In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **MICKY RAY CAGE,** **Defendant and Appellant.**	**CAPITAL CASE** Case No. S120583

Riverside County Superior Court Case No. RIF083394
The Honorable Dennis A. McConaghy, Judge

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

On July 14, 2003, the Riverside County District Attorney filed an amended information charging appellant Micky Ray Cage (Cage) with the murder of Brunilda Montanez (Pen. Code,[1] § 187, subd. (a); count 1), the murder of David Burgos (§ 187, subd. (a); count 2), and being a felon in possession of a shotgun (§ 12021, subd. (a)(1); count 3). As to counts 1 and 2, the amended information alleged that during the commission of the crimes, Cage personally and intentionally discharged a firearm and proximately caused great bodily injury or death to another person, within the meaning of sections 12022.53, subdivision (d), and 1192.7, subdivision (c)(8). The amended information further alleged the special circumstances of lying in wait (§ 190.2, subd. (a)(15)) and multiple murders (§190.2, subd. (a)(3)). (2 CT 473-475.)

Cage was arraigned on the amended information. He entered "not guilty" pleas to all charges and denied all of the allegations. (2 CT 472; 1 RT 217.)

Jury selection began on August 4, 2003. (3 CT 584; 3 RT 344.) On August 18, 2003, the jury was sworn. (13 CT 3447; 5 RT 750-752.) On August 19, 2003, the prosecution began presenting evidence in the guilt phase of the trial. (13 CT 3452; 6 RT 789.) Following the presentation of evidence and arguments of counsel, the jury retired for deliberations on September 3, 2003. (13 CT 3520; 11 RT 1604-1607.)

On September 4, 2003, the jury found Cage guilty as charged. The jury also found true the firearm enhancements and all special circumstances allegations. (13 CT 3522-3531; 11 RT 1621-1626.)

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[1] Unless otherwise indicated, all future statutory references will be to the California Penal Code.

The penalty phase of the trial commenced on September 11, 2003. (13 CT 3578; 12 RT 1643.) Following the presentation of evidence and the arguments of counsel, the jury began its deliberations on September 22, 2003. (13 CT 3594; 16 RT 2266-2267.) The jury reached a verdict that same afternoon. (13 CT 3620.) On September 23, 2003, the jury's verdict of death was announced. (13 CT 3618, 3620-3621; 17 RT 2272-2273.)

On November 14, 2003, the trial court denied Cage's motion for a new trial and denied the automatic request to modify the verdict of death pursuant to section 190.4, subdivision (e). (13 CT 3649-3652; 17 RT 2284-2290.) The trial court imposed the death penalty for the first degree murder charged in count 1. The trial court also imposed the death penalty for the first degree murder charged in count 2, ordering that the sentence in count 2 run concurrent to the sentence in count 1. The trial court stayed the sentence on count 3. (13 CT 3671-3674, 3676-3678, 3684- 3687; 17 RT 2295-2302.)

This appeal is automatic. (§ 1239, subd. (b).)

STATEMENT OF FACTS

I. GUILT PHASE

A. Prosecution Case

Upset that she would not tell him of the whereabouts of his estranged wife and children, Cage killed his mother-in-law, Brunilda Montanez ("Bruni"),[2] by shooting her in the face with a shotgun while she stood in the entryway of her home. He then walked upstairs to the room of his 16-year-old brother-in-law, David Burgos ("David"), and shot him to death.

[2] As some of the witnesses and victims share the same or similar last names, respondent will refer to these witnesses by their first names.

Cage met his future wife, Claribel Burgos ("Clari"), Bruni's daughter and David's sister, when they were both 14 years old. Shortly thereafter, Cage moved in with Clari's family, which included Clari, Bruni, David, and Richard Montanez ("Ritchie"), Clari's other brother. Throughout their relationship, Cage and Clari lived with Clari's family off and on. (6 RT 789-791.) In December 1985, Cage and Clari had their first child, Vallerie Cage ("Vallerie"). (6 RT 791, 853.)

During the course of their almost 15-year relationship, Cage inflicted abuse and humiliation upon both his immediate family and Clari's family.[3] (6 RT 846.) In 1987, while Cage, Clari, and Vallerie were living in Bellflower with Clari's family, Cage asked Clari, who was sleeping, to get him some water. When Clari told Cage to get the water himself, Cage pulled Clari out of bed, dragged her down the stairs by her hair, and began choking her. After he forced Clari to pour him some water, Cage choked her again until she blacked out. (6 RT 792.)

On another occasion when all were living in Bellflower, David, who was five or six years old at the time, began crying because he wanted to go to the store with Bruni. Cage told David that he was a "momma's boy" and proceeded to punch him and stomp on his head with steel-toed boots. When Clari tried to intervene to protect her brother, Cage turned to Vallerie and pulled her legs over her head until her face turned blue. (6 RT 792-793.)

In 1991, when Cage, Clari, and Vallerie were living in Signal Hill, Cage and Clari had an argument. During this argument, Cage thought that Clari was following him around. Although Clari told him she was not following him, Cage pushed her into the bathroom, smashed her against the

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[3] The parties stipulated that Cage had been convicted of a felony prior to November 9, 1998. (13 CT 3517; 11 RT 1547-1548.)

bathtub, breaking her tooth, and choked her. Cage told Clari, "If you want to play, then we'll play." (6 RT 793-795.)

Later that same year, during an argument about money, Cage choked Clari and pushed her face down onto the couch, trying to smother her. He then grabbed her by the hair and dragged her into the kitchen. Once in the kitchen, Cage grabbed a knife, pushed Clari to the floor, and put the knife to her throat. Cage then dragged Clari to the bedroom where, in front of Vallerie, he beat and choked her the rest of the night. Cage told Clari, "You think I'm playing with you but I'm not, I'll kill you." (6 RT 795-797, 853-855.) The next morning, Cage, seeing the injured Clari, told her, "You look fucked up, I fucked you up didn't I?" He threatened Clari that if she called the police to report him, he would kill Vallerie. (6 RT 797.)

In December 1994, Cage and Clari had their second child, Micky Cage, Jr. ("Micky"). (6 RT 798.) At this time, Clari was living in Perris with Vallerie, her mother, and her brothers; although Cage did not live with them during this time, he was still in daily contact with Clari. (6 RT 799.)

After her maternity leave ended, Clari bought a car to use for her commute to work in Carson. (6 RT 798-799.) Within a day or two of buying her car, Cage came over and asked to use it. Clari told him no because he had destroyed every other car she owned and she needed this car for work and for the children. As Cage approached her, Clari ran outside. (6 RT 799-800.) While attempting to run away from Cage, Clari slipped in the grass and fell to the ground. Cage grabbed a brick and quickly jumped on top of her. Cage began hitting Clari in the face with the brick until she screamed in pain. Cage said that he knew she would call the police and told her he was not going back to jail. (6 RT 799-800, 855, 858.)

Cage then made Clari, Vallerie, David, and Micky get into Clari's new car. Dizzy and hurt, Clari begged Cage to take her to the hospital. Cage said he would but instead drove first to Lake Elsinore and then to

Long Beach. In shock and pain, Clari saw in the visor mirror that her forehead was flapping and looked "like ground beef." (6 RT 800-802, 855-856.) She used a diaper to mop up the blood; when the diaper was saturated, she used her shirt. (6 RT 856-857.)

As night fell, Cage finally stopped the car in the parking lot of Long Beach Memorial Hospital. However, instead of taking Clari inside, Cage drove around and around, in and out of the parking lot, until about 9:00 p.m., more than seven hours after Cage beat her with a brick. (6 RT 800-803, 857.) Before finally letting Clari go inside the hospital, Cage told her that if she said anything to get him arrested, he would kill their children. (6 RT 802, 856.) Cage also told Vallerie and David that if they said anything about this incident, he would hurt them. (6 RT 856, 858.)

Once inside the hospital, Clari told the hospital staff that she had hurt herself slipping at a store; she was afraid to tell them the truth because Cage still had the children in the car. She repeated this lie to Cage's mother, Emily Farmer, Cage's brother, Richard Cage ("Richard"), and Richard's girlfriend, Traci Thompson, who came to see her in the hospital. (6 RT 803.)

Clari needed numerous stitches to close the wound to her forehead, the scar of which was still visible at trial. (6 RT 803-805.) She also lost her front teeth and had to see an oral surgeon to realign her jaw, which he did by bracing his foot on a chair and pulling her jaw together. At the time of trial, in 2003, Clari's mouth still did not close properly. (6 RT 804-805.)

About six months later, Clari finally received dentures to replace her broken teeth. (6 RT 805.) On numerous occasions, Cage would throw her dentures away or hide them so that she would have to go to work humiliated. Twice, Vallerie went to the dumpster to retrieve Clari's dentures for her. (6 RT 805-806.)

After her mother purchased a home in Moreno Valley, Clari and her children moved back in with Cage, who was living a few miles from Bruni's home. (6 RT 806-808.) When Vallerie was 10 or 11 years old, she saw another woman sitting on the couch when she came home early from school. (6 RT 858.) Cage "dared" Vallerie to tell her mother about the woman. When Cage found out that Vallerie *did* tell Clari about the woman, Cage dragged Vallerie into the bathroom and used clippers to cut off all of her hair, which had hung about and inch and a half past her shoulders. Cage then made Vallerie go to school bald. When Clari bought a wig for Vallerie to wear, Cage took it from her in order to further humiliate Vallerie. (6 RT 858-860.)

Although she was back living with Cage, Clari had decided to leave Cage for good after he beat her with the brick. She began to secretly give money to her Aunt Lydia to hold for her, and she started to look for a new job and new apartment. (6 RT 808-809, 810-811.) As her current job was flexible, she was able to hide clothes at her aunt's home and go on job interviews either before work or during her lunch. (6 RT 811.)

Suspicious, Cage threatened Clari that if she ever left him, he would first take Micky and then kill her, Vallerie, and Clari's other family members, including her mother, Bruni. (6 RT 808-812.) Cage also insisted upon driving to work with Clari. (6 RT 812-813.) As Cage became increasingly aggressive, he would do things such as put sugar in the gas tank of Clari's car, shift the car into "park" while Clari was driving on the freeway, and tear up her paycheck and flush it down the toilet. (6 RT 808-809, 813-814.) Cage would not let Clari be alone with the children and he kept her up at night telling her that she did not know what he was capable of doing if she left him. (6 RT 811-812, 847-848.)

On the morning of October 15, 1998, a day she had a job interview scheduled, Cage again insisted upon driving to work with her. During the

drive, Clari told Cage that there was not enough gas in the car for him to drop her off and pick her back up so he would need to get some gas money from his mother. Cage grabbed Clari's purse to look for money; finding none, he threw her purse out the window and onto the freeway. Clari had to exit the freeway and then backtrack to retrieve her purse. As soon as she got her purse back and continued to drive to work, Cage again threw the purse out the window. When Cage asked her if she was going to get it, she told him no and continued to drive to work. Clari knew at that point she had to take her children and leave Cage. (6 RT 814-816, 826-827.)

When she arrived at work, she emailed her boss a request for a leave of absence. She then called Bruni and told her she could not take it anymore and was leaving Cage. She asked her mother to pick up Vallerie and Micky and bring them to her work. Clari then called Vallerie and told her that they were leaving and not coming back; she told her to put clothes for the three of them in a trash bag. (6 RT 816-817, 860-861.)

Clari's boss told her that she could not have a leave of absence. She then told him she would not be coming back; although she ultimately told her boss she would be back the next day, because he kept complaining about needing someone because another person was on vacation. However, Clari had no intention of actually returning to her place of employment. (6 RT 817.)

When Bruni picked her up from work with the children, Clari wanted to find a pay phone to call the person that she had an interview with and tell him that she would not be coming in. However, Bruni told her that was not a good idea as Cage would find her if she stayed. (6 RT 817-819.) Clari instead went to the courthouse to attempt to get a restraining order against Cage. While waiting, she made flight reservations to Puerto Rico. As she received no help regarding the restraining order, she left the courthouse. (6 RT 819-820.)

After stopping quickly first at Clari's apartment to pick up some contact lenses that Vallerie had forgotten to pack and at then at the dentist to pick up Clari's bridge, Bruni took Clari and the children to a friend's house. (6 RT 820-823, 861.) After staying a few days at the friend's house, Clari and the children flew to Puerto Rico on October 18, 1998, to stay with Clari's grandmother. (6 RT 823-824, 826-827.)

While in Puerto Rico, Clari spoke with Bruni over the phone almost every day. Her last conversation with Bruni and David was on Sunday, November 8, 1998, the day before Cage killed them.

During the time Clari and the children were in Puerto Rico, Cage, who had obtained Bruni's work information, called Bruni at work several times. (6 RT 844-845; 7 RT 902-903, 1015-1017.) He also drove through Bruni's neighborhood at least once during the weeks Clari and the children were gone. (7 RT 917.)

On Monday, November 9, 1998, Bruni's sister-in-law, Carmen Burgos ("Carmen"), was at Bruni's house during the day. (6 RT 872-873, 875-876; 7 RT 908.) After she and Bruni took David to get a haircut and do some shopping, they returned to Bruni's house to watch television. (6 RT 876-877.) Ritchie and his friend and neighbor, Steve Phipps, went to a bar about 7:00 p.m. (6 RT 877; 7 RT 905-907, 909.) Carmen left around 9:00 p.m. Neither Carmen nor Phipps saw anything in the entryway of Bruni's house when they left. (6 RT 877-879; 7 RT 918-919, 922.)

Ritchie and Phipps went to watch a football game at a bar called Bahama Mama's, which was about two and a half miles away from Bruni's house. (6 RT 863; 7 RT 909-910.) After the game, Ritchie called Bruni to ask her to come pick him up and bring some money; Bruni agreed to do so. (6 RT 864; 7 RT 907, 909.)

That same evening, Cage was playing dominoes and watching football with his friend, Jason Tipton, Tipton's roommate, Kevin Neal, and

another friend of Cage, James Sovel, at Tipton's apartment, which was in the same building as Cage's apartment. (7 RT 959-961, 967, 988-990, 992, 995-997, 1002; 8 RT 1091-1092.) They were all drinking and smoking pot, and Cage seemed a little high but not very drunk. (7 RT 971-974, 978-979, 1021-1025.)

During the weeks that Clari had been gone, Cage had told Tipton how upset and angry he was that Clari had taken his son and that he did not know where they were.[4] (7 RT 965.) He said that he felt "like doing something to Clari's mom to get my son back." (7 RT 966.) Cage said that he wanted to go to Clari's mother's house and put a gun to Bruni's head to find out where Clari had taken his son. (7 RT 965.) Specifically, Cage told Tipton that he should "bust a cap in [Bruni's] ass" and that he "should just put a gun to [Bruni's] head and tell her to call my wife." (7 RT 965-966.) At other times, Cage said he wanted to "fuck up" Clari's mom. (7 RT 967.) Cage had also shown Tipton the shotgun he owned. (7 RT 962-964, 979-981.)

Cage also told Neal how upset he was that his wife had taken his son away. (7 RT 995-999, 1012.) Neal heard Cage say that he was upset with Bruni because she was a "bitch" and would not tell him where his wife and children where. (7 RT 1013, 1017.) He also heard Cage say that he wanted to confront Bruni to find out where his family was. (7 RT 1014-1015.) Like Tipton, Neal had seen Cage's shotgun at Cage's apartment. (7 RT 1007-1011.)

On November 9, 1998, after the football game ended around 9:00 or 10:00 p.m., Cage, wearing a long dark Raider's jacket that went to his

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[4] As Tipton was unavailable for trial, having died in an accident, his testimony from the preliminary hearing was read into the record. (4 Supp. CT 1-2; 3 RT 429-431.)

knees, left Tipton's apartment with Sovel in Sovel's Honda. (7 RT 961-962, 966-967, 975-977, 986-987, 1003-1004.) Sovel drove Cage to Bruni's house. (8 RT 1091-1092.)[5]

Cage arrived at Bruni's house around 10:30 or 10:45 p.m. (8 RT 1059-1061.) After Bruni opened the door and let him inside, Cage shot Bruni several times with his shotgun, which he had hidden in a laundry basket full of clothes; his assault included shooting her in the face at close range. Cage then went upstairs and shot David to death. (7 RT 933-936, 952-953; 8 RT 1061-1063.) Cage, wearing his long dark coat, a dark jacket, and dark pants, then left the house and walked across the street. (7 RT 936-944, 953-954; 9 RT 1246-1248, 1255-1256.) After waiving to a neighbor and mumbling a hello, an alarm sounded from Bruni's house and Cage started to run. (7 RT 940-941, 947-948, 956-957; 11 RT 1543.) The neighbor thought that it looked like Cage was carrying a rifle. (7 RT 948-949, 952.)

Cage returned to his apartment building later that night, around 12:00 a.m. (7 RT 1017-1018.). Tipton and Neal saw Cage loading some type of plant or tree into his car, which Cage said he was going to sell for money. (7 RT 962, 982, 987.) Neal went outside to help Cage put the plant in his car. (7 RT 1004-1005.) Several hours later, Cage showed up at the apartment of Tipton and Neal and said his thermostat was not working and his apartment was cold. Neal invited Cage to stay the night on the couch in his apartment. (7 RT 1005.)

Because Bruni failed to show up at Bahama Mama's, Ritchie called home several more times; one time, Cage answered the phone. (6 RT 864;

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[5] Sovel died in a car accident in March of 1999, prior to Cage's trial. (8 RT 1092.)

7 RT 910-911.)[6] Concerned because it was unlike Bruni not to show up after saying she would, Ritchie and Phipps took a taxi to Ritchie's home. (6 RT 864-865; 7 RT 911-912, 927-928; 9 RT 1242-1243.)

When they arrived at the house around 11:00 p.m., the front door to Bruni's home was open about an inch and there were some clothes in the driveway. (6 RT 864-865; 7 RT 931; 8 RT 1065.) While Phipps went to get some money at his house to pay the cab driver, Ritchie opened the door to his house and saw his mom lying on the floor "with her face blown off." He then ran upstairs and saw that his brother David was also shot dead. Ritchie screamed and called 9-1-1. (6 RT 865-866, 870; 7 RT 912-914; 8 RT 1064-1065.)

Hearing Ritchie scream, Phipps ran back to the cab and told the driver, Curtis Wilhusen, to call the police. (7 RT 915, 930.) Ritchie continued to scream for about five minutes before coming outside covered in blood. He kept yelling that his mom and brother were dead and asking "why, why, why." Phipps and Wilhusen tried to calm him down but Ritchie was inconsolable. (6 RT 915-916, 929-930, 932; 8 RT 1065.)

The police arrived soon after Ritchie's call to 9-1-1. (7 RT 916.) Deputy Ronald Heim, the first officer to arrive, saw that Ritchie was hysterical and covered in blood and fleshy matter. (9 RT 1230-1233.) Several officers tried to calm Ritchie down and get him into a police car for his own safety. (9 RT 1233-1235; 11 RT 1526-1528.)

Inside Bruni's house, the police encountered a "gruesome" homicide scene; blood, brain matter, and tissue were on the floor, ceiling, and walls. (8 RT 1082-1084, 1094.) Bruni and David were shot dead. (9 RT 1237-1240.) Several shell casings were found by Bruni's feet. One shotgun slug

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[6] Phipps testified that no one answered Bruni's phone after Bruni said she would pick them up. (7 RT 925.)

was found behind the upstairs dresser and another one was found on top of the stereo. (8 RT 1112-1113, 1115-1116, 1124-1126.) David's room was also bloody. (11 RT 1539-1541.) A pair of burgundy pants found in the driveway matched a burgundy top found in the laundry basket inside the entryway. (8 RT 1112-1113.)

When Clari called her mother on November 10, 1998, no one answered the phone so she left a message on the answering machine. (6 RT 827-828.) Later that day, one of Clari's uncles called her and told her that her mother and brother were dead. Clari thought he was joking so she gave the phone to her Aunt Rose. (6 RT 828.) Aunt Rose's face did not change but she told Clari to go ahead and go to her job interview and take her grandmother with her. (6 RT 828.)

As she was putting gas in her car at the gas station, Clari realized that something was not right. She went back to her grandmother's house and some family members in the driveway would not let her inside. Clari's uncle then came outside and took her to pick up her Aunt Carmen. When her Aunt Carmen told Clari what happened, Clari just "lost it." (6 RT 828-830.) Detective Michele Amicone later gave Clari more details of the murders over the phone. (6 RT 830-831; 11 RT 1535-1536.)

When Clari arrived back in California the next day, she went to her mother's house. At the house, Clari saw blood all over the floor, carpet, and walls, reaching all the way to the ceiling. She also saw on the floor a basket full of clothes belonging to her and Cage. (6 RT 831-833, 837, 842-843; 11 RT 1536-1538.) In the pocket of a pair of Cage's jeans in the basket, Clari found a note with her mother's work information on it in Cage's handwriting. (6 RT 844-845; 8 RT 1101-1104.) The basket reminded Clari of how Cage had twice previously hidden guns under clothes in a laundry basket. (6 RT 833-836.)

Police located a shotgun with live round in the magazine and some shell casings in a bush along a trail that Cage used as a short-cut to get to Bruni's house. (6 RT 840, 842, 849, 851-852; 8 RT 1077-1078, 1131-1133, 1141-1144.) In addition to the shotgun, which appeared to have had blood or tissue in the barrel, and shell casings, police also found Newport cigarette packs, Newport cigarette butts, a lighter, and boot prints.[7] (8 RT 1133, 1145, 1150-1151; 9 RT 1356-1362.) Technicians were unable to get fingerprints from the shotgun, casings, or lighter. (9 RT 1358-1361.) Criminalist Paul Sham testified that the left boot recovered from Cage's apartment "probably" made one of the impressions and that the right boot recovered "could have" made one of the other impressions. (8 RT 1394-1395, 1401-1404.) Criminalist Phillip Pelzel testified that the expended shells recovered from inside the house "definitely" came from the shotgun found and that the slugs recovered "probably" came from this shotgun. (9 RT 1259-1260, 1265-1278, 1287-1288.)

Using the pair of shorts Cage was wearing the night of November 9, 1998, a dog traced Cage's scent from the bush were the shotgun and other items were found back to the front door of Bruni's house. (8 RT 1146-1150, 1155-1167.)

Dr. Daniel Garber, a forensic pathologist, performed the autopsies on the bodies of Bruni and David on November 12, 1998. (10 RT 1452-1454.) Dr. Garber testified that David suffered two different shotgun wounds, one to the chest and one to the left arm. (10 RT 1454-1457.) The shotgun barrel would have been within a foot of David when it was fired and the wounds were consistent with David raising his arm to defend himself. (10

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[7] Clari testified that Cage smoked Newport cigarettes when he ran out of his regular brand, Camel. (8 RT 1100-1101, 1103-1104.)

RT 1459-1463.) The official cause of David's death was a gunshot wound to the chest. (10 RT 1465.)

Dr. Garber testified that Bruni suffered three gunshot wounds, one to the right shoulder, one to the chest, and one to the head, consistent with the shotgun being placed in or close to her mouth. (8 RT 1084, 1087-1089; 10 RT 1466.) The shots were fired in rapid succession but the head wound was probably the final shot, as it resulted in the massive destruction of Bruni's head, leaving soot and gunpowder on her tongue and the inside of her mouth. (10 RT 1472-1474.) One of Bruni's thumbs was severed and her other thumb was almost severed, which likely resulted from Bruni putting her hands up to protect herself. (10 RT 1475.) The official cause of Bruni's death was multiple gunshot wounds. (10 RT 1476.)

In addition to boots the police found in Cage's apartment, they also recovered a black jacket, a purple coat, a gun case, and a clip for a large handgun. (8 RT 1177-1185.) After his arrest, the police also collected the clothing Cage was wearing the night of November 9, 1998, including his pants and boxer shorts. (9 RT 1190-1194, 1204-1217; 11 RT 1533-1534.) A forensic nurse took swabs from Cage's legs. (9 RT 1223-1227.)

Criminalist Lourdes Petersen analyzed a number of items of Cage's clothing, as well as swabs taken from Cage's leg and the recovered shotgun. (7 RT 1027, 1032-1033.) Cage's pants, shorts, and swabs of his leg and shotgun tested positive for blood. (7 RT 1036, 1038-1040, 1042, 1044-1046.) Cage's belt, shoes, shirt, socks, jackets, boots, and boxer shorts did not screen positive for blood. (7 RT 1042-1044; 8 RT 1186.)

Criminalist Donald Jones, the prosecution's DNA analyst, testified that he received numerous items from the crime lab, as well as blood samples from Cage, Bruni, and David. (9 RT 1294-1295, 1317-1323.) Jones testified that human DNA was present on the swabs from the gun, Cage's pants, and Cage's shorts. (9 RT 1326-1335.) He testified that Cage

was a possible source of the stains inside the pants and leg swabs, with Bruni and David eliminated as possible sources. (9 RT 1335-1336.) He also testified that Bruni was the source of the stain and human tissue found outside Cage's blue pants, with Cage and David excluded as possible sources.[8] (9 RT 1337.)

B. Defense Case

Cage did not present any evidence at the guilt phase of his trial. In closing argument, Cage's counsel argued that the DNA evidence and circumstantial evidence linking Cage to the shooting, as well as the evidence of his mental state at the time of the shooting, was not sufficient proof for the jury to find him guilty of first degree murder beyond a reasonable doubt. (11 RT 1590-1600.)

II. PENALTY PHASE

Evidence in Aggravation

Detective Amicone testified that she had contact with Cage on November 10, 1998, off and on, from 10:00 a.m. until 9:30 p.m. (12 RT 1655-1656.) She testified that Cage was not shaking or shivering after his arrest, nor was he doing so when he was in his holding cell. (12 RT 1656-1657.) However, just before he was to be interviewed at 5:20 p.m., Cage began bouncing up and down in his chair, and shivering and chattering his teeth together. He had a blank stare and his eyes would bug out when Detective Amicone asked him a question. (12 RT 1657-1659.) When Detective Amicone asked Cage why he was sweating but acting cold, Cage said he did not like her and told her to get out of the room. (12 RT 1659-1660; 13 RT 1857-1861.) She also saw Cage pick up a phone, which was given to him because he asked to call a lawyer, look at it like he did not

[8] Criminalist Ellen Clark confirmed these findings. 910 RT 1416-1430.)

know what it was, sing, and then place the phone on the table. When Detective Amicone asked Cage if he made his call, he did not respond. (12 RT 1661-1662.)

Knowing Cage had diabetes and not getting a response from him to her questions regarding his health, Detective Amicone had Cage taken to Riverside County Regional Medical Center to be checked to see if he was having a diabetic reaction. (12 RT 1660, 1665-1666.) At the hospital, Dr. Steven Green contacted Cage at 8:30 p.m. and finished his observations at 9:15 p.m., during which time Cage did not shiver, shake, or chatter his teeth. (12 RT 1663-1665, 1670; 13 RT 1850-1853.)

Dr. Green found that Cage's glucose level was moderately elevated, a condition consistent with diabetes not optimally controlled, and recommended only that Cage take his regular evening dose of insulin. (12 RT 1666-1667.) Dr. Green testified that a moderately elevated level of glucose would not cause symptoms such as shaking or chattering teeth; rather, those symptoms would be more common in a person with a very low level of glucose, or in a person trying to fake a diabetic reaction. (12 RT 1667-1669, 1672.)

In addition, Dr. Green testified that a person with Cage's moderately elevated glucose level would be able to think and function normally, as well as to have been expected to function normally the night before. (12 RT 1669-1671.) Dr. Green had not seen a situation where a person was shivering, shaking, chattering their teeth, and perspiring, and then two hours later have a moderately elevated glucose level. Dr. Green concluded that these "symptoms" were not related to Cage's diabetes and that there was no medical basis for that activity. (12 RT 1671-1672.)

When Cage returned to the police station, he started to shake and shiver again during the interview. (13 RT 1854.) However, Cage invoked

his right to remain silent and further attempts to interview him were terminated. (12 RT 1661.)

