.4th 936, 1006.)

inadequate because they did not specify "what evidence was admissible [against] which defendant, or for what charges or allegations." (Vo AOB 356.) It was his obligation, however, to request further clarification if necessary. (Evid. Code, § 355.) His failure to do so forfeits the claim on appeal. As for his complaint that the instructions on mental state defenses, witness intimidation, and firearm use pertained only to Hajek (Vo AOB 356), the jury could not have been confused or misled as the instructions themselves specifically named Hajek. (7 CT 1912, 1924, 1927.)[64/] Finally, although the two instructions on preoffense and postarrest statements by a defendant did not specifically name Hajek (7 CT 1931, 1933; see Vo AOB 356-357), any juror at this trial would understand those instructions pertained to Hajek's preoffense statement to Tevya Moriarty and his numerous postarrest letters. (*People v. Carey, supra*, 41 Cal.4th at p. 130 [jurors presumed to be intelligent persons, capable of understanding instructions and applying them to the facts of the case].) The latter instruction specified that the postarrest statement could be used against the declarant alone. (7 CT 1933.) If Vo believed a limiting instruction was needed as to the former, it was his burden to ask for one. (Evid. Code, § 355.)

XXXIII.

THE PROSECUTOR DID NOT COMMIT MISCONDUCT IN THE GUILT PHASE CLOSING ARGUMENT BY REFERRING TO DEFENSE COUNSEL'S "SALESMANSHIP"

Hajek contends the prosecutor committed misconduct during his guilt phase argument in rebuttal by referring several times to defense counsels' "salesmanship." (Hajek 2nd Supp. AOB 8-9 [Arg. XXXIII.A.].) The claim has

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64. CALJIC No. 2.06 (7 CT 1926), addressing witness intimidation did not name Hajek, but CALJIC No. 2.07, which immediately followed (7 CT 1927) and dealt with the same topic, did specifically refer to Hajek.

no merit.

A. The Challenged Remarks

The prosecutor argued in rebuttal that Hajek's counsel was particularly effective in arguing for a conviction of second degree murder, which "is a garden variety, every day average type of murder where there's no plan." (22 RT 5554.) He continued, "And she told you actually that this was such a case. When you think about it that's amazing. That is really an *incredible job of salesmanship*, to get you to think about that even." (22 RT 5554-5555, italics added.) Defense counsel did not object to the remark.

Later, the prosecutor asked the jury "to remember your role in this case is not to decide who the best lawyer is or what the *best job of salesmanship* is, but simply to do justice, to follow the law in this case and decide what happened." (22 RT 5557, italics added.) Again the defense lodged no objection.

Counsel also failed to lodge an objection when the prosecutor subsequently responded to Hajek's counsel's argument that "they were at the house for hours and hours and nothing happened" (22 RT 5498): "It's *excellent salesmanship*, you would have to believe that in order to acquit them of these charges, this is nothing, kidnaping and murder, this is all nothing?" (22 RT 5560, italics added.)

Nor did the defense object when, after Hajek's counsel argued the prosecutor was throwing a plate of spaghetti up on the wall to see what stuck (22 RT 5459), the prosecutor responded that the various liability theories were dictated by the law and appellants' own actions: "I simply don't have that power to throw junk up on the wall and make it stick. It's a careful argument, technique, by *great salesmen*. It's just not the reality." (22 RT 5561, italics added.)

The only time Hajek objected to the word "salesmanship" was when the prosecutor argued that Su Hung's health problems had no bearing on the torture

issue:

> [PROSECUTOR]: It was very clever to try and distract you and focus on you the fact that she's 73 years old, she had lung problems, she was malnourished and she probably died right away. So what? *Salesmanship.* Those things don't happen to be relevant.
>
> MS. GREENWOOD: Excuse me, your Honor. I'm sorry, Mr. Waite. I'm going to object to this repeated reference to salesmanship. That is improper argument. Focus is on the law and the facts, not my ability as an attorney. Thank you.
>
> THE COURT: Objection is overruled.
>
> MR. WAITE: If she finds salesmanship—I will strike that word and call it excellent lawyering. That's what it is. She's an excellent defense attorney. She can't make up the law, however, and she can't hide those facts.

(22 RT 5562, italics added.)

B. Hajek Has Forfeited His Claim of Prosecutorial Misconduct

"Generally, a reviewing court will not review a claim of misconduct in the absence of an objection and request for admonishment at trial. '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 cured the harm caused by the misconduct.' [Citation.]" (*People v. Gionis*, *supra*, 9 Cal.4th at p. 1215.)

As shown above, defense counsel neither objected nor requested an admonition the first four times the prosecutor referred to her salesmanship. The present challenges to those remarks are therefore forfeited. To the extent that counsel's objection to the prosecutor's "repeated reference to salesmanship" (22 RT 5562), can be construed as an objection to all the comments challenged on appeal, counsel's failure to request an admonition forfeits the claim in any event. Nor can Hajek claim that objection would have been futile given that

once counsel objected to the fifth reference to salesmanship, the prosecutor immediately dropped the term, saying, "I will strike that word and call it excellent lawyering." (22 RT 5562.)

C. The Prosecutor Did Not Commit Misconduct

In any event, there was no misconduct. It has been recognized as prosecutorial misconduct to disparage defense counsel in front of the jury. (*People v. Young* (2005) 35 Cal.4th 1149, 1193 [accusing defense counsel of lying to the jury]; *People v. Cummings* (1993) 4 Cal.4th 1233, 1302 [accusing defense counsel of engaging in deception to the jury].) "Nevertheless, the prosecutor has wide latitude in describing the deficiencies in opposing counsel's tactics and factual account. (See *People v. Frye* (1998) 18 Cal.4th 894, 977-978 [no misconduct where prosecutor accused counsel of making an "'irresponsible"' third party culpability claim]; *People v. Medina* (1995) 11 Cal.4th 694, 759 [no misconduct where prosecutor said counsel can "'twist [and] poke [and] try to draw some speculation, try to get you to buy something"'].)" (*People v. Bemore* (2000) 22 Cal.4th 809, 846.)

The prosecutor's references to salesmanship are similar to the asserted misconduct in *People v. Zambrano* (2007) 41 Cal.4th 1082, 1154, where the prosecutor called defense counsel's argument a "'lawyer's game' and an attempt to confuse the jury by taking the witness's statement out of context." This Court found no misconduct.

> It was clear the prosecutor's comment was aimed solely at the persuasive force of defense counsel's closing argument, and not at counsel personally. We have found no impropriety in similar prosecutorial remarks. (E.g., [*People v.*] *Stitely* [(2005)] 35 Cal.4th 514, 559-560 [argument that jurors should avoid "'fall[ing] for"' defense counsel's "'ridiculous"' and "'outrageous"' attempt to allow defendant to "'walk' free" by claiming he was guilty only of second degree murder]; *People v. Gionis* (1995) 9 Cal.4th 1196, 1215-1216 [argument that defense counsel was talking out of both sides of his mouth and that this was "'great lawyering"']; *People v. Breaux* (1991) 1 Cal.4th 281, 306-307

> [argument that law students are taught to create confusion when neither the law nor the facts are on their side, because confusion benefits the defense]; *People v. Bell* (1989) 49 Cal.3d 502, 538 [argument that defense counsel's job is to "'confuse[ ]'"and "'throw sand in your eyes,'" and that counsel "'does a good job of it'"].)

(*Zambrano*, *supra*, at p. 1155.)

The challenged remarks here were of the same order as those in *Zambrano* and the cases cited therein. There was "no improper attack on counsel's integrity, but only on the merits of [her] trial tactics and arguments." (*Ibid.*) Hajek's claim of prosecutorial misconduct thus fails.

XXXIV.

APPELLANTS WERE NOT PREJUDICED BY THE TRIAL COURT'S FAILURE TO COMPLY WITH PENAL CODE SECTION 190.9

Hajek and Vo both contend the trial court failed to comply with section 190.9, which requires all proceedings in a capital case to be conducted on the record with a court reporter present. (Hajek AOB 269-275 [Arg. XXIV]; Vo AOB 362-374 [Arg. 21].) Appellants note that there were numerous off-the-record discussions during the preliminary examination and trial, and that during Officer Walter Robinson's testimony, the tape-recorded conversation between Hajek and Vo was played without specification of the parts of the tape being played.[65/] The omissions do not require reversal because appellants fail to demonstrate prejudice.

With regard to section 190.9, this Court recently stated:

> [T]rial courts should take care to avoid off-the-record discussions in capital cases, and to comply with section 190.9 in all respects. (*People v. Freeman* [1994] 8 Cal.4th [450] at p. 511.) Maintaining the documentary record is equally important. (See [Pen. Code], § 190.7.)

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65. The entire tape was played through once. (16 RT 3816.) The prosecutor thereafter played unspecified portions of the tape and asked Officer Robinson to identify the speaker. (16 RT 3817-3618.)

> These measures not only assure an adequate appellate record, but also obviate the burden of settling the record. (*Freeman,* at p. 511.) Human affairs being what they are, however, perfect records are not always achieved. Appellants must do more than merely complain about omissions; they must demonstrate that the record is insufficient for meaningful appellate review. (*People v. Rogers* [2007] 39 Cal.4th [826] at pp. 857-858.) The significance of missing items must be analyzed with reference to what is reflected by the record. Here, defendant fails to establish that the omissions he notes resulted in a record so deficient as to make the appellate process unreliable.

(*People v. Harris*, *supra*, 43 Cal.4th at p. 1283; see also *People v. Huggins* (2006) 38 Cal.4th 175, 204 [defendant's burden to show prejudice].)

Likewise here, appellants have failed to meet their burden of showing prejudice as a result of any of the omissions they identify. Indeed, Hajek concedes as much (Hajek AOB 275), but asks this Court to reconsider its rule requiring a showing of prejudice in favor of per se reversal for noncompliance with the statute. The Court should decline to do so. Most of the unreported proceedings likely involved routine matters or rulings in appellants' favor, or matters such as instructions or jury requests that can be reviewed by reference to the instructions or responses themselves. (Cf. *People v. Freeman* (1994) 8 Cal.4th 450, 510.) Appellants were also given the opportunity to settle the record. In any event, appellants' able advocates would have ensured that anything of importance discussed off the record was later repeated or summarized on the record so as to preserve it for purposes of appeal. Appellants were entitled to a trial record adequate for meaningful appellate review. This does not necessarily require verbatim transcription of all proceedings. "Failure to report bench or chambers conferences between counsel and the trial judge is not a 'structural defect affecting the framework within the trial proceedings.' . . . It has never been suggested that either the adequacy of an appellate record or the fairness of the proceedings necessarily is affected by failure to report bench and chambers conferences." (*People v.*

Cummings (1993) 4 Cal.4th 1233, 1333, fn. 70.)

XXXV.

THE TRIAL COURT PROPERLY EXCUSED JUROR ERNST AND REFUSED TO EXCUSE JUROR WILLIAMS

Vo, joined by Hajek, contends the court abused its discretion in excusing Juror Ernst during the trial for hardship and refusing to excuse Juror Williams. (Vo AOB 378-386 [Arg. 23]; Hajek 2nd Supp. AOB 4-5.) They are mistaken.

A. Factual Background

On April 10, 1995, before the prosecution completed its case-in-chief, Juror Ernst notified the court that he was having a problem with work. He explained that he worked as an assistant grocery manager for Save Mart Supermarket. The company had locked out the workers and personnel had informed him that there was no collective bargaining agreement and therefore, they were not required to pay him for jury service. His union advised him that he could file a grievance, but was unlikely to prevail. He explained to the court that he could work for another grocery chain that was not on strike, such as Nob Hill, PW, or Lunardis, and had in fact applied to all of those companies, but none would hire him while he was on jury duty. He could not afford his house payments without a job. (14 RT 3412.)

After Juror Ernst had left the courtroom, the court advised the parties, "I'm inclined to dismiss him due to the fact that he's going to be without pay. There's a possibility he could get a job elsewhere." (14 RT 3413.) Vo's counsel asked the court to defer its decision because there were only three alternates remaining and the labor dispute might resolve. "So my request would be he not be excused right now, but we wait a matter of a few days until we see what happens in that area." (14 RT 3413.) The prosecutor asked, "Would it be reasonable to ask Mr. Ernst if he can suffer for the next four days, and with the

understanding that if the strike doesn't resolve, he would be excused so that he would be free and he could tell future employers he would be able to get a job next week?" (14 RT 3414.) The court responded that he was "probably competing with everyone else that is union that's been locked out" and by that time available positions would be filled. (14 RT 3414.) It decided, "Rather than defer the decision, I'm going to excuse him at this time." (14 RT 3415.) Hajek's counsel noted that she was joining the remarks made by the prosecutor and Vo's counsel. (14 RT 3415.) However, neither she nor Vo's counsel objected to the court's ruling.

