IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

ERIC CHRISTOPHER HOUSTON,

Defendant and Appellant.

S035190

CAPITAL CASE

Napa County Superior Court No. 14311
The Honorable W. Scott Snowden, Judge

RESPONDENT'S BRIEF

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PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, **v.** **ERIC CHRISTOPHER HOUSTON,** Defendant and Appellant.	S035190 **CAPITAL CASE**

STATEMENT OF THE CASE

On May 4, 1992, the District Attorney of Yuba County filed a complaint in the Yuba County Municipal Court charging appellant, Eric Christopher Houston, with committing the following offenses: in counts I through IV, the murders (Pen. Code,[1/] § 187) of Robert Brens, Judy Davis, Beamon Hill, and Jason White, respectively; in counts V through XIII, the attempted murders (§§ 664/187) of Wayne Boggess, John Kaze, Rachel Scarberry, Jose Rodriguez, Tracy Young, Sergio Martinez, Danita Gipson, Patricia Collazo, and Mireya Yanez, respectively; and in count XIV, false imprisonment for the purpose of protection from arrest (§ 210.5). In association with counts I through IV, the complaint alleged the special circumstance that appellant committed at least one crime of first degree murder and one or more crimes of first or second degree murder (§ 190.2, subd. (a)(3)). In association with counts I through XIV, the complaint alleged that in the commission or attempted commission of the offenses, appellant personally used a firearm (§§ 1203.06, subd. (a)(1), 12022.5), causing the offenses to become serious felonies (§ 1192.7, subd.

1. Unless otherwise designated, subsequent statutory references are to the Penal Code.

(c)(8)). Finally, in association with count V, the complaint alleged that in the commission of the offense appellant personally inflicted great bodily injury to the victim (§ 12022.7). (1 CT 14-18.)[2/] On the same date the complaint was filed, the court appointed the Public Defender to represent appellant; Public Defender Jeff Braccia accepted the appointment. (1 CT 5, 28.) Also on that same date, appellant entered a plea of not guilty to each of the counts in the complaint and denied each of the special allegations. (1 CT 5.) On or before June 1, 1992, Julian Macias was appointed as co-counsel for appellant (§ 987, subd. (d)). (See 1 CT 8.)

On September 15, 1992, an indictment was filed in the Yuba County Superior Court charging appellant with committing the following offenses: in counts I through IV, the murders (§ 187) of Robert Brens, Beamon Hill, Judy Davis, and Jason White, respectively; in counts V through XIV, the attempted

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2. The Clerk's Transcript on Appeal consists of the following: a five-volume Clerk's Transcript (cited herein as 1 CT, 2 CT, etc.); a four-volume Supplemental - 1 (cited herein as 1 CT Supplemental - 1, 2 CT Supplemental - 1, etc.), containing grand jury exhibit records; a three-volume Supplemental - 2, containing victim medical records; a ten-volume Supplemental - 3 (cited herein as 1 CT Supplemental - 3, 2 CT Supplemental - 3, etc.), containing trial juror questionnaires; a five-volume Supplemental - 4 (cited herein as 1 CT Supplemental - 4, 2 CT Supplemental - 4, etc.), containing records pertaining to the certification of the record; a one-volume Supplemental - 5 (cited herein as CT Supplemental - 5), containing the transcript of trial exhibits 57-A and 57-B that was provided to the jurors as Exhibit 89 and a jointly-prepared revised transcript of the same; a five-volume Supplemental - 6 (cited herein as 1 CT Supplemental - 6, 2 CT Supplemental - 6, etc.), containing a transcript of trial exhibits 82 through 88, a revised transcript of the same, and a jointly-prepared revised transcript of the same; a one-volume Supplemental - 7, containing a transcript of trial exhibit 92; a three-volume Supplemental - 8, containing the redacted transcripts that were read to the jury during deliberations and verification of excerpts of the same; and one volume containing confidential documents pursuant to section 987.

The Reporter's Transcript on Appeal consists of the following: a 26-volume Reporter's Transcript (cited herein as 1 RT, 2 RT, etc.); and a one-volume transcript of the May 19, 1993, deposition of Judge Dennis J. Buckley.

murders (§§ 664/187) of Thomas Hinojosai, Rachel Scarberry, Patricia Collazo, Danita Gipson, Wayne Boggess, Jose Rodriguez, Mireya Yanez, Sergio Martinez, John Kaze, and Donald Graham, respectively; in counts XV through XVII, assault with a firearm (§ 245, subd. (a)(2)) on Tracy Young, Bee Moua, and Joshua Hendrickson, respectively; and in count XVIII, false imprisonment for the purpose of protection from arrest (§ 210.5).[3/] In association with counts I through IV, the indictment alleged the special circumstance that appellant committed at least one crime of first degree murder and one or more crimes of first or second degree murder (§ 190.2, subd. (a)(3)). In association with counts I through XIV, the indictment alleged that in the commission or attempted commission of the offenses, appellant personally used a firearm (§§ 1203.06, subd. (a)(1), 12022.5), causing the offenses to become serious felonies (§ 1192.7, subd. (c)(8)). Finally, in association with counts VI through XIII, the indictment alleged that in the commission of the offenses appellant personally inflicted great bodily injury on the victims (§ 12022.7). (1 CT 124-130; see also 1 CT 131 [indictment minutes].)