As set forth below, evidence was presented regarding Cage's criminal convictions and prior criminal activity involving force or violence.[9]

Tyrone Hatfield, a lieutenant with the Long Beach Police Department, testified that he arrested Cage in July 1986 for possession of a deadly weapon, a broken wooden walking cane. (13 RT 1836-1839.) Cage told him that he was going with a friend to possibly beat up a man who owed him money. (13 RT 1840.)

Nancy Icenogle, who was a close friend of Bruni and Clari, testified that in April 1987, Cage beat 16-year-old Willie Hinton, with a board with a screw or nail sticking out of it, while Ritchie hit him with a chain. Cage thought Willie had stolen money from him. (13 RT 1879-1888.) When Bruni arrived, she protected Willie and took him to his grandfather's house. (13 RT 1888-1890.) A few days later, Cage confronted Icenogle at a liquor store and screamed at her for "ratting him out." Cage told Icenogle to watch her back because he was going to shoot her.[10] (13 RT 1890-1892.)

Mary Roosevelt, the mother of Cage's other daughter, Felisha Cage ("Felisha"), testified that on April 29, 1990, Cage came to her house, grabbed her neck, and choked her. He then hit her in the face and threw her to the floor, where he kicked her in the face and stomach. Cage then slammed Roosevelt's head into a wall. (13 RT 1833-1834.)

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[9] The parties stipulated that Cage had been previously convicted of two felonies: he was convicted on April 14, 1988, of selling cocaine and was sentenced to three years in prison for this offense on November 7, 1988; he was convicted on September 4, 1991, of spousal abuse and was sentenced to two years in prison for that offense on September 18, 1991. (13 CT 3580; 13 RT 1771.)

[10] Icenogle testified that she was afraid because Cage had stolen her grandfather's World War II gun several weeks earlier. (13 RT 1892-1900.)

Steven Owens, a police officer with the city of Signal Hill, testified that in August 1991, he responded to a domestic violence call involving Cage. (13 RT 1842-1843.) He contacted Clari, who was upset and had some redness on her face, and she told him that Cage had hit her twelve days earlier. She provided Officer Owens with the kitchen knife Cage used and some of her still bloody clothes. (13 RT 1843-1845.) When Officer Owens and another officer took Cage into custody, he struggled so hard that a sergeant had to use the cartoid hold on him. (13 RT 1847-1849.)

David Olson testified that he had been a neighbor of Bruni's and knew Cage and Clari. In June 1994, he was receiving tutoring from Clari. (13 RT 1864-1867.) However, Olson was afraid of Cage because Cage was upset that Olson did not let him borrow his weights. (13 RT 1867-1870.) When Cage saw Olson in Bruni's house, Cage picked Olson up and threw him into some bushes outside. (1870-1872, 1905.) Cage told Olson's mother that he would kill her son and burn down her house if she called the police. He then exposed himself to her and told her to "lick my nuts, bitch." (13 RT 1905-1907.) Olson's mother called the police. (13 RT 1906.)

The police came and arrested Cage after a violent struggle, in which Cage broke a window in the police car and had to be subdued with pepper spray. (13 RT 1872-1875, 1907-1907-1.) While being arrested, Cage told Olson, "Don't let me see you on the street because I'll kill you. If your dad comes out, I'll kill his white ass. If I don't kill you, I'll have 18th Street come over here and kill you." (13 RT 1875-1877.)

Vallerie testified regarding the time in 1994 when she and Ritchie had a minor argument and Cage beat Ritchie so bad that he had to go to the hospital. (14 RT 2048-2051.) She also testified that Cage sometimes punished her by beating her with the metal parts of a belt and putting her in

a closet all day. She remembered that she was in the closet all day once on her birthday. (14 RT 2051-2053.)

Clari testified about the time when David was six years old that Cage beat him and kicked him in the head. As a result, David had excruciating headaches every couple of weeks thereafter. (15 RT 2071.) She also recounted the time Cage beat up Willie Hinton. (15 RT 2072-2080.) She told the jury about the time he saw Cage assault Mary Roosevelt and the time she saw Cage beat Vallerie on the bottom and back with a belt. (15 RT 2080-2086.)

Traci Thompson, who had children with Cage's brother, Richard, testified that she saw Clari in the hospital after the brick incident and that Clari told her Cage had beat her. (14 RT 1956-1958.) She also recalled an incident where Vallerie did not want to eat her vegetables. In response, Cage slapped Vallerie so hard that her nose bled. (14 RT 1958-1960.) In addition, she recounted that Vallerie had told her that Cage had shaved her hair off and would not let her wear a wig to school. (14 RT 1961-1962.)

The prosecution presented testimony regarding the impact the deaths of Bruni and David had on their families.

Celena Rodriguez, Bruni's mother, told the jury that her family was very close and that celebrating holidays since the murders was very difficult without Bruni. Her family loved Bruni and David a lot and would always talk about them. (14 RT 1926-1934.)

Bruni's sister and best friend, Lupe Quiles, testified that she was originally told that Bruni and David were in a car accident, but were okay. (14 RT 1935-1939.) When her sister Lydia called and told her Bruni and David were dead, she fell to the floor. (14 RT 1939-1940.) She flew to California the next day. (14 RT 1940-1941.) Quiles testified that when she arrived at Bruni's house, she saw blood and pieces of brain on the door, walls, and ceiling. She saw the same thing in David's room. (14 RT 1941-

1942.) She bought some bleach and began cleaning the house but it was very difficult as pieces of bone from Bruni's face were still on the floor. She testified that she kept a piece of bone she thought was from Bruni's nose. (14 RT 1942-1944.) Quiles told the jury that the deaths of Bruni and David had been very hard on Ritchie, as Bruni had always taken care of him. (14 RT 1947-1948.) Quiles testified that Ritchie had become violent and aggressive, was not capable of taking care of himself, and was currently in a mental hospital.[11] (14 RT 1948-1951.) Quiles also testified that holidays were especially hard now that Bruni and David were dead. (14 RT 1945.) She testified that Bruni was more than a sister to her and that part of her heart died with Bruni. (14 RT 1952-1953.)

Vallerie told the jury that David was like a brother to her; they lived together most of the time, went to the same school, had mutual friends, and always played together. (14 RT 2053-2056.) She also testified that Bruni was the provider in the family and her only real "father figure." (14 RT 2057.) The last five years did not seem complete without Bruni and David. Her family does not even put up a Christmas tree anymore and they have difficulty celebrating holidays, especially Mother's Day. (14 RT 2056-2058.)

Clari testified that David was like a son to her. She gave him his name and he slept in her bed with her until he was two or three years old. When she was 14 years old, she got a job at McDonald's in order to have money to buy David things. (15 RT 2086-2089.) She took David everywhere with her and even "bribed" him to keep "hanging out" with her when he got older. Just before she left for Puerto Rico, she taught David

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[11] Clari also testified during the penalty phase that Ritchie had become very aggressive after the murders of Bruni and David. (15 RT 2094-2095.)

how to drive. When Clari arrived at Bruni's house after the murders, David's driver's license was in the mailbox. (15 RT 2088-2090.)

Clari told the jury that there is no longer any joy or happiness in her life. Her family no longer celebrates holidays and she does not even answer her phone on Mother's Day. (15 RT 2091-2092.)

Mitigation Evidence

Dr. Joseph Wu, an associate professor at the University of California – Irvine ("UCI") School of Medicine and clinical director of the UCI brain imaging center, testified in Cage's defense.[12] (12 RT 1684-1685.) Dr. Wu testified that his specialty was PET scan studies and explained that PET scans showed the brain's function or activity, as opposed to an MRI or CAT scan, which showed the brain's structure. (12 RT 1688-1693.) Dr. Wu explained the procedure used to obtain a PET scan, as well as the clinical uses for such a scan, including evaluating brain injuries, movement disorders, and psychiatric disorders. (12 RT 1694-1700.)

Dr. Wu testified that he performed a PET scan on Cage on October 3, 2002. This scan indicated that Cage had significant decreases in the level of frontal lobe activity, while having a lot of activity in the occipital area. (12 RT 1704-1707.) Dr. Wu testified that this pattern is seen in people with traumatic brain injury and also in people suffering from mental disorders, such as schizophrenia. (12 RT 1707, 1710.)

Although Dr. Wu declined to state what specifically he thought Cage was suffering from, he testified that he had reviewed a social security application evaluation, in which Cage was diagnosed with paranoid schizophrenia, medical records showing Cage's head trauma, and jail

[12] To accommodate his schedule, the trial court allowed Dr. Wu to testify out of order during the prosecution's case. (12 RT 1684.)

records showing that Cage was given powerful antipsychotic medication, and thought these records were consistent with the abnormalities shown on the PET scan. (12 RT 1707-1710; 13 RT 1802-1803.)

During cross-examination, Dr. Wu admitted that he had always testified for the defense and that some medical centers do not accept that PET scans can be used to diagnose head trauma or mental disorders. (12 RT 1748; 13 RT 1826-1827.) He also admitted that he had not actually seen any of Cage's jail or prison records, but relied on what Cage's attorney had told him. (13 RT 1789-1791.) He also stated that his "average" PET scan, to which he compared Cage's scan, was created using a composite of the PET scans of 56 "normal" people and was itself "normalized." (12 RT 1750-1751, 1755-1756.) Dr. Wu testified that it was difficult to scan Cage's whole brain and that he could not be one hundred percent sure that Cage had schizophrenia based on the PET scan. (12 RT 1760; 13 RT 1791.)

Dr. Alan Waxman, a physician with Cedars-Sinai Imaging Medical Group and the director of the Nuclear Medicine Service, also testified regarding Cage's PET scan.[13] (14 RT 1981-1988.) Dr. Waxman first took issue with how Dr. Wu compiled his "normals" because some of the "normal" images actually were *not* normal, such as one image showing a brain that had suffered from mini-strokes, one showing a person with Alzheimer's disease, and several showing decreased frontal lobe activity, which can be caused by such things as age and depression. He testified that if an image of a brain with a defect on the left side, for example, was compiled with an image of a brain with a defect on the right side, these defects would cancel each other out and the resulting image would appear "normal." (14 RT 1988-1990, 1993-1995.)

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[13] While part of the prosecution's evidence in aggravation, Dr. Waxman testified after Dr. Wu.

Dr. Waxman further told the jury that Dr. Wu was the only doctor who "normalized" these types of images for clinical purposes and that this method was investigational. He testified that Dr. Wu's methods had not been evaluated and that these methods were "guaranteed" to produce "abnormalities" in just about every PET scan. (14 RT 1999-2002.) Dr. Waxman also told the jury that Dr. Wu used poor quality scanners to produce the PET scans. (14 RT 1988, 1998-1999.)

As to Cage's PET scan specifically, Dr. Waxman testified that he saw no defects; rather, Cage's head was tilted up when it was scanned and Cage's blood sugar was elevated, conditions which affected the scan. (14 RT 1990-1993, 1997-1998.) He further testified that if Cage's scan was abnormal, then over one-half of Dr. Wu's "normals" could also be termed "abnormal." (14 RT 2002.)

Dr. Boniface Dy, a psychiatrist at Riverside County Detention, also testified for the defense. Dr. Dy testified that he has seen Cage since June 2000 and that Cage was taking, among other things, some anti-psychotic medications. Dr. Dy saw Cage every 25 to 30 days to review his medications. (15 RT 2097-2100.) Dr. Dy admitted that he did not perform the initial diagnoses of Cage. (15 RT 2102.)

Cage's daughter Felisha testified that she saw Cage about once a month before he was incarcerated and that he had never been violent towards her. She recalled that one time he took her to Magic Mountain. Cage now calls her about once a week from jail. (15 RT 2105-2107.) Felisha admitted that the main activity she did when she was with Cage was play with Vallerie. She was unable to remember activities where it was just her and Cage. (15 RT 2107-2111.)

Emily Farmer, Cage's mother, testified that Cage's behavior changed as a child once he was diagnosed with diabetes. (15 RT 2112-2115.) She told the jury that when Cage was about 15 years old, he ran into a light pole

while playing football and had to have his jaw wired for about eight months. (15 RT 2115-2117, 2136-2137.) Farmer testified that Cage's father was not around so she raised her children by herself, which meant often leaving them alone while she worked. When Cage was fourteen years old, he left home to live with Bruni's family, but he would come back intermittently. (15 RT 2119-2121, 2127-2128.)

Farmer told the jury that the last time she saw Cage before the murders was in late October 1998, and that at that time he seemed dirty, unkempt, and distant. (15 RT 2130.) A week after the murders, she saw Cage in jail and he was trembling and shaking; he did not seem to recognize her and just stared at her. (15 RT 2131-2132.) She admitted that she did not alert the jail staff to Cage's condition and testified that he recognized her after about a month. (15 RT 2132-2133, 2145-2146.)

Rebuttal Evidence

On rebuttal, Vallerie testified that when she was ten or eleven years old, she went with Cage to the social security office. (15 RT 2147-2148.) Cage parked far away from the office so no one could see that he drove. He told Vallerie to pat his back and rub him and ask if he was okay. At the social security office, Cage would talk about being abducted by aliens and would make funny noises. (15 RT 2148-2149.) Cage also cut his own hair and intentionally burned himself before this visit. (15 RT 2152-2153.) Vallerie told the jury that Cage always understood what was happening around him. (15 RT 2153.) She testified that Cage faked his mental illness and that he was able to "fake out" the jail doctors. (15 RT 2154, 2157-2158.)

Clari also testified in rebuttal. She explained that Cage had met someone during a stint in jail who told him how to get money from social security without working. (15 RT 2161.) As a result, Cage lied on his

social security application and received about $650 per month. (15 RT 2165-2167.) Cage would often brag about cheating the social security agency and fooling doctors; he said he could write a book about it. (15 RT 2168-2169.) Cage always immediately cashed his social security checks and would not contribute any money to the rent or other bills. (15 RT 2167-2168.)

Clari also testified that Cage would rarely take his medications; when he did, he would just go to sleep. (15 RT 2169-2170.) She twice saw him have a reaction due to his diabetes, the last time was a couple of months before the murders. (15 RT 2170-2171.) She testified that Cage only briefly worked but he "hustled" on the street. Clari testified that she was the one who had to initiate Felisha coming over to see Cage. (15 RT 2174-2177.)

ARGUMENT

I. THE TRIAL COURT PROPERLY ADMITTED EVIDENCE OF CAGE'S PRIOR ABUSE AGAINST HIS FAMILY MEMBERS UNDER EVIDENCE CODE SECTIONS 1101, SUBDIVISION (B), AND 352

Cage claims that the trial court violated his constitutional rights when it admitted evidence of his prior abuse committed against his family members because such evidence was improper propensity evidence. Specifically, Cage contends that the trial court abused its discretion when it admitted evidence that he physically abused and threatened his wife - Clari, his daughter -Vallerie, and his brother-in-law - David, because this evidence was "not probative on any disputed issue" and "unduly prejudicial." (AOB 46-93.) Cage's claim should be denied. The trial court properly admitted this evidence under Evidence Code sections 1101, subdivision (b), and 352, because it was relevant to prove Cage's motive and intent, as the prosecution had to prove Cage's murders were deliberate

and premeditated, and its probative value was not substantially outweighed by any danger of undue prejudice.

A. Trial Court Proceedings

Prior to trial, the prosecutor filed a "Trial Brief Regarding the Admissibility of Evidence." (2 CT 531-545.) In this brief, the prosecutor set forth the proffered prior abuse evidence, which included 13 separate acts of abuse against Clari, one act of abuse against David, three acts of abuse against Vallerie, and the allegation that Cage "beat up Rich[ie] all the time." (2 CT 536-540.) The prosecutor asserted in the brief that Cage's prior bad acts were relevant and admissible pursuant to Evidence Code section 1101, subdivision (b), as evidence of Cage's intent and motive. Specifically, the prosecutor argued that Cage's prior acts of abuse toward his family and his wife's family explained several things:

> First of all, it shows the power and control that he exercised over all of them for so many years. It also shows an escalating pattern of violence by the defendant when he does not get what he wants from the people involved in this case. It explains why Clari had to take her children and leave the country to feel safe. Most importantly, it is the only logical and reasonable explanation for the killings. Without the motive evidence, the jury will simply be left with the fact that the defendant brutally murdered his mother-in-law and brother-in-law. The first question they will want answered is why. That is why the law allows motive evidence to be introduced.

(2 CT 540.)

In response, Cage filed a "Motion in Limine to Exclude Other Crimes Evidence," arguing that the admission of this "other crimes evidence" would violate his federal due process rights. Specifically, Cage claimed that evidence of his prior abuse against his family should be excluded as the proffered instances of abuse are "too remote," "irrelevant," and would "unfairly appeal to the jury's emotions." (8 CT 2123-2125.)

At the hearing on these motions, the prosecutor reiterated that the most important reason she was seeking to admit evidence of Cage's prior bad acts was to establish motive, without which "the murder makes no sense":

> Well, the defendant was angry at his wife for taking his children and fleeing, and him having no idea where they were. The defendant had a strong suspicion that his mother-in-law knew where his wife was. And so he wasn't able to get that information from his mother-in-law because obviously never went and sought her out. He just complained about not being able to find his children, being upset about the fact that his son was gone.
>
> So he went over to his mother-in-law's house, using the clothes as a ruse to get her to open the door. Because I think it's pretty obvious that this man has terrorized this family repeatedly over the years. And she probably wouldn't have willingly opened the door to him, but for the fact that he's using this pretense of returning clothes to Clari – or giving clothes to the mother to say, "Give them to Clari."
>
> So because the defendant is angry with his mother-in-law for not telling him where his wife and children are he kills her.
>
> Also, in one of many threats the defendant made to Clari in the course of the relationship, especially over the last couple of weeks before she actually left, he made threats to the effect of, "I'll kill your whole family," things like that.
>
> Well, sure enough, lo and behold, the defendant follows through on those threats that he made to Clari if she ever left him.
>
> . . .
>
> Without this motive evidence, which basically makes the big picture clear, it's going to be much harder to argue the premeditation and deliberation theory and the lying-in-wait theory to the jury.
>
> . . .

> . . . [I]f you're left without motive evidence, we have a middle-aged mother and her teenage son gunned down in their home in Moreno Valley with circumstantial and physical evidence pointing to the defendant.

(3 RT 438-440.)

Cage again objected to the introduction of this evidence arguing that "this really smacks of propensity evidence" (3 RT 442) and that such evidence "is just so substantially prejudicial that it unnecessarily inflames the jury." (3 RT 445.)

The trial court allowed the prosecutor to introduce under Evidence Code section 1101, subdivision (b), most of the evidence set forth in her trial brief:

> All of these are prejudicial, obviously. If they weren't, the People wouldn't want to get them into evidence. Taken in a vacuum, I would not allow many of them in at all. But to show the motive and identity, which are the two biggies under the enumerated reasons that 1101(b) can come in, the probative value, in this Court's opinion, far outweighs the prejudicial effect, and, therefore, I would allow on page 6, "C" [choking incident] and "E" [1/21/91 strangling incident,] page 7 "F" [8/10/91 strangling and knife incident,] and just that portion of "G" [8/22/91 officer contact] that just kind of explains "F." Not the conviction, obviously. And not even the arrest for that matter.
>
> . . .
>
> And on page 8, "I" [1/27/95 brick incident] and "J" [false teeth incident] and "K" [torn money incident] because it's kind of all part and parcel of each other as they are. And "M" [purse incident] falls rights along in that same pattern.
>
> And then on page 9, "A" under "priors with David Burgos," under 1109 I would let that in.
>
> And 1101(b), for that matter, for the same reasons, for the identity and motive. . .

> As far as Vallerie Cage, under "A" [choking incident] and "B" [bloody nose incident,] I would let those in because it helps explain why Mrs. Cage was hiding herself and the kids. And it is prior 1101(b), in the sense that it's just violent – random violence upon another member which helps show the over-all picture which goes to ID and motive.
>
> I understand that you want to get them all in, but I think that shows enough. And it shows enough of a pattern and it keeps the balance under 352 in favor of probative value.
>
> If we put all of those in, we're going to step over that line where we're going to have – the prejudicial effect is going to far – not far, but I think maybe outweigh the probative value. When I look at all of the ones that you want in, it does show a pattern, and it goes to show the ID and the motive. And for that reason I would let them in.
>
> . . .
>
> And obviously – and the prejudicial effect we're talking about – I'm talking about all the elements that are under 352.

(3 RT 445-447.)[14]

Clari, the prosecution's first witness, testified about some of the abuse Cage inflicted on her and her family. Around 1987, while living in Bellflower, Cage woke Clari up in the middle of the night and demanded she get him water. When Clari told Cage to get it himself, Cage pulled her out of bed, dragged her downstairs by her hair, and choked her until she blacked out. (6 RT 792.) Also during the late 1980s, while living in Bellflower, Cage, upset that David was crying, punched and kicked David and then stomped on his head with his steel-toed boots. When Clari tried to

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[14] The trial court disallowed any evidence of Cage "always beating up" Richie both because the prosecution had "enough" evidence and because the introduction of this further evidence could be time-consuming. (3 RT 446-447.)

pull Cage away from David, Cage went to Vallerie, put her legs over her head, and squished her until her face turned blue. (6 RT 792-793.)

In January 1991, while living in Signal Hill, Cage, during an argument with Clari, pushed Clari into the bathroom and choked her. Cage then smashed Clari's head against the bathtub, breaking one of her teeth. Cage told her, "If you want to play, then we'll play." (6 RT 793-795.) In August 1991, while still living in Signal Hill, Cage and Clari were arguing about money. Cage proceeded to choke Clari; he then threw her face down on the couch and pulled some of her hair out. Cage then dragged Clari into the kitchen and put a knife against her throat. Cage next dragged her into the bedroom where he beat and choked her the rest of the night. Cage said, "You think I'm playing with you but I'm not, I'll kill you." (6 RT 795-797.) Cage later told Clari that if she called the police, he would kill Vallerie. (6 RT 797.)

In December 1994, Cage and Clari had a son, Micky Cage, Jr. (6 RT 798.) At that time, Cage was not living with his family; Clari, Vallerie, and Micky Jr. had moved in with Bruni, Richie, and David, who were living in Perris. (6 RT 797-799.) In January 1995, Cage showed up at Bruni's house and wanted to use Clari's new car, which she had just purchased a few days earlier for her commute between Perris and Carson. (6 RT 799-800.)

When Clari told Cage that she needed the car for work, he began to beat her. Clari ran outside but slipped and fell to the ground; Cage quickly got on top of her and began beating her head with a brick until she blacked out. Cage told her that he knew she would call the police on him and that he was not going back to jail. (6 RT 799-800.)

Clari, in shock and pain, begged Cage to take her to the hospital. Cage said he would but, instead, just drove her, Vallerie, David, and Micky Jr. around aimlessly the rest of the day. Clari, noticing in the car's mirror

that her forehead was split open with the flesh looking like "hamburger," again told Cage she was dizzy and in pain. Eventually, at nighttime, Cage took Clari to a hospital in Long Beach. However, Cage continued to drive around, in and out of the hospital parking lot, until he finally stopped to let Clari out. (6 RT 800-803.)

Before allowing Clari to go into the hospital, Cage told her to tell anyone who asked that she slipped at the store. He told her that if she said anything to get him arrested, he would kill their children. (6 RT 802.) Inside the hospital, Clari told hospital staff that she injured herself when she slipped at the store. Clari was afraid because her children were still in the car. (6 RT 802-803.)

Although she was not admitted, Clari had a CAT scan and waited overnight to see an oral surgeon. She needed numerous stitches to close the wound on her forehead. While she waited, Cage's mother, who worked in the hospital, and Cage's brother, Richard, and his girlfriend Traci, came to see her. (6 RT 803-804.)

When Clari was able to see the oral surgeon, he had to brace his foot on a chair and pull her jaw to realign it. Clari testified that her mouth still does not close properly. As a result of Cage's beating, Clari lost her front teeth and has a scar still visible on her forehead. (6 RT 804-805.)

About six months to a year after Cage beat her with a brick, Clari received dentures due to her loss of teeth and gums from Cage's beating. (6 RT 805.) In order to humiliate Clari, Cage would throw away or hide her dentures. Cage did this numerous times; twice, Vallerie had to retrieve Clari's dentures from the trash dumpster. (6 RT 805-806.)

After Cage beat her with a brick, Clari knew that she had to take the children and leave Cage. She began to give money to her Aunt Lydia to hold for her, and began to look for a new apartment and new job. (6 RT 807-808.) However, Cage threatened to kill Clari and her family if she ever

left him. Clari knew that her "family" meant her mother and brothers because when Cage referred to her immediate family, he would say "Vallerie" or "Mick." (6 RT 808-810.)

Nevertheless, Clari continued to make plans to leave Cage. She continued to give money to her aunt to hold for her and would hide interview clothes at her aunt's house. (6 RT 810-811.) Meanwhile, Cage became more and more aggressive. He would not let Clari sleep or be alone with the children and kept telling her that if she tried to leave, he would kill her and her whole family, including her mother. (6 RT 811-812.) He would put sugar in Clari's gas tank and would shift the car to "park" while Clari was driving on the freeway. (6 RT 808-809.) He also once tore up Clari's paycheck and flushed it down the toilet. (6 RT 813-814.)

A couple of weeks before Clari finally left Cage, he began to insist on driving to work with her. One morning, on a day Clari had a job interview, she told Cage that she did not have enough gas in the car for him to drop her off and then pick her up so he needed to get some money from his mother. During the drive to Clari's work, Cage grabbed her purse to look for money; finding none, he threw the purse out the window. Clari got off the freeway and reentered going the other way so she could pick up her purse. As soon as she retrieved her purse and continued her drive to work, Cage again threw Clari's purse out of the window. She decided to keep driving and knew at that point she had to leave Cage as soon as possible. (6 RT 814-816.)

Vallerie, who was 17 years old at the time of trial, testified after her mother. (6 RT 853.) Vallerie testified as to several of the incidents Clari testified to, including the time Cage beat Clari with a brick. Vallerie testified that Cage told her and David that if they said anything about what happened, he would harm them. Vallerie told no one because she believed Cage. (6 RT 853-858.)

Vallerie also testified about an incident that happened when she was 10 or 11 years old. Vallerie came home from school and saw a woman sitting on the couch with Cage; Cage told Vallerie, "I dare you to open your mouth." (6 RT 858.) Vallerie told Clari about the other woman. When Cage found out Vallerie told Clari about the other woman, Cage dragged Vallerie into the bathroom and cut off her shoulder-length hair. Although she was humiliated, Cage made her go to school that way. When Clari bought Vallerie a wig to wear, Cage took it away and would not let her wear it. (6 RT 858-860.)

Prior to closing arguments, the trial court instructed the jurors with, among other instructions, CALJIC No. 2.50:

> Evidence has been introduced for the purpose of showing that the defendant committed crimes other than that for which he is on trial.
>
> This evidence, if believed, may not be considered by you to prove that defendant is a person of bad character or that he had a disposition to commit crimes. It may be considered by you only for the limited purpose of determining if it tends to show:
>
> The existence of the intent which is a necessary element of the crime charged;
>
> The identity of the person who committed the crime, if any, of which the defendant is accused;
>
> A motive for the commission of the crime charged;
>
> For the limited purpose for which you may consider such evidence, you must weigh it in the same manner as you do all other evidence in the case. You are not permitted to consider such evidence for any other purpose.

(13 CT 3555; 11 RT 1558.)

During closing argument, the prosecutor reminded the jury of Cage's prior bad acts and argued that these prior acts demonstrated Cage's motive for killing Bruni and David – to make Clari pay for leaving him by taking

away from her people she loved. (11 RT 1573-1574, 1584-1587.) However, the prosecutor also reminded the jury of the limited purpose of this other crimes evidence:

> Why did you hear all of that evidence? Not that you would think that the defendant is a bad guy or a person of bad character. You can't use it that way. You heard that evidence to help you understand the intent required in this case, to help you understand the premeditation and deliberation; to help you determine the identity of the killer; to help you determine the motive for this crime. That's why you heard all of that evidence. That's how you can use all of that evidence.

(11 RT 1586.)