Juror Ernst was replaced with one of the alternates, Juror Williams. (14 RT 3415.) The jury returned its guilty verdicts on May 22, 1995, about a month and a half later. (22 RT 5638.) The parties then began discussing scheduling for the penalty phase. Hajek's counsel said she would be ready to start on June 5, 1995. (22 RT 5639.) Vo's counsel indicated he was not ready. (22 RT 5640.) Hajek's counsel responded that she did not want there to be a significant break before the penalty phase began. (22 RT 5641.) The court responded that the prosecutor could proceed against Hajek first, which would give Vo some more time. (22 RT 5641.) It then noted the receipt of a note from Juror Williams indicating she had a hardship at work and called her into the courtroom. (22 RT 5641-5642.)

Juror Williams explained, "On June 5th I am scheduled to go to Washington D.C. This is a career developmental step for promotion possibility. It is a kind of a precursor to advancement in the organization. [¶] I've already been able to postpone this. It was scheduled for the 1st of April, but this is the last particular two-week period until next year that I'll be able to attend this." (22 RT 5642.) The meeting was to last for two weeks. (22 RT 5642.) If she did not attend, her career would be "put on hold for another year" as she would be ineligible for promotion. (22 RT 5643.)

Initially, Hajek and Vo both objected to discharging Juror Williams. Hajek's counsel argued that Williams deliberated in the guilt phase, but "alternate jurors who would replace her would not have looked at the exhibits and listened to the tape and done a variety of things I think would be necessary for them to go into a penalty phase on equal footing with the other jurors." (22 RT 5644.) Vo's counsel objected as well, asserting that he was not "comfortable with the state of [his] readiness" and asking that the penalty phase be delayed for an additional three weeks (from June 6 to June 26) to give him more time to prepare while accommodating the juror's need to pursue her career. (22 RT 5644-5645.) The court indicated its reluctance to delay the case that long and after discussing the schedule with the jury, maintained the June 6 setting to begin the penalty phase and declined to discharge Juror Williams. (22 RT 5647-5648.)

On May 25, appellants reversed course and asked the court to discharge Juror Williams. The following week, Hajek's counsel recounted the parties' off-the-record discussion, explaining that "although, yes, I would like the original 12 who participated in the guilt phase deliberations to be in the penalty phase, that the defense is caught between a rock and a hard place because the heart of what we do in a penalty phase is ask the jury to be generous, and essentially what we have done has been less than generous with her." (22 RT 5699.) Counsel expressed a concern that any anger Juror Williams felt would be directed toward the defense even though it was the court that announced the decision and thus asked that she be discharged. (22 RT 5699.) Vo joined in counsel's comments and request. (22 RT 5699.)

The court stated that it had decided to retain Juror Williams. (22 RT 5699.) It denied as unnecessary Vo's request to question the juror about whether the decision to retain her would affect her impartiality. (22 RT 5700-5701.)

B. Standard of Review

Penal Code section 1089 provides, in pertinent part, that "[i]f at any time, whether before or after the final submission of the case to the jury, a juror dies or becomes ill, or upon other good cause shown to the court is found to be unable to perform his duty, or if a juror requests a discharge and good cause appears therefor," the court may discharge the juror and replace him with an alternate.[66] A trial court's decision to retain or discharge a juror is reviewed under the deferential "abuse of discretion" standard. (*People v. Earp* (1999) 20 Cal.4th 826, 892.) The reviewing court will uphold the decision unless it """"falls outside the bounds of reason."""" (*Ibid.*)

C. The Court Properly Exercised Its Discretion with Respect to Jurors Ernst and Williams

The court properly exercised its discretion in dismissing Juror Ernst for financial hardship. The juror needed his job to pay his mortgage and could not get another job while serving jury duty. The predicament he faced constituted "good cause" for substitution of an alternate. In the past, "[this Court has] upheld a trial court's decision to discharge a juror for 'good cause' when continued jury service would force the cancellation of a juror's scheduled vacation [citation], would be a financial hardship on the juror [citation], or when a juror who anticipated starting a new job needed additional time to complete certain paperwork related to her old position [citation]." (*People v. Earp*, *supra*, 20 Cal.4th at pp. 892-893.) In *Earp*, this Court upheld a trial court's discharge of a juror during penalty phase deliberations where the juror's employer had stopped paying her for jury service one month earlier and she had used her own vacation time during that month to continue to serve on the jury.

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66. Code of Civil Procedure section 204, cited by Vo (Vo AOB 383), applies to excusal from jury service, as opposed to the discharge of a juror who has already been sworn.

(*Ibid.*) The circumstances here were of the same order.

Juror Williams's problem, however, was of a lesser magnitude, and the trial court's decision to retain her was likewise a proper exercise of discretion. Her continued jury service, while inconvenient, did not render her unable to pay for basic needs like housing. Nor would it cause any permanent damage to her job because, as she indicated, the meeting would recur the following year. On balance, the court did not exceed the bounds of reason in concluding that Williams's having to put her career "on hold" for a year was insufficient cause for dismissal. There was no basis for the defense speculation that the court's decision would compromise Williams's impartiality and do so at the expense of appellants.

XXXVI.

VO RECEIVED NOTICE OF THE EVIDENCE IN AGGRAVATION WITHIN A REASONABLE TIME

Vo, joined by Hajek, contends he was denied due process and statutory notice of the evidence in aggravation. (Vo AOB 386-393 [Arg. 24]; Hajek 2nd Supp. AOB 5-6.) We disagree.

Section 190.3 provides, in relevant part: "Except for evidence in proof of the offense or special circumstances which subject a defendant to the death penalty, no evidence may be presented by the prosecution in aggravation unless notice of the evidence to be introduced has been given to the defendant within a reasonable period of time as determined by the court, prior to trial." "The purpose of the notice provision is to afford defendant an opportunity to meet the prosecutor's aggravating evidence." (*People v. Taylor* (2001) 26 Cal.4th 1155, 1182.)

On February 6, 1995, prior to the start of the guilt phase trial, the prosecutor filed a notice pursuant to section 190.3, listing potential penalty phase

witnesses and evidence.[67] (6 CT 1577-1579.) The list included "[e]ach of the members of the Wang family," who "may be called upon to describe the impact of defendant's crimes against them"; photographs of the victim prior to death; and police testimony regarding Hajek's arrest on January 1, 1991, for possession of a stolen vehicle and loaded shotgun. (6 CT 1578.)

On June 5, 1995, prior to the start of the penalty phase, the prosecutor filed a brief announcing his intent to present victim impact testimony through Ellen Wang and Cary Wang, evidence of Hajek's juvenile criminal activities, evidence of Hajek's January 1, 1991 conviction and other violent criminal behavior, including his display of nunchucks and assault on his Round Table coworker, and evidence that Vo was found in possession of an illegal razor blade in jail in 1992. (8 CT 2202-2207.) Appellants both filed motions arguing that the prosecutor should be restricted to presenting evidence contained in his February 1995 notice. (8 CT 2118-2125; 8 CT 2132-2140.) At the hearing on June 5, the trial court agreed with appellants and excluded everything except testimony by Ellen Wang as to the effect of appellants' crimes on her immediate family (but not on her grandfather, Su Hung's husband, who lived in Taiwan),[68] photographs of the victim while she was alive, and Hajek's conviction for auto theft with a firearm enhancement, but not the underlying facts. (22 RT 5680, 5681, 5684.)

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67. Although Vo makes a point of noting that no proof of service appears in the record (Vo AOB 387), it is evident that the parties received the notice in January or February. (See 22 RT 5673, 5678, 5679 [Hajek's counsel repeatedly referring to the "January notice"]; 8 CT 2132 [Vo's motion to restrict prosecution's penalty phase evidence to evidence listed in its February 1995 notice].)

68. Although his June brief listed both Cary and Ellen Wang as penalty phase witnesses, the prosecutor announced at the hearing that he only intended to call Ellen. (22 RT 5672.)

Appellants contend that the February 6, 1995, notice was not provided a reasonable period of time before trial. We disagree. "Section 190.3's plain language gives the court discretion to determine what amount of notice is reasonable, but the evidence must be given to a defendant before the case is called." (*People v. Roberts* (1992) 2 Cal.4th 271, 330.) The notice in this case was given to the defense in January or February, prior to the start of the guilt phase trial. Appellants did not complain that they had insufficient time to prepare their response to the listed evidence. Indeed, their motions in June, which sought to limit the prosecutor to the evidence listed in the February notice, implicitly conceded that the prior notice was timely. Nor were appellants prejudiced by the timing of the notice. The only witness ultimately called was Ellen Wang, a witness with whom the defense was well acquainted; moreover, her testimony was limited to the effect of the crimes on her immediate family. Indeed, appellants are unable to articulate specifically how they were prejudiced by the allegedly late notice, relying instead on bald assertions and boilerplate about the importance of adequate notice.

Appellants also appear to contend the prosecutor's notice was inadequate because he argued various aggravating factors in his closing statement that were not contained in his notice. (See Vo AOB 390.) Their failure to timely object on grounds of prosecutorial misconduct and request an admonition from the court precludes their complaint on appeal. (*People v. Gionis*, *supra*, 9 Cal.4th at p. 1215.) In any event, this Court recognized the distinction between evidence in aggravation and argument in *People v. Salcido* (2008) 44 Cal.4th 93. There, in response to defendant's contention that the prosecutor, without notice, argued lack of remorse and that life without possibility of parole would afford him "a lifetime of unfettered leisurely pursuits," this Court noted:

> The prosecutor made both of these points in his closing *argument*, but did not offer any related *evidence* in aggravation. The statute requiring the prosecution to provide notice of aggravating evidence (§ 190.3) does

not require any notice relating to the prosecution's intended argument. (*People v. Holt* (1997) 15 Cal.4th 619, 691.)

(*Salcido, supra*, 44 Cal.4th at p. 157, fn. 11.)

XXXVII.

APPELLANTS WERE NOT ENTITLED TO A SEPARATE JURY FOR THE PENALTY PHASE

During voir dire, prospective juror Barrett indicated that he could not sentence a person to death "no matter what. I just have—morally I couldn't do it." (3 RT 578.) After the court excused him for cause, Vo's counsel asked the court not to excuse him from serving as a guilt phase juror. (3 RT 580.) Vo's position was that a prospective juror who is excludable as a penalty phase juror is not automatically excludable as a guilt phase juror. (3 RT 580.) The court responded, "There's only going to be one jury. I'm not going to select two juries, so the record will be clear." (3 RT 580.) It explained, "I am going to follow [*Wainwright v.*] *Witt* [(1985) 469 U.S. 412]. The only jurors that we will keep are those that will have a free choice and can impose either penalty and have no predisposition to impose death or life without [the possibility of parole]." (3 RT 581.) Counsel responded that "the fact he is excludable as a penalty phase juror, does not automatically result in him being excused as a guilt juror, and we would request the court not excuse him from service as a guilt phase juror." (3 RT 581.) He noted an objection to all similarly situated prospective jurors. (3 RT 580.)

Vo contends the trial court erred in refusing to provide a separate jury for the penalty phase because death-qualified jurors are more likely to convict at the guilt phase than non-death-qualified jurors. (Vo AOB 394-396 [Arg. 25].) Assuming, arguendo, that defense counsel's remarks sufficiently resembled an actual motion to impanel separate juries for the guilt and penalty phases to preserve the issue for appeal, the court's ruling was correct. Penal Code section

190.4, subdivision (c) "'requires that, absent good cause, the same jury decide guilt and penalty in a capital trial.'" (*People v. Prince* (2007) 40 Cal.4th 1179, 1281.) And as Vo recognizes (Vo AOB 394, fn. 160), this Court and the United States Supreme Court have both held that separate juries for the guilt and penalty phase are not constitutionally required. (*People v. Osband* (1996) 13 Cal.4th 622, 668; *Lockhart v. McCree* (1986) 476 U.S. 162, 174-176.) He offers no compelling reason to revisit these holdings.

XXXVIII.