On September 16, 1992, the district attorney filed a request for dismissal of the pending action in the Yuba County Municipal Court in light of the grand jury indictment having been returned to the superior court. (1 CT 5, 132.) The court ordered the action dismissed. (1 CT 5, 132.)

Also on September 16, 1992, at the request of Mr. Braccia, the court "reaffirm[ed] appointment of Mr. Macias"; Mr. Macias accepted the appointment. (1 CT 133.) On October 13, 1992, the court "affirm[ed] the appointment of the Public Defender's office as counsel for [appellant] with Mr. Macias acting as co-counsel." (1 CT 174.) Also on October 13, 1992,

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3. On June 17, 1993, the indictment was amended by interlineation to allege with respect to count XVIII the following victims: Victorino Hernandez, Joshua Hendrickson, Erik Perez, Jocelyn Prather, Eddie Hicks, Jake Hendrix, and Johnny Mills. (1 CT 130; 10 RT 2339-2342.)

appellant entered pleas of not guilty and not guilty by reason of insanity to each of the charges in the indictment and denied each of the special allegations. (1 CT 176-177.) The court stated that, in light of appellant's pleas of not guilty by reason of insanity, it would appoint two doctors to examine appellant and report to the court whether or not, in their opinion, appellant was sane at the time of the commission of the charged offenses and whether or not he had a mental disease or mental defect which made him incapable of knowing or understanding the nature and quality of his act and incapable of distinguishing right from wrong. (1 CT 177; 3 RT 554.) On October 19, 1992, the court appointed Drs. Captane Thomson and Charles Shaffer, pursuant to section 1027 and Evidence Code section 730, to examine appellant. (1 CT 186.) Dr. Thomson's report was filed with the court on January 19, 1993. (2 CT 442-456.) Dr. Thomson found "no evidence to support a plea of not guilty by reason of insanity." (2 CT 456.) Dr. Schaffer's report was filed with the court on January 27, 1993. (2 CT 499-527.) Dr. Schaffer opined that appellant "was probably capable of understanding the nature and quality of his act of shooting Mr. Brens and the students at Lindhurst High School" and "was probably capable of distinguishing right from wrong at the time of the commission of the offenses." (2 CT 527.)

On December 30, 1992, appellant field a motion for change of venue. (2 CT 289-423.) On January 4, 1993, the court granted the motion. (2 CT 435-436.) On February 17, 1993, Napa County was selected as the county to which venue would be transferred. (2 CT 543.) On March 1, 1993, venue was transferred to Napa County. (2 CT 589.)

Meanwhile, on February 23, 1993, appellant filed a motion to set aside and dismiss the indictment on the following grounds: (1) the prosecution ordered critical portions of the grand jury proceedings to be unreported in violation of section 190.9; (2) the prosecution failed to comply with the

requirements of sections 934 and 935 by refusing to produce evidence requested by the grand jury; (3) the selection and composition of the grand jury that indicted appellant violated the due process clause of the United States Constitution and the United States Constitution's Sixth Amendment right to a trial by a fair cross-section of the community; and (4) the grand jury was not adequately voir dired regarding extensive, prejudicial pre-indictment publicity. (2 CT 544-587.) The prosecution filed a response to the motion on March 3, 1993. (3 CT 593-604.) The following day, March 4, 1993, appellant filed an errata to his motion. (3 CT 616-631.) A hearing on the motion commenced on May 17, 1993, and concluded on May 21, 1993. (3 CT 682, 685-686.) On May 27, 1993, after both appellant and the prosecution had filed supplemental briefing (3 CT 721-729 [appellant's supplemental briefing]; 3 CT 730-734 [the prosecutor's supplemental briefing]), the court denied the motion. (3 CT 720.)

On June 8, 1993, jury selection commenced. (3 CT 740.) On June 17, 1993, a jury was empaneled to try the case. (3 CT 803.)

On July 8, 1993, at the close of evidence in the prosecution's case-in-chief, appellant brought a motion for the entry of judgment of acquittal for insufficient evidence pursuant to section 1118.1. (3 CT 835; 18 RT 4340.) The court denied the motion on that same date. (3 CT 835; 18 RT 4342.)