B. Evidence Of Cage's Prior Bad Acts Against His Family Demonstrated His Motive And Intent In Committing The Murders

Evidence of other crimes is not admissible to prove the defendant's propensity to commit the charged offense. (Evid. Code, § 1101, subd. (a).) However, subdivision (b) of Evidence Code section 1101 states that such evidence is admissible to prove some relevant fact such as identity, motive, intent, knowledge, or common design, plan or scheme. (Evid. Code, § 1101, subd. (b).) Admissibility under Evidence Code section 1101, subdivision (b) "depends on the materiality of the fact sought to be proved, the tendency of the prior crime to prove the material fact, and the existence vel non of some other rule requiring exclusion." (*People v. Roldan* (2005) 35 Cal.4th 646, 705; *People v. Daniels* (1991) 52 Cal.3d 815, 856; see also *People v. Gray* (2005) 37 Cal.4th 168, 202.) When a defendant pleads not guilty, he or she places all issues in dispute, and thus the perpetrator's identity, intent and motive are all material facts. (*People v. Roldan, supra*, 35 Cal.4th at pp. 705-706.)

The materiality of the uncharged offense or offenses depends on the degree of similarity between the present offense and the prior uncharged

offense. This Court has required varying levels of similarity, depending on the type of fact to be proved. To prove identity, the uncharged crime must be highly similar to the charged offense. (*People v. Kipp* (1998) 18 Cal.4th 349, 369; see also *People v. Abilez* (2007) 41 Cal.4th 472, 500 ["admissibility 'depends upon proof that the charged and uncharged offenses share distinctive common marks sufficient to raise an inference of identity.' [Citation.]"]; *People v. Lenart* (2004) 32 Cal.4th 1107, 1123.) "For identity to be established, the uncharged misconduct and the charged offense must share common features that are sufficiently distinctive so as to support the inference that the same person committed both acts." (*People v. Ewoldt* (1994) 7 Cal.4th 380, 403.)

A lesser degree of similarity is required to establish the existence of a common design or plan. (*People v. Ewoldt, supra*, 7 Cal.4th at pp. 402, 403.) To demonstrate the existence of a common plan, "the common features must indicate the existence of a plan rather than a series of similar spontaneous acts, but the plan thus revealed need not be distinctive or unusual . . . Unlike evidence of uncharged acts used to prove identity, the plan need not be unusual or distinctive; it need only exist to support the inference that the defendant employed that plan in committing the charged offense. [Citation.]" (*Id.* at p. 403.)

The least degree of similarity is required to establish relevance on the issues of knowledge and intent. Accordingly, where admission of a prior offense is sought to establish intent or knowledge, the uncharged conduct need only be sufficiently similar to the charged offenses to support the inference that the defendant probably harbored the same knowledge and intent in each instance. (*People v. Lewis* (2001) 25 Cal.4th 610, 636-637; *People v. Kipp, supra*, 18 Cal.4th at pp. 369-371; *People v. Carpenter* (1997) 15 Cal.4th 312, 379, superseded by statute on a different point as stated in *Verdin v. Superior Court* (2008) 43 Cal.4th 1096, 1106.)

Contrary to Cage's assertion that this Court should use "heightened scrutiny" because this case is a capital case (AOB 67-69), established case law dictates that trial court rulings under Evidence Code section 1101 are reviewed under the deferential abuse of discretion standard, examining the evidence in the light most favorable to the trial court's ruling. (*People v. Gray, supra*, 37 Cal.4th at p. 202; *People v. Cole* (2004) 33 Cal.4th 1158, 1195; *People v. Lewis, supra*, 25 Cal.4th at p. 637; *People v. Kipp, supra*, 18 Cal.4th at p. 369.) Under this standard, "[a]buse may be found if the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner . . . ." (*People v. Coddington* (2000) 23 Cal.4th 529, 587-588, overruled on other grounds by *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.)

In the present case, the trial court acted well within its discretion in admitting evidence of Cage's prior acts of abuse against his family members under Evidence Code section 1101, subdivision (b), for the purpose of showing Cage's motive and intent in killing Bruni and David in their own home. (See *People v. Memro* (1995) 11 Cal.4th 786, 864, [under subdivision (b) of Evidence Code section 1101, "evidence of conduct may be admitted to prove motive or intent, although it may not be admitted to show a disposition to do the type of conduct shown by the evidence"], opn. mod. 12 Cal.4th 783.) "'[M]otive is an intermediate fact which may be probative of such ultimate issues as intent [citation], identity [citation], or commission of the criminal act itself [citation].' [Citation.]" (*People v. Lewis* (2001) 26 Cal.4th 334, 370, original brackets omitted.) "[T]he intermediate fact of motive" may be established by evidence of "prior dissimilar crimes." (*People v. Thompson* (1980) 27 Cal.3d 303, 319, fn. 23.)

"Similarity of offenses [is] not necessary to establish this theory of relevance" because the motive for the charged crime arises simply from the commission of the prior offense. (*People v. Thompson, supra*, 27 Cal.3d at

p. 319, fn. 23.) Although the existence of a motive requires a nexus between the prior crime and the current one, such linkage is not dependent on comparison and weighing of the similar and dissimilar characteristics of the past and present crimes. (*People v. Daniels* (1991) 52 Cal.3d 815, 857; see also *People v. Scheer* (1998) 68 Cal.App.4th 1009, 1018.)

Here, Cage's prior acts of abuse against his and Clari's family were relevant to establishing his motive and intent in murdering Bruni and David. First, Cage's prior bad acts demonstrated to the jury the power and control he exerted over his family members: beating Clari when she did not do what Cage wanted her to do, threatening harm to Clari's family members if she defied his will or ever left him, and humiliating Clari and Vallerie to keep them in line. When Clari finally left Cage and took their children with her, Cage exerted this power and control the only way left to him – killing the people closest to Clari. All of this evidence helped explain to the jury *why* Cage killed Clari's mother and brother - that he followed through on his threats, again showing the control he still sought to exercise over Clari by making her "pay" for leaving him.

Although Cage's prior acts of abuse against family members were "dissimilar" from the shotgun killings of Bruni and David, only a "nexus" between the prior acts and the current crimes is required for these prior crimes to be admitted to demonstrate motive. (See *People v. Daniels, supra*, 52 Cal.3d at p. 857; *People v. Scheer, supra*, 68 Cal.App.4th at p. 1018.) In the present case, this "nexus" between the prior bad acts and the murders of Bruni and David is the power and control Cage sought to exert over his family, shown by Cage's prior acts of abuse against his family and the threats he made to Clari that he would harm her family is she left, threats he made good on by killing her mother and brother when she finally did leave him. Thus, the prior crimes evidence addresses *why* Cage killed Bruni and David, i.e., his motive in killing them, and thus the trial court did

not abuse its discretion in admitting this evidence under Evidence Code Section 1101, subdivision (b).

C. The Probative Value Of The Evidence Of Cage's Prior Abuse Against His Family Outweighed Any Potential For Undue Prejudice

Cage further argues that, even if evidence of his prior acts of abuse had some "marginal relevance," the trial court should have excluded this evidence under Evidence Code section 352 because "the probative value of this evidence was greatly outweighed by its unduly prejudicial effect." Specifically, Cage claims that these prior acts should have been excluded because they were significantly different from the charged offenses, with many of the prior acts remote in time, and were largely cumulative. (AOB 85-91.) Cage is incorrect.

Uncharged offenses admitted pursuant to Evidence Code section 1101, subdivision (b), are subject to the balancing test of Evidence Code section 352. Accordingly, the probative value of any uncharged crimes must also outweigh any prejudice. (*People v. Ewoldt, supra*, 7 Cal.4th at pp. 402-403.) Evidence Code Section 352 provides that "[t]he court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

Here, as one of the prosecution's theories of first degree murder was "premeditation and deliberation," evidence of Cage's motive and intent in committing the murders was highly probative.[15] As discussed above,

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[15] See 13 CT 3559; CALJIC 8.20 [". . . The word 'deliberate' means formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action. The word 'premeditated' means considered beforehand."]

evidence of Cage's prior abuse against his and Clari's family members, although happening over more than a decade[16] and involving abuse different than that involved in the charged murders, showed Cage's motive in killing Bruni and David. This evidence demonstrated to the jury *why* Cage would kill Bruni and David – to continue his power and control over his family and to make good on his previous threats to Clari – and this "why" evidence helped demonstrate to the jury that these murders were actually considered beforehand, rather than being a result of some type of explosion of violence.

The mere fact that such evidence was also prejudicial does not automatically render evidence of Cage's prior abuse against his family inadmissible. As noted by the trial court, "All of these [prior acts] are prejudicial, obviously. If they weren't, the People wouldn't want to get them into evidence." (3 RT 445.) However, "'[i]n applying [Evidence Code] section 352, "prejudicial" is not synonymous with "damaging."'" (*People v. Bolin* (1998) 18 Cal.4th 297, 320, quoting *People v. Yu* (1983) 143 Cal.App.3d 358, 377.) Rather, "'[t]he "prejudice" referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against defendant as an individual and which has very little effect on the issues.'" (*Ibid.*)

Here, the trial court, mindful of balancing the probative value of the prior crimes evidence against its potential for undue prejudice, carefully limited the prior acts evidence it allowed to be introduced. (3 RT 445-447; see also 2 RT 301-302.) Thus, the high probative value of the evidence of Cage's prior abuse to show Cage's motive for committing his murders, and

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[16] Although Cage's prior abuse against his family members took place over a lengthy period of time, this length of time was actually highly probative to show the degree of power and control Cage exerted over his family.

therefore help demonstrate premeditation and deliberation, coupled with the trial court's limiting of the evidence to be presented, demonstrates that the trial court did not abuse its discretion in determining that the probative value of this evidence outweighed its potential for undue prejudice, especially when the prior abuse evidence was no more inflammatory than evidence presented concerning Cage's shotgun murders of Bruni and David. (See *People v. Zepeda* (2001) 87 Cal.App.4th 1183, 1211 ["The factors affecting the prejudicial effect of uncharged acts include whether . . . the evidence of uncharged acts is stronger or more inflammatory than the evidence of the charged offenses."].)

Additionally, the prejudicial impact of the evidence of Cage's prior acts was necessarily minimized by the limiting instruction given the jury in this case. Here, as set forth above, the jury was instructed that it could not consider evidence of Cage's prior acts of abuse "to prove that [Cage] [wa]s a person of bad character or that he had a disposition to commit crimes" and was only to be considered "for the limited purpose of determining if it tends to show [t]he existence of the intent which is a necessary element of the crime charged; [t]he identity of the person who committed the crime, if any, of which the defendant is accused; [a] motive for the commission of the crime charged." (13 CT 3555; 11 RT 1558 [CALJIC No. 2.50].) As it is presumed that the jury followed this instruction (*People v. Smith* (2007) 40 Cal.4th 483, 517-518), the instruction minimized any danger that the jury relied upon evidence of Cage's prior acts for any improper purpose. (See *People v. Barnett* (1998) 17 Cal.4th 1044, 1119; *People v. Garceau* (1993) 6 Cal.4th 140, 178, overruled on another point in *People v. Yeoman* (2003) 31 Cal.4th 93, 117-118).

In addition, the prosecutor emphasized this instruction to the jury during closing argument, noting that the jury could not use evidence of Cage's prior acts to find that Cage was "a bad guy or a person of bad

character" but only as a help to determine identity or motive. (11 RT 1586.) Thus, the limiting instruction given in this case and the argument of counsel decreased any possibility of prejudice created by admission of the prior acts.

In sum, because the prosecution needed to demonstrate that Cage's murders of Bruni and David were premeditated and deliberate, the probative value of the evidence of Cage's prior abuse against his family showing Cage's motive and intent outweighed any probability that the evidence would create undue prejudice. Hence, the trial court acted well within its discretion in finding that Evidence Code section 352 did not bar admission of evidence of Cage's prior bad acts.

D. Any Error In The Admission Of Evidence Of Cage's Prior Abuse Against His Family Was Harmless

Even assuming that the trial court abused its discretion in admitting evidence of Cage's prior crimes, any such error was harmless because it is not reasonably probable that Cage would have received a better result in the absence of the error. (*People v. Malone* (1988) 47 Cal.3d 1, 22 [harmless error standard enunciated in *People v. Watson* (1956) 46 Cal.2d 818, 836, applies to erroneous admission of character evidence].)

First, even excluding evidence of Cage's prior abuse, there was ample evidence of first degree premeditated murder. Two weeks before the murder, Cage told Jason Tipton that he was upset that Clari took his son away from him and that he was going to put a gun to Bruni's head to find out where Clari had gone. (7 RT 965-966.) A few days before the murders, Cage told Tipton that he felt "like doing something to Clari's mom to get my son back." (7 RT 966.) He also stated on several occasions that he wanted to "fuck up" Clari's mom. (7 RT 967.) Cage further told Kevin Neal that he was upset with Bruni because she would not tell him where his children were and called her a "bitch." (7 RT 1012-1017.) Evidence was also presented that Cage concealed the shotgun he used to kill Bruni and

David in a basket of clothes he took over to Bruni's house and that, after killing Bruni, Cage walked upstairs and killed David, still in his bedroom. In light of the overwhelming evidence of guilt and weak defense case, it was not reasonably probable Cage would have received a more favorable verdict in absence of evidence concerning Cage's prior abuse. (See *People v. Holloway* (2004) 33 Cal.4th 96, 128-129 [applying standard enunciated in *People v. Watson, supra*, 46 Cal.2d at p. 836]; *People v. Malone* (1988) 47 Cal.3d 1, 22 [error in admitting Evidence Code section 1101 evidence tested by *Watson* harmless error standard].)

Second, Cage fails to show that the jury did not apply the limiting instruction given in this case. As previously indicated, the jury was specifically advised to consider evidence of Cage's prior abuse only "for the limited purpose of determining if it tends to show [t]he existence of the intent which is a necessary element of the crime charged; [t]he identity of the person who committed the crime, if any, of which the defendant is accused; [a] motive for the commission of the crime charged." (13 CT 3555; 11 RT 1558 [CALJIC No. 2.50].) During closing argument, the prosecutor emphasized the instruction that the jury could not use evidence of Cage's prior acts to find that Cage was "a bad guy or a person of bad character" but only as a help to determine identity or motive. (11 RT 1586.) Thus, the limiting instruction given by the court necessarily rendered any erroneous admission of evidence nonprejudicial, as the jury would not have considered evidence of Cage's prior acts of abuse if it found such evidence immaterial to Cage's motive or intent. Accordingly, any error in the admission of the prior acts evidence was necessarily harmless and does not compel reversal in this case.

In sum, the trial court acted within its discretion when it admitted evidence of Cage's prior acts of abuse against his family as this evidence demonstrated Cage's motive and intent in committing the charged murders

and because the probative value of this evidence outweighed any potential for undue prejudice. Regardless, in light of the other evidence supporting first degree murder, any error in admitting the prior acts evidence was harmless. Likewise, any error in admitting the prior abuse evidence was harmless as the jury was properly instructed as to the limited purpose of this evidence.

Accordingly, Cage's argument challenging the admissibility of evidence of Cage's prior acts of abuse against his family must be rejected.

II. MORE THAN SUFFICIENT EVIDENCE OF PREMEDITATION AND DELIBERATION WAS PRESENTED TO SUSTAIN CAGE'S CONVICTIONS FOR FIRST DEGREE MURDER

Cage claims that his first degree murder convictions and sentence must be reversed because insufficient evidence of premeditation and deliberation was presented to sustain these first degree murder verdicts. (AOB 93-108.) Cage's claim must be denied because the prosecution presented more than sufficient evidence of premeditation and deliberation to sustain Cage's convictions and sentence for first degree murder.

A. Trial Court Proceedings

The prosecution charged Cage with two counts of deliberate and premeditated murder. (2 CT 473-474.) The trial court instructed the jury that deliberate and premeditated murder is murder in the first degree:

> All murder which is perpetrated by any kind of willful, deliberate and premeditated killing with express malice aforethought is murder of the first degree.
>
> The word "willful," as used in this instruction, means intentional.
>
> The word "deliberate" means formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action. The word "premeditated" means considered beforehand.

> If you find that the killing was preceded and accompanied by a clear, deliberate intent on the part of the defendant to kill, which was the result of deliberation and premeditation, so that it must have been formed upon pre-existing reflection and not under a sudden heat of passion or other condition precluding the idea of deliberation, it is murder of the first degree.
>
> The law does not undertake to measure in units of time the length of the period during which the thought must be pondered before it can ripen into an intent to kill which is truly deliberate and premeditated. The time will vary with different individuals and under varying circumstances.
>
> The true test is not the duration of time, but rather the extent of the reflection. A cold, calculated judgment and decision may be arrived at in a short period of time, but a mere unconsidered and rash impulse, even though it includes an intent to kill, is not deliberation and premeditation as will fix an unlawful killing as murder of the first degree.
>
> To constitute a deliberate and premeditated killing, the slayer must weigh and consider the question of killing and the reasons for and against such a choice and, having in mind the consequences, he decides to and does kill.

(13 CT 3559-3560; CALJIC No. 8.20; 11 RT 1564-1565.)

The jury found Cage guilty of two counts of first degree murder. (13 CT 3524-3525; 11 RT 1621-1626.)

B. The Prosecution Presented More Than Sufficient Evidence Of Premeditation And Deliberation

Where a defendant challenges the sufficiency of the evidence upon which a judgment is based, the proper test is whether substantial evidence supported the conclusion of the trier of fact, not whether the evidence proved guilt beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 318-319 [99 S.Ct. 2781, 61 L.Ed.2d 560]; *People v. Johnson* (1980) 26 Cal.3d 557, 578.) A reviewing court must view the evidence in the light most favorable to the People and presume every fact which the trier of fact could reasonably have deduced from the evidence in favor of

the judgment. (*People v. Scott* (2011) 52 Cal.4th 452, 487; *People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) The role of a reviewing court is thus a limited one:

> A reviewing court may not substitute its judgment for that of the jury. It must view the record favorably to the judgment below to determine whether there is evidence to *support* the instruction, not scour the record in search of evidence suggesting a contrary view. [Citation.]

(*People v. Ceja* (1993) 4 Cal.4th 1134, 1143, italics in original.)

The same standard applies to the review of circumstantial evidence. (*People v. Scott, supra*, 52 Cal.4th at p. 487; *People v. Stanley* (1995) 10 Cal.4th 764, 792.) Circumstantial evidence "is as sufficient as direct evidence to support a conviction." (*People v. Bloom* (1989) 48 Cal.3d 1194, 1208.) While a jury must acquit a defendant if it finds that the circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence, "it is the jury, not the appellate court which must be convinced of the defendant's guilt beyond a reasonable doubt." (*People v. Bean* (1988) 46 Cal.3d 919, 932-933.) Indeed, if the circumstances reasonably justify the jury's findings, the reviewing court's opinion that the circumstances might also be reasonably reconciled with a contrary finding does not warrant a reversal of the judgment. (*Id.* at p. 933.)

Murder which is willful, premeditated, and deliberate is defined as murder in the first degree. (§ 189.) Reviewing courts have determined that the term "premeditated" means "considered beforehand." "Deliberate" has been defined as "formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action. [Citations.]" (*People v. Mayfield* (1997) 14 Cal.4th 668,

767, internal quotation marks omitted.)[17] A defendant need not plan an action for any great period of time in advance, and premeditation may be arrived at quickly. (*People v. Halvorsen* (2007) 42 Cal.4th 379, 419.) The true test is not the duration of time so much as it is the extent of reflection. (*People v. Koontz* (2002) 27 Cal.4th 1041, 1080.) In fact, the length of time which must pass before a killing can be described as deliberate and premeditated is a question of fact. (*People v. Bender* (1945) 27 Cal.2d 164, 184.) A reviewing court "need not be convinced beyond a reasonable doubt that [Cage] premeditated the murder[]." (*People v. Lucero* (1988) 44 Cal.3d 1006, 1020.) The relevant inquiry on appeal is whether "any rational trier of fact" could have been so persuaded. (*Ibid.*, internal quotation marks omitted.)

Categories of evidence establishing premeditation and deliberation include: (1) facts about a defendant's behavior before the incident that show planning; (2) facts about any prior relationship or conduct with the victim from which the jury could infer motive; and (3) factors about the manner of the killing from which the jury could infer the defendant intended to kill the victim according to a preconceived plan. (*People v. Anderson* (1968) 70 Cal.2d 15, 26-27; accord, *People v. Thomas* (1992) 2 Cal.4th 489, 516-517.) However, this Court has also held that the *Anderson* criteria are not rigid:

> Unreflective reliance on *Anderson* for a definition of premeditation is inappropriate. The *Anderson* analysis was intended as a framework to assist reviewing courts in assessing whether the evidence supports an inference that the killing resulted from preexisting reflection and weighing of

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[17] As set forth above, the trial court properly instructed the jury with, among other instructions, CALJIC No. 8.20, which set forth the elements of first degree murder and defined "deliberate" and "premeditated." (13 CT 3559-3560; 11 RT 1564-1565.)

> considerations. It did not refashion the elements of first degree murder or alter the substantive law of murder in any way. [Citation.] *Anderson* identifies categories of evidence relevant to premeditation and deliberation that we "typically" find sufficient to sustain convictions for first degree murder. [Citation.]

(*People v. Thomas, supra*, 2 Cal.4th at p. 517; see *People v. Steele* (2002) 27 Cal.4th 1230, 1249 [""*Anderson* was simply intended to guide an appellate court's assessment whether the evidence supports an inference that the killing occurred as the result of preexisting reflection rather than unconsidered or rash impulse. [Citation.]"' [Citation.]"].) The guidance from the *Anderson* factors does not exclude other types of evidence and combinations of evidence that support a finding of premeditation and deliberation. It is also not necessary that these factors be accorded a particular weight. (*People v. Sanchez* (1995) 12 Cal.4th 1, 33, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, citing *People v. Pride* (1992) 3 Cal.4th 195, 247.) Evidence of all three elements is not essential to sustain a conviction. (*People v. Edwards* (1991) 54 Cal.3d 787, 813-814.) It is not necessary to determine whether the evidence was sufficient to show Cage thought about the possibility of killing his victim from the outset. It is enough that the record shows sufficient premeditation and deliberation. (*People v. Kelly* (1990) 51 Cal.3d 931, 957.)

In the present case, there was more than sufficient evidence to support the jury's verdicts of premeditated first degree murder. To begin with, as discussed at length in Argument I, Cage had motive to kill Bruni and David. To sum up, Cage's prior acts of abuse against his and Clari's family, demonstrating the power and control he exerted over his family members, and his threatening harm to Clari's family members if she defied his will and left him, clearly established Cage's motive in killing Bruni and David,

and thus helped demonstrate that the murders were deliberate and premeditated. [*Anderson* factor 2.] (See Argument I.)

In addition, there was sufficient evidence Cage planned to murder Bruni. [*Anderson* factor 1.] As noted above, in the days leading up to the murders, Cage told Jason Tipton that he was upset that Clari took his son away from him and that he was going to put a gun to Bruni's head to find out where Clari had gone. (7 RT 965-966.) Cage told Tipton that he felt "like doing something to Clari's mom to get my son back." (7 RT 966.) He further stated on several occasions that he wanted to "fuck up" Clari's mom. (7 RT 967.) Cage also told Kevin Neal that he was upset with Bruni because she would not tell him where his children were and called her a "bitch." (7 RT 1012-1017.)

The most telling evidence, however, showing that Cage planned to murder Bruni and David [*Anderson* factor 1] is that he went over to Bruni's house with his loaded shotgun hidden in a basket of laundry, a ruse he had used earlier to hide his weapons from Clari. (6 RT 833-836, 842-843, 878-879; 7 RT 918-919, 922, 931; 8 RT 1112-1113; 11 RT 1579.) This ruse is clearly behavior from which a rational jury could find that Cage planned to use this gun to fulfill his threats to Clari and to exert his domination and control over her family in the only way he had left – killing her mother and brother. (See *People v. Miranda* (1987) 44 Cal.3d 57, 87 [the fact that the defendant brought his loaded gun to the location and shortly thereafter used it to kill an unarmed victim reasonably suggests that defendant considered the possibility of murder in advance]; *People v. Steele, supra*, 27 Cal.4th at p. 1250 [the jury could infer that defendant carried the fatal knife into the victim's home in his pocket, which makes it "reasonable to infer that he considered the possibility of homicide from the outset"].)

Finally, a rational jury can infer premeditation and deliberation from the manner in which Cage killed Bruni and David. [*Anderson* factor 3.]

"[T]he method of killing alone can sometimes support a conclusion that the evidence sufficed for a finding of premeditated, deliberate murder. [Citation.]" (*People v. Memro, supra*, 11 Cal.4th at pp. 863-864.) Here, as soon as Cage entered Bruni's house, in rapid succession he shot her in the shoulder, chest, and then, putting his shotgun in or near Bruni's mouth, shot her in the face. (8 RT 1145; 10 RT 1466-1476.) (See *People v. Caro* (1988) 46 Cal.3d 1035, 1050 ["a close-range gunshot to the face is arguably sufficiently 'particular and exacting' to permit an inference that defendant was acting according to a preconceived design"]; see also *People v. Cruz* (1980) 26 Cal.3d 233, 245 ["Finally, the killings by blows to only the head and by a shotgun blast in his wife's face permit the jury to infer that the manner of the killing was so particular and exacting that defendant must have killed according to a preconceived design and for a reason"].) Then, instead of leaving the home, Cage walked upstairs to David's room. There, Cage got within a foot of David and, with David raising his arm in defense, shot him once in the arm and then again in the chest. (10 RT 1456-1465.) Simply put, these methods of killing, rather than indicating unconsidered "explosions" of violence, instead support inferences of calculated designs to ensure death. (See *People v. Alcala* (1984) 36 Cal.3d 604, 626, disapproved on other grounds by *People v. Falsetta* (1999) 21 Cal.3d 903, 911; see also *People v. Hovey* (1988) 44 Cal.3d 543, 556.)

Cage attempts to argue the contrary, for example, arguing that the evidence showed that Cage planned only a "threatening confrontation" with Bruni, rather than a "cold-blooded killing" (AOB 100-101), that Cage's hiding his shotgun in the laundry basket did not demonstrate "detailed or carefully considered planning activity" but was almost an afterthought after being offered a ride to Bruni's house (AOB 103-104), and that the manner of killing – multiple shots at close range - implies a *lack* of premeditation and deliberation, and instead shows an explosion of violence flowing from

Cage's irrational anger and lack of self-control (AOB 104-107.) However, Cage is viewing the evidence in the light most favorable to *him*. When viewed in the light most favorable to the *verdicts*, as must be done, it is clear that a rational jury, faced with the evidence of Cage's motive to kill Bruni and David, the evidence of Cage's planning to kill them, based on Cage's conversation with his friends and his disguising his shotgun in a laundry basket, and the method of killing, including shooting Bruni at close range with his shotgun at or near her mouth and then walking up to David's room to shoot him at close range, could find that Cage considered killing Bruni and David "beforehand" and "reflected" on the matter, even if briefly, before the killings. Sufficient evidence was presented to support the first degree murder verdicts based on premeditated and deliberate murder and Cage's assertion to the contrary is untenable. Accordingly, Cage's claim should be rejected.

C. In Any Event, Even If There Was Insufficient Evidence Of Premeditation And Deliberation, Any Such Insufficiency Was Harmless As Sufficient Evidence Supported The Prosecution's Alternate Theory Of First Degree Murder, Lying-In-Wait

In the present case, even if insufficient evidence was presented to support first degree murder based on premeditation and deliberation, sufficient evidence was presented to support the alternate theory of first degree murder – lying-in-wait. (See Argument III.)

> When a prosecutor argues two theories to the jury, one of which is factually sufficient and one of which is not, the conviction need not be reversed, because the reviewing court must assume that the jury based its conviction on the theory supported by the evidence. [Citations.]

(*People v. Seaton* (2001) 26 Cal.4th 598, 645; see also *People v. Geier* (2007) 41 Cal.4th 555, 592; *People v. Scott* (1991) 229 Cal.App.3d

707, 718 [The jury need not unanimously agree on a theory of first degree murder].)