THE PROSECUTOR DID NOT COMMIT MISCONDUCT IN THE PENALTY PHASE BY CROSS-EXAMINING HAJEK'S EXPERT ABOUT SADISM

In his second supplemental opening brief, Hajek argues that the prosecutor committed misconduct in the penalty phase by questioning defense expert Minagawa about sadism. (Hajek 2nd Supp. AOB 9-12 [Arg. XXXIII.B.1.].) He is mistaken.

A. Factual Background

The following colloquy took place during the prosecutor's penalty cross-examination of Dr. Minagawa, who had testified during the guilt phase that Hajek suffered from, inter alia, borderline personality disorder with antisocial traits:

> Q. Sadism is a disorder described in the Diagnostic and Statistical Manual Number 4?
>
> A. Yes.
>
> Q. What is sadism?
>
> A. Sadism is getting pleasure out of inflicting pain purposely on an individual or a pet, usually in the form of sexual gratification.
>
> Q. Not necessarily?

A. Not necessarily, but in the majority of cases, yes.

Q. Now you certainly have very clear, very strong evidence that Mr. Hajek was sadistic before he did this murder?

A. What I had was an individual who said he didn't do it, and it wasn't my purpose, at least my understanding was not to discover what he did. It was to come up with a diagnosis based on all the evidence that I had prior to the crime as well as leading up to the crime.

. . .

Q. Okay. Sir, well, you were aware, were you not, of the statement by Tevya Moriarty, Mr. Hajek called her and described that he wanted to kill the whole family in front of Ellen Wang so he could look into her eyes and watch as he killed her last? Would you not agree that is overwhelming evidence of sadism?

A. It is sadistic, yes.

Q. Would you not agree then he is also—another problem, another diagnosis you could add on to him, is he is a sadistic person?

A. That also falls under the antisocial traits though.

Q. So would you agree Mr. Hajek, another disorder, mental problem he has is he's sadistic?

A. It could be. I'd have to have more information. I'd have to go into it in greater length, yes.

(23 RT 5894-5895.)

The questioning continued in like vein for the next few pages, with Hajek's counsel objecting periodically on bases not asserted here. (23 RT 5895-5899.) The colloquy then continued as follows:

Q. Now with a person who is sadistic, the Diagnostic and Statistical Manual recognizes there are different forms of it, correct?

A. Yes.

Q. Sexual sadism for instance is a very well-defined—

A. That's the most common form.

Q. It is perhaps the most well-documented, most well-researched form?

A. I would have to say yes, but I would have to look at the literature and I could certainly do that if you wanted me to.

Q. Other forms of sadism not so tied to the sex drive are not so well-known; is that correct?

A. That's correct.

Q. And we don't know much about sadistic murderers, do we?

A. No, we don't.

Q. You agree this crime and Mr. Hajek's statements and actions show strong signs he's a sadistic murderer?

A. At the time when I was interviewing Mr. Hajek, he denied committing the murder. I did not pursue that at any great length. He said he didn't know what happened.

There isn't a lot of literature on sadistic murderers, that's correct, because there are not many of them. And sadism is covered under different diagnoses and different criteria.

If you want to look throughout the DSM-4, other sadistic behaviors are indications of paranoia, schizophrenia paranoia, psychotic thinking. There are lots of ways sadistic acts and thinking are covered in DSM-4 including antisocial traits and antisocial personality disorder.

Q. Okay. I'm going to return back to—just focus on my question. Maybe it was too broad. My question specifically now is: Would you agree that much of what you chose to talk to him about, from all the evidence, the whole person, it is very strong that Stephen Hajek is a sadistic murderer?

A. I think there are sadistic parts of what he did, yes.

(23 RT 5899-5901.)

When the prosecutor later pressed Minagawa, asking, "Would you agree we can include in a third diagnosis he is a sadist," the doctor replied, "I would have to look at the information you would want to present to me." (23 RT 5902.) The prosecutor then cited Hajek's telling his mother he wanted to mutilate the family dog; the victim's being strangled and having her throat slashed, as well as being stabbed an additional six times; and Hajek's statement to Tevya that he wanted to kill Ellen's family to make her suffer more. (23 RT 5902-5903.) Dr. Minagawa agreed that all these facts reflected signs of sadistic traits, but said that he incorporated them into his diagnosis of borderline personality disorder with antisocial traits, and that the various diagnoses in DSM-IV included a lot of overlapping criteria. (23 RT 5903-5904.)

The prosecutor followed up by referencing Hajek's remarks during a counseling session while in jail about what it would be like to kill a whole theater of people, and his letter to Vo describing his dream to rape and sodomize Ellen. (23 RT 5905-5907.) The prosecutor again asked Minagawa, "Now considering all these factors, can we add a third diagnosis for Mr. Hajek that he's a sadist?" (23 RT 5907.) Minagawa replied, "I would want to review the criteria in the DSM-4. I would want to go back over the material I have to date and then make a decision about that." (*Ibid.*)

Shortly after the above exchange, the prosecutor agreed to give Minagawa some time to review the DSM-IV. (23 RT 5907.) The court excused the jury and heard a motion by Vo in the interim. (23 RT 5908.) When trial resumed, the prosecutor asked Minagawa whether the entry for sadism was very short. Minagawa responded, "For that particular category, sadism, yes." When the prosecutor asked, "And are there any other categories of sadism in there that you are aware of," Minagawa replied, "No, I am not." (23 RT 5915.) He agreed with the prosecutor's assertion "that there's not a lot of literature in the DSM or in general about sadism compared to other . . . mental disorders." (23

RT 5915.) When the prosecutor began reading from the DSM category on sexual sadism, the court sustained Hajek's counsel's relevancy objection that the case did not involve a sex act. (23 RT 5916.) When the prosecutor began, "As to sadism in general, the broad sense—," counsel for the first time objected that "there is no diagnosis for sadism in the DSM-IV, which the district attorney knows well." (23 RT 5917.) The court overruled the objection, and Minagawa subsequently repeated that he had incorporated the sadistic qualities of Hajek's acts as antisocial traits, explaining, "There is no diagnosis in the DSM-IV for sadism, per se. It is incorporated in other areas." (23 RT 5917-5918, 5921.) As for sexual sadism, Hajek did not qualify because he had to commit a real act, sexual in nature, that incorporated sadistic qualities, not merely imagine one. (23 RT 5921.)

Hajek's counsel on redirect underscored that, notwithstanding the prosecutor's lengthy cross-examination on the issue, there is no category of sadism per se in the DSM-IV:

> Q. I will start, Dr. Minagawa, by asking you specifically about the series, maybe 45 minutes to an hour, of questions that the district attorney asked you about sadism. His questions largely went to the issue of why you didn't diagnose Stephen Hajek with a third additional diagnosis of sadism. Is there such a diagnosis as sadism in the DSM-IV?
>
> A. Not sadism by itself.
>
> Q. What type of sadism is included in the DSM-IV?
>
> A. Sexual sadism is included.
>
> Q. Is that the only type of sadistic diagnosis included in the DSM-IV?
>
> A. That's correct.
>
> Q. Now, when you were being questioned by the district attorney, you didn't have the DSM-IV in front of you; is that correct?

A. That's correct.

Q. And in fact, what the district attorney said was that he really didn't want to get into the DSM-IV. Isn't that true?

A. That's my recollection, yes.

Q. Now, over the lunch hour, did you sit down and look at this reference work upon which you rely when you bring back a diagnosis for yourself as a professional?

A. Yes, I did.

Q. And what did you determine in looking through the DSM-IV as to, first of all, whether there is any simple diagnosis of just plain old sadism that you could have added as a third diagnosis for Mr. Hajek?

A. There is no third category or separate entity called sadism in the DSM-IV.

(23 RT 5926-5927; see also 23 RT 5931.) Counsel also established that the prosecutor presumably knew there was no separate sadism category and that he had been pointing Minagawa toward the sexual sadism category for which Hajek did not qualify. (23 RT 5928-5930.) She also elicited Minagawa's opinion that the antisocial and sadistic behavior that Hajek had exhibited in the past took place when he was unmedicated; there was no evidence of such behavior after he was placed on Lithium. (23 RT 5934-5935.)

On recross, Minagawa acknowledged that he had testified earlier that there were other forms of sadism besides sexual sadism. When asked if the lack of a specific category for such sadism was because of a lack of information, Minagawa said, "I would have to go back to the DSM-IIIR to see if there was not at some point in time whether sadistic personality was looked at or proposed, but there may not have been enough subjects to make that diagnosis either." (23 RT 5938-5939.)

B. The Prosecutor Committed No Misconduct

In his argument heading, Hajek contends the prosecutor committed misconduct by questioning Dr. Minagawa about the "bogus issue" of sadism. (Hajek 2nd Supp. AOB 9.) Implicitly recognizing that counsel did not object on this ground until almost the end of the cross-examination and that Minagawa himself acknowledged repeatedly that there is such a diagnosis, his only legal argument on appeal is that the prosecutor continued to question Minagawa about *sexual sadism* even after the trial court repeatedly sustained defense objections on that topic (as opposed to non-sexual sadism). (Hajek 2nd Supp. AOB 11-12; see 23 RT 5916-5917, 5937-5938.) Given that the defense objections were sustained, however, and that defense counsel neither sought to have the jury admonished nor claimed below, as he does now, that the prosecutor's "defiance of court rulings" caused him an "unfair trial" (Hajek 2nd Supp. AOB 12), any error was either non-prejudicial or forfeited. (Cf. *People v. Carrera* (1989) 49 Cal.3d 291, 317-318.) Moreover, Minagawa testified clearly and repeatedly that a diagnosis of sexual sadism required the commission of an actual sexual act, not just an imagined one (such as Hajek's report of having a dream about raping and sodomizing Ellen), and that Hajek therefore did not qualify. (23 RT 5921, 5928-5931, 5937-5938.) For this reason, too, the repeated references to sexual sadism, if misconduct, were not prejudicial. No reasonable juror would have believed that Hajek suffered from sexual sadism or faulted Minagawa for failing to diagnose it.

Although (aside from his argument heading) Hajek does not appear to be contending that the prosecutor committed misconduct in questioning Minagawa about non-sexual sadism, we note that no claim would lie on that ground either. As noted above, Hajek did not object to the prosecutor's questions as improper until almost the end of cross-examination, thereby forfeiting any claim of misconduct. Moreover, Minagawa repeatedly acknowledged that sexual sadism

was not the only type of sadism although it was the most common. Under the circumstances, the prosecutor committed no misconduct in cross-examining him on why he did not diagnose Hajek with sadism. An attorney should not be expected to know more than a psychologist about what does and does not qualify as a mental disorder. It is logical to infer that if deriving sexual excitement from the suffering or humiliation of another qualifies as a disorder, that drawing pleasure in other ways from the same conduct would qualify as well.[69] Finally, any misconduct in asking Minagawa why he did not diagnose Hajek with sadism, or in suggesting that such a diagnosis existed, was not prejudicial. Minagawa made it very clear on redirect and recross that there is no separate diagnosis for sadism in the DSM-IV; instead, sadistic acts and thinking are incorporated into other diagnoses such as antisocial personality disorder and antisocial traits. The point would not have been lost on the jury.

XXXIX.

THE PROSECUTOR DID NOT COMMIT MISCONDUCT DURING THE PENALTY PHASE ARGUMENT

Appellants raise numerous claims of prosecutorial misconduct during the penalty phase argument. (Vo AOB 424-435 [Arg. 29]; Hajek 2nd Supp. AOB 6, 12-17 [Arg. XXXIII.B.2-3.].) All are waived and none are meritorious.

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69. Indeed, in responding to the prosecutor's query as to whether the omission of a separate category for sadism in the DSM-IV was due to a lack of information, Minagawa responded that he would have to look back at the DSM-IIIR. Though it did not come out at trial, that manual in fact includes "sadistic personality disorder," the essential feature of which is "a pervasive pattern of cruel, demeaning, and aggressive behavior directed toward other people, beginning by early adulthood." (Am. Psychiatric Assn., Diagnostic and Statistical Manual of Mental Disorders (3d ed. rev. 1987), p. 369.) The manual goes on to note that in many cases, people with this disorder are "fascinated by violence, weapons, martial arts, injury, or torture." (*Id.* at p. 370.)