The jury retired to begin deliberations at about 9:30 a.m. on July 21, 1993. (3 CT 863.) The jury returned with its verdict at about 3:45 p.m. on July 22, 1993. (4 CT 953; see also 22 RT 5266.) In counts I through IV, the jury found appellant guilty of first degree murder; in counts V through XIV, the jury found him guilty of attempted murder, and it further found that the crime attempted was willful, deliberate, and premeditated murder; in counts XV through XVII, the jury found appellant guilty of assault with a firearm; and in count XVIII, it found him guilty of false imprisonment for protection from arrest. The jury found each of the special allegations to be true. (4 CT 956,

969, 982, 995, 1008, 1010, 1019-1020, 1031-1032, 1043-1044, 1055-1056, 1067-1068, 1079-1080, 1091-1092, 1103-1104, 1115, 1124, 1129, 1134, 1139.)

Trial on the sanity phase commenced on July 27, 1993. (4 CT 1147.) The jury retired to begin its deliberations at 2:25 p.m. on August 9, 2003. (23 RT 5685; see also 5 CT 1161-1162.) The jury returned with its verdict at 4:45 p.m. that same date. (23 RT 5694; see also 5 CT 1162.) The jury found that, at the time of the commission of each of the offenses, appellant was sane. (5 CT 1170-1187.)

The penalty phase trial commenced on August 10, 1993. (5 CT 1188.) On August 16, 1993, the jury determined the penalty to be imposed upon appellant to be death. (5 CT 1230.)

On September 15, 1993, appellant filed a motion to strike the special circumstance finding and an alternative application for modification of the verdict of death to life imprisonment without the possibility of parole (§§ 190.4, subd. (e), 1181, subd. 7, 1385). (5 CT 1274-1286.) The court heard argument on the motion and application on September 17, 1993, and denied both. (5 CT 1287; 25 RT 6053-6060.)

On September 20, 1993, the court sentenced appellant as follows: On counts I through IV, the court ordered that appellant shall suffer the death penalty. On count V, the court sentenced appellant to life in prison for the attempted murder, plus a consecutive term of four years for the enhancement pursuant to section 12022.5. On each of counts VI through XIII, the court sentenced appellant to life in prison for the attempted murder, plus a consecutive term of three years for the section 12022.7 enhancement, with the enhancement pursuant to section 12022.5 stayed. On count XIV, the court sentenced appellant to life in prison for the attempted murder, with the enhancement pursuant to section 12022.5 stayed. On each of counts XV

through XVII, the court sentenced appellant to one year (one-third the three-year middle term) in state prison. Finally, on count XVIII (the principal term), the court sentenced appellant to state prison for the upper-term of eight years. The court ordered that all enhancements were to be served consecutive to the terms to which they apply and also consecutive to one another. (5 CT 1459-1461 [minute order], 1462-1466 [commitment judgment of death], 1478-1480, 1490 [abstract of judgment].)

Appellant's appeal from the judgment of death is automatic. (§ 1239, subd. (b).)

STATEMENT OF FACTS

Guilt Phase

Neng Lor went to Lindhurst High School in Olivehurst at about 1:40 or 1:45 p.m. on May 1, 1992, to pick up his sister, who had a 2:15 p.m. dental appointment. (11 RT 2449-2450; 2462.) Lor parked his car in the visitor parking lot and waited outside his car for his sister. (11 RT 2450.) From where he had parked, Lor could see Building C on the Lindhurst High School campus. (11 RT 2450.) Five to six minutes after his arrival, Lor observed a Caucasian male (appellant), about a quarter of a mile away, walking toward Building C. (11 RT 2450-2455.) Appellant was carrying a long, rifle-type gun. (11 RT 2451.) Lor watched appellant walk into Building C. (11 RT 2452.) Lor continued to stand by his car. (11 RT 2452.) While standing there, Lor heard two gunshots coming from Building C. (11 RT 2452.)