As set forth in detail below, the theory of first degree murder based on lying-in-wait was adequately supported by the evidence. Accordingly, Cage's claim must fail.

III. MORE THAN SUFFICIENT EVIDENCE OF LYING-IN-WAIT WAS PRESENTED TO SUSTAIN CAGE'S CONVICTIONS FOR FIRST DEGREE MURDER AND TO SUSTAIN THE JURY'S TRUE FINDING OF THE SPECIAL CIRCUMSTANCE OF LYING-IN-WAIT

Cage claims that the evidence did not establish that Cage had been lying-in-wait. Specifically, Cage contends that his murder convictions and sentence must be reversed because insufficient evidence of lying-in-wait, particularly as it relates to the element of "watchful waiting," was presented to support the first degree murder verdicts based on this theory and to support the jury's true finding on the special circumstance of lying-in-wait. (AOB 109-126.) Cage's claim must be rejected because more than sufficient evidence of lying-in-wait was presented to support both the first degree murder verdicts based on this theory and the special circumstance of lying-in-wait.

A. Trial Court Proceedings

In addition to charging Cage with two counts of first degree murder, the prosecution also alleged the special circumstances that Cage killed each victim while lying in wait, within the meaning of section 190.2, subdivision (a)(15), and that Cage murdered more than one victim, within the meaning of section 190.2, subdivision (a)(3). (2 CT 473-475.) In addition to being instructed that deliberate and premeditated murder is murder in the first degree (13 CT 3559-3560; CALJIC No. 8.20), the jury was instructed that murder which is immediately preceded by lying in wait is murder in the first degree:

> The term "lying in wait" is defined as a waiting and watching for an opportune time to act, together with a concealment by ambush or by some other secret design to take the other person by surprise even though the victim is aware of the murderer's presence. The lying in wait need not continue for any particular period of time provided that its duration is such as to show a state of mind equivalent to premeditation or deliberation.
>
> The word "premeditation" means considered beforehand.
>
> The word "deliberation" means formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action.

(13 CT 3560; 11 RT 1565; CALJIC No. 8.25.) The trial court also instructed the jury as to the two alleged special circumstances – lying-in-wait and multiple murder. (13 CT 3561; CALJIC No. 8.80.1.) As to the special circumstance of lying-in-wait, the trial court instructed the jury as follows:

> 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 defendant intentionally killed the victim, and
>
> 2. The murder was committed while the defendant was lying in wait.
>
> The term 'while lying in wait" within the meaning of the law of special circumstances is defined as a waiting and watching for an opportune time to act, together with a concealment by ambush or by some other secret design to take the other person by surprise even though the victim is aware of the murderer's presence. The lying in wait need not continue for any particular period of time provided that its duration is such as to show a state of mind equivalent to premeditation or deliberation.
>
> Thus, for a killing to be perpetrated while lying in wait, both the concealment and watchful waiting as well as the killing must occur during the same time period, or in an uninterrupted attack commencing no later than the moment concealment ends.

> If there is a clear interruption separating the period of lying in wait from the period during which the killing takes place, so that there is neither an immediate killing nor a continuous flow of the uninterrupted lethal events, the special circumstance is not proved.
>
> A mere concealment of purpose is not sufficient to meet the requirement of concealment set forth in this special circumstance. However, when a defendant intentionally murders another person, under circumstances which include (1) a concealment of purpose, (2) a substantial period of watching and waiting for an opportune time to act, and (3) immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage, the special circumstance of murder while lying in wait has been established.

(13 CT 3562; CALJIC No. 8.81.15.) As to the special circumstance of multiple murder, the trial court instructed the jury as follows:

> The defendant in this case has been convicted of at least one crime of murder in the first degree and one or more crimes of the first or second degree.

(13 CT 3561; CALJIC No. 8.81.3.)

The jury found Cage guilty of two counts of first degree murder (13 CT 3524-3525) and found true the special circumstance allegations that Cage committed the murders while lying in wait (13 CT 3528, 3531) and that Cage committed multiple murders. (13 CT 3530.)

B. Sufficient Evidence That Cage Murdered His Victims While Lying-In-Wait Was Presented To Support Both The Jury's First Degree Murder Verdicts And The Jury's True Finding On The Special Circumstance Of Lying-In-Wait

As set forth in Argument II, in determining sufficiency of the evidence, an appellate court reviews the entire record in the light most favorable to the prosecution to determine whether it contains evidence that is reasonable, credible, and of solid value, from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Kipp*

(2001) 26 Cal.4th 1100, 1128; *People v. Marshall* (1997) 15 Cal.4th 1, 34.) The same test applies with respect to special circumstance findings, in which case the issue is whether any rational trier of fact could have found true the essential elements of the allegation beyond a reasonable doubt. (*People v. Scott, supra*, 52 Cal.4th at p. 487; *People v. Chatman* (2006) 38 Cal.4th 344, 389; *People v. Lewis, supra*, 26 Cal.4th at p. 366; *People v. Mickey* (1991) 54 Cal.3d 612, 678.)

In addition, in evaluating the sufficiency of the evidence, an appellate court must presume in support of the judgment the existence of every fact the trier of fact could reasonably have deduced from the evidence. (*People v. Scott, supra*, 52 Cal.4th at p. 487; *People v. Ochoa, supra*, 6 Cal.4th at p. 1206; *People v. Barnes* (1986) 42 Cal.3d 284, 303; *People v. Johnson, supra*, 26 Cal.3d at pp. 576-577.) The often repeated rule is that, when a verdict is attacked on the ground that there is no substantial evidence to sustain it, the power of an appellate court begins and ends with the determination as to whether, on the entire record, there is any substantial evidence, contradicted or uncontradicted, which will support it; when two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the trier of fact. It is of no consequence that the trier of fact, believing other evidence, or drawing different inferences, might have reached a contrary conclusion. (*People v. Ceja, supra*, 4 Cal.4th at pp. 1138-1139; *People v. Johnson, supra*, 26 Cal.3d at pp. 576-577.) The appellate court does not reweigh evidence or redetermine issues of credibility. (*People v. Ochoa, supra*, 6 Cal.4th at p. 1206.)

In cases in which the People rely primarily on circumstantial evidence, the standard of review is the same. (*People v. Scott, supra*, 52 Cal.4th at p. 487; *People v. Stanley, supra*, 10 Cal.4th at p. 793; *People v. Ceja, supra*, 4 Cal.4th at p. 1138.) If the circumstances reasonably justify the conviction,

the possibility of a reasonable contrary finding does not warrant a reversal. (*People v. Kraft* (2000) 23 Cal.4th 978, 1053-1054; *People v. Ceja, supra*, 4 Cal.4th at p. 1139, fn. 1.)

From the jury instructions given in this case, it is clear that the two types of lying-in-wait (the lying-in-wait theory of first degree murder and the lying-in-wait special circumstance) significantly overlap. (*People v. Ceja, supra*, 4 Cal.4th at p. 1140, fn. 2.) Both the lying-in-wait special circumstance and lying-in-wait murder require a murder committed under circumstances which include (1) a concealment of purposes, (2) a substantial period of watching and waiting for an opportune time to act, and (3) immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage.'" (*People v. Moon* (2005) 37 Cal.4th 1, 22, quoting *People v. Carpenter* (1997) 15 Cal.4th 312, 388; *People v. Russell* (2010) 50 Cal.4th 1228, 1244.) Lying-in-wait for first degree murder requires only a "wanton and reckless intent to inflict injury likely to cause death," while the special circumstance requires the defendant to have "intentionally killed" the victim. (*People v. Webster* (1991) 54 Cal.3d 411, 448.)

Therefore, as it relates to the present case, both the lying-in-wait first degree murder theory and the lying-in-wait special circumstance are satisfied if sufficient evidence is presented that Cage intentionally murdered his victims under circumstances that included (1) a concealment of purpose, (2) a substantial period of watching and waiting for an opportune time to act, and (3) immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage. (See *People v. Hillhouse* (2002) 27 Cal.4th 469, 500 [if "the evidence supports the special circumstance, it necessarily supports the theory of first degree murder"]; see also *People v. Stanley, supra*, 10 Cal.4th at pp. 795-796; *People v. Gurule* (2002) 28 Cal.4th 557, 630.) Viewed in the light most favorable to

the judgment, the evidence in the present case amply supports the guilty verdicts of first degree murder on the lying-in-wait theory and the related true finding of lying-in-wait special circumstances.

As to the first requirement, the evidence clearly established that Cage concealed his purpose when he went to Bruni's house on the night of the murders. The element of concealment of purpose is met by showing that the 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 his victim.'" (*People v. Moon, supra*, 37 Cal.4th at p. 22, quoting *People v. Carpenter, supra*, 15 Cal.4th at p. 388; see also *People v. Michaels* (2002) 28 Cal.4th 486, 517.) The concealment element may manifest itself either by an ambush or by the creation of a situation in which the victim is taken unaware, even though she sees her murderer. (*People v. Hillhouse, supra*, 27 Cal.4th at p. 500.) As set forth above, Cage went over to Bruni's house that night with his loaded shotgun hidden in a basket of laundry, a ruse he had used earlier to hide his weapons from Clari. (6 RT 833-836, 842-843, 878-879; 7 RT 918-919, 922, 931; 8 RT 1112-1113; 11 RT 1579.) Using this ruse, to either give clothes to Bruni to send to Clari, or to have Bruni wash these clothes, allowed Cage to gain access to the house in concealment of his actual purpose and take his victim "unaware."[18]

The second requirement, a substantial period of watching and waiting for an opportune time to act, was also satisfied by the evidence presented. Contrary to Cage's assertion that "[n]othing in Cage's activities in the weeks before the shootings implied that he was watching Bruni to catch her unawares" (AOB 121), the evidence actually demonstrated that he *was*

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[18] Cage does not appear to seriously dispute that he concealed his purpose by use of the laundry basket ruse. (See AOB 122-123.)

watching and waiting for such an opportunity. At trial, Clari testified that she found a note in the pocket of Cage's jeans in the laundry basket that had Bruni's work information on it in Cage's handwriting. (6 RT 844-845; 8 RT 1101-1103.) In addition, a phone bill from the apartment Cage shared with Clari showed two calls from the apartment phone to Bruni's work in Mira Loma made *after* Clari had left the country, one on October 22 at 5:45 p.m. and one on October 24 at 10:38 p.m. (6 RT 826-827; 7 RT 902-903.) Furthermore, Steve Phipps, a neighbor of Bruni, testified that he saw Cage driving his car in his neighborhood during the time between when Clari left for Puerto Rico and Cage committed the murders. (7 RT 917.) Although of course susceptible to different interpretations, looking at this evidence in the light most favorable to the prosecution, a rational jury could certainly infer that Cage was watching Bruni, monitoring her whereabouts for a substantial period, at least several weeks, and waiting for an opportune time to act.

Finally, more than sufficient evidence was presented as to the third element - immediately after a substantial period of watching and waiting and concealing his true purpose, Cage made a surprise attack on the unsuspecting Bruni from a position of advantage. Here, after gaining entry to Bruni's house through his laundry basket ruse, Cage was able to surprise Bruni by pulling out his gun and shooting the unsuspecting woman, who did not have a chance to defend herself. (See *People v. Moon, supra*, 37 Cal.4th at p. 24 [where a victim knows the defendant, she may not immediately suspect she is in danger upon seeing him, but may be subsequently taken by surprise].)

Accordingly, the evidence presented at trial, viewed in the light most favorable to the prosecution as required by the appellate standard of review, amply supports both the guilty verdicts of first degree murder based on the

lying-in-wait theory and the jury's true finding on the special circumstance of lying-in-wait.[19] Cage's claim to the contrary should therefore be denied.

C. In Any Event, Even Assuming That Insufficient Evidence Was Presented To Support The Jury's First Degree Murder Verdicts Based On The Lying-In-Wait Theory Or To Support The Jury's True Finding On The Lying-In-Wait Special Circumstance, No Reversal Is Required

As set forth above, the jury was instructed on deliberate and premeditated murder as a theory of first degree murder (13 CT 3559-3560; CALJIC No. 8.20), as well as murder by lying-in-wait. Therefore, even if there were factual deficiencies that undermine the lying-in-wait theory of first degree murder, this Court should affirm the first degree murder convictions as there was more than ample evidence of premeditated, deliberate murder, as discussed in Argument II above, to warrant affirmance. (See *People v. Guiton* (1996) 4 Cal.4th 1116, 1130 [where there is factually unsupported theory, reversal is required only if that theory was the sole basis for guilt finding]; see also *People v. Marks* (2003) 31 Cal.4th 197, 232.)

In addition, if the lying-in-wait special circumstance is found deficient, no reversal of the penalty phase is required. The jury in the present case also found true the special circumstance of multiple murder (13 CT 3530), a finding Cage does not challenge on appeal.[20] Here,

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[19] As Cage murdered David immediately after he murdered Bruni, the same evidence that supports the lying-in-wait first degree murder theory and the lying-in-wait special circumstance for Bruni's murder (i.e., a 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) applies to David's murder, too.

[20] Therefore, even if this Court finds that evidence supporting the lying-in-wait special circumstance as it relates to David is lacking, any such (continued...)

"[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 other aggravating circumstances. (See 16 RT 2248-2266.)

Accordingly, Cage's first degree murder verdicts and sentence should be affirmed.

IV. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY AS TO THE LYING-IN-WAIT FIRST DEGREE MURDER THEORY AND THE LYING-IN-WAIT SPECIAL CIRCUMSTANCES

Cage claims that the jury instructions pertaining to the lying-in-wait special circumstances and first degree murder theory were confusing and deprived him of a fair trial. Specifically, Cage contends that the lying-in-wait special circumstances instruction, CALJIC No. 8.81.15, was "lengthy," "confusing," "internally inconsistent," and "conflicted with other instructions," and that both this instruction and the lying-in-wait first degree murder theory instruction, CALJIC No. 8.25, "used identical language to state the temporal elements of the crimes, leaving jurors with no meaningful way to separate lying in wait first degree murder from the lying in wait special circumstance." (AOB 126-133.) However, as the trial court properly instructed the jury as to both the lying-in-wait special circumstance and the lying-in-wait first degree murder theory, Cage's claim must be denied.

(...continued)
deficiency is harmless as substantial evidence supported the jury's verdict that Bruni was guilty of first degree murder and that Cage also murdered David, which is sufficient to support the true fining on the special circumstance of multiple murder.

As set forth above, the trial court instructed the jury as to the elements of the lying-in-wait special circumstance with CALJIC No. 8.81.15:

> 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 defendant intentionally killed the victim, and
>
> 2. The murder was committed while the defendant was lying in wait.
>
> The term 'while lying in wait" within the meaning of the law of special circumstances is defined as a waiting and watching for an opportune time to act, together with a concealment by ambush or by some other secret design to take the other person by surprise even though the victim is aware of the murderer's presence. The lying in wait need not continue for any particular period of time provided that its duration is such as to show a state of mind equivalent to premeditation or deliberation.
>
> Thus, for a killing to be perpetrated while lying in wait, both the concealment and watchful waiting as well as the killing must occur during the same time period, or in an uninterrupted attack commencing no later than the moment concealment ends.
>
> If there is a clear interruption separating the period of lying in wait from the period during which the killing takes place, so that there is neither an immediate killing nor a continuous flow of the uninterrupted lethal events, the special circumstance is not proved.
>
> A mere concealment of purpose is not sufficient to meet the requirement of concealment set forth in this special circumstance. However, when a defendant intentionally murders another person, under circumstances which include (1) a concealment of purpose, (2) a substantial period of watching and waiting for an opportune time to act, and (3) immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage, the special circumstance of murder while lying in wait has been established.

(13 CT 3562; CALJIC No. 8.81.15.) The trial court also instructed the jury as to the lying-in-wait first degree murder theory with CALJIC No. 8.25:

> The term "lying in wait" is defined as a waiting and watching for an opportune time to act, together with a concealment by ambush or by some other secret design to take the other person by surprise even though the victim is aware of the murderer's presence. The lying in wait need not continue for any particular period of time provided that its duration is such as to show a state of mind equivalent to premeditation or deliberation.
>
> The word "premeditation" means considered beforehand.
>
> The word "deliberation" means formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action.

(13 CT 3560; 11 RT 1565; CALJIC No. 8.25.)

As an initial matter, Cage did not object to the trial court giving either CALJIC No. 8.81.15 or CALJIC No. 8.25. (11 RT 1492-1494.) Therefore, Cage has forfeited his claims of error on appeal. (See *People v. Rogers* (2006) 39 Cal.4th 826, 877; see also *People v. Delgado* (1993) 5 Cal.4th 312, 331; *People v. Medina* (1990) 51 Cal.3d 870, 902.)

Even if his claims are cognizable on appeal, they must be denied. This Court has repeatedly held that CALJIC No. 8.81.15 correctly sets forth the elements of the special circumstance of lying-in-wait. (*People v. Stevens* (2007) 41 Cal.4th 182, 203-204; see also *People v. Cruz* (2008) 44 Cal.4th 636, 678.) Specifically, as to Cage's claim that the instruction as to the lying-in-wait special circumstance was too lengthy and internally inconsistent in its treatment of major elements, such as the definition of the temporal element and the concealment element (AOB 127-130), this Court has rejected challenges to CALJIC No. 8.81.15 on these very grounds. (See *People v. Bonilla* (2007) 41 Cal.4th 313, 333 [CALJIC No. 8.81.15 correctly conveys the temporal and concealment elements]; *People v. Carpenter, supra,* 15 Cal.4th at p. 312; *People v. Michaels, supra*, 28 Cal.4th at p. 516; see also *People v. Sims, supra*, 5 Cal.4th at p. 434 [CALJIC No. 8.81.15 adequately informs the jury that the concealed

purpose had to be an intent to kill and the watchful waiting had to be for an opportune time to commit a lethal act].)

As to Cage's contention that the instructions on lying-in-wait were confusing because "[t]he temporal element of lying in wait, first degree murder [] stated in CALJIC No. 8.25 in [sic] the *identical language* used in the special circumstance instruction" (AOB 131-133), this Court, again, has repeatedly rejected this claim. (See *People v. Carpenter, supra*, 15 Cal.4th at pp. 390-391[the language stating that the duration of the lying-in-wait must be "such as to show a state of mind equivalent to premeditation or deliberation" is proper for both lying-in-wait murder and lying-in-wait special circumstance].)

In addition, the prosecutor, during her closing argument, emphasized to the jury some of the differences between lying-in-wait murder and the lying-in-wait special circumstance. (See *People v. Kelly* (1992) 1 Cal.4th 495, 526-527 [the arguments of counsel are relevant to determining whether the jury misunderstood the instructions].) Here, the prosecutor, after noting what was similar between lying-in-wait first degree murder and lying-in-wait special circumstance, stated what *else* the jury had to find, temporally speaking, to find the special circumstance true:

> So what do you need? Well, the instruction says you need more than just a concealment of purpose. You also need a *substantial* period of watching and waiting, which we have in this case, and *immediately thereafter* a surprise attack on an unsuspecting victim from a position of advantage.

(11 RT 1584, emphasis added.) Therefore, the prosecutor addressed the temporal distinction between lying-in-wait murder and the lying-in-wait special circumstance.

In any event, even if the trial court improperly instructed the jury with both CALJIC Nos. 8.81.15 and 8.25, any error was harmless. As set forth above, the jury was also instructed on premeditated, deliberate murder as a

theory of first degree murder. (13 CT 3559-3560; CALJIC No. 8.20.) Therefore, even if the instruction on lying-in-wait first degree murder was incorrect, this Court should affirm the first degree murder conviction as there was more than ample evidence of premeditated, deliberate murder, as discussed in Argument II above, to warrant affirmance. (See *People v. Guiton, supra*, 4 Cal.4th at p. 1130; *People v. Marks, supra*, 31 Cal.4th at p. 232.)

In addition, if the lying-in-wait special circumstance instruction is found improper, the jury in the present case also found true the special circumstance of multiple murder (13 CT 3530), a finding Cage does not challenge on appeal. Here, again, as noted above, "[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. Instead, the prosecutor focused on other aggravating circumstances. (See 16 RT 2248-2266.)

Accordingly, Cage's claims of instructional error should be denied.

V. AS CAGE DID NOT OBJECT TO ANY OF THE TESTIMONY DURING THE GUILT PHASE OF THE TRIAL AS TO THE REACTIONS OF CLARI OR RICHIE UPON LEARNING OF THE MURDERS, HE HAS FORFEITED HIS ABILITY TO RAISE HIS CLAIM OF ERROR ON APPEAL; EVEN IF COGNIZABLE ON APPEAL, ANY ERROR IN ALLOWING TESTIMONY IN THE GUILT PHASE OF THE TRIAL ABOUT THE REACTIONS OF CLARI AND RICHIE UPON LEARNING OF THE MURDERS WAS HARMLESS

Cage claims that the trial court erred in allowing the jury to hear during the guilt phase of the trial testimony regarding how Clari and Richie reacted upon learning of the murders. Specifically, Cage contends that Clari's testimony regarding how she reacted when she first learned of the

murder of her mother and brother and what she observed when she first saw the crime scene, and the testimony of other witnesses regarding how Richie reacted at the scene of the crime,[21] constituted improper "victim impact evidence which had no place in the jury's guilt phase determinations" and "was an improper appeal for sympathy." (AOB 133-146.) However, Cage, by not objecting to any of the testimony he now complains of on appeal, has forfeited his ability to raise his claim of error on appeal. In any event, Cage's claim should be denied because Cage was not prejudiced by any of the now complained of testimony.

As set forth by Cage (AOB 134-138), Clari gave a detailed account of how she learned of the deaths of her mother and brother, including testifying that she "lost it" in response to the news and was "emotional." (6 RT 828-831.) She also testified that she was "in shock" after seeing the crime scene. (6 RT 831-833.)

The next-door neighbor of Bruni and Richie, Sarah Phipps, testified that she heard Richie's "blood-curdling scream" (8 RT 1064) and Sarah's brother, Steve Phipps, testified that Richie kept crying and asking "Why? Why? Why?" (7 RT 914-916.) In addition, Officer Heim, the first member of law enforcement to arrive upon the scene, testified that Richie was screaming, crying, and hysterical. (9 RT 1230-1231, 1233-1235.) Lead Detective Amicone also testified that Richie was crying and screaming when she tried to talk to him. (11 RT 1526-1527.)

Except for an objection lodged during Detective Amicone's testimony regarding some of the alleged inconsistencies between Richie's trial testimony and his initial interview, Cage did not object to the now complained of testimony regarding the reactions of Clari and Richie to the

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[21] As Richie was a percipient witness, Cage does not claim that his own guilt phase testimony was improper. (AOB 133, fn. 42, 144.)

murders and crime scene. More specifically, Cage *never* objected at trial that *any* of the guilt phase testimony constituted improper "victim impact testimony." Accordingly, any claim of error on this basis has been forfeited. (See *People v. Guerra* (2006) 37 Cal.4th 1067, 1117; Evid. Code, § 353.)

In any event, even if Cage's claim is cognizable on appeal, any "error" in admitting testimony regarding the reactions of Clari and Richie upon finding out that their mother and brother had been murdered and their reactions to seeing the crime scene was harmless under any standard. Based on the undisputed proper testimony, the jury knew that Clari and Richie were very close to Bruni and David. (See, e.g., 6 RT 817-826, 845, 864; 911-912.) The jury also knew of the horrific nature of both the nature of the crime scene and the manner in which Bruni and David were murdered. (See, e.g., 8 RT 1094, 1461-1476; 11 RT 1539-1541.) The jury further knew, from Richie's own unchallenged testimony, that Richie was very upset upon discovering the murdered bodies of his mother and brother. (6 RT 863-871.) Given this properly admitted testimony, any additional "improper" testimony informing the jury that Clari was very upset upon learning of the deaths of her mother and brother and in shock when she saw the crime scene, and that Richie was hysterical and screaming and crying after discovering his murdered mother and brother, was harmless. (See *People v. Wallace* (2008) 44 Cal.4th 1032, 1058 [no prejudice from admitting evidence that victim had poor eyesight and mobility problems where jury already knew victim was a frail 83-year-old woman]; *People v. Gurule, supra*, 28 Cal.4th at pp. 622-624.) Finally, the jury was properly instructed not to be influenced by passion, sympathy, or prejudice and to conscientiously consider and weigh only the evidence in applying the law and reaching the verdict. (13 CT 3549-3550; CALJIC No. 1.00; see *People v. Doolin, supra*, 45 Cal.4th at p. 439.) Accordingly, any error in admitting the now challenged testimony was harmless.

VI. THE TRIAL COURT PROPERLY ADMITTED INTO EVIDENCE PHOTOGRAPHS TAKEN AT THE CRIME SCENE AND DURING THE AUTOPSIES

Cage claims that the trial court abused its discretion in admitting into evidence "an excessive number of gruesome and highly prejudicial photographs." Specifically, Cage contends that the trial court improperly admitted nine[22] photographs depicting the crime scene and the autopsies because these photographs "were gory and disturbing, cumulative, and unduly prejudicial under Evidence Section 352." (AOB 146-158.) Cage's claim must be denied as the trial court properly exercised its discretion in admitting a limited number of photographs of the crime scene and autopsies.

A. Trial Court Proceedings

Prior to trial, Cage's trial counsel objected to eight photographs taken either at the crime scene or during the autopsies of Bruni and David. Specifically, Cage's counsel objected to Exhibit 83, an autopsy photograph showing the exit wound, with probe, to David's chest. (2 RT 316-318.) Cage also objected to Exhibit 85, an autopsy photograph showing David's elbow wound and the distance between his elbow wound and chest wound. (2 RT 318-321.) The trial court ruled that the prosecutor's five proposed photographs taken during David's autopsy, Exhibits 82, 83, 85, 86, and 87, would be admissible:

> In weighing the probative value against the prejudicial effect, I find that each of the photos shows something different that has probative value, to wit, the marks on the hip, the entrance and exit wounds of both shots, and the photo of under the chin, and in one of the other ones, and the relationship of the two.

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[22] Based on the record, it appears that Cage's trial counsel actually objected to eight photographs. (2 RT 315-332.)

(2 RT 321.)[23]

Cage also objected to Exhibit 34, a photograph showing Bruni's body at the crime scene, as unduly prejudicial because of the blood. (2 RT 322-325.) The trial court ruled that Exhibit 34 would be admissible:

> The Court finds that the probative value of that disputed photo, which is No. [] 34, does outweigh the prejudicial effect, in that it shows the position of the body to two shotgun shells, and a much closer view of the laundry basket. And, quite frankly, it shows in much better detail the positioning of the body in relation to the front door. And so I would allow it in for that reason.

(2 RT 325.)

Cage next objected to Exhibit 40, a photograph showing David's body in his bedroom, under Evidence Code section 352. (2 RT 325-327). The trial court ruled that all three photos showing David's room and David's body in his room, including Exhibit 40, would be admissible:

> I find all three of them have probative value. And that all – and all three of them put together, the probative value outweighs the prejudicial effect because it shows progressions from outside the room, inside the room, to the close-up of how the body was positioned, including the arm that had the bullet – or had the slug going through the elbow. And so I will allow all three of those.

(2 RT 327.)

Finally, Cage objected to Exhibits 69, 70, 71, and 73, photographs taken during Bruni's autopsy, arguing that the prejudicial value of these photos outweighed their probative value, prejudicial value that was

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[23] As to Exhibit 83, the trial court specifically ruled that it would allow the prosecution to use this photograph as it was the only photograph showing the entry and exit angle of the gunshot wound to David's chest. (2 RT 317-318.)

enhanced by the courtroom's graphic system. (2 RT 329-331.) The trial court ruled that these photographs would be admissible:

> I'm going to rule that these four have probative value to the testimony of the pathologist and to the cause of deaths, and to the extent of the injuries of this woman.
>
> And I'll rule that the probative value outweighs the prejudicial effect because they do have probative value, that they would be admissible.

(2 RT 331-332.)

During trial, the pathologist, Dr. Darryl Garber, used, among other photographs, Exhibits 69, 70, 71, 73, 83, and 85, in identifying the injuries inflicted upon Bruni and David and in explaining the causes of their death. (10 RT 1452-1476.)