A. Appellants Have Waived Their Claims of Penalty Phase Misconduct

> To preserve a claim of prosecutorial misconduct for appeal, a criminal defendant must make a timely objection, make known the basis of his objection, and ask the trial court to admonish the jury. (*People v. Hill* (1998) 17 Cal.4th 800, 820 [criminal defendant may not complain on appeal of prosecutorial misconduct unless he objected 'on the same ground' at trial].) As [this Court] explained in the analogous situation of a civil case in which it was alleged that one attorney made prejudicial comments in closing argument: 'The purpose of the rule requiring the making of timely objections is remedial in nature, and seeks to give the court the opportunity to admonish the jury, instruct counsel and forestall the accumulation of prejudice by repeating improprieties, thus avoiding the necessity of a retrial. . . . In the absence of a timely objection the offended party is deemed to have waived the claim of error through his participation in the atmosphere which produced the claim of prejudice.' (*Horn v. Atchison, T. & S.F. Ry. Co.* (1964) 61 Cal.2d 602, 610.) Failure to make a specific and timely objection and request that the jury be admonished forfeits the issue for appeal unless such an objection would have been futile. (*Hill, supra,* at p. 820.)

(*People v. Brown* (2003) 31 Cal.4th 518, 553.)

Vo objected only once during the prosecutor's entire penalty phase closing argument, when the prosecutor began comparing appellants with each other. In that instance, the prosecutor quickly conceded his error, correctly informed the jury of the law, and proceeded to argue in a proper manner. (25 RT 6395.) Indeed, Vo does not identify this one objected-to remark among his many assignments of misconduct, perhaps because he recognizes that it was cured by the prosecutor's response.

Hajek, who joins in Vo's claims, and raises a couple of his own misconduct claims, likewise lodged only one objection during the prosecutor's closing argument on a ground not raised on appeal. (25 RT 6405.) Accordingly, both appellants have forfeited their present claims of prosecutorial misconduct. For the reasons explained below, the claims are also without merit.

B. The Prosecutor Did Not Commit Misconduct by Arguing the Relevance of Vo's Secret Life, His Association With a Bad Crowd, and His Loving Family

Vo contends the prosecutor improperly argued several nonstatutory factors in aggravation. (Vo AOB 429.) Many of these were actually addressed by the prosecutor as factors that should not be given weight as mitigating. Argument along these lines is entirely proper.[70] (*People v. Valencia* (2008) 43 Cal.4th 268, 305.) For example, the prosecutor argued that Vo should not be extended mercy for having a rough childhood when he had parents who loved him, taught him values, and raised several other law-abiding citizens. (25 RT 6399-6400.) The prosecutor argued, "Mr. Vo simply went wrong on his own" (25 RT 6400), and in this context, talked about the "secret life" he kept from his family (25 RT 6400, 6402) and the "bad friends" with whom he chose to associate (25 RT 6398, 6400, 6402). Contrary to Vo's assertion, the prosecutor did not argue that Vo's family's caring for him was a factor in aggravation.

C. The Prosecutor Properly Argued Vo's Future Dangerousness

Vo also argues that the prosecutor improperly argued future dangerousness as a factor in aggravation when he told the jury, "[If] anything, Mr. Park, Mr. Vo's own expert told you, age makes them worse prisoners, more dangerous, less controllable in the prison situation." (25 RT 6397; Vo AOB 429.) As discussed below, the prosecutor made this remark in the course of discussing why appellants' age should not be given weight as a factor in mitigation. By the same stroke, he countered the defense mitigation evidence that Vo would be a nonviolent prisoner by pointing out that even their expert acknowledged that youth was ordinarily viewed as a risk factor in predicting dangerousness. (Cf. *People v. Morris* (1991) 53 Cal.3d 152, 219-220 ["While the prosecution

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70. Indeed, Hajek's counsel conceded as much below without disagreement by Vo. (25 RT 6352-6353.)

is prohibited from offering expert testimony predicting future dangerousness in its case-in-chief [citation], it may explore the issue on cross-examination or in rebuttal if defendant offers expert testimony predicting good prison behavior in the future."].) He did not argue future dangerousness as a factor in aggravation, as Vo alleges. In any event, while this Court's precedents prohibit the prosecutor from calling experts to make predictions about the defendant's future violent conduct, it has never barred the prosecution from commenting on the issue. (*People v. Champion* (1995) 9 Cal.4th 879, 940.)

Any error was also harmless. The prosecutor's remark "was an isolated one that does not support an inference of prejudice and . . . any conceivable prejudice could have been cured by a timely admonition, which was not requested by the defense." (*Morris*, *supra*, 53 Cal.3d at p. 220.) Moreover, notwithstanding the prosecutor's quip, Mr. Park testified unequivocally that despite his young age, Vo would *not* present a risk of future dangerousness:

> Now, the one slightly negative thing is that he is now age 24. And I think I mentioned briefly, the break even point is 25. At age 25, prisoners start to settle down if they have been a problem before. In Mr. Vo's case, this lack of one year in reaching that critical point, I think, is counter-balanced by the fact that the jail records show that he's been a very good prisoner, he's gotten along with other prisoners of all kinds, he's worked well and he's not gotten into any serious disciplinary problems.

(24 RT 6170-6171.)

D. The Prosecutor Properly Argued in Connection with Innocence of the Victims in Connection with Properly Admitted Victim Impact Evidence

Vo next claims that the prosecutor improperly urged that the "innocence" of the victims was a reason to sentence appellants to death. (Vo AOB 429.) He is mistaken. The prosecutor mentioned the innocence of the victims while arguing the impact of appellants' crimes on the victim's family. He did not suggest that the victim's innocence itself was a factor in aggravation:

> But when you do consider those factors in favor of the defendant, I'll ask you to also consider and weigh and assign what importance you think is relevevant [*sic*], the impact of the victim's family as a circumstance of this crime.
>
> Because one difference between these defendants in the penalty I'm asking for and victims in this case, these victims were entirely innocent. They had not even known—Su Hung the actual woman who was murdered, never even knew these murderers and nevertheless they chose her out. These people did nothing, were absolutely blameless. And yet Su Hung was killed.
>
> I want you to consider how the defendants savaged the Wang family.

(25 RT 6386-6387.)

Viewed in context, the prosecutor's point was that Su Hung's murder had a great impact on her family because she did nothing to cause appellants to want to kill her. She did not even know them. Consequently, the family had no reason to expect her to be the victim of this violent crime.

The prosecutor mentioned the victim's innocence again when discussing the *inapplicability* of factor (e), which permits consideration of "[w]hether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act." (10 CT 2643 [CALJIC No. 8.85].)

> Factor (d) and (e) I suggest do not apply in this case. Mr. Vo was not under any emotional disturbance, and clearly the victim in this case was innocent and was not a participant. That's kind of a strange factor if you consider how could a victim ever be a participant in their own homicide. Well, a crime where people decide to commit a murder and one of the participants gets killed, felony homicide. Nothing remotely like that in this case. These two men killed people strangers to them, for no good reason at all.

(25 RT 6396.)

Plainly, nothing in the above passage suggests that the victim's innocence was a factor in aggravation. On the contrary, the prosecutor explicitly stated that factor (e) was not applicable.

In any event, the characteristics of the victims, including their innocence, is relevant to Penal Code section 190.3, factor (a), the circumstances of the crime (*People v. Davis* (1995) 10 Cal.4th 463, 532, fn. 28), and thus fair game for the prosecutor to argue. There was no misconduct.

E. The Prosecutor Properly Argued Factors Pertaining To Hajek

Vo also identifies three allegedly nonstatutory factors in aggravation pertaining to Hajek that the prosecutor improperly argued. (Vo AOB 429.) These include reference to Hajek's sadistic tendencies, sexual interest in Ellen, and fabrication of a mental health defense. Vo has no standing to raise these issues as any impropriety on these matters could not have prejudiced him. Because Hajek joins in Vo's claim, however, and independently raises the prosecutor's argument regarding satanism and sadism as misconduct (Hajek 2nd Supp. AOB 12-14), we address them.

1. Fabrication Of Mental Illness

The prosecutor argued that Hajek was manipulating his psychological problems to show that his behavior should be excused or given mitigating effect. For example, he argued:

> I suggest to you the defense has amounted to manipulation, trying to manipulate the facts and not truthfully but to show you the best possible light. And that began with Mr. Hajek talking about how the Twinkie defense could work for him, he was aware that psychological defenses might excuse his behavior. Surprise, surprise, you got such a defense in this case.
>
> This is not some poor victim of mental illness who doesn't know what he is doing, who doesn't know right from wrong, doesn't know the consequences of it. He fully appreciates he's a murderer and fully appreciates he might fool you with this Twinkie defense, this psycho babble.

(25 RT 6391-6392.)

Later, he argued:

> "D", Mr. Hajek would like you to believe he did this because he was influenced by extreme mental or emotional disturbance, mental problems. That he deserves a break. I suggest to you that everything you know about these—the actual crime itself, which is what this is relevant for, he was not at that time influenced or under the influence of any such disturbance.
>
> You had evidence of when he might have been disturbed. For instance, when Officer Fazo described him being arrested for his indecent exposure. He was concerned about this 16-year-old because he was obviously influenced. He was acting bizarrely. So does this factor (d) apply to this case? No, it does not. All the evidence was clear, Mr. Hajek was not bizarre, in full control, not under the influence of any mental problems at the time.

(25 RT 6403.)

The prosecutor also argued that the opinion testimony of Dr. Minagawa, Hajek's mental health expert, should not be credited:

> I suggest to you Minagawa's testimony, especially in the penalty phase, has only given you a better idea of Mr. Hajek. He is really not a victim of mental illness, but a sadistic murderer.
>
> To begin with obviously, Dr. Minagawa admitted to you right up front, even if you were to believe his theories about his mental problems, that there's no real correlation between these particular mental disorders he's describing and ending up a murderer. . . .
>
> And the same is true when I asked him questions about borderline disorder, manic depressive.
>
> Reality of it is, as you know from listening to Dr. Minagawa and recalling Dr. Friedlander, these people have real legitimate illnesses, are not evil. If they do act out and do something wrong, they will regret it. They have remorse.

(25 RT 6412-6413.)

The foregoing arguments were all appropriate. Hajek was advancing mental illness as a mitigating factor. The prosecutor was entitled to argue that the

defense evidence was not mitigating because it was made up, played up, or both. (*People v. Crew*, *supra*, 31 Cal.4th at pp. 857-858 ["The prosecutor argued to the jury that the mitigating evidence presented by the defendant was not in fact mitigating, and he simply placed such evidence in the broader factual context of the case. Such argument is allowed."].) He did not argue fabrication of mental illness as a factor in aggravation, nor could the jury understand him to be doing so in light of his express reference to factor (d).[71] (*People v. Brown*, *supra*, 31 Cal.4th at p. 553 ["'To prevail on claim of prosecutorial misconduct based on remarks to the jury, the defendant must show a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner. [Citations.] In conducting this inquiry, we "do not lightly infer" that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements. [Citation.]'"].)

2. Hajek's Sexual Interest in Ellen

The prosecutor referred twice to a letter Hajek wrote Vo while in jail in which Hajek discussed his dream to rape and sodomize Ellen. To counter the defense's attempt to portray Hajek as a "poor victim of mental illness," the prosecutor asked the jury to consider evidence that reflected the "true picture of Stephen Hajek" (25 RT 6392)—evidence that included Hajek's threatening letter to Cary Wang and the letters he wrote to Vo discussing with pleasure,

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71. Factor (d) permits consideration of "[w]hether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance." (10 CT 2643 [CALJIC No. 8.85].) Hajek's counsel argued, after the prosecutor, that Hajek's mental disease bore on both this factor and factor (h), which permits consideration of "[w]hether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to confirm his conduct to the requirements of law was impaired as a result of mental disease or defect or the effects of intoxication" (10 CT 2644). (25 RT 6436.) The prosecutor did not discuss factor (h) beyond lumping it with a number of other factors that he said did not apply. (25 RT 6404.)

among other things, the crime, the thought of killing Tevya Moriarty, and his intent to beat up correctional officers if he was convicted. (25 RT 6392-6394.) The prosecutor continued, "And of course Dr. Minagawa described reading letters where he described his dream to rape and sodomize Ellen Wang, reviewing notes where Stephen Hajek told the guards how he dreamed of killing a whole theater full of people. . . . I think you see the real Stephen Hajek, the whole picture." (25 RT 6394.)