At about 2:00 p.m. on May 1, 1992, Patricia Morgan was teaching her Business Law class in Building C at Lindhurst High School when she excused herself to use the bathroom, which was in the nearby Administration Building. (11 RT 2464-2466.) On her way back to Building C, Ms. Morgan observed

appellant moving "with a determined stride towards C Building."[4] (11 RT 2466-2467; see also 11 RT 2468, 2477-2488.) Appellant was headed towards the northeast entrance of Building C. (11 RT 2469, 2471.) He was carrying, cradled in his hands, what appeared to Ms. Morgan to be a "[l]ong," rifle-type gun, like the type the school's R.O.T.C. students carried. Appellant had another gun slung over his back; from Ms. Morgan's perspective, the latter gun was similar in appearance to the first gun. (11 RT 2469-2470, 2478-2479.) Ms. Morgan called out to appellant, "'Do you have a permit for that?'" (11 RT 2470.) Appellant turned his head and looked at Ms. Morgan but did not answer her question; instead, he continued to walk towards Building C. (11 RT 2470-2471, 2484.) Ms. Morgan watched as appellant entered the building. (11 RT 2471.) A couple of seconds later, from outside the building, Ms. Morgan heard "[f]our popping sounds." (11 RT 2471; see also 11 RT 2487.) She then heard about three more "pops," which she instinctually knew were coming from her classroom, classroom C-107.[5] (11 RT 2472-2473, 2487; see also 11 RT 2485-2486 [on cross-examination, Ms. Morgan testified that, *in total*, she heard three or four shots].) Ms. Morgan turned and ran back towards the Administration Building to report that gunshots had been fired in Building C. (11 RT 2472-2473.)

Vice-principal Gary Featherston was in the assistant principal's (Jane Smith's) office at around 2:00 p.m. on May 1, 1992. (11 RT 2500-2501.) As

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4. Appellant had previously been a student in one of Ms. Morgan's Drama classes. (11 RT 2476-2477.) However, Ms. Morgan did not recognize appellant when she observed him walking towards Building C on May 1, 1992. (11 RT 2476.)

5. Building C on the Lindhurst High School campus is a two-story building. The classrooms on the first floor have room numbers in the 100s; the classrooms on the second floor have room numbers in the 200s. (See 11 RT 2528.)

he went to leave the office, Ms. Morgan "came into the door" and reported that "someone is shooting in the C Building." (11 RT 2501-2502.) Mr. Featherston and Ms. Smith responded by running immediately to the northeast entrance of Building C. (11 RT 2504, 2506.) When they got to the door, they heard what sounded like gunshots. (11 RT 2504.) Mr. Featherston ran around the building to the northwest door and immediately entered the building; the day custodian, John Fegan, who Mr. Featherston had run into on his way around the building, entered right behind him. (11 RT 2504, 2507-2508.) Once inside, Mr. Featherston heard approximately four gunshots coming from the south end of the building; meanwhile, he observed expended shells and also smoke in the air. (11 RT 2504, 2509.) Mr. Featherston looked into classroom C-109A and observed a student who was "sitting down and he was holding his left arm and he was hollering, "I've been shot." (11 RT 2509-2510.) At that point, Mr. Featherston realized that there was a "major problem" and that he needed to return to the Administration Building to make sure others were aware of the situation. (11 RT 2510.) He exited the northeast door of Building C and ran back to the Administration Building; when he got there he observed Ms. Smith on the phone, calling for emergency services. (11 RT 2510-2511.)

Classroom C-108B

On May 1, 1992, Thomas Hinojosai and Tracy Young were students in Robert Brens's sixth period United States History class, classroom C-108B. (11 RT 2551-2552, 2600; see also 11 RT 2586, 2591.) Between 2:15 and 2:20 p.m., Hinojosai's attention was drawn outside the classroom to the hallway as the door to Building C was opened, letting in light. (11 RT 2554-2556.) From his seat in classroom C-108B, Hinojosai looked out the open classroom doorway and observed appellant "come in with a gun." (11 RT 2554-2555; see also 11 RT 2570, 2583-2584 [Hinojosai's in-court identification of appellant].) Appellant was wearing a camouflage vest. (11 RT 2569-2570.) According to

Rachel Scarberry, who was also a student in classroom C-108B, appellant had a gun strap running diagonally across the front of his chest, and he had a second gun on his back. (11 RT 2593.)

Hinojosai watched as appellant, traveling from the east, "walked in the classroom and he had the gun to his chest, a twelve gauge shotgun . . . . He swung around the corner and he shot at Rachel Scarberry . . . ." (11 RT 2556; see also 11 RT 2557.) As for Scarberry, she witnessed appellant appear "in front of the door with a gun pointed into the classroom," and then she saw him fire the gun, which in her perception he was holding in the area of his chest or waist and pointing towards her. (11 RT 2587-2588.) Scarberry fell to the ground upon being shot. (11 RT 2587.) Hinojosai watched as appellant then "swung around in the doorway" and, after pumping the shotgun, "shot Mr. Brens in the right – in his right ribs, in the right side of his chest." (11 RT 2557, 2562, 2564.) When appellant fired the shot he still was holding the gun "on his shoulder or chest," and he appeared to Hinojosai to be aiming the gun. (11 RT 2563.)