B. The Trial Court Properly Admitted Exhibits 34, 40, 69, 70, 71, 73, 83, and 85 Into Evidence

The admission of allegedly gruesome photographs is basically a question of relevance over which the trial court has broad discretion. (*People v. Roldan, supra*, 35 Cal.4th at p. 713; *People v. Scheid* (1997) 16 Cal.4th 1, 13-14.) As this Court has often noted, murder is "seldom pretty," and pictures, testimony, and physical evidence in such a case are "always unpleasant." (*People v. Perry* (2006) 38 Cal.4th 302, 318; *People v. Riel* (2000) 22 Cal.4th 1153, 1194; *People v. Pierce* (1979) 24 Cal.3d 199, 211.) Prosecutors are not obliged to prove their cases with evidence solely from live witnesses; the jury is entitled to see details of a murder victim's body to determine if the evidence supports the prosecution's theory of the case. (*People v. Roldan, supra*, 35 Cal.4th at p. 713; *People v. Gurule, supra*, 28 Cal.4th at p. 624.)

A trial court has broad discretion in determining the admissibility of murder victim photographs against a claim that the photographs will arouse in the jurors an excessively emotional response. (*People v. Perry, supra*,

38 Cal.4th at p. 318; *People v. Price* (1991) 1 Cal.4th 324, 441.) A trial court's decision to admit photographs under Evidence Code section 352 will be upheld on appeal unless the prejudicial value of such photographs clearly outweighs their probative value. (*People v. Gurule, supra*, 28 Cal.4th at p. 624; *People v. Allen* (1986) 42 Cal.3d 1222, 1256.)

First, the eight photographs depicting the crime scene and injuries to Bruni and David were relevant to prove the prosecution's theory that the murders were premeditated and deliberate. (See *People v. Roldan, supra*, 35 Cal.4th at p. 713, quoting *People v. Gurule, supra*, 28 Cal.4th at p. 624 [Prosecutors "'are not obliged to prove their case with evidence solely from live witnesses; the jury is entitled to see details of the victims' bodies to determine if the evidence supports the prosecution's theory of the case'"].) Evidence Code section 350 provides that all relevant evidence is admissible. (Evid. Code, § 350.) Relevant evidence is that which has "any tendency in reason to prove or disprove any disputed fact that is of consequence" to the action. (Evid. Code, § 210; *People v. Hall* (1980) 28 Cal.3d 143, 152, overruled on other grounds in *People v. Newman* (1999) 21 Cal.4th 413.)

The admitted photographs that showed the shotgun wounds suffered by Bruni and David, including the relationship and distance of the wounds to each other, and the position of the bodies when they were found, were thus relevant to demonstrate that, rather than an "explosion of violence," Cage committed the homicides with an intent to kill, rather than for example, just injure, and did so with premeditation and deliberation, both "disputed" facts. (*People v. Ramirez* (2006) 39 Cal.4th 398, 453 [noting that this Court has consistently upheld the introduction of autopsy photographs disclosing the manner in which a victim was injured as relevant not only to the question of deliberation and premeditation but also aggravation of the crime and the appropriate penalty].)

Again, the prosecutor is not obliged to prove relevant facts from testimony alone, or be compelled to accept an antiseptic stipulation. The jury is entitled to see how details of the murder scene and the victims' bodies support the prosecution theory, and photographs are one kind of physical evidence which may be introduced. (*People v. Pride, supra*, 3 Cal.4th at p. 243; *People v. Price, supra*, 1 Cal.4th at pp. 433-435.) As one appellate court has explained:

> [A] defendant has no right to transform the facts of a gruesome real-life murder into an anesthetized exercise where only the defendant, not the victim, appears human. Jurors are not, and should not be, computers for whom a victim is just an "element" to be proved, a "component" of a crime. A cardboard victim plus a flesh-and-blood defendant are likely to equal an unjust verdict.

(*People v. Thompson* (1992) 7 Cal.App.4th 1966, 1974.)

As for Cage's specific argument that the objected to photographs should have been excluded pursuant to Evidence Code section 352, while photographs depicting murder victims lying in their own blood and showing the autopsies conducted on their bodies are obviously somewhat disturbing, the photographs which the trial court allowed to be admitted at Cage's trial were not *excessively* bloody or gruesome. For example, there was no "revolting portraiture displaying horribly contorted facial expressions that conceivably could inflame a jury." (*People v. Scheid, supra*, 16 Cal.4th at p. 19.)

Indeed, numerous decisions have upheld the admission of similar photographs against claims of undue prejudice under Evidence Code section 352. (See, e.g., *People v. Perry, supra*, 38 Cal.4th at p. 318 [no abuse of discretion regarding admission of photograph showing the mortally wounded victim lying unconscious with blood on his head and chest, even though it would undoubtedly unsettle some jurors]; *People v. Roldan, supra*, 35 Cal.4th at pp. 712-713 [four photographs, including one

showing the nude body of the victim lying on the coroner's table, covered by a towel, and three others depicting close-up views of the wounds the victim suffered, were not unduly bloody or gruesome]; *People v. Navarette* (2003) 30 Cal.4th 458, 495 [no abuse of discretion in admitting photograph of murder victim's naked chest, showing several stab wounds concentrated in the area between her breasts, and another photo depicting her body, facedown, pants and underwear around her ankles, and hands and feet tied together, where the photographs were "certainly gruesome" but trial court found them not unduly prejudicial]; *People v. Farnam* (2002) 28 Cal.4th 107, 184-185 [32 photographs of victim in prior murder case not impermissibly cumulative or inflammatory, were clearly relevant to the prosecution's theory that the victim was the victim of a torture murder]; *People v. Scheid, supra*, 16 Cal.4th at p. 19 [photograph of murder victim unpleasant but not unduly gory or inflammatory]; *People v. Wash* (1993) 6 Cal.4th 215, 245-246 [five crime scene photographs and thirteen autopsy slides not unduly gruesome or inflammatory].)

Although the eight photographs were undeniably disturbing, that is because the crimes themselves were disturbing - the photographs did no more than accurately portray the nature of the murders. While the jury can, and must, be shielded from depictions that sensationalize an alleged crime, or are unnecessarily gruesome, the jury cannot be shielded from an accurate depiction of the charged crimes that does not unnecessarily play upon the emotions of the jurors. Here, the probative value of these photographs, which included not only the depictions of the gunshot wounds and position of the bodies when found, which was probative as to both the prosecution's theory of the case and the pathologist's determination of the causes of death, but also the fact that these photographs depicted things not clear in the other photographs, were not unduly inflammatory in the context of the case. The record here reflects that the experienced trial judge was well aware of

his duty to weigh the prejudicial effect of the photographs against their probative value, and expressly and carefully did so. (See *People v. Coleman* (1988) 46 Cal.3d 749, 776.) Therefore, Cage has failed to show an abuse of discretion in admitting the eight disputed photographs into evidence.

C. In Any Event, Even If The Trial Court Abused Its discretion in Admitting These Eight Photographs Into Evidence, Any Such Error Was Harmless

Here, even if the trial court erred in admitting these eight photographs, reversal is not warranted. This Court has stated that a miscarriage of justice warranting reversal occurs only when the reviewing court, after an examination of the entire cause, including the evidence, is of the opinion "that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*People v. Watson, supra*, 46 Cal.2d at p. 836.) The erroneous admission of a photograph is reviewed under the *Watson* standard. (*People v. Scheid, supra*, 16 Cal.4th at p. 21.)

Even if Cage is correct and the trial court abused its discretion in admitting these eight photographs, either because they were excessively "gory" or merely cumulative to other properly admitted evidence, any such error was harmless. (See *People v. Allen, supra*, 42 Cal.3d at pp. 1257-1258 [admission of photographs cumulative to other evidence that "was itself detailed and essentially uncontested" may have been an abuse of discretion, but any error was harmless].) Here, the photographs introduced in this case "did not disclose to the jury any information that was not presented in detail through the testimony of witnesses," and they were "no more inflammatory than the graphic testimony provided by a number of the prosecution's witnesses." (*People v. Heard* (2003) 31 Cal.4th 946, 978.) Several witness, including Richie, the one who discovered the bodies,

testified as to the injuries to the victims' bodies, the position of these bodies at the crime scene, and the nature of the crime scene itself. (See, e.g., 6 RT 863-871; 8 RT 1094, 1461-1476; 10 RT 1452-1476; 11 RT 1539-1541.) Even if this testimony, graphic as it was, did not paint as "gory" a picture as the photographs did, it is not likely that the jury would have decided the case differently, either during the guilt phase or the penalty phase, just because the photographs illustrated more vividly the properly admitted testimony.[24] In addition, the jury was instructed that it must not be influenced by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion, or public feeling. (CALJIC No. 1.00; 2 CT 359.) Under these circumstances, it is not reasonably probable that the admission of photographs of the crime scene or autopsies affected the jury's verdict. (*People v. Watson, supra*, 46 Cal.2d at p. 836.) Accordingly, any error was harmless and Cage's claim must be denied.

VII. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY WITH CALJIC NO. 2.51

Cage claims that the trial court erred in instructing the jury with CALJIC No. 2.51. Specifically, Cage contends that his murder convictions, as well as the jury's true finding on the lying-in-wait special circumstance allegations, must be reversed because CALJIC No. 2.51 "improperly

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[24] When as here, a party claims photographs are gruesome or unduly prejudicial, it has been aptly noted:

> . . . A juror is not some kind of dithering nincompoop, brought in from never-never land and exposed to the harsh realities of life for the first time in the jury box. . . The average juror is well able to stomach the unpleasantness of exposure to the facts of a murder without being unduly influenced. The supposed influence on jurors of allegedly gruesome or inflammatory pictures exists more in the imagination of judges and lawyers than in reality.

(*People v. Long* (1994) 38 Cal.App.3d 680, 689.)

allowed the jury to determine guilt based upon the presence of an alleged motive, and shifted the burden of proof to Cage to show an absence of motive to establish innocence thereby lessening the prosecution's burden of proof." (AOB 158-166.) However, as Cage concedes, this Court has upheld CALJIC No. 2.51 and has consistently rejected claims similar to those of Cage. (AOB 159.) Here, as Cage sets forth no reason why this Court's previous holdings have been in error, his claim must be denied.

Here, without objection, the trial court instructed the jury with CALJIC No. 2.51:

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

(13 CT 3556; 11 RT 1485-1488, 1559.)

Generally, as stated above, failure to object to instructional error forfeits the issue on appeal unless the alleged error affects a defendant's substantial rights. The question is whether the error resulted in a miscarriage of justice under *People v. Watson, supra*, 46 Cal.2d 818. (See *People v. Huggins* (2006) 38 Cal.4th 175, 192.) However, ascertaining whether a claimed instructional error affected a defendant's substantial rights necessarily requires an examination of the merits of the claim to determine whether the asserted error was prejudicial. As this Court has previously ruled that a claim questioning whether a motive instruction shifts the prosecution's burden of proof to imply a defendant had to prove his innocence, does implicate a defendant's substantial rights (see *People v. Guerra, supra*, 37 Cal.4th at p. 1134, citing *People v. Cleveland* (2004) 32 Cal.4th 704, 750) Cage's instant claim is cognizable on appeal notwithstanding his failure to timely object to the instruction at trial.

Here, Cage's claim of instructional error should be rejected on the merits. This Court has determined that CALJIC No. 2.51 does not lessen the prosecution's burden of proof (*People v. Brasure* (2008) 42 Cal.4th 1037, 1059; *People v. Nakahara* (2003) 30 Cal.4th 705, 714, citing *People v. Frye* (1998) 18 Cal.4th 894, 957-958), nor does it shift the burden of proof to the accused (*People v. Richardson* (2008) 43 Cal.4th 959, 1018-1019; *People v. Cleveland, supra*, 32 Cal.4th at p. 750), or allow the jury to determine guilt based on motive alone. (*People v. Wilson* (2008) 43 Cal.4th 1, 22.)

Specifically, in *People v. Richardson*, this Court held that claims like that of Cage had been rejected in its prior decisions where numerous other instructions were given, e.g., CALJIC No. 2.90 [presumption of innocence], No. 8.71 [doubt whether first or second degree murder], and No. 8.80 [special circumstances-introduction], that directed the jury to convict only on the prosecution proving the defendant guilty beyond a reasonable doubt. This Court concluded in those circumstances there was no reasonable likelihood the jury would have understood the challenged instructions to have required a shifting of the burden of proof. (*People v. Richardson, supra*, 43 Cal.4th at p. 1019, citing *People v. Snow* (2003) 30 Cal.4th 43, 97 [CALJIC No. 2.51 "leaves little conceptual room for the idea that motive could establish all the elements of murder"], and *People v. Frye, supra*, 18 Cal.4th at pp. 957-958 [trial court's instruction that "[a]bsence of motive may tend to establish innocence" did not shift burden of proof where jury was instructed with CALJIC 2.90 [reasonable doubt].)

Similarly, in *People v. Wilson* this Court rejected this same type of claim by observing that CALJIC No. 2.51 did not include instructions on the prosecution's burden of proof or the reasonable doubt standard and that this instruction thus did not undercut other instructions that correctly informed the jury on reasonable doubt, the presumption of innocence, and

the People's burden of proof. (*People v. Wilson, supra*, 43 Cal.4th at pp. 22-23.)

With regard to CALJIC No. 2.51, this Court has repeatedly stated: "We have repeatedly rejected these arguments [citing *Cleveland, supra*] and defendant gives us no reason to reconsider our views." (*People v. Howard* (2008) 42 Cal.4th 1000, 1024.) Nothing about the instant case provides any reason for this Court to reconsider its earlier decisions that CALJIC No. 2.51 does not shift the burden of proving Cage's guilt away from the prosecutor especially when, as in this case, the other usual instructions are also given. (See 13 CT 3558; CALJIC No. 2.90 ["People" have burden to prove guilt beyond a reasonable doubt]; 3561; CALJIC No. 8.71 [when reasonable doubt whether first or second degree murder, defendant to be given benefit of doubt]); 3561; CALJIC No. 8.80.1 ["People have the burden of proving the truth of a special circumstance"].) Moreover, the prosecutor reminded the jury that she had the burden to prove Cage guilty beyond a reasonable doubt before the jury could convict him of the underlying crimes. (11 RT 1576, 1601-1602.)

Like in the prior cases cited above, CALJIC No. 2.51 given here cannot be reasonably read as shifting the burden to require Cage to prove he had no motive; rather the instruction guides the jury on what weight to give motive evidence if it determines such evidence exists. Absent Cage's showing to the contrary, the jury is presumed to have followed all of the court's instructions. (*People v. Carter* (2005) 36 Cal.4th 1114, 1176-1177.) Cage has not demonstrated the jury here disregarded the several instructions that the prosecutor had the burden to prove him guilty beyond a reasonable doubt before the jury could convict him of the underlying crimes.

In short, CALJIC No. 2.51 given in this case is not constitutionally infirm. The instruction cannot be reasonably read as requiring Cage to

prove the absence of motive in order to demonstrate his innocence. Nor can the instruction be reasonably interpreted, even with the trial court also giving the jury CALJIC No. 2.52 [see Argument VIII], as suggesting that the jury could find him guilty based only on proof that he had a motive to commit the underlying murders. Finally, Cage does not present any persuasive reason why this Court should reconsider its earlier decisions that CALJIC No. 2.51 does not shift the burden of proof; it properly tells the jury that "motive" is not an element of the underlying charged crimes and the jury may attribute appropriate weight to the presence or absence of motive. Cage's arguments to the contrary should be rejected.

VIII. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY WITH CALJIC NO. 2.52

Cage claims that the trial court deprived him of his constitutional rights by instructing the jury on flight pursuant to CALJIC No. 2.52. Specifically, he contends that his convictions and sentence must be reversed because the instruction improperly duplicated the circumstantial evidence instructions, was unfairly partisan and argumentative, and permitted the jury to draw an irrational permissive inference. (AOB 166-183.) First, as Cage did not object to the flight instruction at trial, his claim of instructional error is forfeited. In any event, the instruction was properly given, and even assuming arguendo such instruction was given in error, it was clearly harmless so reversal is not required. As with his previous claim, Cage concedes that this Court has upheld CALJIC No. 2.52 and has consistently rejected claims similar to those of Cage. (AOB 167, citing *People v. Lunch* (2010) 50 Cal.4th 693, 761, and *People v. Taylor* (2010) 48 Cal.4th 574, 630.)

The trial court instructed the jury with CALJIC No. 2.52:

> The flight of a person immediately after the commission of a crime or after he is accused of a crime is not sufficient in itself to establish his guilt, but is a fact which, if proved, may be

> considered by you in the light of all other proved facts in deciding whether a defendant is guilty or not guilty. The weight to which this circumstance is entitled is a matter for you to decide.

(13 CT 3556; 11 RT 1560.)

Cage's trial counsel did not object to this instruction. (See 11 RT 1490-1491.) The failure to object to a flight instruction forfeits any complaint that the instruction was given. (*People v. Loker* (2008) 44 Cal.4th 691, 705-706; see *People v. Farnam, supra*, 28 Cal.4th at pp. 107, 165; *People v. Bolin, supra*, 18 Cal.4th at pp. 297, 326; *People v. Jackson* (1996) 13 Cal.4th 1164, 1223; but see *People v. Smithey* (1999) 20 Cal.4th 936, 982, fn. 12 [claim that flight instruction was not warranted by the evidence was not forfeited by failure to object].)

Even if it is not forfeited, Cage's claim fails. Cage first argues that the flight instruction was duplicative of the general instructions regarding circumstantial evidence. (AOB 167-168, citing CALJIC Nos. 2.00 and 2.01.) Cage is incorrect. CALJIC Nos. 2.00 and 2.01 instructed the jurors regarding the definition of circumstantial evidence and the sufficiency of circumstantial evidence to establish facts leading to a finding of guilt. On the other hand, CALJIC No. 2.52 is a cautionary instruction which benefitted the defense by "admonishing the jury to circumspection regarding evidence that might otherwise be considered decisively inculpatory." (*People v. Jackson, supra*, 13 Cal.4th at p. 1224.)

Moreover, the flight instruction *must* be given where evidence of flight is relied upon by the prosecution. (*People v. Howard, supra*, 42 Cal.4th at pp. 1000, 1020; *People v. Abilez, supra*, 41 Cal.4th at pp. 521-522; *People v. Turner* (1990) 50 Cal.3d 668, 694; *People v. Cannady* (1972) 8 Cal.3d 379, 391.) Here, the instruction was properly given because evidence was presented that Cage walked away from Bruni's house after the murders in the direction of a trail he frequently used as a shortcut

between his apartment and Bruni's house and that Cage began to run when an alarm sound was heard. (See *People v. Ray* (1996) 13 Cal.4th 313, 345 [CALJIC No. 2.52 properly given where evidence shows defendant departed the crime scene under circumstances suggesting his movement was motivated by a consciousness of guilt].) Evidence was also presented that Cage hid his shotgun under a bush on this trail. (See 6 RT 840-842, 851-852; 7 RT 936-949, 956-957; 8 RT 1077-1082, 1161-1167; See also 11 RT 1574, 1575, 1587-1588 [prosecutor's closing argument relying on evidence of flight to show consciousness of guilt.) Accordingly, the trial court was *required* to give the flight instruction regardless of the general instructions given regarding circumstantial evidence.

Cage next contends that the flight instruction was partisan and argumentative because it focused the jury's attention on evidence favorable to the prosecution. (AOB 168-175.) Cage's argument has been repeatedly rejected by this Court. (*People v. Howard, supra*, 42 Cal.4th at p. 1021; *People v. Mendoza* (2000) 24 Cal.4th 130, 180-181; *People v. Jackson, supra*, 13 Cal.4th at p. 1224 [noting that the cautionary nature of the instruction benefits the defense].) Cage urges this Court to reconsider its holdings in light of *People v. Mincey* (1992) 2 Cal.4th 408, 437, which he contends rejected as argumentative an instruction analogous to CALJIC No. 2.52. (AOB 169-170.) However, this Court has more recently rejected the identical claim with regard to CALJIC No. 2.03, a similar consciousness of guilt instruction:

> [Bonilla] is correct that the rejected instruction in Mincey was structurally identical to CALJIC No. 2.03: both contained the propositional structure "If certain facts are shown, then you may draw particular conclusions." But it was not the structure that was problematic in *Mincey*. Rather it was the way the proposed instruction articulated the predicate "certain facts": "If you find that the beatings were a misguided, irrational and totally unjustified attempt at discipline rather than torture as defined

> above, you may . . . ." (*Mincey*, [*supra*, 2 Cal.4th] at p. 437, fn. 5 [].) This argumentative language focused the jury on defendant's version of the facts, not his legal theory of the case; this flaw, not the generic "if/then" structure, is what caused us to approve the trial court's rejection of the instruction. (*Id.* at p. 437 [].) Any parallels between that instruction and CALJIC No. 2.03 are thus immaterial. [Citations.] We adhere to our prior decisions rejecting the argument that CALJIC No. 2.03 is impermissibly argumentative.

(*People v. Bonilla, supra*, 41 Cal.4th at p. 330, original brackets omitted.)[25]

The same logic applies to CALJIC No. 2.52, as both are similarly structured consciousness of guilt instructions. (See *People v. Morgan* (2007) 42 Cal.4th 593, 621 [treating claims relating to CALJIC No. 2.03 and CALJIC No. 2.52 uniformly]; accord, *People v. Thornton* (2007) 41 Cal.4th 391, 438; *People v. Boyette* (2002) 29 Cal.4th 381, 438-439; *People v. Jackson, supra*, 13 Cal.4th at pp. 1223-1224.)

Lastly, Cage contends the flight instruction permitted the jury to draw irrational permissive inferences regarding his state of mind at the time the offenses were committed. (AOB 175-182.) Not so. As this Court has repeatedly held, CALJIC No. 2.52 does not permit the jury to draw such irrational or impermissible inferences. (*People v. Zambrano* (2007) 41 Cal.4th 1082, 1160, disapproved on other grounds in *People v. Doolin, supra*, 45 Cal.4th at p. 421, fn. 22 ["We have explained that the flight instruction, as the jury would understand it, does not address the defendant's specific mental state at the time of the offenses, or his guilt of a particular crime, but advises of circumstances suggesting his consciousness that he has committed some wrongdoing"]; accord, *People v. Howard, supra*, 42 Cal.4th at p. 1021; *People v. Thornton, supra*, 41 Cal.4th at p.

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[25] Thus, *People v. Bonilla* provides the very explanation that Cage claims was lacking in *People v. Nakahara, supra*, 30 Cal.4th at p. 713. (See AOB 170-171.)

438; *People v. Bolin, supra*, 18 Cal.4th at p. 327; see also *People v. Mendoza, supra*, 24 Cal.4th at pp. 179-180.)

Cage appears to argue that because evidence of flight bears only on a person's state of mind *after* the killing, and since the only actual disputed issue was his mental state at the time the charged crimes were committed, the instruction improperly permitted the jury to use the evidence that he fled the scene to prove that he had the mental state required for conviction of first degree murder. (AOB 178-180.) This Court has repeatedly rejected the contention that instruction on flight permits the jury to draw impermissible inferences about a defendant's mental state, or is otherwise inappropriate where mental state, not identity, is the principal disputed issue. (*People v. Martinez* (2009) 47 Cal.4th 399, 450; *People v. Mendoza, supra*, 24 Cal. 4th at p. 180.)

There is nothing inherently improper in a jury drawing inferences from certain types of deceptive or evasive behavior. (See *People v. Bolin* (1998) 18 Cal.4th 297, 327.) Accordingly, to the extent the jury found Cage's flight after the crimes provided insight into his state of mind when he committed the crimes, it was permitted to consider it. CALJIC No. 2.52 did not require the jury to draw such an inference or even suggest that it should. The gist of the instruction was to warn the jury against using evidence of flight improperly. The instruction permitted the jury to consider such evidence only to the extent it found it relevant. The instruction begins by informing the jury that flight is not sufficient in itself to prove guilt. It goes on to inform the jury it may consider evidence of flight "in the light of all other proved facts," but that the weight to give to such evidence is a matter for them to decide.

Therefore, the trial court properly instructed the jury with CALJIC No. 2.52 in accordance with well established precedent construing the standard

jury instruction on flight, and appellant has not provided any basis for this Court revisiting those prior decisions.

In any event, even if Cage's claim is cognizable on appeal, and further assuming that the trial court erred in instructing the jury with CALJIC No. 2.52, Cage was not prejudiced. Cage contends any error is of a federal constitutional magnitude requiring the prosecution to show that the error was harmless beyond a reasonable doubt. (AOB 183.) To the contrary, the appropriate harmless error standard to apply to improperly giving CALJIC No. 2.52 is the Watson standard, i.e. whether it is reasonably probable appellant would have obtained a more favorable result had the instruction not been given. (See *People v. Turner, supra*, 50 Cal.3d at p. 695 [error in giving flight instruction at guilt phase is reviewed under *People v. Watson, supra*, 46 Cal.2d at p. 836]; accord, *People v. Silva, supra*, 45 Cal.3d 604, 628.) Appellant was not prejudiced as the instructions as a whole informed the jury that the prosecution had the burden of proof beyond a reasonable doubt regarding every fact establishing Cage's guilt. (See 13 CT 3550-3551, 3558, 3561; [CALJIC No. 1.01, CALJIC No. 2.01, CALJIC No. 2.90, CALJIC No. 8.71]; see *People v. Frye, supra*, 18 Cal.4th at p. 957 [appellate court looks to the entire charge to the jury to determine whether there is a reasonable probability the jury improperly applied a challenged instruction].) The instructions also made it clear to the jury that the flight instruction might not apply. (13 CT 3564; CALJIC No. 17.31 ["Disregard any instruction which applies to facts determined by you not to exist"]; see also *People v. Richardson, supra*, 43 Cal.4th at pp. 1019-1022.)

Moreover, given the overwhelming evidence of Cage's guilt, as set forth fully in Arguments II and III, apart from any evidence of flight, it is not reasonably probable Cage would have obtained a more favorable result had the flight instruction not been given under even the more onerous harmless beyond a reasonable doubt standard. (See *Chapman v. California*

(1967) 386 U.S. 18 [87 S.Ct. 824, 17 L.Ed.2d 705].) Accordingly, even assuming error, Cage was not prejudiced.

IX. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY AND ITS INSTRUCTIONS DID NOT IMPERMISSIBLY UNDERMINE OR DILUTE THE REQUIREMENT OF PROOF BEYOND A REASONABLE DOUBT

Cage claims that the numerous instructions given to the jury impermissibly undermined and diluted the requirement of proof beyond a reasonable doubt. Specifically, Cage contends that the standard jury instructions on circumstantial evidence (CALJIC Nos. 2.90 [Presumption of Innocence - Reasonable Doubt – Burden of Proof], 2.01 [Sufficiency of Circumstantial Evidence - Generally], 8.83 [Special Circumstances – Sufficiency of Circumstantial Evidence – Generally], and 8.83.2 [Special Circumstances – Jury Must Not Consider Penalty),[26] and several other general instructions (CALJIC Nos. 1.00 [Respective Duties of Judge and Jury], 2.21.1 [Discrepancies in Testimony], 2.21.2 [Witness Willfully False], 2.22 [Weighing Conflicting Testimony], 2.27 [Sufficiency of

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[26] Although Cage includes CALJIC No. 8.83.2 among the list of instructions on circumstantial evidence he is challenging in a subheading of his argument (AOB 185), he does not address this instruction in the body of his argument; indeed, this instruction does not even address circumstantial evidence. Presumably, the reference is to CALJIC No. 8.83.1, although Cage also neglects to address that instruction in the body of his argument. (See Cal. Rules of Court, rule 14(a)(1)(B); *People v. Gray, supra*, 37 Cal.4th at p. 198 [appellate brief must support each point with argument and, if possible, citation of authority]; *People v. Turner* (1994) 8 Cal.4th 137, 214, fn. 19 [perfunctory assertion of error without development or a clear indication they are intended to be discrete contentions are not properly presented and will be rejected on that basis].) Even if this Court were inclined to consider the assignment of error as relating to CALJIC No. 8.83.1, notwithstanding the failure to properly raise the issue as a discrete contention, this Court has rejected the argument that CALJIC No. 8.83.1 undermines the requirement of reasonable doubt. (*People v. Wilson* (1992) 3 Cal.4th 926, 943.)