Later, while discussing testimony by Dr. Minagawa, the prosecutor recalled the doctor's acknowledgment that there were sadistic parts to what Hajek:

> And he admitted, what formed the basis of that opinion was for instance Mr. Hajek telling his mother the night before about wanting to mutilate, kill the family dog, his letters where he discussed revenge or his dreams to rape and sodomize Ellen Wang, the notes from the jail where Stephen Hajek mentioned a plan or a dream to kill a theater full of people. None of these things did the good doctor care, wish to follow-up on, to ask him about.

(25 RT 6415.)

The prosecutor committed no misconduct. As discussed in the immediately preceding argument, Hajek advanced mental illness as a mitigating factor. The prosecutor was entitled to argue that the defense evidence was not mitigating because it was made up, played up, or both—that the "real" Hajek was simply a heartless violent criminal as reflected in his letters. (*People v. Crew*, *supra*, 31 Cal.4th at pp. 857-858.) He did not argue that Hajek's "sexual interest in Ellen" was a factor in aggravation.

3. Characterizing Hajek As Sadistic

Finally, the prosecutor on several occasions argued that Hajek was a sadistic murderer, who took pleasure in killing.[72] The argument is hardly unwarranted.

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72. See, e.g., 25 RT 6391 ["what Stephen Hajek is about is a desire to murder and pleasure he gets from it."], 6393 [referring to Hajek's letter to Vo in which he writes, "We're terrorists, cool," prosecutor argues, "That's what

Hajek told Tevya Moriarty in an upbeat, happy manner that he was going to go Ellen's house, kill her family in front of her, and then look in her eyes as he killed her. (15 RT 3651-3652, 3678-3679.) While in jail, he wrote letters to Vo, which discussed how it was "cool" that they were terrorists, and discussing with pleasure the thought of killing Tevya. From this evidence, the prosecutor could reasonably infer that Hajek enjoyed killing and fairly label him as sadistic.

"A prosecutor is given wide latitude during argument. The argument may be vigorous as long as it amounts to fair comment on the evidence, which can include reasonable inferences, or deductions to be drawn therefrom. . . . A prosecutor may vigorously argue his case and is not limited to Chesterfieldian politeness, and he may use appropriate epithets." (*People v. Hill* (1998) 17 Cal.4th 800, 819, internal quotations and citations omitted.; accord, *People v. Edelbacher* (1989) 47 Cal.3d 983, 1030 [prosecutor may use opprobrious epithets reasonably warranted by the evidence].)

Mr. Hajek likes. He enjoys being a terrorist, he enjoys killing."], 6393 [referring to Hajek's letter to Vo in which he writes, "I could K___ the bitch," Tevya Moriarty, followed by "Okay, we'll share the pleasure," prosecutor argues, "Further evidence of the truth, the real picture of Mr. Hajek, the pleasure he thinks about in killing witnesses in this case."], 6395 [referring to Hajek as an "outrageous person who kills a person for the pleasure of it"], 6412 ["I suggest to you Minagawa's testimony, especially in the penalty phase, has only given you a better idea of Mr. Hajek. He is really not a victim of mental illness, but a sadistic murderer."], 6413-6414 [noting that Minagawa "had to admit, although there's no DSM diagnosis right on point, Mr. Hajek was sadistic and the facts supported he was sadistic"], 6415 [quoting Minagawa's acknowledgment on cross-examination by the prosecutor that "there are sadistic parts of what he did, yes], 6415-6416 ["I'll suggest to you that although Dr. Minagawa is called her to show mitigation or that the issue here was manic depression, that he chose to ignore the real focus which was told to Tevya Moriarty, Stephen Hajek wanted to look into Ellen Wang's eyes and inflict this pain on her and he wanted to enjoy it."]

The prosecutor's argument along these lines did not amount to arguing a nonstatutory factor in aggravation, as Vo contends. (Vo AOB 429.) Nor was it irrelevant and inflammatory, as Hajek summarily asserts without argument or citation to legal authority (Hajek 2nd Supp. AOB 14), even assuming the claim is cognizable. (Cal. Rules of Court, rules 8.204(a)(1)(B), 8.360(a); *People v. Turner* (1994) 8 Cal.4th 137, 214, fn. 19.) "Factor (a) of section 190.3 allows the prosecutor and defense counsel to present to the penalty phase jury evidence of all relevant aggravating and mitigating matters 'including, but not limited to, *the nature and circumstances of the present offense,* . . . and the defendant's character, background, history, *mental condition* and physical condition.' (Italics added.) Evidence that reflects directly on the defendant's state of mind contemporaneous with the capital murder is relevant under section 190.3, factor (a), as bearing on the circumstances of the crime." (*People v. Guerra* (2006) 37 Cal.4th 1067, 1154.) In this case, the prosecutor's argument that Hajek was a sadist who enjoyed killing bore on his mental state at the time of the murder and as such, on the nature and circumstances of the offense. Indeed, the theory of murder perpetrated by torture and the torture-murder special circumstance required the jury to find that he intended to inflict pain for the purpose of "revenge, extortion, persuasion or for any sadistic purpose." (8 CT 2020, 2033.)

Hajek suggests that he preserved this issue in a hearing regarding the scope of the prosecutor's penalty phase argument. (Hajek 2nd Supp. AOB 13.) He did not. On the contrary, counsel advised the court of her obligation and intent to object *if* the prosecutor overstepped his bounds during his argument:

> I really dislike interrupting other people's arguments. I don't like mine interrupted either. But I certainly have to put Mr. Waite and the court on notice that any entry into that area is going to result in me having to. It depends on how he does it , obviously, but, you know, the moment I start hearing psychopathic sado-murderer, I am going to be on my feet. And the law requires not only that I object, but that I ask that it be

assigned as misconduct and ask for an admonition to the jury. And I simply want to point that out to the court. I don't like doing it. I don't like that law, but it's my obligation.

(25 RT 6364.)

The court replied, "I am well aware that if you don't object that you don't preserve the objection for—you waive the objection for the appellate process and it has to be done." (25 RT 6365.) In the argument that followed, the prosecutor made numerous references to Hajek's sadistic nature without objection by counsel.

Indeed, it appears that counsel's concerns were satisfied. She argued at the hearing that (1) the prosecutor could not use Hajek's mental illness as a factor in aggravation, though he could argue "that evidence in mitigation does not exist, that it's not been proved" (25 RT 6362), and (2) permitting the prosecutor to depict Hajek as a "psychopathic sado-murderer" (25 RT 6361) would "inflame the passions of the jury." (25 RT 6362.) The prosecutor agreed with the first point, saying, "I can't argue that because of a mental condition . . . that's an aggravator," but asserting that he could "dispute factually. . . what is actually the diagnosis." (25 RT 6363.) He also pointed out that having a sadistic intent was one of the elements of torture-murder and that he was therefore entitled to argue that. (25 RT 6363-6364.) The record reveals that he restricted himself accordingly. He did not argue that Hajek's mental illness was an aggravating factor, but did challenge the defense contention that it was a mitigating factor by arguing that Hajek killed not due to mental illness but because he enjoyed it. (25 RT 6391-6394, 6403, 6412-6413.) In making this argument, he did not suggest that sadism was a mental disorder or engage in lengthy rhetoric portraying Hajek as a deranged psychopath, but pointed to concrete facts from the case to support his assertion that Hajek was a sadistic person who took pleasure in others' suffering. (25 RT 6391-6394.)

F. The Prosecutor Properly Referred to Hajek's Interest in Satanism

Again without argument or legal authority, and mixed in with his claim addressing sadism, Hajek argues that the prosecutor also improperly referred to the "irrelevant and inflammatory" issue of his interest in Satan. (Hajek 2nd Supp. AOB 12-13 [Arg. XXXIII.B.2.].) Assuming, arguendo, the claim is cognizable (Cal. Rules of Court, rules 8.204(a)(1)(B), 8.360(a)), and was not forfeited for failure to object, there was no misconduct.

The prosecutor mentioned Hajek's interest in Satan twice during his argument. As part of his argument that Hajek was not a "poor victim of mental illness" but a ruthless killer (25 RT 6392), the prosecutor said, "He says, 'Hail, Satan.' Describes in the letters how he would like to get a hold of a Satanic Bible. That's what Mr. Hajek is about. Worship of evil." (25 RT 6393; see Exhs. 64, 65.) Later, in arguing against the jury considering Hajek's "being a victim of some terrible childhood" as a factor in mitigation, the prosecutor argued that he was "lucky to be raised by the Hajeks. Hajeks admitted to you they raised him going to the church, raised him with values of right and wrong. It was not them that taught him about values of Satan, or Satanism." (25 RT 6412.)

The prosecutor's quotes about Satan were taken from letters Hajek wrote to Vo that were admitted into evidence. The prosecutor used them to argue that Hajek killed not due to mental illness but because he enjoyed it—an inference that could reasonably be drawn from, inter alia, his speaking of the devil, a symbol of malevolence and cruelty, in positive terms. Likewise, he argued that Hajek's rough childhood should not be credited as a mitigating factor because he was in fact raised by loving parents, but had gone wrong on his own. Any misconduct was not prejudicial in any event as the unobjected-to comments were brief and isolated, comprising only a few lines in an argument filling some

35 pages of the reporter's transcript.

G. The Prosecutor Properly Argued That the Jury Should Not Consider Sympathy a Mitigating Factor

Vo contends the prosecutor improperly urged the jury not to consider mercy for appellants. (Vo AOB 430-431 [Arg. 29.C.].) The challenged remarks were as follows:

> When the defendants are entitled to consider mercy, think whether Su Hung had any mercy. She suffered knife wounds, which I'm not going to describe. She had the cartilage in her neck broken by being strangled by these monsters. She was suffocated and strangled so that the blood vessels burst all over her face.

(25 RT 6387.)

It is impermissible to argue that the jurors are prohibited from considering mercy for appellants in making their penalty determination. (See *People v. Easley* (1983) 34 Cal.3d 858, 878-879.) Viewed in context, however, the prosecutor's argument was not that the jury should disregard sympathy for appellants, but that it should be accorded no mitigating effect in light of the severe nature of the crime. This Court found no misconduct under similar circumstances in *People v. Jackson* (1996) 13 Cal.4th 1164, where the prosecutor argued:

> When you think of sympathy for Noel Jackson think about Sonja Niles as she lay there. When you think of compassion and pity for Noel Jackson, think of Shelley P. and her plea not to hurt her, not to rape her. And measure that, ladies and gentlemen, against what may be called mitigation, if there is any.

(*Jackson*, *supra*, at p. 1241.)

This Court concluded that the prosecutor in *Jackson* was arguing, in effect, "that the aggravating evidence in this case greatly outweighed the mitigating evidence. . . . [T]he prosecutor was arguing implicitly that the testimony by defense witnesses designed to elicit sympathy from the jury 'lacked the mitigating force the defendant claimed for it, a type of argument we have

approved.'" (*Ibid.*)

Likewise, in *People v. Benavides* (2005) 35 Cal.4th 69, the prosecutor told the jury:

> I ask you one final thing, that is to give the defendant the mercy that he gave Consuelo Verdugo. When he asked for your mercy here today through Mr. Harbin, you remember him on the stand denying anything that happened. Mr. Harbin says that he could be rehabilitated, I ask you to remember how he denied every single thing for hours on there. I ask you to show him the same mercy that he showed Consuelo Verdugo and to do justice here today, that is to sentence him to death. Thank you.

(*Id.* at pp. 107-108.)

Again, this Court found no misconduct:

> The jury was instructed that they were allowed to consider sympathy, pity, compassion, and mercy for the defendant, as raised by the facts presented. We have held that it is not inappropriate for the prosecution to urge the jury to show the defendant the same degree of mercy he showed his victim. [Citations.] In light of the aggravated nature of the offense, a reminder by the prosecution that Consuelo was helpless in the hands of the man to whom she had been entrusted and a suggestion that he deserved an equal measure of mercy did not constitute deceptive or reprehensible methods of persuasion, nor did such comments infect the trial with unfairness. [Citation.]

(*People v. Benavides*, *supra*, 35 Cal.4th at p. 109, footnote omitted.)