At the time he was shot, Mr. Brens was in the front of the classroom, leaning on his desk. (11 RT 2566.) According to Hinojosai, Mr. Brens fell to the ground after he was shot; he then rolled over and crawled to the east wall of the classroom, where there was a podium. Mr. Brens pulled the podium down towards him. (11 RT 2562.) Appellant, meanwhile, followed Mr. Brens over toward the wall. (11 RT 2563.) Appellant then turned around and, after pumping the gun again, shot Judy Davis in the face and upper chest from about 10 feet away, causing her to fall over in her seat. (11 RT 2563-2565; see also 11 RT 2588-2589 [according to Scarberry, Davis fell to the ground after being shot; she saw Davis lying face down on the floor with puddles of blood forming in the area of her head].) Again appellant had the gun "towards his shoulder, and he was looking down the barrel" as he fired it. (11 RT 2564.) After he

shot Davis, appellant aimed the shotgun at Hinojosai from about 15 feet away. (11 RT 2565.) Hinojosai fell over and, as a result, when appellant fired the gun the shot went right by Hinojosai's head.[6/] (11 RT 2565.) Hinojosai lay on the floor and pretended he was dead so that appellant would not shoot at him again. (11 RT 2566.)

As for Young, she jumped to the floor when she heard appellant fire the first shot into classroom C-108B and she remained on the floor, lying face down, until appellant had left the room. (11 RT 2601-2602.) Young heard a total of four of five shots fired while appellant was inside the classroom. (11 RT 2608.) Young was shot on the top of her foot and through her toes; as a result, she lost part of her toes. (11 RT 2602-2603.)

As Hinojosai lay on the floor, pretending to be dead, he could see appellant's feet and lower body. He watched as appellant turned around and then, after leaving classroom C-108B, walked west down the hallway. (11 RT 2567.) Hinojosai subsequently heard gunshots coming from down the hallway. (11 RT 2567.)

For her part, Scarberry heard about 10 "really loud footsteps" and then a gunshot after appellant left the classroom. (11 RT 2590-2591.) She then heard the footsteps keep "getting louder and they like went around the corner and down the hall," headed in a westerly direction up the hallway "into the northern main foyer area, and then proceeding south in the direction past the front of the library." (11 RT 2590-2592.) Scarberry heard at least two gunshots subsequent to appellant's departure from the classroom but at some point she "just shut [her]self down" and heard only footsteps. (11 RT 2592.) Scarberry feared that appellant would return, but she was unable to get up and leave the classroom. (11 RT 2592.) Her chest was burning, and she was losing a lot of

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6. Hinojosai knew the shotgun blast went right by his head because he "caught it on [his] ear and on [his] shoulder." (11 RT 2565.)

blood. (11 RT 2593; see also 11 RT 2590.) When she tried to get up she fell back to the ground. (11 RT 2593.)

Young too heard additional shots after appellant had left the classroom. (11 RT 2609.) At some point she got up from the floor and ran to the Social Sciences office, where she attempted to hide; she later ran out of the building through the northeast entrance. (11 RT 2602-2604.)

For his part, Hinojosai crawled over to where Davis was located after appellant had left the room. (11 RT 2567.) Davis "was wedged in-between the seat and the table, and she was draped over, and her hands, the meat on her hands were [*sic*] gone, and she was dead right then and there." (11 RT 2567.)

Next, Hinojosai crawled over to Mr. Brens and asked him if he was all right. (11 RT 2567.) Mr. Brens, who was holding his chest, "was rocking against the back of the wall, and he was groaning and he was just sitting there rocking back and forth." (11 RT 2567-2568.)

Hinojosai proceeded to get up and go to the classroom doorway. (11 RT 2568.) After looking out the doorway, Hinojosai exited the classroom and then he exited Building C using the northeast door. (11 RT 2568-2569.)

As for Scarberry, "approximately at least 20 minutes" after she was shot, she left first classroom C-108B and then Building C with the help of two other students. (11 RT 2593-2594, 2596-2597.) Scarberry was subsequently transported by ambulance to Rideout Memorial Hospital. (11 RT 2594.) She remained hospitalized for four to five days, and after her release she received additional treatment ("a couple different surgeries") at the University of California, Davis Medical Center (UCDMC). (11 RT 2594-2595.) At the time of trial Scarberry continued to have a bullet lodged between her sternum and heart that doctors were monitoring. (11 RT 2595.)