Testimony of One Witness], 2.51 [Motive], and 2.52 [Flight After Crime], "enabled the jury to convict [him] on a lesser standard than is constitutionally required." (AOB 183-199.) Cage acknowledges these instructions have been found not to undermine or dilute the concept of reasonable doubt, but asks this Court to reconsider its prior rulings. This Court should decline to do so.

This Court has repeatedly rejected identical challenges to every one of these instructions. In *People v. Parson* (2008) 44 Cal.4th 332, 358, the defendant argued that several standard jury instructions individually and collectively undermined and lessened the requirement of proof beyond a reasonable doubt; specifically, CALJIC Nos. 1.00, 2.01, 2.21.1, 2.22, 2.27, 2.51, 2.90 and 8.83. This Court cited and followed its many prior decisions finding the instructions unobjectionable when accompanied by the usual instructions on reasonable doubt, the presumption of innocence, and the People's burden of proof. (*Id.* at p. 358, citing *People v. Kelly* (2007) 42 Cal.4th 763, 792 and cases cited; *People v. Howard, supra*, 42 Cal.4th at pp. 1000, 1025-1026 & fn. 14, and cases cited; *People v. Carey* (2007) 41 Cal.4th 109, 129-131, and cases cited; *People v. Crew* (2003) 31 Cal.4th 822, 847-848, and cases cited; see also *People v. Whisenhunt* (2008) 44 Cal.4th 174, 220, and cases cited.) The giving of standard jury instructions CALJIC Nos. 1.00, 2.01, 2.21.1, 2.21.2, 2.22, 2.27, 2.51, 2.52, 2.90, 8.83, and 8.83.1 was upheld in *People v. Kelly, supra*, 42 Cal.4th at p. 792. Most recently, instruction of a jury with CALJIC Nos. 2.01, 2.21.1, 2.21.2, 2.27, 2.51, and 2.83 was upheld in *People v. Moore* (2011) 51 Cal.4th 386, 414-415.)

The same conclusion should be reached here, because the challenged instructions were accompanied by the usual instructions on reasonable doubt, the presumption of innocence, and the People's burden of proof. Cage's jury was instructed pursuant to CALJIC No. 2.90 as follows:

> A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to a verdict of not guilty. This presumption places upon the People the burden of proving him guilty beyond a reasonable doubt.
>
> Reasonable doubt is defined as follows: It is not a mere possible doubt, because everything relating to human affairs is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge.

(13 CT 3558; 11 RT 1562.) The constitutionality of this instruction has been "conclusively settled." (*People v. Whisenhunt, supra*, 44 Cal.4th at p. 220, citing *People v. Hearon* (1999) 72 Cal.App.4th 1285, 1287.) The instruction properly guided the jury on the concepts of proof beyond a reasonable doubt and the presumption of innocence.

Cage argues the instructions on circumstantial evidence compelled the jury to find him guilty if they found an incriminatory interpretation of the evidence to be more reasonable. (AOB 186-187.) He further argues the instructions created a mandatory presumption that required the jury to accept any reasonable incriminatory interpretation of the circumstantial evidence unless he rebutted the presumption by producing a reasonable exculpatory explanation. (AOB 187-189.)

As to these specific arguments, this Court should follow its many decisions rejecting that claim. (See *People v. Parsons, supra*, 44 Cal.4th at p. 358, citing *People v. Morgan, supra*, 42 Cal.4th at p. 620; *People v. Stewart* (2004) 33 Cal.4th 425, 521; *People v. Nakahara, supra*, 30 Cal.4th at pp 705, 713-714.) As to Cage's more general claim, that all of the instructions undermined the presumption of innocence and the requirement of proof beyond a reasonable doubt, the claim fails because it relies on the faulty presumption that the jury misinterpreted the instructions. This Court

presumes that jurors followed the instructions. (See *People v. Hamilton* (2009) 45 Cal.4th 863, 937.)

Simply put, Cage's interpretation requires a distortion of the clear meaning of the challenged instructions and their context. These instructions do not even purport to address the concept of reasonable doubt; i.e., the level of confidence the jury was required to have in its overall determination regarding Cage's guilt. They deal with an entirely different subject matter. For example, the circumstantial evidence instructions speak directly and solely to the manner in which the jury was to resolve conflicting factual inferences based on circumstantial evidence.

> [T]he jury properly can find the prosecution's theory as to the interpretation of the circumstantial evidence 'reasonable' and alternate theories favorable to the defense `unreasonable,' within the meaning of these instructions [CALJIC Nos. 2.01, 8.83, 8.83.1], only if the jury is convinced beyond a reasonable doubt of the accuracy of the prosecution's theory.

(*People v. Wilson, supra*, 3 Cal.4th at p. 943.) As to the burden of proof and the concept of reasonable doubt, the jury was specifically and correctly instructed pursuant to CALJIC 2.90. Thus, Cage's claim that "it cannot seriously be maintained that a single instruction such as CALJIC 2.90 is sufficient, by itself, to serve as a counterweight to the mass of contrary pronouncements given in this case" (AOB 197-198) misses the point; the challenged instructions were not "contrary pronouncements" at all. (*Ibid.*)

Even assuming the trial court erred in giving these standard instructions, any such error was harmless and thus reversal is not required. Cage contends that erroneous instruction constitutes structural error requiring reversal. (AOB 198, citing *Sullivan v. Louisiana* (1993) 508 U.S. 275, 280-282 [113 S.Ct. 2078, 124 L.Ed.2d 182].) Cage's structural error assertion rests on the untenable premise that the circumstantial evidence instruction required that he be convicted by a standard of proof less than

beyond a reasonable doubt. (AOB 198.) However, the instruction does no such thing. (*People v. Parson, supra*, 44 Cal.4th at p. 358.) In the alternative, Cage argues that erroneous instruction with CALJIC No. 2.52 warrants reversal absent the prosecution showing the error was not harmless beyond a reasonable doubt. (AOB 198, citing *Carella v. California* (1989) 491 U.S. 263, 266-267 [109 S.Ct. 2419, 105 L.Ed.2d 218].) There is no error of a constitutional magnitude from instructing with these standard jury instructions because, as explained above, these instructions do not individually, or in combination, shift the burden of proof. Accordingly, the appropriate harmless error standard is the *Watson* standard for state law error. (See *People v. Watson, supra*, 46 Cal.2d at p. 836.)

In addition to the overwhelming evidence of Cage's guilt as set forth in Arguments II and III, the prosecutor reminded the jury that she had the burden of proof beyond a reasonable doubt. (11 RT 1576, 1601-1602.) The jury was further instructed that proof based on circumstantial evidence required a finding beyond a reasonable doubt as to each fact essential to complete a circumstance. (13 CT 3551; CALJIC 2.01.) There is simply no reasonable likelihood the jury misunderstood the burden of proof beyond a reasonable doubt. (See *People v. Watson, supra*, 46 Cal.2d at p. 836.) For the same reasons, any error was also harmless beyond a reasonable doubt. (See *Chapman v. California, supra*, 386 U.S. at 24.) Accordingly, under either standard, Cage was not prejudiced. Cage's claim should be denied.

X. THE SECTION 190.2, SUBDIVISION (A)(15) LYING-IN-WAIT SPECIAL CIRCUMSTANCE IS CONSTITUTIONAL

Cage claims that the section 190.2, subdivision (a)(15), lying-in-wait special circumstance is unconstitutional. Specifically, Cage contends that the lying-in-wait special circumstance violates the Eighth Amendment's prohibition against cruel and unusual punishment because it has been expanded so that it no longer "'genuinely narrows the class of persons

eligible for the death penalty'" and "fails to distinguish 'in a meaningful way the category of defendants upon whom capital punishment may be imposed.'" (AOB 199-207.) This Court has repeatedly rejected these claims. (*People v. Cruz, supra*, 44 Cal.4th at p. 678; *People v. Lewis* (2008) 43 Cal.4th 415, 515-516; see *People v. Morales* (1989) 48 Cal.3d 527, disapproved on another ground in *People v. Williams* (2010) 49 Cal.4th 405, 459.) Although Cage places reliance on various dissents and concurrences (see AOB 202-206), this Court has consistently and repeatedly upheld the constitutionality of the lying-in-wait special circumstance and Cage has offered no compelling justification to decide differently here.

As set forth above, "The lying in wait special circumstance requires 'an intentional murder committed under circumstances which include (1) a concealment of purposes, (2) a substantial period of watching and waiting for an opportune time to act, and (3) immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage.'" (*People v. Moon, supra*, 37 Cal.4th at p. 22, quoting *People v. Carpenter, supra*, 15 Cal.4th at p. 388.) As this Court has found numerous times, the lying-in-wait special circumstance sufficiently narrows the class of murderers eligible for the death penalty, provides a principled way of distinguishing capital murders from other first degree murders, and thus comports with the Eighth Amendment. (*People v. Lewis, supra*, 43 Cal.4th at p. 516; *People v. Moon, supra*, 37 Cal.4th at p. 44; *People v. Nakahara, supra*, 30 Cal.4th at p. 721.) Specifically, this Court held in *People v. Morales* that the lying-in-wait special circumstance is constitutionally sound as it provides a meaningful basis for distinguishing those cases that qualify for society's most severe penalty:

> [W]e believe that an intentional murder, committed under circumstances which include (1) a concealment of purpose, (2) a substantial period of watching and waiting for an opportune time to act, and (3) immediately thereafter, a surprise attack on an

> unsuspecting victim from a position of advantage, presents a factual matrix sufficiently distinct from "ordinary" premeditated murder to justify treating it as a special circumstance.

(*People v. Morales, supra*, 48 Cal.3d at p. 557.)

The distinguishing factors identified in the above cited cases that characterize the lying-in-wait special circumstance constitute "clear and specific requirements that sufficiently distinguish from other murders a murder committed while the perpetrator is lying in wait, so as to justify the classification of that type of case as one warranting imposition of the death penalty." (See *People v. Sims, supra*, 5 Cal.4th at p. 434; see also *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1148-1149.)

Cage submits no compelling reason to depart from this Court's determination that the lying-in-wait special circumstance properly narrows death-eligibility and is constitutional. As this Court succinctly stated in *People v. Nakahara* with respect to Cage's very contentions, "We have repeatedly rejected this contention, and defendant fails to convince us the matter warrants our reconsideration." (*People v. Nakahara, supra*, 30 Cal.4th at p. 721.) Here too, this Court should summarily reject Cage's claim.

XI. THE TRIAL COURT PROPERLY ADMITTED THE VICTIM IMPACT EVIDENCE AND TESTIMONY DURING THE PENALTY PHASE OF THE TRIAL

Cage claims that the trial court erred in admitting the victim impact evidence and testimony in the penalty phase of the trial because such evidence was unduly inflammatory in light of the circumstances of this case. Specifically, in a series of related arguments, Cage contends that it was improper for Clari to include her opinion of Cage in her testimony, it was improper and highly prejudicial to ask witnesses to speculate about what their responses would be if the victims had died under different circumstances, the evidence and testimony relating to the victims' life

stories and memories of them as children and at family holidays was irrelevant and highly prejudicial, Lupe Quiles' testimony was cumulative and inflammatory, and witnesses should not have been allowed to testify about the impact of the crimes on Richie. Cage claims that this testimony violated his federal constitutional rights to due process and to a reliable penalty determination, and was cumulative and unduly prejudicial under Evidence Code section 352. Cage also asserts that section 190.3, subdivision (a), which permits the prosecution to present circumstances of the crime as a factor for the jury to consider in rendering a penalty of death or life without the possibility of parole, is "void for vagueness, encourages arbitrary decision-making, and fails to provide proper notice to the defendant." Cage concludes that for all the above reasons, reversal of the penalty phase verdict is required. (AOB 207-250.) However, as neither United States Supreme Court law nor the laws of California support Cage's positions, his various contentions must be denied.

A. Factual and Procedural Background

Prior to trial, the prosecution filed its notice of intention to introduce victim impact evidence at the penalty phase of the trial, as well as notices of what evidence it would introduce under section 190.3. (1 CT 194-196, 200-201; 2 CT 299-300; 13 CT 3540-3541.) Cage filed a motion for preliminary examination on unadjudicated aggravation evidence (1 CT 222-229) and a motion to strike the notice of aggravation due to the prosecution's alleged failure to properly notify Cage of the evidence it intended to use (1 CT 231-235), both of which were opposed by the prosecution. (1 CT 237-240.)

During the penalty phase of the trial, Celena Rodriguez, Bruni's mother, Lupe Quiles, Bruni's sister, Clari, and Vallerie all testified with only a few objections made by Cage's trial counsel, none of which were

made on any of the bases on which Cage is now challenging the testimony.[27] (See 14 RT 1912, 1926-1954, 2048-2058; 15 RT 2071-2096.)

B. As Cage Did Not Object At Trial To The Victim Impact Testimony of Which He Now Complains, He Has Forfeited His Ability To Raise His Claims Of Error On Appeal

Failure to object to the victim impact evidence forfeits the issue on appeal. (*People v. Collins* (2010) 49 Cal.4th 175, 229.) To preserve a claim of error for appeal, the defendant must make a timely objection. (*People v. Zapien* (1993) 4 Cal.4th 929, 979; Evid. Code, § 353.) Here, as Cage did not object at trial to any of the victim impact testimony on any of the grounds on which he now alleges the testimony was improper, he has forfeited his ability to raise these claims on appeal.[28] (See *People v. Clark*

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[27] During Lupe Quiles' testimony, Cage's counsel objected to the prosecutor's question asking about Richie's mental health issues as calling for an "expert opinion." The trial court disagreed but asked the prosecutor to rephrase the question. The prosecutor did and counsel made no further objection. (14 RT 1948-1951.) During Clari's testimony, Cage's counsel objected on relevancy grounds to Clari's testimony that she thought that Mary Roosevelt was a co-worker of Cage's; the trial court overruled this objection. (15 RT 2081.) Cage's counsel next objected on relevancy grounds to the prosecutor's question regarding when David stopped following her around as a child; the trial court overruled the objection and allowed Clari to answer. (15 RT 2088-2089.) Finally, Cage's counsel objected to two of the prosecutor's questions to Clari on redirect examination; one on the grounds that the question was "beyond the scope" and the other on the grounds that the question was "asked and answered." The trial court overruled both objections. (15 RT 2094-2096.)

[28] Cage's pretrial motion to strike the notice of aggravation due to the prosecution's alleged failure to properly notify Cage of the evidence it intended to use (1 CT 231-235) was insufficient to preserve any claim of error on appeal because he never pressed the court for a ruling on his motion. (*People v. Danielson* (1992) 3 Cal.4th 691, 728-729, overruled on another point in *Price v. Superior Court* (2001) 25 Cal. 4th 1046, 1069; *People v. Kaurish* (1990) 52 Cal.3d 648, 680 [failure to pursue a ruling has the same effect as a failure to object]; *People v. Rhodes* (1989) 212

(continued...)

(1993) 5 Cal.4th 950, 988, fn. 13, disapproved on other grounds in *People v. Doolin, supra*, 45 Cal.4th at p. 421, fn. 22; *People v. Mayfield* (1993) 5 Cal.4th 142, 172; *People v. Fauber* (1992) 2 Cal.4th 792, 854; *Lorenzana v. Superior Court* (1973) 9 Cal.3d 626, 640.)

C. Federal And State Law Regarding Victim Impact Testimony

In *Payne v. Tennessee* (1991) 501 U.S. 808 [111 S.Ct. 2597, 115 L.Ed.2d 720], the United States Supreme Court in large part overruled *Booth v. Maryland* (1987) 482 U.S. 496 [109 S.Ct. 2207, 104 L.Ed.2d 876], which had foreclosed all evidence and argument regarding victim impact. In *Payne*, the high court adopted the reasoning of the dissent in *Booth*, which had observed that, "'the State has a legitimate interest in counteracting the mitigating evidence which the defendant is entitled to put in, by reminding the sentencer that just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family.'" (*Payne v. Tennessee, supra*, 501 U.S. at p. 825 [quoting *Booth v. Maryland, supra*, 482 U.S. at p. 517] (disn. opn. of White, J.).)

The *Payne* Court found that victim impact evidence is simply another form or method of informing the sentencing authority about the specific harm caused by the crime in question, evidence of a general type long considered by sentencing authorities. (*Payne v. Tennessee, supra*, 501 U.S. at p. 825 [quoting *Booth v. Maryland, supra*, 482 U.S. at p. 517] (disn. opn. of White, J.).) It concluded that a state may properly determine that for the jury meaningfully to assess the defendant's moral culpability and blameworthiness, it should have before it at the sentencing phase evidence

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(...continued)
Cal.App.3d 541, 554 [failing to press for a ruling acts as a waiver of issue on appeal].)

of the specific harm caused by the defendant. (*Ibid.*) Turning the victim into a faceless stranger at the penalty phase of a capital trial deprives the State of the "full moral force of its evidence and may prevent the jury from having before it all the information necessary to determine the proper punishment for a first-degree murder." (*Ibid.*) Thus, if a state chooses to permit the admission of victim impact evidence, the Eighth Amendment erects no per se bar:

> A State may legitimately conclude that evidence about the victim and about the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed. There is no reason to treat such evidence differently than other relevant evidence is treated.

(*Id.* at p. 827.)

In California, victim impact evidence and related "victim character" evidence is admissible under section 190.3, subdivision (a), which allows the jury to consider the circumstances of the capital murder when deciding whether to impose life imprisonment or the death penalty. (*People v. Robinson* (2005) 37 Cal.4th 592, 650; *People v. Panah* (2005) 35 Cal.4th 395, 494-495; *People v. Edwards, supra*, 54 Cal.3d at pp. 835-836.) Consideration of victim impact evidence as a circumstance of the crime does not render section 190.3, subdivision (a), unconstitutionally vague. (*Payne v. Tennessee, supra*, 501 U.S. at p. 826; *People v. McKinnon* (2011) 52 Cal.4th 610, 690; *People v. Boyette, supra*, 29 Cal.4th at p. 445, fn. 12.)

"The federal Constitution bars victim impact evidence only if it is so unduly prejudicial as to render the trial fundamentally unfair." (*People v. Vines* (2011) 51 Cal.4th 830, 889; *People v. Hamilton, supra*, 45 Cal.4th at p. 927.) "Unless it invites a purely irrational response, evidence of the effect of a capital murder on the loved ones of the victim and the community is relevant and admissible under section 190.3, factor (a) as a circumstance of the crime." (*Id.*)

D. The Victim Impact Testimony Was Properly Admitted Because Such Testimony Was Relevant And Not Unduly Prejudicial

Even assuming Cage's contentions are cognizable on appeal, this Court should deny them on the merits. First, Cage's argument that the trial court's admission of the complained-of victim impact testimony exceeded the scope of what is admissible as a circumstance of the crime under section 190.3, subdivision (a), because this Court's "construction of Penal Code section 190.3(a) under which the 'circumstances of the crime' encompasses virtually everything which 'materially, morally, or logically' surrounds the crime is unconstitutional" (AOB 210, 218-219) should be denied. As Cage acknowledges (AOB 210), this claim is foreclosed by this Court's holding in *People v. Brady* (2010) 50 Cal.4th 547, 574, fn. 11. (See also *People v. Carrington* (2009) 47 Cal.4th 145, 196-197; *People v. Bramit* (2009) 46 Cal.4th 1221, 1240; *People v. Zamudio* (2008) 43 Cal.4th 327, 364-365; *People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1057.) As Cage has provided no reason to reverse these holdings, this Court should decline Cage's request to revisit the issue.

1. Clari's testimony during the penalty phase was not unduly prejudicial

During Clari's testimony at the penalty phase of the trial, the prosecutor asked her whether the deaths of her mother and brother would have affected her differently if they had died in a car accident. Clari responded in the affirmative and explained, "Well, how would you feel if you brought the devil to your mom's house and he did it to her?" (15 RT 2092.)

Cage contends that this response violated "a clearly established constitutional principle . . . The witnesses are forbidden to express opinions about the crime, the defendant or the appropriate sentence." (AOB 228-231,

citing *Payne v. Tennessee, supra*, 501 U.S. at p. 830.) In *Payne v. Tennessee, supra*, 501 U.S. at p. 830, fn. 2, the Court did not address the prior holdings in *Booth* and *South Carolina v. Gathers* (1989) 490 U.S. 805 [109 S.Ct. 2207, 104 L.Ed.2d 876] that a victim's family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence are impermissible. However, this Court has held that the admission of a victim's family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence violates the Eighth Amendment (U.S. Const., 8th Amend.). (*People v. Collins, supra*, 49 Cal.4th at p. 229.) Assuming that Cage's claim is cognizable on appeal despite his failure to object to this testimony, and the single reference to Cage as the devil in the context in which the comment was made constitutes a comment on the defendant or the crime, Clari's testimony was not unduly prejudicial.

The fact that Clari was not impacted merely by the fact of the deaths of her mother and brother, but also by the knowledge that she is the one responsible for bringing Cage into their lives and home is not an opinion on the murders or the defendant but rather evidence of the impact of the crime on her. (See *People v. Pollack* (2004) 32 Cal.4th 1153, 1182.) That Clari was left with guilt over having in effect brought the "devil" into her mother's home as a result of Cage's crime, is a circumstance of the crime, as opposed to opinion about a defendant or the defendant's crime.

Even if Clari's reference to Cage as the "devil" is construed as an improper opinion on Cage, the admission of this testimony, without objection, was harmless. Given what the jury had heard about how Cage had treated Clari during the course of their long relationship, how Cage treated their children and Clari's other family members, and the extremely brutal and callous nature of the murders of Clari's mother and 16-year-old brother, it should hardly have come as a surprise to the jury to hear Clari

call him the "devil." (See *People v. Johnson* (1992) 3 Cal.4th 1183, 1246 [any error in admitting victim's family member's opinion was not likely to have affected verdict in light of callousness of crime].) Therefore, given the other properly admitted evidence, there is there is no reasonable possibility that the jury would have returned a different sentence but for Clari's reference. (*People v. Jones* (2003) 29 Cal.4th 1229, 1264, fn. 11.) Accordingly, any state or federal error from Clari's testimony was harmless. (*People v. Bennett* (2009) 45 Cal.4th 577, 605, fn. 13 [state reasonable possibility standard of prejudice same in substance and effect as the beyond a reasonable doubt standard enunciated in *Chapman v. California, supra*, 386 U.S. at p. 24].)

2. The witnesses speculation during the penalty phase regarding how they would have reacted or felt if Bruni and David had died under different circumstances was proper

During the penalty phase of the trial, the prosecutor asked Celena Rodriguez, Bruni's mother, if "the death of Bruni being taken as the hands of another impacted you differently than losing a child in a different way?" Rodriguez responded, "Well, I don't think so. I think death is the same, but – well, she didn't deserve to die in that manner." (14 RT 1932-1933.) The prosecutor asked Lupe Quiles, Bruni's sister, a similar question, asking her whether the impact of Bruni's death on her was different than losing her sister Lydia to illness. Quiles responded that the impact from Bruni's death was different because she was "healthy" and "happy" before she died unexpectedly, whereas her family had expected Lydia to die as she had been very ill. (14 RT 1953-1954.) Finally, as set forth above, the prosecutor asked Clari if the deaths of her mother and brother would have affected her differently had they died in a car accident. Clari responded "definitely." (15 RT 2092.)

Cage contends that this testimony was "speculative," "irrelevant," and "highly prejudicial." (AOB 231-235.) However, again assuming Cage's claim is cognizable on appeal despite his failure to object to any of this testimony at trial, this claim should be denied because the testimony was both proper and not unduly prejudicial. Cage complains that this testimony was unduly prejudicial and "not helpful to the task at hand" (AOB 235) but fails to cite *any* authority in support of his position that such testimony is improper.[29] Here, as "[t]he circumstances of the crime of which the defendant was convicted" (§ 190.3, subd. (a)) include, by definition, the *way* in which the victims died, any testimony regarding the impact those deaths had, even in the context of comparing it to the impacts other types of deaths may have had, was entirely proper. (See *People v. Pollock, supra*, 32 Cal.4th at p. 1182.)

However, even assuming such testimony was improper, the admission of this testimony, again without objection, was harmless. Given what the jury had heard about the horrific nature of the murders, as well as the extent of the injuries suffered by Bruni and David, it again would not have surprised the jury that the impact of these death would be different on family members than if Bruni and David had died in a car accident or after an illness. Here, again, given the other properly admitted evidence, there is no reasonable possibility that the jury would have returned a different sentence but for the above referenced testimony. (*People v. Jones, supra*,

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[29] The two out of state cases Cage cites in this section of his argument, *Young v. State* (Okla. 1999) 992 P.2d 332, 341-342, and *Copeland v. State* (Ark. 2001) 37 S.W.3d 567, 573, even as interpreted by Cage (AOB 235), fail to support his assertion that testimony regarding whether the impact that the deaths of Bruni and David had would have been different if they had died under different circumstances was improper; in fact, these cases seem to support the opposite contention.

29 Cal.4th at p. 1264, fn. 11.) Accordingly, any error is harmless. (*Chapman v. California, supra*, 386 U.S. at p. 24.)

3. The witnesses properly testified about the victims' life stories and memories of them as children and at family holidays

During the penalty phase of the trial, Rodriguez testified about Bruni's childhood in Puerto Rico, including testifying about how holidays became different and less joyful after Bruni was killed. (14 RT 1926-1932.) Clari and Vallerie testified similarly as to David's life. (15 RT 2086-2091.) Cage contends that such testimony regarding a victim's "personal history" or childhood is irrelevant and should have been excluded. (AOB 236-139.) Cage's claim should be rejected.

The victim impact evidence that was presented in this case was neither excessive nor inflammatory. In *People v. Russell* (2010) 50 Cal.4th 1228, 1265, this Court held, "Admission of testimony presented by a few close friends or relatives of each victim, as well as images of the victim while he or she was alive, has repeatedly been held constitutionally permissible." Such evidence is admissible "to demonstrate how a victim's family is impacted by the loss and to show the victim's uniqueness as an individual human being[.]" (*Ibid.* [citations and internal quotation marks omitted].)

Nothing in *Payne* limits the history of the victim to a "brief glimpse." Quoting Chief Justice Rehnquist's dissenting opinion in *Mills v. Maryland* (1988) 486 U.S. 367, 397 [108 S.Ct. 1860, 100 L.Ed.2d 384], Justice O'Connor said in her concurring opinion that

> A State may decide also that the jury should see "a quick glimpse of the life petitioner chose to extinguish," *Mills v. Maryland*, 486 U.S. 367, 397 (1988) (Rehnquist, C.J., dissenting), to remind the jury that the person whose life was taken was a unique human being.

(*Payne v. Tennessee, supra*, 501 U.S. at pp. 830-831 (conc. opn. of O'Connor, J.).) Although this statement was not part of the majority opinion and so is not precedent, the *Mills* opinion quoted by Justice O'Connor is consistent with a conclusion that victim impact evidence should not be *limited* to a "quick glimpse." Arguing that *Booth* and *Gathers* were incorrectly decided, Justice Rehnquist noted in *Mills* that "Virtually no limits are placed on the mitigating evidence a capital defendant may introduce concerning his own history and circumstances . . ." but the "quick glimpse of the life" offered in *Mills* was inadmissible under *Booth* and *Gathers*. (*Mills v. Maryland, supra,* 486 U.S. at p. 397 (dis. opn. of Rehnquist, C.J.).) Thus, the quoted language was not necessarily limiting allowable victim impact evidence to just a "quick glimpse."

Indeed, the rationale of the majority opinion in *Payne* itself supports a conclusion that evidence of the victim's personal characteristics is not limited to a "quick glimpse." (See *Payne v. Tennessee, supra*, 501 U.S. at pp. 822-823 [State should also be allowed to present evidence showing each victim's "uniqueness as an individual human being"], 825 ["the victim is an individual whose death represents a unique loss to society and in particular to his family"], 827 [State should be allowed to prevent the victim from becoming "a faceless stranger at the penalty phase of a capital trial"].)