Assuming, arguendo, the challenged remarks could be viewed as suggesting that the jury was not allowed to consider mercy for the defendants, the error was harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.) The jury was expressly instructed: "In this phase of the case, you may consider sympathy, pity, mercy or compassion in determining the appropriate penalty." (10 CT 2641.) Vo's counsel emphasized the point as well: "The law allows you to consider sympathy, pity, mercy and compassion in determining the appropriate penalty. And we ask you to do that and spare the life of this young man." (25 RT 6483.) Given these direct statements, the jury could not have been misled to believe, based on the prosecutor's oblique

remarks, that it could not consider sympathy for appellants as a mitigating factor. Indeed, the prosecutor himself, after the challenged remarks, argued that appellants "*do not deserve mercy*, because . . . they did not show at the time of these crimes and instances in this case, any remorse, any human feelings for what they did. [¶] Clearly they planned and premeditated these attacks ahead of time." (25 RT 6390, italics added.) In other words, the jury, though permitted to consider mercy, should not extend it because appellants did not deserve it in light of the facts and circumstances of the crime. (Cf. *People v. Stansbury* (1993) 4 Cal.4th 1017, 1067 [no error where prosecutor "argued that no sympathy was due to the defendant, but not that sympathy or mercy were inappropriate considerations under the law"].)

H. The Prosecutor Properly Argued Appellants' Lack Of Remorse Was Relevant to the Evaluation of Mitigating Factors

Both appellants contend the prosecutor improperly urged lack of remorse as a factor in aggravation. (Vo AOB 431-432 [Arg. 29.D.]; Hajek 2nd Supp. AOB 14-17 [Arg. XXXIII.B.3.].) They are mistaken.

The prosecutor argued:

> I would suggest to you when defense counsel argues that, you know, the only issue here is whether the defendants will die in prison when you say they will or when their natural life expires, that they would be executed and killed as soon as possible, based on their own actions in this case, that *they do not deserve mercy, because they have never shown, or they did not show at the time of these crimes and instances in this case, any remorse, human feelings for what they did.*

(25 RT 6389-6390, italics added.)

After playing an excerpt from the audiotaped conversation between appellants in jail on the night of their arrest, the prosecutor continued:

> Mr. Vo, when he testified to you, told you how sorry he was, that he never intended this terrible crime to have happened, that he was shocked and appalled when he learned the victim was killed. Baloney. He's lying to you. On this tape you hear Mr. Vo, what's he concerned about?

> Concerned about getting his name in the newspaper. Concerned how court will be dragged out. *He never expressed anywhere on this tape any recrimination or any shock, any remorse, for the torture murder of this grandma.*

(25 RT 6390-6391, italics added.)

Playing the tape again, the prosecutor argued,

> That is the real Stephen Hajek. "Fuck, I wanted to kick Ellen so bad. Walk by her in the fucking hall, fucking dog." Makes that howling noise. "Fucking Chinese bitch." [¶] Then he begins to talk about, "Hey, did they give you coffee?" [¶] This man has no human feelings except for himself.

(25 RT 6391.)

Continuing on, the prosecutor argued that the defense was portraying Hajek as a "poor victim of mental illness," but "[t]he truth is shown by this man on the tape and by the letters in this case."

> After being in jail for months, reflecting on this crime, what does he think of to do? What does he think is the appropriate response? He sends a letter to the victim's family, "If you come to court you will die, bitch." That's the true Stephen Hajek. *That's a person who shows absolutely no remorse. Deserves no mercy, no mitigation.*

(25 RT 6392, italics added.)

At the end of his argument, the prosecutor referred back to Hajek's comments on the tape about wanting to beat Ellen, arguing:

> I submit Mr. Hajek is monstrous, voice on that tape. Blood of the 73-year-old woman he never knew on his gloves, *is not remorseful*, but howling how he further wants to beat and damage her granddaughter. That's the type of case that deserves the death penalty.

(25 RT 6419, italics added.)

The foregoing arguments were entirely appropriate. "Although a prosecutor in a capital case may not argue that a defendant's postcrime lack of remorse is an aggravating factor, a prosecutor may . . . argue that lack of remorse is relevant to the evaluation of mitigating factors." (*People v. Jurado, supra*, 38 Cal.4th at p. 141; accord, *People v. Sims, supra*, 5 Cal.4th at p. 465; *People v.*

Ghent (1987) 43 Cal.3d 739, 771; see also *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1232 ["It is proper for the prosecution to stress that remorse is not available as a mitigating factor."].) That is what the prosecutor was doing here. He told the jury not to extend mercy to appellants as the defense would ask it to do because they showed no remorse at the time of the crime or immediately afterward when in jail.[73] (25 RT 6390 ["they do not deserve mercy"].) Likewise, the prosecutor made clear that Hajek's comments on the tape about wanting to harm Ellen and his threatening letter to Cary showed that he had no remorse and therefore "[d]eserves no mercy, no mitigation." (25 RT 6392.)

The prosecutor argued that Vo's reaction immediately after the crime was not remorse but concern about the potential media coverage. It was to show that Vo was lying when he testified that he was not a knowing participant in the murder. Vo's role in the crime was, of course, central to the jury's penalty determination.

The only time the prosecutor's words could be interpreted as urging remorse as a factor in aggravation was at the conclusion of his argument when he remarked, "That's the type of case that deserves the death penalty," immediately after referring to Hajek's lack of remorse as reflected by his comments on the tape about wanting to beat Ellen. (25 RT 6419.) In light of his earlier use of this same evidence to argue that Hajek "[d]eserves no mercy, no mitigation," however, it is unlikely the jury understood the prosecutor to be now arguing that it was a factor in aggravation.

In any event, insofar as the prosecutor was commenting on appellants' overt remorselessness at the time of the crime in discussing Vo's concern about the media and Hajek's wanting to harm Ellen, the jury was permitted to consider

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73. Indeed, notwithstanding his use of the word "remorse," the prosecutor seemed to be arguing, as he did later (25 RT 6387), that the defendants should be accorded no mercy because they had acted callously (i.e. displayed no "human feelings for what they did") in committing the crimes.

it in aggravation. (*People v. Cain* (1995) 10 Cal.4th 1, 77 ["A murderer's attitude toward his actions and the victims at the time of the offense is a 'circumstance[] of the crime' ([Pen. Code,] § 190.3, factor (a)) that may be either aggravating or mitigating].) "With or without argument, jurors can be expected to react strongly to evidence of overt callousness. [Citation.] Their response is unlikely to be influenced by whether the prosecutor brands such evidence 'aggravating' or merely 'nonmitigating.' No basis for reversal appears." (*People v. Gonzalez, supra*, 51 Cal.3d at p. 1232.)

I. The Prosecutor Properly Argued Appellants' Age Should Not Be Used as a Mitigating Factor

Vo contends the prosecutor improperly urged the jury to treat his youthful age itself as an aggravating factor. (Vo AOB 425-426, 432-433 [Arg. 29.E.].) He mischaracterizes the prosecutor's comments.

With regard to age, the prosecutor argued:

> [N]o doubt they will ask you to consider he is youthful and that should somehow weigh in his favor if you wish. I suggest to you it does not. They're both adults. Legally responsible. And moreover look at the crime they committed. Is this some crime of youthful indiscretion? Is this some mere exuberance of youth? Something they would outgrow? No, it is not. This is a monstrous crime and these are monstrous defendants and age has nothing to do with it.
>
> [If] anything, Mr. Park, Mr. Vo's own expert told you, age makes them worse prisoners, more dangerous, less controllable in the prison situation. I suggest to you that cuts against them.

(25 RT 6397.)

The above comments do not urge the jury to consider appellants' age as a factor in aggravation, but to accord it no weight as a factor in mitigation. Specifically, the prosecutor argued that appellants' youthfulness was not mitigating because (1) they were adults and legally responsible for their actions, (2) the crime was heinous, and (3) Vo's own expert testified that the risk of

future dangerousness was higher with younger prisoners than older prisoners. The argument was an appropriate response to the anticipated defense argument "to consider he is youthful and that should somehow weigh in his favor." (25 RT 6397.) In the case of Vo's expert, it was also fair comment on the evidence.[74]

In any event, arguing age as a factor in aggravation is permissible. As this Court explained in *People v. Lucky* (1988) 45 Cal.3d 259, 302, "[T]he word 'age' in statutory sentencing factor (i) is used as a metonym for any age-related matter suggested by the evidence or by common experience or morality that might reasonably inform the choice of penalty. Accordingly, either counsel may argue any such age-related inference in every case." (See also *Tuilaepa v. California* (1994) 512 U.S. 967, 977 [rejecting vagueness challenge to factor (i) because it can be aggravating or mitigating].)

J. The Prosecutor Did Not Urge the Jury to Consider Appellants Jointly

Vo contends the prosecutor paid "lip service" to individualized sentencing but in actuality urged the jury to consider the defendants jointly in making their penalty determination. (Vo AOB 433-434 [Arg. 29.F.].) The assertion is simply not true. Obviously, some factors applied to both appellants. They were, after all, participants in the same crime. The prosecutor thus began by discussing the circumstances of the crime and the impact on the victims. (25 RT 6386-6390.) He then played the audiotape of appellants' conversation with

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74. Vo's expert, James Park, opined that Vo would be a nonviolent prisoner and would do productive and useful work if given a sentence of life without the possibility of parole. (24 RT 6170.) In the course of explaining why, Park noted that "the one slightly negative thing is that he is now age 24. And I think I mentioned briefly, the break even point is 25. At age 25, prisoners start to settle down if they have been a problem before." (24 RT 6170; see also 24 RT 6145, 6174.)

one another, and pointed out various things said by each, though he never suggested that Hajek's statements should be held against Vo, or vice versa. (25 RT 6390-6391.) He thereafter assessed each appellant independently, going through the applicable factors. (25 RT 6392-6394 [discussing Hajek], 6394-6402 [discussing Vo], 6402-6416 [discussing Hajek].) Indeed, he delineated when he was shifting his focus from one appellant to the other by announcing that he was doing so. (25 RT 6394 ["Enough with Mr. Hajek. Let's look at Mr. Vo."], 6402 ["Let's look at these factors and evaluate independently Mr. Hajek."].)

Although Vo asserts that the prosecutor urged the jury to consider appellants jointly "[t]hroughout his argument," he can give but one example (Vo AOB 433), when, during the prosecutor's introductory remarks, he told the jury, "Each of you are here because you told me you could [impose the death penalty]. [¶] Ladies and gentlemen, it is time for you to resolve that issue, and I'll submit to you there's no question that these two murderers, attempted mass murderers, deserve the death penalty." (25 RT 6385.) But stating that they both deserved the death penalty is not the same as stating that they both deserved it for the same reasons. This point could not have been lost on the jury. Not only was it instructed by the court that it was required to make an individualized penalty determination as to each defendant (10 CT 2646, 2651), it was also told by all three attorneys. (25 RT 6395, 6423-6424, 6460-6461, 6466; see Argument XLVI.C., *post.*) The one time the prosecutor misstepped—not by treating appellants jointly but by comparing them to one another—Vo's counsel quickly objected. The prosecutor acknowledged his mistake and admonished the jury himself, telling them, "You're right. Ladies and gentlemen, it is a mistake to ask you to compare defendants. That should not be done. Each defendant should be evaluated separately and individually." (25 RT 6395.) He then proceeded to discuss only Vo and to go through the

aggravating and mitigating factors as they pertained to him individually. (25 RT 6395-6402.) There was neither misconduct nor "lip service," as Vo accuses.

XL.

THE TRIAL COURT DID NOT ERR IN DENYING APPELLANTS' MOTIONS FOR NEW TRIAL

Vo contends that the trial court abused its discretion in denying his motion for new trial, which raised nine grounds of error. (Vo AOB 435-469 [Arg. 30].) As he acknowledges, "[a]ll but one of the grounds raised for a new trial are addressed in other arguments in [Vo's opening] brief, and incorporated herein." (Vo AOB 435.) As Vo raises no new arguments as to these contentions, respondent does not reply to them separately, and instead rests on the responses given elsewhere in this brief.

The remaining ground raised in the new trial motion, concerning the audiotaped conversation between appellants at the police station following their arrest, was also raised as a separate claim by both appellants.[75] (See Hajek AOB 120-132; Vo AOB 238-249.) The present claim largely repeats that argument. We incorporate our response thereto, and add the following. The fact that the defense team did not hear the statements allegedly heard by the jury does not mean that the statements did not exist (Vo AOB 453) or that the jury improperly considered "extraneous," "extrinsic," or "extra-record" evidence (Vo AOB 454, 457-458). Because all presumptions must be drawn in favor of the court's ruling (*Denham v. Superior Court*, *supra*, 7 Cal.3d at p. 564), it must be presumed that the court, too, concluded that the challenged statements were in fact made notwithstanding the lack of an express finding on this point.