Classroom C-105A

On May 1, 1992, Jose Rodriguez, Patricia Collazo, and Mireya Yanez were students in Nancy Ortiz's sixth period English as a Second Language (ESL) class, classroom C-105A. (11 RT 2653-2655, 2666, 2682-2683; 12 RT 2727-2728, 2748.) Rodriguez's attention was drawn to the hallway outside the classroom when someone opened the door to Building C's northeast entrance. (11 RT 2654-2655.) From his seat facing "in the direction of the [classroom] door," Rodriguez watched as appellant entered the building, walked down the hallway in the direction of classroom C-105A, and then turned to his left and fired approximately three shots from a "long gun," held at mid-chest level, into classroom C-108B. (11 RT 2656-2658, 2660, 2667-2669, 2673-2674, 2676-2677; see also 11 RT 2663-2664 [Rodriguez identifies appellant].)

Appellant, who was wearing a gun belt that crisscrossed in front of him (11 RT 2670-2671), then walked quickly down the hallway in the direction of classroom C-105A. (11 RT 2657, 2659, 2680-2681; 12 RT 2705-2707.) From outside the classroom (and from about 14 or 15 feet away, in Collazo's estimation), with the shotgun held at mid-chest level (see 11 RT 2677, 2689-2690), appellant fired at least one shot into the classroom (see 12 RT 2719 [Collazo testifies she was struck by the first shot, after which appellant fired about two more shots into the classroom]); appellant then turned to his left and continued down the hallway. (11 RT 2659-2660, 2675-2677, 2688-2690; 12 RT 2708-2710, 2719, 2743-2744.) Rodriguez was struck in both feet; Collazo, who was standing in the vicinity of the door, was hit in the right knee; and Yanez, who was getting up from her seat so she could move away from the door, was struck on both knees. (11 RT 2660, 2688-2690, 2692; 12 RT 2729, 2732, 2736, 2738, 2744.)

Ms. Ortiz was in the office behind classroom C-105A when appellant fired the above-described shot or shots into her classroom. (11 RT 2661, 2690-

2691; 12 RT 2749-2750; see also 12 RT 2731.) Ms. Ortiz subsequently entered the classroom and closed and locked the door. (11 RT 2665; see also 11 RT 2678, 2691-2692; 12 RT 2716-2717, 2731-2733, 2752.) On her way back into the classroom, she observed appellant standing in the doorway of, and looking or speaking into, classroom C-107. (12 RT 2751, 2778; see also 12 RT 2758, 2763-2764 [Ms. Ortiz identifies appellant].) After closing her classroom door, Ms. Ortiz heard a series of approximately 12 to 15 gunshots coming from inside Building C, "going from a distance from [her] classroom." (12 RT 2753; see also 12 RT 2779.)

At some point thereafter, Ms. Ortiz stood on a table and looked out one of the vents that was over her classroom doorway. (12 RT 2754-2755.) When she did so, she saw appellant upstairs, in classroom C-204B. (12 RT 2756.) Appellant was positioned behind a cabinet. (12 RT 2756-2757.) He had a long gun in his hands. (12 RT 2757.) He was shouting commands at students, ordering for no one to move. He was also yelling that there had better not be any police in the building. (12 RT 2757-2758.) Appellant threatened the students that if they "didn't tell him if people were moving there, or if there were police there that he was going to shoot students." (12 RT 2775.) At times appellant pointed the gun at a student who was "on the railing directly in front of the opening of the doorway" to classroom C-204B and at a student who was "on the staircase leading down from upstairs" (i.e., the staircase directly in front of classroom C105-A). (12 RT 2759-2760.) During this period of time, Ms. Ortiz was in telephonic communication with a law enforcement officer, and she told him what she could see happening. (12 RT 2760; see also 17 RT 3984.)

After about two or three hours, a student by the name of Tony Vue opened the door to classroom C-105A. (12 RT 2761.) Ms. Ortiz whispered to him to close the door; Vue responded that he could not do that and that "[h]e knows you're in here." (12 RT 2761.) Vue told Ms. Ortiz that if she did not

"take the students out of the classroom that students upstairs would be shot."[7] (12 RT 2777.) Ms. Ortiz told Vue to yell upstairs that there were three wounded students in the classroom; Vue did so. (12 RT 2761.) Robert Daehn was subsequently sent down from upstairs; he picked up Yanez and carried her outside the building. (12 RT 2735-2736, 2761; see also 16 RT 3757, 3762-3763.) Two more students then came downstairs and carried Rodriguez outside. (12 RT 2762; see also 11 RT 2663, 2678-2679.) Several minutes later, Vue called upstairs and said he needed some help. Another student then came downstairs and helped Vue carry Collazo out of the building. (11 RT 2693; 12 RT 2762.) At about 7:00 p.m., law enforcement officers broke out the windows of classroom C-105A. Ms. Ortiz and the remaining students in the classroom exited Building C through the windows. (12 RT 2763, 2772.)