Similarly, this Court has said emotional evidence is permissible, but "irrelevant information or inflammatory rhetoric that diverts the jury's attention from its proper role or invites an irrational, purely subjective response should be curtailed. [Citation.]" (*People v. Edwards, supra*, 54 Cal.3d at p. 836, quoting *People v. Haskett* (1982) 30 Cal.3d 841, 864; accord, *People v. Howard* (1992) 1 Cal.4th 1132, 1190-1191 [finding limitation against "inflammatory rhetoric" equivalent to federal standard of

evidence that is "so unduly prejudicial" that it renders trial fundamentally unfair].) While other states may have explicitly narrowed the scope of victim impact evidence (see AOB 236-238), this Court expressly declined to examine the "outer reaches" of such evidence (*People v. Edwards, supra*, at pp. 835-836).

Contrary to Cage's assertion and other state court opinions (AOB 236-238), the evidence of the victims' personal characteristics was not irrelevant. (Cf. *Cargle v. State* (Okla.Crim.App. 1995) 909 P.2d 806, 829-830 [evidence of victim's childhood was not relevant to contemporaneous and prospective circumstances of the murder].) Evidence of a victim's life history provides the jury with a picture of the unique life extinguished by the defendant. (*Payne v. Tennessee, supra*, 501 U.S. at p. 823.) Moreover, the victim's life history, as it connects with the victim's family and friends, is relevant to show their loss. That is, a victim's mother who has a close connection with her child may testify to the circumstances surrounding that bond because it is relevant to show the degree of harm caused by the defendant. (See *State v. Loftin* (N.J. 1996) 680 A.2d 677, 744-745 (dis. opn. of Handler, J.) ["contribution and connection" victim makes to his family is relevant victim impact evidence].) Here, evidence regarding memories of time spent with the victims, including when Bruni was a child, life stories, and holiday absences was relevant to the loss that the family of Bruni and David felt as a result of Cage's crimes. This is not a situation where the childhood of an adult victim was emphasized. (See *People v. Prince* (2007) 40 Cal.4th 1179, 1289.) Rather, the testimony was about Bruni's unique background growing up in Puerto Rico, which was relevant to convey the full impact of the crime on her family and the community. (See *People v. Virgil* (2011) 51 Cal.4th 1210, 1274-1275.)

Cage's citation to *Salazar v. State* (Tex.Crim.App. 2002) 90 S.W.3d 330 is inapposite. (AOB 238-239.) At the sentencing phase in *Salazar*, the

prosecution introduced a 17-minute videotape that was a montage of 140 photographs of the victim, nearly half of which depicted the adult victim as he was as an infant, toddler, or small child, set to music from the film Titanic. (*Salazar v. State, supra*, 90 S.W.2d at pp. 332-333, 337.) The reviewing court found the probative value of the evidence was minimal and the risk of unfair prejudice high. (*Id.* at pp. 337-339.) By contrast, the reviewing court in *Hicks v. State* (Ark, 1997) 940 S.W.2d 855, 855-857, upheld the admission of a 14-minute videotape, which included approximately 160 photographs of the victim at various stages of his life, his family and friends, where the videotape was narrated by the victim's weeping brother.

Unlike *Salazar*, and far less inflammatory than the evidence admitted in *Hicks*, the victim impact evidence here did not unduly dwell on Bruni or David as a child, even though David was only 16 years old when he died. Nor did it include such a large number of photographs, set to music designed to inflame. In fact, only three exhibits consisting of pictures (Exhs. 151, 152, 155) were introduced. (14 RT 1926-1932.) Rather, the evidence here, largely testimony, explained some of the facts of Bruni's life, and to a lesser extent, David's life. This evidence was far more probative of the victims' uniqueness, and the impact on the victims' family, than the evidence in *Salazar*. Moreover, the risk of undue prejudice was not nearly as high. (See *People v. Kelly, supra*, 42 Cal.4th at p. 795; see also *People v. Prince* (2007) 40 Cal.4th 1179, 1289 [photographs do not entail the same risk of injecting the proceedings with a legally impermissible level of emotion].)

Other states have said that victim impact and character evidence can become prejudicial "through sheer volume." (*Mosley v. State* (Tex.Crim.App. 1998) 983 S.W.2d 249, 263; see also *State v. Bernard* (La. 1992) 608 So.2d 966, 971.) But the volume of the victim character

evidence relating to the life stories of Bruni and David was not "so unduly prejudicial" as to deny a fair trial. Even if some evidence was cumulative, it was not particularly inflammatory. Thus, evidence of the victim's life history was properly admitted.

Here, for the same reasons as set forth above, even assuming such testimony was improper, the admission of this testimony, again without objection, was harmless under any standard. (*People v. Jones, supra*, 29 Cal.4th at p. 1264, fn. 11; *Chapman v. California, supra*, 386 U.S. at p. 24.)

4. The testimony of Lupe Quiles was proper

Lupe Quiles testified at the penalty phase regarding what happened when she learned of the deaths of Bruni and David, detailing the initial confusion regarding the circumstances of their deaths and her reactions to learning how Bruni and David had been killed. (14 RT 1938-1940.) She also described seeing the crime scene for the first time and its effect on her, including her difficulty in cleaning Bruni's house and finding pieces of Bruni's bones and brain matter. (14 RT 1940-1944) From the record, it is clear that Quiles had some difficulty testifying as to these matters and at times became emotional, at one point necessitating a recess in the proceedings. (14 RT 1942.)

Although Cage acknowledges that this Court has repeatedly held that emotional testimony is not necessarily inflammatory (see *People v. Edwards, supra*, 54 Cal.3d at p. 836; see also *People v. Verdugo* (2010) 50 Cal.4th 263, 298 [no error despite victim's mother crying on stand]; *People v. Jurado* (2006) 38 Cal.4th 72, 132-134 [no error although testimony from family members caused some jurors to cry]), he claims that this testimony of Lupe Quiles was "cumulative and inflammatory." (AOB 239-245.) Not so.

There was nothing unduly inflammatory or emotional about Lupe Quiles' testimony. Cage's crime deeply affected the lives of the witnesses

who testified, including Bruni's sister. Victim impact evidence is permissible not merely to show that the defendant killed a human being, in the abstract, that caused a loss to some person, without any details. Rather, the victim impact evidence is to give a face to the "faceless stranger" of the victim and demonstrate the degree of the harm caused by the defendant. The prosecution was entitled to show how and why the survivor's were affected by Cage's crimes because it was a relevant circumstance of the crimes. (See *People v. Dykes* (2009) 46 Cal.4th 731, 786.) [Victim-impact evidence is relevant to the penalty determination because such evidence provides the jury with an idea who the victim was and of the impact of his or her death on family and close friends].)

Where a defendant causes a great harm or loss, there is no rational reason for limiting evidence that demonstrates that harm. In criminal law, the appropriate penalty is often based on the degree of harm caused by the defendant. (*Payne v. Tennessee, supra*, 501 U.S. at p. 819 ["the assessment of harm caused by the defendant as a result of the crime charged has understandably been an important concern of the criminal law, both in determining the elements of the offense and in determining the appropriate punishment"].) The emotional evidence admitted here, even if some of it was cumulative, properly demonstrated the harm caused by Cage. This was proper. (*People v. Dykes, supra*, 46 Cal.4th at p. 785 [fact victim's mother cried during her testimony did not render it inflammatory as her tears reflected a normal human response to the loss of a child that the jury would reasonably expect a mother to experience].)

Here, too, even assuming such testimony was improper, the admission of this testimony, again without objection, was harmless under any standard. Quiles' testimony reflected a normal human response to the loss of a sister and nephew, a response that the jury would reasonably expect a close relative to experience. Therefore, for the same reasons as set forth above,

any error was harmless. (*People v. Jones, supra*, 29 Cal.4th at p. 1264, fn. 11; *Chapman v. California, supra*, 386 U.S. at p. 24.)

5. Witnesses properly testified about the impact that the murders of Bruni and David had on Richie

Although Richie, Bruni's oldest son, testified in the guilt phase of the trial (6 RT 862-871), he did not testify in the penalty phase. However, Quiles testified as to how dependent Richie had been on Bruni and how her death had affected his functioning. Specifically, she testified that Richie had to be put in a mental hospital and that his behavior had become unpredictable and aggressive. (14 RT 1948-1950.) Clari also testified that, after the deaths of Bruni and David, Richie's behavior had become aggressive and he had to be placed in a group home. (15 RT 2094-2095.)

Cage contends that this testimony, regarding the impact that the murders had on Richie, was improper opinion evidence and "sheer speculation," and, because Richie did not testify in the penalty phase, his counsel was unable to test the accuracy of these statements. (AOB 245-250.) This contention should be rejected.

In *People v. Panah, supra*, 35 Cal.4th at pp. 494-495, this Court upheld the admission of testimony by the victim's family that the victim's brother had begun doing poorly in school and begun using drugs and alcohol after his brother's death. In rejecting the defendant's constitutional arguments, this Court held, "There is no requirement that family members confine their testimony about the impact of the victim's death to themselves, omitting mention of other family members." (*Id.* at p. 495.) Additionally, the "'residual and lasting impact'" the victim's brother "'continued to experience'" as a result of his sister's murder was properly admitted. (*Ibid.*) "It is common sense that surviving families would suffer repercussions from a . . . [person's] senseless . . . murder long after the crime is over." (*People v. Brown* (2003) 31 Cal.4th 518, 572-573; see also *People v.*

Hamilton, supra, 45 Cal.4th at p. 927 [victim-impact evidence not restricted to the "immediate injurious impact" of the murder and "logical to conclude that the psychological and physical effects of a violent murderous assault... would endure and were relevant as direct results of the defendant's crimes."]; *People v. Zamudio, supra*, 43 Cal.4th at p. 368 [testimony by victims' grandchildren regarding "personal difficulties" following their murders was properly admitted victim-impact evidence of the emotional trauma suffered by family and close friends of the victims as a result of their death]; *People v. Taylor, supra*, 26 Cal.4th at pp. 1171-1172 [evidence directed towards showing "the impact of the defendant's acts on the family of his victims is admissible at the penalty phase of capital trials"].)

Although Cage attempts to distinguish this case from *People v. Panah* on the basis that the jury in *Panah* was specifically instructed that "it could 'consider only such harm as was directly caused by defendant's act'" and that this type of testimony was briefer there than in the present case (AOB 249-250), Cage fails to recognize that the jury in the present case *was* instructed as to what type of evidence it could consider, an instruction the prosecutor emphasized during her closing argument. (13 CT 3601-3602; CALJIC No. 8.85 [detailing the factors the jury could consider in determining penalty]; 16 RT 2225-2238 [prosecutor's closing argument regarding factors the jury could rely on in making penalty determination].) Furthermore, the testimony at issue *was* brief, taking up less than 8 pages of transcript. (14 RT 1947-1951, 1953; 15 RT 2094-2095.) As such, the holding of *Panah* is applicable here. As this Court has made plain, "'[t]here is no requirement that family members confine their testimony about the impact of the victim's death to themselves, omitting mention of other family members.'" (*People v. Scott, supra*, 52 Cal.4th at p. 495, quoting *People v. Panah, supra*, 35 Cal.4th at p. 495.)

The jury is entitled to know "the full extent of the harm caused by the crime, including its impact on the victim's family and community." (*Payne v. Tennessee, supra*, 501 U.S. 808, 830 (conc. opn. of O'Connor, J.).) Murderers know their victims "probably ha[ve] close associates, 'survivors,' who will suffer harms and deprivations from the victim's death . . . . [T]hey know that their victims are not human islands, but individuals with parents or children, spouses or friends or dependents."[30] (*Id.* at p. 838 (conc. opn. of Souter, J.).) Accordingly, nothing precluded the witnesses in this case from also testifying to the effects the murders of Bruni and David had on Richie – especially since Richie is the one who found the bodies of his mother and brother. (See *People v. Mitcham* (1992) 1 Cal.4th 1027, 1062 [trial court properly permitted witness to testify to length of extensive hospitalization for psychiatric problems, two nervous breakdowns, suicide attempts, phobias of entering small stores and continuing inability to work].)

Here, too, even if this testimony was admitted in error, without objection to the substance of the testimony, any such error was harmless. The jury heard Richie testify during the guilt phase of the trial and thus knew how upset he still was about the murders of his mother and brother. (6 RT 862-871.) In addition, while the testimony regarding the impact the murders had on Richie was obviously emotional, it was not, given the evidence the jury properly heard, surprising or shocking. (*People v. Sanders* (1992) 11 Cal.4th 475, 550.) Furthermore, given the other

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[30] This is especially true in the present case, as Cage knew his victims and knew how their death would impact their family. Although, the testimony would still have been admissible victim-impact evidence since there is no requirement limiting victim-impact evidence to matters within the defendant's knowledge at the time of his crimes. (*People v. Carrington, supra*, 47 Cal.4th at pp. 196-197; *People v. Pollock* (2004) 32 Cal.4th 1153, 1183.)

properly admitted evidence, there is no reasonable possibility that the jury would have returned a different sentence but for two witnesses references to how the murders impacted the behavior of Richie. (*People v. Jones, supra*, 29 Cal.4th at p. 1264, fn. 11; *Chapman v. California, supra*, 386 U.S. at p. 24.) Accordingly, Cage's claim should be denied.

E. Even If Cage's Claim That The Now Complained Of Victim Impact Evidence Was Improperly Admitted Is Cognizable On Appeal, And Further Assuming That Such Testimony Was Improperly Admitted, Any Error Was Harmless

Cage claims the 'errors" in admitting victim impact evidence were prejudicial. (AOB 209-210, 250.) As set forth above, any erroneous admission of victim impact evidence is subject to harmless error analysis. (See *People v. Johnson, supra*, 3 Cal.4th at p. 1246 [any error in admitting victim's family member's opinion was not likely to have affected verdict in light of callousness of crime].)

Here, for the reasons set forth above in response to each sub-claim, there is no reasonable possibility that the jury would have returned a different sentence but for the "erroneous admission" of any victim impact evidence. (*People v. Jones, supra*, 29 Cal.4th at p. 1264, fn. 11.) For the same reasons, any federal constitutional error was harmless beyond a reasonable doubt. (*Chapman v. California, supra*, 386 U.S. at p. 24.)

The challenged victim impact evidence expressed sadness, not outrage over the victims' deaths, and there was no "clarion call for vengeance." (*People v. Kelly, supra*, 42 Cal.4th at p. 797.) Though they may never be influenced by passion or prejudice, in considering the impact of a defendant's crimes, jurors may "'exercise sympathy for the defendant's murder victims and . . . their bereaved family members.'" (*People v. Zamudio, supra*, 43 Cal.4th at pp. 368-369 [quoting *People v. Pollock, supra*, 32 Cal.4th at p. 1195].)

However, even if some portion of the victim impact evidence was inadmissible, the vast majority of the evidence was proper. The evidence in this case properly showed each "victim's 'uniqueness as an individual human being,' whatever the jury might think the loss to the community resulting from his death might be." (*Payne v. Tennessee, supra*, 501 U.S. at p. 819.) "Courts have always taken into consideration the harm done by the defendant in imposing sentence," and "[v]ictim impact evidence is simply another form or method of informing the sentencing authority about the specific harm caused by the crime in question . . . ." (*Id.* at p. 825.) The evidence adduced in this case was representative of the harm caused by Cage's crime. Any limited portions of the evidence that were improper would not have been significant in light of the abundance of properly admitted evidence.

Moreover, even if the victim impact evidence should have been excluded *entirely*, any error was harmless. Cage was convicted of two counts of first degree murder with personal use of a firearm, and the jury found true the special circumstances of lying in wait and multiple murder. In both the guilt phase and the penalty phase, the jury heard Cage's long history of committing violent acts against his family. [See 13 CT 3601; CALJIC No. 8.85 [instructing the jury that in determining a penalty it can "consider all of the evidence which has been received during any part of the trial"].) While Cage presented some limited mitigating evidence from his mother and other biological daughter, the aggravating evidence of the brutality and circumstances of the murders and violent history was overwhelming. Thus, any error was harmless beyond a reasonable doubt in light of the circumstances surrounding the murders of Bruni and David, and the balance of the circumstances in aggravation reflecting the impact of the victims' murders on their families.

XII. THE TRIAL COURT PROPERLY DENIED CAGE'S REQUESTS TO MODIFY CALJIC NO. 8.88

Cage claims that the trial court denied his constitutional rights to due process of law and a fair and reliable penalty determination by refusing his three requests for modifications to CALJIC No. 8.88. Specifically, Cage contends that because his three proposed modifications "correctly stated the law," the trial court's denial of his requests constituted prejudicial error. (AOB 251-256.) As Cage's proposed modifications to CALJIC No. 8.88 were duplicative to what was already stated in CALJIC No. 8.88, the trial court correctly denied Cage's requests and Cage's claim should be denied.

After the penalty phase evidence was introduced and arguments of counsel heard, the trial court instructed the jury with, among other instructions, CALJIC No. 8.88:

> It is now your duty to determine which of the two penalties, death or imprisonment in the state prison for life without possibility of parole, shall be imposed on the defendant.
>
> After having heard all of the evidence, and after having heard and considered the arguments of counsel, you shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed.
>
> An aggravating factor is any fact, condition or event attending the commission of a crime which increases its severity or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself. A mitigating circumstance is any fact, condition or event which does not constitute a justification or excuse for the crime in question, but may be considered as an extenuating circumstance in determining the appropriateness of the death penalty.
>
> The weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side of an imaginary scale, or the arbitrary assignment of weights to any of them. You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the

> various factors you are permitted to consider. In weighing the various circumstances you determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances. To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole.

(13 CT 3603-3604.)

Cage had requested three modifications to CALJIC No. 8.88. First, Cage requested that the following language be added to CALJIC No. 8.88:

> In weighing the aggravating and mitigating factors, you are not merely to count numbers on either side. You are instructed, rather, to weigh and consider the factors. You may return a verdict of life imprisonment without possibility of parole even though you should find the presence of one or more aggravating circumstances.

(13 CT 3596.) Second, Cage requested that the term "totality" be removed from the instruction asserting that the term "improperly implies that one mitigating factor may not outweigh all factors in aggravation." (13 CT 3597.) Third, Cage requested that the following language be added to CALJIC No. 8.88: "One mitigating circumstance may be sufficient for you to return a verdict of life imprisonment without possibility of parole." (13 CT 3598.)

During the discussion regarding penalty phase jury instructions, the trial court denied Cage's first requested addition as it found that it was "covered by [CALJIC] 8.88" and that "[CALJIC] 8.88 is much clearer than the language from" Cage's cited case. (16 RT 2203.) The trial court also denied Cage's second proposed modification, to remove the word "totality" from CALJIC No. 8.88, finding that because the standard instruction states that the jury is "free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to

consider," the word "totality" does not improperly imply that one mitigating factor may not outweigh all aggravating factors. (16 RT 2203-2204.) As to Cage's third proposed modification, the trial court agreed that it was a correct statement of the law. However, it found that the wording in CALJIC No. 8.88 instructing the jury that "To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole" adequately informed the jury that one mitigating circumstance may be sufficient to return a life without parole verdict. (16 RT 2204-2205.)

Although Cage's proposed additions and modification to CALJIC No. 8.88 may have been accurate statements of the law, and other courts may have used instructions similar to Cage's proposed language, a trial court has no obligation to give special instructions that are repetitious of other properly given instructions. (*People v. Benson* (1990) 52 Cal.3d 754, 805, fn. 12; *People v. Wright* (1988) 45 Cal.3d 1126, 1134.) That is to say, a trial court is not required to give defense-requested pinpoint instructions which simply repeat or paraphrase the applicable CALJIC instructions, for such special instructions are simply superfluous. (*People v. Sanders, supra*, 11 Cal.4th at pp. 560-561.)

Here, the trial court instructed the jury with CALJIC No. 8.88. This Court has repeatedly held that "CALJIC No. 8.88 provides constitutionally sufficient guidance to the jury on the weighing of aggravating and mitigating factors." (*People v. Howard* (2010) 51 Cal. 4th 15, 39; see also, e.g., *People v. Butler* (2009) 46 Cal.4th 847, 873–875; *People v. Geier, supra*, 41 Cal.4th at pp. 618–619.) Therefore, because CALJIC No. 8.88 properly informed the jury of its duty in weighing aggravating and mitigating factors, the trial court correctly denied as duplicative Cage's proposed changes to this standard instruction because those proposed

modifications attempted only to *further* clarify the jury's duty in this regard.[31]

In any event, even if the trial court erred in denying Cage's request to modify CALJIC No. 8.88, any such error was harmless. Given the overwhelming evidence of aggravating circumstances, and the paucity of mitigating circumstances, any error was harmless because even if the jury was instructed as Cage had requested, there is no reasonable possibility that he would have received a more favorable outcome. For the same reasons, any federal constitutional error was harmless beyond a reasonable doubt. (*Chapman v. California, supra*, 386 U.S. at p. 24.)

XIII. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY WITH CALJIC NO. 8.88

In an argument related to the preceding claim, Cage claims that the use of CALJIC No. 8.88 violated his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments. Specifically, Cage contends that his death judgment must be reversed because (1) CALJIC No. 8.88 improperly reduced the prosecution's burden of proof below the level required by section 190.3; and (2) CALJIC No. 8.88 incorrectly described the weighing process applicable to aggravating and mitigating circumstances.[32] (AOB

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[31] Insofar as Cage's proposed modifications included wording that would urge the jury to either interpret the evidence or apply the law *in a particular way* (i.e., "You may return a verdict of life imprisonment without the possibility of parole even though you should find the presence of one or more aggravating factors" (13 CT 3596) and "One mitigating circumstance may be sufficient for you to return a verdict of life imprisonment without the possibility of parole" (13 CT 3598)), such modifications were also argumentative and, thus, properly denied. (See *People v. Cook* (2007) 40 Cal.4th 1334, 1362 ["the court has no duty to give argumentative, duplicative, incomplete, or erroneous instructions. [Citations.]"].)

[32] Although Cage references several other potential contentions in his "Introduction and Overview" for this claim (AOB 256-257), the only

(continued...)

256-265.) As Cage acknowledges, this Court had repeatedly rejected such challenges, but claims these cases were incorrectly decided and should be reconsidered. (AOB 257-258, fn. 85, citing *People v. Coffman* (2004) 34 Cal.4th 1, 124; *People v. Ochoa* (1998) 19 Cal.4th 353, 457-458; *People v. Duncan* (1991) 53 Cal.3d 955, 978; *People v. Berryman* (1993) 6 Cal.4th 1048, 1099-1100.) As Cage fails to provide any good reason for this Court to reconsider its prior holdings, his claims should be similarly rejected.

As set forth in the previous argument, Cage proposed several modifications to CALJIC No. 8.88. (13 CT 3596-3598.) The trial court denied Cage's requests and instructed the jury with CALJIC No. 8.88, the standard instruction describing the duties of the jury at the penalty phase. (13 CT 3603-3604; 16 RT 2203-2205.)

Cage first argues that the language in CALJIC No. 8.88 "informs the jury merely that the death penalty may be imposed if aggravating circumstances are 'so substantial' in comparison to mitigating circumstances that the death penalty is warranted." (AOB 259.) Cage maintains that such language fails to conform to the requirements of section 190.3 and "would plainly permit the imposition of a death penalty whenever aggravating circumstances were 'of substance' or 'considerable,' even if they were outweighed by mitigating circumstances." (AOB 258,

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(...continued)
two arguments he actually makes are the two set forth above. Accordingly, any other claims are not properly presented on appeal and should be rejected on that basis. (See Cal. Rules of Court, rule 14(a)(1)(B); *People v. Gray, supra*, 37 Cal.4th at p. 198 [appellate brief must support each point with argument and, if possible, citation of authority]; *People v. Turner, supra*, 8 Cal.4th at p. 214, fn. 19 [perfunctory assertion of error without development or a clear indication they are intended to be discrete contentions are not properly presented and will be rejected on that basis].)

259.) This identical contention was rejected by this Court in *People v. Duncan, supra*, 53 Cal.3d at p. 978:

> Defendant contends that the instruction given (CALJIC No. 8.84.2, 1986 rev.) was invalid because it did not state the following language from section 190.3: "If the trier of fact determines that the mitigating circumstances outweigh the aggravating circumstances, the trier of fact shall impose a sentence of confinement in state prison for a term of life without the possibility of parole."
>
> His contention fails. In *People v. Brown, supra*, 40 Cal.3d 512, we noted that instruction in the terms of the statute had the potential to confuse jurors and thus suggested the adoption of an instruction like the one given here. (*Id.* at p. 545, fn. 19.) The instruction given informed the jurors that to return a verdict of death they must be persuaded that the "aggravating evidence is so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." We do not think that there is a reasonable likelihood that any of the jurors would have concluded that, even if the mitigating factors outweighed those in aggravation, the "so substantial in comparison with" language nevertheless might demand imposition of the higher punishment. (See *Boyde v. California* (1990) 494 U.S. 370, ___ [108 L.Ed.2d 316, 329, 110 S.Ct. 1190].) The instruction clearly stated that the death penalty could be imposed only if the jury found that the aggravating circumstances outweighed mitigating. There was no need to additionally advise the jury of the converse (i.e., that if mitigating circumstances outweighed aggravating, then life without parole was the appropriate penalty).

Therefore, this Court in *Duncan* expressly rejected Cage's claim. (See *People v. Hughes* (2002) 27 Cal.4th 287, 405, and *People v. Jackson, supra*, 13 Cal.4th at p. 1443 [both cases citing *Duncan* and expressly rejecting the claim that CALJIC No. 8.88 is flawed because it does not inform the jury that it is required to return a verdict of life imprisonment without the possibility of parole if it finds the aggravating factors do not outweigh the mitigating factors]; see also *People v. Abilez, supra*, 41 Cal.4th at p. 531[CALJIC No. 8.88 did not "improperly reduce the

prosecution's burden of proof" because the prosecution does not bear such a burden at the penalty phase].) Thus, as Cage simply repeats a claim that has been repeatedly rejected, his claim here should also be rejected.

Likewise, Cage's second complaint about CALJIC No. 8.88 - that it incorrectly describes the weighing process applicable to aggravating and mitigating factors (AOB 260-264) - has repeatedly been rejected by this Court. This Court has explained that the standard CALJIC penalty instructions, such as CALJIC No. 8.88, "'are adequate to inform the jurors of their sentencing responsibilities in compliance with federal and state constitutional standards.'" (*People v. Gurule, supra*, 28 Cal.4th at p. 659, quoting *People v. Barnett, supra*, 17 Cal.4th at pp. 1176-1177; see also *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1192; *People v. Tuilaepa* (1992) 4 Cal.4th 569, 593; *People v. Raley, supra*, 2 Cal.4th 870, 919-920.) In this regard, CALJIC No. 8.88 properly informed the jury that "[t]o return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." (13 CT 3603-3604.) This Court has also held that CALJIC No. 8.88 properly describes the weighing process as "'merely a metaphor for the juror's personal determination that death is the appropriate penalty under all the circumstances.'" (*People v. Jackson, supra*, 13 Cal.4th at p. 1244, quoting *People v. Johnson, supra*, 3 Cal.4th at p. 1250; see also *People v. Gutierrez, supra*, 28 Cal.4th at p. 1161; *People v. DePriest* (2007) 42 Cal.4th 1, 60 [CALJIC No. 8.88 "does not prevent either the proper weighing of aggravating and mitigating factors, or an individualized sentencing determination"]; *People v. Berryman, supra*, 6 Cal.4th at pp. 1099-1100 [CALJIC 8.88 is not death oriented and adequately conveys that a single mitigating factor may be sufficient to outweigh all aggravating factors]; *People v. Hawkins* (1995) 10 Cal.4th 920, 965-966 [terms "aggravating"

and "mitigating" need no definition].) Cage's second complaint concerning CALJIC No. 8.88 should therefore also be rejected.