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75. Hajek nevertheless joins this part of Vo's appellate challenge to the trial court's denial of new trial. (Hajek 2nd Supp. AOB 6-7.)

(Vo AOB 463.)

Vo was not denied notice and an opportunity to defend (Vo AOB 455) or the right to counsel (Vo AOB 460). The defense had a copy of the tape. It is of no moment that the defense claims it did not hear what the jurors apparently heard.

As noted previously, jury misconduct was not raised in the motion for new trial, and the jury committed no misconduct by listening to a tape admitted into evidence. (See Vo AOB 456-457.) *Eslaminia v. White* (9th Cir. 1998) 136 F.3d 1234, cited by Vo (Vo AOB 457), is distinguishable because there, the jury listened to a tape that was not admitted into evidence.

As also argued in connection with appellants' claims concerning the audiotape and the court's failure to comply with Penal Code section 190.9, the tape was played without the reporter simultaneously transcribing the recording because counsel stipulated to this procedure and the tape itself was available, ensuring meaningful appellate review. (See Vo AOB 461-462.)

Finally, the trial court did not abuse its discretion in rejecting appellants' claim that the verdict was "contrary to . . . [the] evidence" (§ 1181, subd. (6); 10 CT 2753, 2766) because even aside from the tape, there was abundant evidence of both appellants' guilt. The court's job in the exercising its supervisory power over the verdict was to determine whether the evidence as a whole was sufficient to sustain the verdict. Whether and how the jury considered the tape, and how much if any weight it gave to it, was irrelevant to the court's inquiry. (See Argument XII.C., *ante*.)

XLI.

THE EIGHTH AMENDMENT DOES NOT PROHIBIT IMPOSITION OF THE DEATH PENALTY ON PEOPLE WHO ARE MENTALLY ILL

In his first supplemental opening brief, Hajek contends his death sentence must be vacated because the Eighth Amendment prohibits imposition of the death penalty on people who are mentally ill. (Hajek 1st Supp. AOB 1-10.) He is mistaken.

In *Atkins v. Virginia* (2002) 536 U.S. 304, 321, the United States Supreme Court held that execution of a mentally retarded criminal is "cruel and unusual punishment" under the Eighth Amendment. Hajek contends that the rationales underlying *Atkins* apply equally to the execution of a criminal who is severely mentally ill. The jury rejected Hajek's mental illness defenses and arguments in both the guilt and penalty phases of the trial. Moreover, state and federal courts have declined to extend *Atkins* to mental illness. (*In re Neville* (5th Cir. 2006) 440 F.3d 220, 223; *Commonwealth v. Baumhammers* (Pa. 2008) 960 A.2d 59, 96-97; *State v. Johnson* (Mo. 2006) 207 S.W.3d 24, 51; *Lewis v. State* (Ga. 2005) 620 S.E.2d 778, 764.) This Court should do the same. Hajek has made no showing that a national legislative consensus has developed against the execution of mentally ill individuals, as was the case in *Atkins* with mentally retarded individuals. (*Atkins v. Virginia*, *supra*, 536 U.S. at 314-317.) That case did not rely, as does appellant, on the opinion of mental health organizations, resolutions by the United Nations' Human Rights Commission, and a survey of some 1,000 Americans. Under the circumstances, there is no need to turn to the question whether the national consensus is supported by United States Supreme Court's recognition of retribution and deterrence as justifications for the death penalty. (See *id.* at p. 318 ["[O]ur death penalty

jurisprudence provides two reasons *consistent with the legislative consensus* that the mentally retarded should be categorically excluded from execution."], italics added.)

XLII.

PENAL CODE SECTION 190.2 IS NOT IMPERMISSIBLY BROAD

Vo contends Penal Code section 190.2 does not meaningfully narrow the pool of murderers eligible for the death penalty because the "special circumstances are so numerous and so broad in definition as to encompass nearly every first-degree murder." (Vo AOB 495-496 [Arg. 32.A.].) This Court has rejected the claim in numerous opinions, and appellant provides no principled reason to depart from those decisions. (*People v. Lindberg* (2008) 45 Cal.4th 1, 53; *People v. Loker* (2008) 44 Cal.4th 691, 755; *People v. Stevens* (2007) 41 Cal.4th 182, 211.) In particular, the lying-in-wait special circumstance adequately narrows the class of murderers subjected to the death penalty. (*People v. Jurado*, *supra*, 38 Cal.4th at p. 127; *People v. Bemore* (2000) 22 Cal.4th 809, 843.) The same is true of the torture-murder special circumstance. (*People v. Barnett*, *supra*, 17 Cal.4th at p. 1163.)

XLIII.

THE FAILURE TO PROVIDE INTERCASE PROPORTIONALITY REVIEW DOES NOT VIOLATE APPELLANTS' EIGHTH AND FOURTEENTH AMENDMENT RIGHTS

Appellants contend this Court's failure to conduct intercase proportionality review in capital cases violates the constitutional guarantees of due process and equal protection. (Hajek AOB 276-279 [Arg. XXV]; Vo AOB 517-519 [Arg. 32.C.6.].) Both the United States Supreme Court (*Pulley v. Harris* (1984) 465

U.S. 37, 50-53), and this Court have rejected identical claims (*People v. Loker* (2008) 44 Cal.4th 691, 755; *People v. Wilson* (2008) 43 Cal.4th 1, 30-31; *People v. Boyer* (2006) 38 Cal.4th 412, 484; *People v. Moon* (2005) 37 Cal.4th 1, 48). This Court should continue to do so. For the same reason, the trial court did not err in denying Vo's Motion to Preclude the Death Penalty (8 CT 2079-2087), in which he argued, based on comparison to other Santa Clara County cases, that the death penalty was being applied to him arbitrarily in violation of *Fuhrman v. Georgia* (1972) 408 U.S. 238. (Vo AOB 396-400 [Arg. 26].)

XLIV.

CALIFORNIA'S DEATH PENALTY STATUTE AND INSTRUCTIONS ARE NOT INVALID FOR FAILING TO SET OUT THE APPROPRIATE BURDEN OF PROOF

Appellants contend California's death penalty scheme violates the Sixth, Eighth, and Fourteenth Amendments because it (1) fails to require the state to prove beyond a reasonable doubt the existence of an aggravating factor, that the aggravating factors outweigh the mitigating factors, and that death is the appropriate penalty; (2) fails to require the state to bear some burden of persuasion if not proof beyond a reasonable doubt; and (3) fails to require juror unanimity on aggravating factors. (Hajek AOB 284-298 [Arg. XXVI]; Vo AOB 422-423 [Arg. 28.A.8-9], 499-514 [Arg. 32.C.1-4.) This Court has rejected similar claims. (*People v. Carasi* (2008) 44 Cal.4th 1263, 1317; *People v. Cruz* (2008) 44 Cal.4th 636, 681; *People v. Romero* (2008) 44 Cal.4th 386, 428-429; *People v. Parson* (2008) 44 Cal.4th 332, 370.) Appellants offer no cogent reason why the result should differ in this case.

XLV.

THE STANDARD CALJIC DEATH PENALTY INSTRUCTIONS WERE CORRECT

Hajek makes numerous claims attacking the standard death penalty instructions, specifically CALJIC Nos. 8.85 and 8.88.[76] (Hajek AOB 299-327 [Args. XXVII, XXVIII].) To the extent Hajek did not request the specific modifications alleged here he has forfeited his claim on appeal. (*People v. Daya*, *supra*, 29 Cal.App.4th at p. 714 ["defendant is not entitled to remain mute at trial and scream foul on appeal for the court's failure to expand, modify, and refine standardized jury instructions"].) In any event, both CALJIC Nos. 8.85 and 8.88 have been found to be constitutional.

A. CALJIC No. 8.88

Hajek claims that CALJIC No. 8.88 was constitutionally deficient or impermissibly vague for a number of reasons. (Hajek AOB 299-310 [Arg. XXVII].) This Court has previously rejected these claims and appellant offers no persuasive reason to reconsider those holdings. Specifically, this Court has held CALJIC No. 8.88 is not unconstitutional for: (1) using the "so substantial" standard for comparing mitigating and aggravating circumstances; (2) requiring the jury to decide whether the death penalty is "warranted" rather than "appropriate;" (3) failing to advise the jury that if the mitigating circumstances outweigh those in aggravation, it is required to return a sentence of life without the possibility of parole; (4) failing to inform the jury that defendant did not have the burden to persuade it that the death penalty was inappropriate. (*People v. Lindberg*, *supra*, 45 Cal.4th at p. 52; *People v. Parson*, *supra*, 44 Cal.4th at p. 371 [citing cases].)

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76. Vo makes many of the same challenges as Hajek to CALJIC No. 8.85 without referring specifically to the instruction. We have noted these with citations to Vo's brief, but have not responded separately.

B. CALJIC No. 8.85

Appellants contend that CALJIC No. 8.85 and California's death penalty scheme are unconstitutional for a variety of reasons. (Hajek AOB 311-327 [Arg. XXVIII]; Vo AOB 406-413 [Arg. 28.A.1-4], 423 [Arg. 28.A.10.], 497-499 [Arg. 32.B.], 515-517 [Arg. 32.C.5.], 519-526 [Args. 32.C.7-9, 32.D.].) All of these contentions have previously been rejected by this Court and should be rejected here. Specifically, this Court has held: (1) Penal Code section 190.3, subdivision (a) does not result in the arbitrary and capricious imposition of the death penalty and is not overbroad; (2) the trial court need not delete inapplicable sentencing factors from CALJIC No. 8.85 or identify which factors were aggravating or mitigating; (3) CALJIC No. 8.85 is not unconstitutional for failing to instruct that statutory mitigating factors are relevant solely as mitigators; (4) the terms "extreme" and "substantial" do not unconstitutionally limit the mitigating factors the jury may consider; (5) the failure to require the jury to make written findings regarding the aggravating factors found in imposing the death penalty does not violate the defendant's constitutional rights to meaningful appellate review and equal protection; (6) capital and non-capital defendants are not similarly situated and therefore may be treated differently without violating the constitutional guarantee of equal protection; (7) the jury's use of unadjudicated criminal activity during the penalty phase, as permitted by Penal Code section 190.3, factor (b), does not render a sentence unreliable. (*People v. Mungia* (2008) 44 Cal.4th 1101, 1141; *People v. Parson*, *supra*, 44 Cal.4th at pp. 369-370, and cases cited therein; *People v. Wilson*, *supra*, 43 Cal.4th at p. 32; *People v. Tafoya* (2007) 42 Cal.4th 147, 188; *People v. Alfaro* (2007) 41 Cal.4th 1277, 1330-1331.)

XLVI.

VO'S OTHER CLAIMS OF INSTRUCTIONAL ERROR AT THE PENALTY PHASE SHOULD BE REJECTED

In addition to the claims discussed above, Vo contends: (1) the trial court erred in refusing to give his proposed pinpoint instruction describing potential mitigating factors applicable to him; (2) the instruction telling the jury it could consider sympathy was not limited to sympathy for the defendant as constitutionally required; and (3) the instructions failed to convey that the jury should engage in an individualized sentencing process for the two defendants. (Vo AOB 413-422 [Arg. 28.A.5-7.) None of these claims have merit.

A. Pinpoint Instruction

Vo submitted a pinpoint instruction containing a laundry list of factors the jury could consider in mitigation, which the court refused to give. (10 CT 2490-2494.) A separate proposed instruction stating that his military service in the National Guard could be considered as a mitigating factor was also not given. (10 CT 2509.) Vo contends the court abused its discretion in refusing these instructions. (Vo AOB 413-418.) In *People v. Catlin* (2001) 26 Cal.4th 81, 173-174, this Court upheld the trial court's rejection of a similar list of mitigating factors proposed by the defense, stating:

> We repeatedly have concluded . . . that an instruction such as the one actually given in the presence case, directing the jury that it may consider in mitigation "any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime and any sympathetic or other aspect of the defendant's character or record that the defendant offers as a basis for a sentence less than death, whether or not related to the offense for which he is on trial," adequately conveys the full range of mitigating evidence that may be considered by the jury. [Citations.] In addition, we have explained that special instructions such as the one requested by defendant may be refused as argumentative and duplicative of standard instructions. [Citations.]