Following his removal from Building C, Rodriguez was transported in an ambulance to a local hospital; he remained hospitalized for one day. (11 RT 2663.) Collazo and Yanez were transported first to Rideout Hospital in Marysville, and, about 10 to 20 minutes later, they were taken to Fremont Hospital in Yuba City. (11 RT 2694; 12 RT 2736.) Collazo remained in the hospital for more than one day. (11 RT 2694-2695.) Yanez underwent surgery and remained in the hospital for seven days. (12 RT 2736.)

Classroom C-107

At about 2:00 p.m. on May 1, 1992, Kasi Frazier was in Patricia Morgan's sixth period Business Law class, classroom C-107, when he heard three gunshots echo through Building C. (12 RT 2782, 2797.) It sounded to Frazier as if the gunshots had been fired from a shotgun and from "very close"

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7. A student had earlier come to the door of classroom C-105A and said that "he wants all the students in 105 to go up to 204." (12 RT 2772.) Ms. Ortiz had not permitted any students to do so. (12 RT 2773.)

to where he was located. (12 RT 2782.) Frazier went down to the ground, as did his classmates. (12 RT 2782.) Frazier heard footsteps coming up the hallway. (12 RT 2783.) He looked up and saw appellant standing outside the classroom door, having come from the direction of the northeast entrance to the building. (12 RT 2783, 2785; see also 12 RT 2788 [Frazier identifies appellant].) Appellant aimed a shotgun into the classroom (i.e., he had his head down "looking down the pointer")[8]; Frazier ducked. (12 RT 2783, 2785-2786, 2806-2807.) Frazier then heard another shotgun blast. (12 RT 2783.) When he looked across the classroom he saw Jason White lying on the ground. There was blood everywhere, and White was not moving and did not appear to be breathing. (12 RT 2786-2787.)

After appellant had fired his shotgun into classroom C-107 he proceeded down the hallway in a westerly direction (i.e., headed toward the north foyer). (12 RT 2786-2787, 2805.) Frazier subsequently heard more gunshots. (12 RT 2805.) He also heard people screaming throughout the building. (12 RT 2806.)

Frazier stayed down for about 10 to 15 minutes, and then a friend of his ("Jason") came to the doorway (having perhaps come down the stairs) and, as if he was taking orders, waved to Frazier to get up. (12 RT 2790-2791.) Frazier did so and went over to Jason; Jason told Frazier to "go. Leave. Run." (12 RT 2791.) Frazier relayed the message to his classmates, but then he heard steps coming down the stairs. (12 RT 2791.) Fearing that it was appellant, Frazier told everyone to get back down. (12 RT 2791.) Frazier saw, though, that it was not appellant but his drafting teacher, Mr. Macolla. (12 RT 2791.) Jason then told Frazier again to "get up and go"; Frazier followed his instructions and left the building. (12 RT 2791.)

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8. In addition to the shotgun, Frazier saw appellant with another weapon, perhaps a rifle, "sticking up like on a shoulder holster or something." (12 RT 2788.)

Classroom C-109

On May 1, 1992, Sergio Martinez and Gerardo Mojica were students in Ms. Brown's sixth period ESL class, classroom C-109. (12 RT 2812-2816, 2849.) Martinez heard a noise that sounded like four or five firecrackers going off, but louder. (12 RT 2812-2816.) The noise appeared to be coming from the area of classroom C-108. (12 RT 2816; see also 12 RT 2819 [gunshots came from "area like in C-107 and between C-107 and C-105"]; 12 RT 2845 [gunshots came from "[b]etween 105 and 108"].) Martinez ran to the corner of classroom C-109 and hid. (12 RT 2816.) No more than 10 minutes later, he "saw for about a second one man that was walking and looking straight inside the classroom." (12 RT 2818.) The man (appellant) pointed a shotgun[9/] at Martinez, who was on his knees, and fired at him from about 16 to 18 feet away. Martinez moved to the side and, as a result, the shot struck him in the left arm rather than the chest. (12 RT 2820-2822, 2829-2831, 2839, 2842-2843, 2847.) Martinez thereafter heard approximately three or four more gunshots, apparently coming from the south part of the building. (12 RT 2822, 2832-2833, 2844, 2846; see also 12 RT 2837-2838 [Martinez may have heard a second shot immediately after he was shot, but he did not know whether it was fired into classroom C-109 or not].)

As for Mojica, he heard what sounded like three "firecrackers or explosions" coming from "the hallway indoors from the northeast exit." (12 RT 2849-2850, 2864-2865.) Upon hearing the sounds, Mojica got up from his seat in classroom C-109 and looked outside the classroom door. (12 RT 2850.) As he looked around the corner, he saw appellant looking into classroom C-107. (12 RT 2850-2851, 2867.) Immediately thereafter, Mojica heard at least one gunshot. (12 RT 2851-2853, 2869.) Mojica then saw appellant start walking

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9. Appellant had the shotgun positioned on his shoulder, and he had his head leaned down, looking down the barrel. (See 12 RT 2820-2822.)

down the hallway; when appellant came to the corner of classroom C-109, he turned "southerly in the area of the main northern foyer." (12 RT 2852-2853.)