XIV. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY WITH CALJIC NOS. 8.85 AND 8.87

Cage claims the "trial court failed to ensure impartiality and parity between CALJIC instructions 8.85 and 8.87 regarding jury non-unanimity, thus skewing the instructions toward a death verdict and violating Cage's Eighth Amendment right to a fair and reliable penalty determination." (AOB 266.) Specifically, Cage contends that the non-unanimity language in CALJIC No. 8.87 regarding a juror's consideration of prior unadjudicated criminal activity, without similar language in CALJIC No. 8.85 regarding the factors to consider in determining the appropriate penalty, skewed the instructions in favor of a death verdict. (AOB 266-268.) As stated by Cage, ". . . the language that 'it is not necessary for all jurors to agree' should be deleted from CALJIC sua sponte, or alternatively, the same non-unanimity language should be added to the instructions defining the burden of proof regarding mitigating evidence (CALJIC Nos. 8.85, 8.88) so that the instructions are symmetrical." (AOB 267-268.) This contention is meritless.

At the penalty phase of the trial, the trial court instructed the jury with CALJIC No. 8.85, which mirrored the relevant portion of section 190.3:

> In determining which penalty is to be imposed, you shall consider all of the evidence which has been received during any part of the trial of this case. You shall consider, take into account and be guided by the following factors, if applicable:
>
> (a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true.
>
> (b) The presence or absence of criminal activity by the defendant, other than the crime[s] for which the defendant has been tried in the present proceedings, which involved the use or

attempted use of force or violence or the express or implied threat to use force or violence.

(c) The presence or absence of any prior felony conviction, other than the crimes for which the defendant has been tried in the present proceedings.

(d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(e) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.

(f) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct.

(g) Whether or not the defendant acted under extreme duress or under the substantial domination of another person.

(h) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or the effects of intoxication.

(i) The age of the defendant at the time of the crime.

(j) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.

(k) 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 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. Sympathy for the family of the defendant is not a matter that you can consider in mitigation. Evidence, if any, of the impact of an execution on family members should be disregarded unless it illuminates some positive quality of the defendant's background or character.

(13 CT 3602.) The trial court also instructed the jury with, among other instructions, CALJIC No. 8.87:

> Evidence has been introduced for the purpose of showing that the defendant has committed the following criminal acts: assault with force likely to produce great bodily injury, assault with a deadly weapon, spousal abuse, kidnapping, child abuse, resisting arrest and possession of a deadly or dangerous weapon which involved the express or implied use of force or violence of the threat of force or violence. Before a juror may consider any criminal acts as an aggravating circumstance in this case, a juror must first be satisfied beyond a reasonable doubt that the defendant did in fact commit the criminal acts. A juror may not consider any evidence of any other criminal acts as an aggravating circumstance.
>
> It is not necessary for all jurors to agree. If any juror is convinced beyond a reasonable doubt that the criminal activity occurred, that juror may consider that activity as a fact in aggravation. If a juror is not so convinced, that juror must not consider that evidence for any purpose.

(13 CT 3603.)

Here, there was no need for the trial court to modify CALJIC No. 8.85 or CALJIC No. 8.88 with non-unanimity language similar to the language in CALJIC No. 8.87. This Court has squarely held that there is no requirement that the jury be instructed that unanimity is not necessary for consideration of mitigating evidence. (*People v. Breaux* (1991) 1 Cal.4th 281, 314-315; see also *People v. Samoya* (1997) 15 Cal.4th 795, 862.) Indeed, in *Breaux*, this Court upheld the trial court's rejection of a proposed defense instruction to the effect that unanimity was not a requisite to consideration of mitigating evidence. Thus, there was no need for the trial court to modify CALJIC No. 8.85 or CALJIC No. 8.88 with non-unanimity language in the manner suggested by Cage.

In addition, this Court has consistently held that the jury need not unanimously find other crimes true beyond a reasonable doubt before

individual jurors may consider them. (*People v. Foster* (2010) 50 Cal.4th 1301, 1364; *People v. Anderson* (2001) 25 Cal.4th 543, 590 and cases cited therein.) As this Court stated in *Anderson*, "We have consistently applied the rule that while an individual juror may consider violent 'other crimes' in aggravation only if he or she deems them established beyond a reasonable doubt, the jury need not unanimously find other crimes true beyond a reasonable doubt before individual jurors may consider them." (*People v. Anderson, supra*, 25 Cal.4th at p. 590.) Since CALJIC No. 8.87 is a correct statement of the law, there was no need for the trial court to modify the instruction by deleting the non-unanimity language in the manner suggested by Cage.

Accordingly, Cage's claim must be rejected.

XV. THE TRIAL COURT PROPERLY REFRAINED FROM INSTRUCTING THE JURY ON THE "PRESUMPTION OF LIFE"

Cage claims that the trial court's "failure" to instruct the jury on the "presumption of life" violated his rights under the Fifth, Eighth, and Fourteenth Amendments. Specifically, Cage contends that the jury should have been instructed at the penalty phase of the trial that there is a "presumption of life" because this concept correlates to the "presumption of innocence" at the guilt phase. (AOB 268-270.) Cage recognizes this Court has rejected similar arguments in *People v. Howard, supra*, 51 Cal.4th 15, at pages 38-39, *People v. Jennings* (2010) 50 Cal.4th 616, 689, and *People v. Arias* (1996) 13 Cal.4th 92, 190,[33] but insists these cases were wrongly decided because California's death penalty scheme does not properly limit death eligibility as it "gives prosecutor unbridled discretion to seek the death penalty, fails to narrow the class of death eligible murderers, fails to

[33] See also *People v. Abilez, supra*, 41 Cal. 4th at pages 472, 532; *People v. Perry, supra*, 38 Cal.4th at page 321; *People v. Kipp, supra*, 26 Cal.4th at pages 1000, 1137.

require written findings regarding aggravating factors, and fails to require proportionality review."[34] (AOB 269-270.) As Cage did not request at trial that the trial court instruct the jury on the "presumption of life," he has forfeited his ability to raise this claim on appeal. In any event, Cage has not presented any compelling reason for this Court to revisit its previous holdings. Thus, Cage's claim must be denied.

Here, Cage did not ask the trial court to instruct the jury that the law required its deliberation be made in consideration of a "presumption of life" standard of review. His failure to request that the jury be so instructed forfeits this issue on appeal. Had Cage timely objected to the absence of a "presumption of life" instruction, the trial court and counsel could have discussed the reasons for the court omitting such an instruction, including the fact federal constitutional law does not require such an instruction to be given. Cage's failure to raise a timely objection prevented the trial court from presenting on the record any and all reasons it may have had for not including that instruction among all the instructions given. Therefore, notwithstanding Cage's contention that the "presumption of life" instruction is constitutionally mandated (AOB 268-269), his failure to object to the penalty phase instructions not including a "presumption of life" instruction bars him from raising this issue for the first time on appeal. (See *People v. Rogers, supra*, 39 Cal.4th at p. 877; see also *People v. Delgado, supra*, 5 Cal.4th at p. 331; *People v. Medina, supra*, 51 Cal.3d at p. 902.)

Even if cognizable on appeal, Cage's claim fails. As set forth above, this Court has repeatedly held that neither state nor federal law require a

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[34] Cage also acknowledges that this Court has rejected the argument that California's death penalty scheme does not properly limit the death penalty. (AOB 270, fn. 19, citing *People v. Foster* (2010) 50 Cal.4th 1301, 1367-1368; *People v. Brady, supra*, 50 Cal.4th at pp. 589-590.)

trial court give an instruction on the "presumption of life" and Cage does not provide this Court with legal authority or compelling reason to reverse its earlier decisions. Although not articulated in the federal Constitution, the United States Supreme Court has long declared the presumption of innocence a fundamental principle of our system of criminal justice. (*Estelle v. Williams* (1976) 425 U.S. 501, 503 [96 S.Ct. 1691, 48 L.Ed.2d 126], citing *Coffin v. United States* (1895) 156 U.S. 432, 453 [15 S.Ct. 394, 39 L.Ed.481].) However, unlike the "presumption of innocence," Cage's proffered "presumption of life" principle has neither been declared a fundamental principle of the criminal justice system by the United States Supreme Court nor it is entitled to the status of a "fundamental principle" by this Court. Cage's mere claim the "presumption of life" is constitutionally required, without more, should be rejected and his request this issue be reviewed for the first time on appeal should be barred.

Furthermore, Cage does not provide this Court legal authority or compelling reason to reverse its earlier decisions that reject the argument that a penalty phase jury should be instructed its deliberation should take into account a presumption of life standard of review. As this Court earlier ruled in *Arias*, the state may otherwise structure the penalty determination as it sees fit, so long as it satisfies the requirement of individualized sentencing by allowing the jury to consider all relevant mitigating evidence. (*People v. Arias, supra*, 13 Cal.4th at p. 190, referring to *Tuilaepa v. California* (1994) 512 U.S. 967, 972 [114 S.Ct. 2630, 129 L.Ed.2d 750], *Boyde v. California* (1990) 494 U.S. 370, 377 [upholding 1978 law's provision that sentencer "shall" impose death if aggravation outweighs mitigation], and *Zant v. Stephens* (1983) 462 U.S. 862, 875 [103 S.Ct. 2733, 77 L.Ed.2d 235] [once defendant is death eligible, statute may give jury "unbridled" discretion to apply aggravating and mitigating sentencing factors].) Following that analysis, this Court has subsequently rejected

similar claims of error and reaffirmed its decision that a trial court need not give a "presumption of life" instruction. (See, e.g. *People v. Young* (2005) 34 Cal.4th 1149, 1233; *People v. Prieto* (2003) 30 Cal.4th 226, 271; *People v. Kipp, supra*, 26 Cal.4th at p. 1137; *People v. Carpenter* (1999) 21 Cal.4th 1016, 1064.) A similar conclusion should be reached here.

Accordingly, Cage's claim should be rejected.

XVI. THERE WAS NO CUMULATIVE ERROR

Cage claims that his convictions and sentence must be reversed due to the cumulative effects of the errors in this trial. Specifically, Cage contends that even if individual errors occurring during his trial did not warrant reversal of his convictions and sentence, the combination of these "errors" during both phases of his trial violated his constitutional rights. (AOB 270-272.) Here, because no error was committed or, to the extent error did occur, because Cage has failed to demonstrate prejudice, reversal of Cage's convictions and death verdict is not warranted.

Even a capital defendant is entitled only to a fair trial, not a perfect one. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1009.) Where few or no errors have occurred, and where any such errors found to have occurred were harmless, the cumulative effect does not result in the substantial prejudice required to reverse a defendant's conviction. (*People v. Price, supra*, 1 Cal.4th at p. 465.) The essential question is whether the defendant's guilt was fairly adjudicated, and in that regard a court will not reverse a judgment absent a clear showing of a miscarriage of justice. (*People v. Hill* (1998) 17 Cal.4th 800, 844; see also *People v. Cunningham*, supra, 25 Cal.4th at p. 1009.) For the reasons explained above, there was no error in this case, and even if there was error it was harmless. (See *People v. Seaton, supra*, 26 Cal.4th at pp. 675, 691-692; *People v. Ochoa, supra*, 19 Cal.4th at pp. 447, 458.) Thus, even considered in the aggregate, the alleged errors could not have affected the outcome of trial. Cage

received a fair trial, there was no miscarriage of justice, and his claim of cumulative error should therefore be rejected.

XVII. THE DEATH PENALTY IS NOT DISPROPORTIONATE TO CAGE'S INDIVIDUAL CULPABILITY

Cage claims that the application of the death penalty in his case is disproportionate to his personal culpability in violation of the state and federal constitutions, and therefore the sentence must be reversed. (AOB 272-277.) Cage's claim should be rejected because, as explained below, Cage's punishment is not disproportionate to his offenses.

Although this Court has rejected the argument that *intercase* proportionality analysis is required under California's death penalty law or by the federal or state constitutions (see, e.g., *People v. Hillhouse, supra*, 27 Cal.4th at p. 511; see also *People v. Foster* (2010) 50 Cal.4th 1301, 1368),[35] this Court does have the discretion to conduct an *intracase* proportionality analysis when requested and in the interests of justice. (*People v. Salcido* (2008) 44 Cal.4th 93, 164; *People v. Hillhouse, supra*, 27 Cal.4th at p. 511; *People v. Weaver* (2001) 26 Cal.4th 876, 989; *People v. Anderson, supra*, 25 Cal.4th at p. 602; *People v. Hines* (1997) 15 Cal.4th 997, 1078.) In conducting an intrastate analysis, this Court reviews the particular facts of a case to determine whether the death sentence is so disproportionate to the defendant's personal culpability as to violate the California Constitution's prohibition against cruel or unusual punishment. (See *People v. Rogers, supra*, 39 Cal.4th at p. 894; *People v. Steele, supra*, 27 Cal.4th at p. 1269; *People v. Dillon* (1983) 34 Cal.3d 441, 478-489.)

> "To determine whether a sentence is cruel or unusual as applied to a particular defendant, a reviewing court must examine the circumstances of the offense, including its motive, the extent of

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[35] Cage acknowledges this but nevertheless urges this Court to reconsider its prior holdings. (AOB 272-273.)

> the defendant's involvement in the crime, the manner in which the crime was committed, and the consequences of the defendant's acts. The court must also consider the personal characteristics of the defendant, including age, prior criminality, and mental capabilities. [Citation.] If the court concludes that the penalty imposed is 'grossly disproportionate to the defendant's individual culpability' [citation], or, stated another way, that the punishment ""'shocks the conscience and offends fundamental notions of human dignity'"" [citation], the court must invalidate the sentence as unconstitutional." [Citation.]

(*People v. Leonard* (2007) 40 Cal.4th 1370, 1426-1427.)

Here, Cage's death sentence is not so disproportionate to his personal culpability as to "shock the conscience" or "offend fundamental notions of human dignity." In support of his claim of a disproportionate sentence, Cage asserts that he had "severe neuropsychological impairments," "little education," "left home before he was fifteen," was "expected to function as a husband and father by the time he was sixteen," and "was impulsive, and at times irrational and even violent." (AOB 276.) Cage also argues that on the night of the homicide, he "had been drinking heavily and using illicit drugs." (AOB 276-277.) What Cage omits, however, is the 14-year-long reign of violence and sadism he unleashed upon his wife, his children, his wife's family, and anyone else who displeased him in some way. Cage also omits the circumstances surrounding the commission of his murders; although he claims that he had neuropsychological problems and was fueled by alcohol and drugs the night of the murder,[36] he declines to discuss his monitoring of Bruni's activity in planning his killings, waiting for an opportune time to act, and the brutal and callous way he shot-gunned his victims to death at close range. In addition, Cage omits the fact that he

[36] These assertions were disputed by some of the testimony at trial. (See, e.g., 7 RT 971-974, 978-979, 1021-1025; 14 RT 1990-1993, 1997-1998.)

committed his crimes alone, committed them to further his control over his wife's family, and in doing so devastated a large extended family. Based on the facts and circumstances surrounding Cage's murders, and taking into consideration the relevant factors, it is clear that the jury's verdict of death for Cage's horrific crimes did not "shock the conscience and offends fundamental notions of human dignity." Thus, the death sentence is not grossly disproportionate to Cage's culpability.

XVIII. CALIFORNIA'S DEATH PENALTY STATUTE IS CONSTITUTIONAL

Cage raises several "routine" challenges to the constitutionality of California's death penalty statute, challenges which he acknowledges have been repeatedly rejected by this Court. (AOB 278-298.) Cage has not presented sufficient reasoning to revisit these issues; therefore, extended discussion is unnecessary and Cage's claims should all be rejected consistent with this Court's previous rulings.

A. Section 190.2 Is Not Impermissibly Broad

Cage argues that "California's death penalty statute does not meaningfully narrow the pool of murderers eligible for the death penalty" in violation of the Eighth and Fourteenth Amendments to the United States Constitution. He contends the reach of section 190.2 has been extended so far that it now encompasses nearly every first-degree murder, and that the statute "now comes close to making every murderer eligible for death." (AOB 280-281.) These claims have been rejected in numerous decisions, and Cage gives this Court no reason to reconsider them. (See, e.g., *People v. Zamudio, supra*, 43 Cal.4th at p. 373; *People v. Snow, supra*, 30 Cal.4th at p. 125; *People v. Kelly, supra*, 42 Cal.4th at p. 800; *People v. Prieto, supra*, 30 Cal.4th at p. 276.)

B. Section 190.3, Subdivision (a), Does Not Allow The Arbitrary And Capricious Imposition Of The Death Penalty

Cage claims that the application of section 190.3, subdivision (a), has "resulted in the arbitrary and capricious imposition of the death penalty" because the concept of "'aggravating factors' has been applied in such a wanton and freakish manner that almost all features of every murder can be, and have been, characterized by prosecutors as 'aggravating.'" (AOB 281-282.) This challenge has been repeatedly rejected by this Court. (See, e.g., *People v. Curl* (2009) 46 Cal.4th 339, 362; *People v. Loker, supra*, 44 Cal.4th at p. 755; *People v. Salcido, supra*, 44 Cal.4th at p. 166; *People v. Mendoza* (2007) 42 Cal.4th 686, 708; *People v. Guerra, supra*, 37 Cal.4th at p. 1165; see also *Tuilaepa v. California, supra*, (1994) 512 U.S. at p. 976 [explaining that section 190.3, subdivision (a), was "neither vague nor otherwise improper under our Eighth Amendment jurisprudence"]). As explained in *Tuilaepa*, a focus on the facts of the crime permits an individualized penalty determination. (*Tuilaepa v. California, supra*, 512 U.S. at p. 972; *Blystone v. Pennsylvania* (1990) 494 U.S. 299, 304, 307 [110 S.Ct. 1078, 108 L.Ed.2d 255].) Thus, possible randomness in the penalty determination disappears when the aggravating factor does not require a "yes" or "no" answer, but only points the sentencer to a relevant subject matter. (*Tuilaepa v. California, supra*, 512 U.S. at pp. 975-976.)

Cage points to no factors in his own case that were arbitrarily or capriciously applied. He merely states that the aggravating factors "ha[ve] been applied in a wanton and freakish manner. . ." (AOB 282.) Cage does not, and cannot, demonstrate that factor (a) was presented to the jury in his case in other than a constitutional manner. Noticeably missing from Cage's analysis is any showing that the facts of his crime or other relevant factors

were improperly relied on by the jury as facts in aggravation. Accordingly, this claim should be rejected.

C. The Words "So Substantial" In CALJIC No. 8.88 Did Not Render The Penalty Phase Instructions Constitutionally Deficient

Cage claims that CALJIC No. 8.88 (13 CT 3603-3604) violates the Eighth and Fourteenth Amendments because the phrase "'so substantial' is an impermissibly broad phrase that does not channel or limit the sentencer's discretion in a manner sufficient to minimize the risk of arbitrary or capricious sentencing." (AOB 283.) This Court has previously found that the "so substantial" language embodied in the penalty phase instructions was not impermissibly vague and ambiguous. (*People v. Rogers* (2009) 46 Cal.4th 1136, 1179; see *People v. Boyette, supra*, 29 Cal.4th at pp. 464-465; see also *People v. Breaux, supra*, 1 Cal.4th at p. 316, fn. 14.) Thus, CALJIC No. 8.88, as it related to the comparison of aggravating and mitigating factors, was not unconstitutionally vague or overbroad.

D. The Use Of The Adjectives "Extreme" And "Substantial" In Section 190.3, Subdivisions (d) And (g), Was Not Unconstitutional

Cage makes the perfunctory claim that the use of the adjectives "extreme" and "substantial" in section 190.3, subdivisions (d) and (g), "acted as barriers to the meaningful consideration of mitigation in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments." (AOB 283-284.) This Court has repeatedly rejected the same challenge Cage raises to the terms "extreme" and "substantial." (*People v. Hamilton, supra*, 45 Cal.4th at p. 960; *People v. Parson, supra*, 44 Cal.4th at pp. 332, 369-370; *People v. Salcido, supra*, 44 Cal.4th at p. 168; *People v. Prince, supra*, 40 Cal.4th at pp. 1179, 1298; *People v. Beames* (2007) 40 Cal.4th 907, 934.) As Cage

has offered no compelling reason for this Court to deviate from its prior holdings, his claim must be denied.

E. The Trial Court Was Not Required To Instruct The Jury That Statutory Mitigating Factors Are Relevant Solely As Potential Mitigators

Cage contends that the trial court's instructions to the jurors "invited" them to convert the absence of a mitigating factor into an aggravating factor, and to view potentially mitigating evidence as aggravating evidence supporting imposition of the death penalty. (AOB 284-286.) From there, Cage concludes "It is likely that [his] jury aggravated his sentence upon the basis of what were, as a matter of state law, non-existent factors and did so believing that the State – as represented by the trial court – had identified them as potential aggravating factors supporting a sentence of death" in violation of state law and the Eighth and Fourteenth Amendments. (AOB 285.)

This claim has been repeatedly rejected by this Court. A trial court is not required to delineate which factors are aggravating or mitigating, or to instruct the jury that statutory mitigating factors are relevant solely as potential mitigators. (*People v. Zamudio, supra*, 43 Cal.4th at p. 373; *People v. Wilson, supra*, 43 Cal.4th at p. 32; *People v. Kelly, supra*, 42 Cal.4th at p. 801.) Further, "The use of the phrase 'whether or not' to preface certain factors does not improperly prompt the jury to consider the absence of such factors as aggravating circumstances." (*People v. Bramit, supra*, 46 Cal.4th at p. 1249.) Cage's claim should therefore be denied.

F. The Trial Court Was Not Required to Instruct The Jury That It May Impose A Sentence Of Death Only If It Was Persuaded Beyond a Reasonable Doubt That Aggravating Factors Outweighed Mitigating Factors

Cage contends that his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments were violated because the jury was not instructed

in the penalty phase that a sentence of death could be imposed only if it was persuaded beyond a reasonable doubt that the aggravating factors outweighed the mitigating factors and that death was the appropriate penalty. (AOB 286-291.) This Court has repeatedly reaffirmed its rulings that instructions on burden of proof or persuasion are not required at this stage of the proceedings, and should not be given. (See, e.g., *People v. Carrington, supra*, 47 Cal.4th at p. 200; *People v. Hoyos* (2007) 41 Cal.4th 872, 926; *People v. Blair* (2005) 36 Cal.4th 686, 753.) In addition, this Court has rejected the claim made by Cage that *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435], *Ring v. Arizona* (2002) 536 U.S. 584 [122 S.Ct. 2428, 153 L.Ed.2d 556], *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403], and *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856, 166 L.Ed.2d 856], mandate that the prosecution bear the burden of proof. (*People v. Cowan* (2010) 50 Cal.4th 401, 508-509; *People v. Rogers, supra*, 39 Cal.4th at p. 893.) Cage presents no persuasive reason why this Court should revisit the issue and his claim should thus be denied.

G. The United States Constitution Does Not Require Jurors To Return Written Findings Regarding Aggravating Factors

Cage alleges that "The failure to require written or other specific findings by the jury regarding aggravating factors deprived [him] of his federal Sixth, Eighth, and Fourteenth Amendment rights to meaningful appellate review." (AOB 291-294.) This contention has also been repeatedly rejected by this Court, and Cage offers no persuasive reasons to revisit this issue. (See, e.g., *People v. Gonzales* (2011) 51 Cal.4th 894, 957; *People v. Robinson, supra*, 37 Cal.4th at p. 655; *People v. Zamudio, supra*, 43 Cal.4th at p. 373; *People v. Snow, supra*, 30 Cal.4th at p. 126; *People v. Burney* (2009) 47 Cal.4th 203, 267-268.)

H. Jury Unanimity With Respect To Aggravating Factors Is Not Required Under State Or Federal Law

Cage claims that his rights under the Sixth, Eighth, and Fourteenth Amendments were violated because his death verdict was not premised on a unanimous jury finding that a "single set of aggravating circumstances [ ] warranted the death penalty." (AOB 294-296.) This Court has consistently rejected these claims. (*People v. Hamilton, supra*, 45 Cal.4th at p. 960; *People v. Kelly, supra*, 42 Cal.4th at pp. 800-801; *People v. Ward* (2005) 36 Cal.4th 186, 221-222; *People v. Riggs* (2008) 44 Cal.4th 248, 329; *People v. Whisenhunt, supra*, 44 Cal.4th at p. 228.)

Cage also contends that this "failure to require jury unanimity violat[ed] the equal protection clause of the federal constitution." (AOB 295-296.) Here, too, this Court has held on numerous occasions that capital and non-capital defendants are not similarly situated and thus may be treated differently without violating equal protection principles. (*People v. Vines, supra*, 51 Cal.4th at pp. 891-892; *People v. Nelson* (2011) 51 Cal. 4th 198, 227; *People v. Manriquez* (2005) 37 Cal.4th 547, 590; *People v. Hinton* (2006) 37 Cal.4th 839, 912; *People v. Smith* (2005) 35 Cal.4th 334, 374; *People v. Boyette, supra*, 29 Cal.4th at pp. 465-467.) Cage's claims should therefore be denied.

I. The Death Penalty Law Is Not Unconstitutional For Failing To Impose A Burden Of Proof And There Is No Requirement That The Jury Be Instructed That There Is No Burden Of Proof

Cage claims that his constitutional rights were violated by the trial court's failure either to instruct the jury regarding the burden of proof as to findings regarding aggravating circumstances or to instruct the jury that there was no burden of proof. (AOB 296-297.) This Court has previously held that there is no requirement that the jury be instructed during the penalty phase regarding the burden of proof for finding aggravating and

mitigating circumstances in reaching a penalty determination, other than other crimes evidence, or that no burden of proof applied. (See *People v. Lewis* (2009) 46 Cal.4th 1255, 1319; *People v. Burney, supra*, 47 Cal.4th at p. 268; *People v. Morgan, supra*, 42 Cal.4th at p. 626; *People v. Panah, supra*, 35 Cal.4th at p. 499; *People v. Brown* (2004) 33 Cal.4th 382, 401.) Cage has offered no persuasive reason to reconsider this argument so his claim must be rejected.

J. Cage's Death Sentence Does Not Violate International Law, the Eighth Amendment, Or The Fourteenth Amendment

Cage contends that California's use of the death penalty as a regular form of punishment violates international law, the Eighth and Fourteenth Amendments, and "'evolving standards of decency.'" (AOB 297-298.) Cage's claim should be rejected. This Court has previously held that international law does not compel the elimination of capital punishment in California. (*People v. Vines, supra*, 51 Cal.4th at pp. 891-892; *People v. Snow, supra*, 30 Cal.4th at p. 127; see also *People v. Ghent* (1987) 43 Cal.3d 739, 778-779.) This Court also has rejected the contention that California's use of the death penalty constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. (See *People v. Moon, supra*, 37 Cal.4th at pp. 47-48; *People v. Boyette, supra*, 29 Cal.4th at pp. 465-466; *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255; *People v. Samayoa* (1997) 15 Cal.4th 795, 864-865.) Cage's arguments must likewise be denied.

CONCLUSION

For the foregoing reasons, respondent respectfully requests the judgment of conviction and sentence of death be affirmed.

Dated: October 6, 2011

Respectfully submitted,

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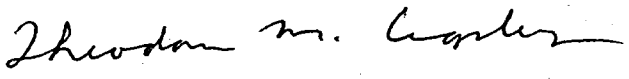

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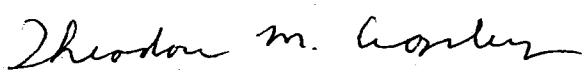
CERTIFICATE OF COMPLIANCE

I certify that the attached Respondent's Brief uses a 13 point Times New Roman font and contains 40,485 words.

Dated: October 6, 2011

KAMALA D. HARRIS
Attorney General of California



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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Cage**
No.: **S120583**

I declare:

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

On **October 7, 2011**, I served the attached **Respondent's Brief** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

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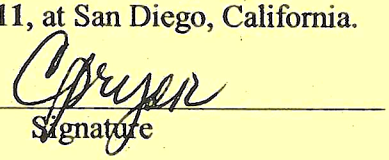
I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on **October 7, 2011**, at San Diego, California.

C. Pryor
Declarant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