Likewise here, the factor (k) catchall instruction covered the items listed in Vo's proposed instruction, as well as his National Guard service. (10 CT 2644.) Accordingly, the trial court's ruling refusing the special instructions did not "fall[] outside the bounds of reason." (*People v. DeSantis* (1992) 2 Cal.4th 1198, 1226.) The jury was instructed on the need to make an individualized penalty determination as to each defendant. (10 CT 2646, 2651.) It did not need this point illustrated by the inclusion of a list of mitigating factors applicable to Vo, but not Hajek, as Vo suggests. (Vo AOB 414.)

B. Sympathy Instruction

Pursuant to CALJIC No. 8.84.1, the jury was instructed at the penalty phase that it would "now be instructed as to all of the law that applies to penalty phase of this trial" and that it should "[d]isregard all other instructions given to you in other phases of this trial." (10 CT 2641.) At Hajek's request (10 CT 2597; 25 RT 6348), it was also instructed: "In this phase of the case, you may consider sympathy, pity, mercy or compassion in determining the appropriate penalty." (10 CT 2641.)[77] Though Vo voiced no objection at the time, he now contends the instruction improperly failed to limit its consideration of sympathy to sympathy for the defendant as a factor in mitigation. (Vo AOB 418-419.) As a result, argues Vo, the instructions inappropriately "allowed the jury to consider sympathy for the victim and the victim's family members in determining the appropriate sentence for appellant Vo." (Vo AOB 419.)

Vo's failure to seek modification to the instruction in the manner now proposed forfeits the claim on appeal. (*People v. Daya, supra*, 29 Cal.App.4th at p. 714.) The claim is also without merit. Sympathy for the victim and the

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77. This language was part of a mitigation instruction proposed by Hajek. (10 CT 2597.) The court rejected the proposed instruction, except for the above-quoted language, which it incorporated as part of CALJIC No.8.84.1. (25 RT 6348.)

victim's family may play a role in the jury's penalty determination, as this Court made clear in *People v. Pollock* (2004) 32 Cal.4th 1153. The trial court in that case refused a defense-requested instruction that would have told the jury: "'Although you have heard testimony from the family and neighbors of [the victims] and you may consider such testimony as a circumstance of the crime, you must not be influenced by passion, prejudice, or sympathy in that regard.'" (*Id.* at p. 1195.) This Court held that the "instruction was properly refused as incorrect." (*Ibid.*)

> The proposed instruction misstated the law in asserting that he jury, in making its penalty decision could not be influenced by sympathy for the victims and their families engendered by the victim impact testimony. Although a jury must never be influenced by passion or prejudice, a jury at the penalty phase of a capital case may properly consider in aggravation, as a circumstance of the crime, the impact of a capital defendant's crimes on the victim's family, *and in so doing the jury may exercise sympathy for the defendant's murder victims and for their bereaved family members.*

(*Ibid.*, citing *People v. Stanley* (1995) 10 Cal.4th 764, 831-832, italics added.)

This Court made the point again in *People v. Zamudio* (2008) 43 Cal.4th 327. There, too, it upheld a trial court's refusal to give a defense-requested instruction suggesting "that emotions may play no part in a juror's decision to opt for the death penalty," citing the above language from *Pollock.* (*Id.* at p. 368.)

C. Individualized Sentencing

Vo contends the instructions were inadequate to convey the requirement that each defendant be given an individualized determination as to the appropriate penalty. (Vo AOB 420-422.) Not so. The jury was given two separate instructions addressing this obligation. They were instructed with CALJIC No. 8.88, which stated, in pertinent part:

> [In this case you must decide separately the question of the penalty as to each of the defendants. If you cannot agree upon the penalty to be

inflicted on [both] defendants, but do agree on the penalty as to one of them, you must render a verdict as to the one on which you do agree.]

(10 CT 2646.)

This concept was expounded upon further in another instruction, which stated:

> In making the determination of the appropriate penalty to impose on a defendant, you must consider each defendant separately and the factors in aggravation and mitigation as to each defendant separately. In making the penalty determination, you are not to weigh one defendant against the other or choose between them. The law requires that your decision regarding the appropriate penalty for each defendant be an individualized determination based on the character and circumstances of each individual and the circumstances of the crime.

(10 CT 2651.)

Vo maintains, however, that the instructions permitted the jury to use evidence admitted against one defendant only to decide the appropriate punishment for the other. He draws this inference from the first sentence of CALJIC No. 8.85, which states: "In determining which penalty is to be imposed on [each] defendant, you shall consider *all of the evidence* which has been received during any part of the trial of this case, [except as you may be hereafter instructed]." (Italics added.) He observes too that although the instruction addressing other crimes evidence—specifically, the incident in which Hajek and Norman Leung were stopped in stolen van with a loaded shotgun—contained only Hajek's name, it did not expressly state that the evidence was only to be used against Hajek.[78]

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78. The instruction read: "Evidence has been introduced for the purpose of showing that the defendant, Stephan Edward Hajek has been convicted of the crime of 10851 of the California Vehicle Code and 12022(a) of the Penal Code and prior to the offense of murder in the first degree or which he has been found guilty in this case. [¶] Before you may consider such alleged crime as an aggravating circumstance in this case, you must first be satisfied beyond a reasonable doubt that the defendant Stephan Edward Hajek was in fact convicted of such prior crime. You may not consider any evidence of any other

To the extent any limiting instructions were necessary, it was Vo's burden to request them. (Evid. Code, § 355.) In any event, as intelligent people capable of understanding and correlating all instructions (*People v. Tatman*, *supra*, 20 Cal.App.4th at p. 11) and instructed to consider the various instructions "as a whole and each in the light of all the others" (CALJIC No. 1.01; 10 CT 2629), the jury would have understood the directive to consider "all of the evidence" to mean "all of the evidence pertaining to each defendant." If the jury were to blindly consider the entire block of evidence against both defendants instead of discriminating between evidence pertaining Hajek and that pertaining to Vo, it would be disregarding the instruction requiring it to "consider each defendant separately and the factors in aggravation and mitigation as to each defendant separately." (10 CT 2651.) And it certainly would not be making an "individualized determination based on the character and circumstances of each individual and the circumstances of the crime." (*Ibid.*) Moreover, instructions aside, no reasonable juror would vote to sentence Vo to death for acts attributable solely to Hajek.

Any potential ambiguity about the necessity of making an individualized penalty determination based on the evidence against each particular individual was also dispelled by the arguments of the attorneys. Hajek's attorney argued:

> This has been a joint trial and my client has sat in the courtroom with Loi Vo throughout the duration of this trial and indeed throughout this penalty phase as well. But the decision about penalty is an individualized decision which you must make.
>
> Let me be very clear about this because the law is very clear about this: You are not here to choose between these two young men. You are not here to decide one should receive death and one should not.
>
> Rather, what the law says is you are to make a decision as to each individual because each individual has a different story and a different

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crime as an aggravating circumstance." (10 CT 2653.)

> life experience and the law directs you to look at all of that. So it is an individualized penalty based on the individual circumstances and character and the crime. . . . And it is not your duty to choose between the two of them, but rather your obligation to make the correct decision about penalty for each of them.

(25 RT 6423-6424.)

Vo's counsel mentioned it twice as well, emphasizing the evidence that applied particularly to Vo:

> Your role is to consider these [aggravating and mitigating] factors and to weigh them, and through that weighing process, come to a decision. The instruction also is that you must decide what the appropriate penalty is and consider each of these young men separately. [¶] Now, the only aggravating factor or aggravating evidence offered by the prosecution against Loi represent the circumstances of the killing.

(25 RT 6460-6461.)

Vo's counsel made the point again when discussing the factors in mitigation, telling the jury:

> And again, I remind you that the instructions require of you, this jury, that there be an individualized determination that is unique and personal to Loi Vo. So that's why we have put on this type of evidence so that you could consider it. And I suggest that there are—is significant factors to mitigation and factor K. They generally would be experiences while he was growing up, that he was forced to flee Vietnam when he was growing up, that he was forced to flee Vietnam when he was less than three years old, that he had unique experiences as an immigrant, that there was stress and abuse in his home, however his family loved him and did the best they could as a family, as a group, as a combination of people being subjected to these rather extraordinary stresses.

(25 RT 6466.)

The topic came up during the prosecutor's argument as well. At one point, he began straying toward comparing the defendants to each other, asking, "Which is worse? Mr. Hajek who is this outrageous person who kills a person for the pleasure of it, or Loi Vo, this cold-blooded, calculating—" (25 RT 6395.) Vo's counsel quickly interrupted, "Object on the basis it is an improper argument because of the comparison factor. Should not be done." (25 RT

6395.) The prosecutor acknowledge his mistake, saying, "I agree, your Honor." (25 RT 6395.) Vo's counsel pressed the point before the jury: "We've discussed the bounds of argument and counsel had promised the court he would not cross the bounds and he has done it, and I object to it." (25 RT 6395.) The court sustained the objection and the prosecutor continued:

> You're right. Ladies and gentlemen, it is a mistake to ask you to compare defendants. That should not be done. Each defendant should be evaluated separately and individually. [¶] I would submit to you, however, Mr. Vo is a cold-blooded, calculating killer.

(*Ibid.*)

The prosecutor went on to go through the various aggravating and mitigating factors as they applied to Vo. (25 RT 6396-6402.) Then he announced, "Let's look at those factors and evaluate independently Mr. Hajek," and engaged in a separate analysis as to him. (25 RT 6402-6416.) Under the circumstances, there is no reasonable likelihood the jury misunderstood the instructions to mean it could use evidence relevant only to Hajek in determining the penalty for Vo. (*Estelle v. McGuire*, *supra*, 502 U.S. at p. 72.)

XLVII.

INTERNATIONAL LAW AND NORMS DO NOT COMPEL REVERSAL OF APPELLANTS' DEATH SENTENCES

Appellants contend that California's use of the death penalty violates international law and lags behind evolving standards of decency. (Hajek AOB 328-332 [Arg. XXIX]; Vo AOB 526-529 [Arg. 32.E.].) This Court has previously rejected such claims. (*People v. Lindberg*, *supra*, 45 Cal.4th at p. 54; *People v. Parson*, *supra*, 44 Cal.4th at p. 372; *People v. Mungia* (2008) 44 Cal.4th 1101, 1142-1143; *People v. Page* (2008) 44 Cal.4th 1, 61; *People v. Harris* (2008) 43 Cal.4th 1269, 1323.) It should do so here as well.

Vo also contends that the state violated international law in his particular case because he was denied a fair trial based on all the claims raised in his brief. (Vo AOB 482-487 [Arg. 31.D.].) For the reasons respondent set forth in response to Vo's various claims, he was not denied a fair trial; therefore, there was no violation of international law. Vo also claims an international law violation based on the contention that he suffered racial discrimination, which denied him the right to a fair trial and sentencing phase. (Vo AOB 487-492 [Arg. 31.E.].) Because he fails to point to any evidence of a racially discriminatory purpose behind his conviction or sentence and concedes that the United States Supreme Court has rejected the use of statistical evidence to establish its existence (Vo AOB 491, citing *McCleskey v. Kemp* (1987) 481 U.S. 279), this claim too must be rejected.

XLVIII.

THE JUDGMENT AND SENTENCE NEED NOT BE REVERSED FOR CUMULATIVE ERROR

Appellants argue that the cumulative effect of the guilt and penalty phase errors require reversal of their convictions and death sentences even if no single error compels reversal. (Hajek AOB 333-336 [Arg. XXX]; Vo AOB 374-378, 529-530 [Args. 22, 33].) For the reasons explained above, virtually all of appellants' claims should be rejected as forfeited, not error, or harmless error. Respondent further submits, "'[N]one of the errors, individually or cumulatively, "significantly influence[d] the fairness of [defendants'] trial or detrimentally affect[ed] the jury's determination of the appropriate penalty."'" (*People v. Coffman and Marlow*, *supra*, 34 Cal.4th at p. 128.)

CONCLUSION

Accordingly, respondent respectfully requests that the judgment be affirmed.

Dated: October 8, 2009

Respectfully submitted,

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Note: Hajek's Argument XXXI is the Conclusion. There is no argument labeled XXXII.

CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 83, 485 words.

Dated: October 8, 2009

Respectfully submitted,

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Stephen Edward Hajek and Loi Tan Vo**
No.: **S049626**

I declare:

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

On October 8, 2009, I served the attached **RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, California 94102-3664, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on October 8, 2009, at San Francisco, California.

M. Bussero

Declarant

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