Mojica ran to the other side of classroom C-109. (12 RT 2853.) As he was running, he heard another gunshot, apparently coming from "the area sort of generally at the foot of the stairs that are due east – due west of the northeast exit." (12 RT 2853-2854.) After Mojica had made it to the other side of the room, he saw appellant at the doorway of classroom C-109. (12 RT 2854, 2870-2871.) Appellant was wearing a green camouflage jacket or vest and was holding a shotgun. (12 RT 2857, 2868, 2874.) Mojica saw appellant point the gun at him, and he heard a shot go off; Mojica "jumped in midair" and then crawled to safety. (12 RT 2872, 2854.) He subsequently heard about five or six gunshots coming from the south end of the building. (12 RT 2854-2855.) He then heard appellant stomp up the stairs at the south end of the building. (12 RT 2855.)

As a result of being shot, Martinez's arm was "on the back of [his] shoulder, twisted back and a lot of blood." (12 RT 2831-2832.) A teacher came and wrapped his arm to stop the bleeding. (12 RT 2832.) About a half-hour later, the teacher and another student helped Martinez get up and walk out of the classroom and out of Building C. (12 RT 2832, 2835, 2847-2848.) Martinez was transported by ambulance to Rideout Hospital, where he stayed for two days. (12 RT 2836.) From there he was transported to UCDMC, where he stayed for about two weeks. (12 RT 2836.) The wound to his arm required surgery (muscle transfusion). (12 RT 2836.)

Mojica remained in classroom C-109 until about 8:00 p.m., when he escaped from both the classroom and the building. (12 RT 2857.) Mojica made his escape after he saw a fellow student, Andrew Parks, walk by the classroom. (12 RT 2857-2858.) Parks told Mojica to "get out of here." (12 RT 2858.) Mojica immediately jumped up; he signaled with his hand and

whispered for the other students who were in the classroom with him to get up and run. (12 RT 2858.)

Classroom C-110B

At about 2:00 p.m. on May 1, 1992, Danita Gipson was in Mr. Howe's sixth period Spanish class, classroom C-110B. John Kaze was substitute teaching that day for Mr. Howe. (12 RT 2886-2887; 13 RT 2921-2922.) Gipson was at her desk, reading, when she heard three to five "loud bangs" coming from toward the north end of the building. (12 RT 2886-2888.) Gipson walked out into the hallway to try to ascertain the source of the noises. (12 RT 2888.) She walked about 50 feet north down the hallway, "to the end of the [double] staircase located between the hallway and the library." (12 RT 2888.) Gipson saw a person (appellant) next to "the staircase that goes upstairs at the north end of the north foyer area." (12 RT 2889.) Appellant had one long gun (Gipson was uncertain whether it was a rifle or a shotgun) in his hand and another strapped to his back (in "a typical gun harness that you would sling over your shoulder and have [the gun] pointing vertically up your back" (12 RT 2909)); appellant was walking in a westward direction. (12 RT 2889-2890, 2909.) While Gipson was standing there, watching appellant, appellant turned and saw her. (12 RT 2890.) At that point, "[h]e picked the gun up to his face,[10/] same as you would a gun as you put it against your shoulder, and aimed it and he fired at [her]." (12 RT 2890.) As Gipson turned to run she was struck in the left buttock and fell to the ground. (12 RT 2890.) She lay on the ground for a second and then got up and ran back to classroom C-110B. (12 RT 2891.) As she got to the doorway of her classroom, Mr. Kaze was in front of her, going out of the doorway. (12 RT 2891.) Mr. Kaze was bleeding from

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10. At first appellant had the gun down at his waist and was "doing something, either cocking it or loading it." (12 RT 2899.)

both his nose and mouth, and the entire front of his shirt was covered with blood. (12 RT 2891.) Gipson and Mr. Kaze both entered the office next to classroom C-110B (i.e., room C-110A (12 RT 2907)), where they joined the other students from classroom C-110B (who had already gone into room C-110A and were huddled together under the large table that was in the room). (12 RT 2891-2892.) Meanwhile, "[t]he bangs were still going." (12 RT 2892; see also 12 RT 2896-2897; and see 12 RT 2895 [Gipson testifies the gunshots seemed to be coming from further away in the building than the ones she had heard earlier, before she had gone out into the hallway].)

As for Mr. Kaze, at about 2:20 p.m. he heard what sounded like gunshots coming from the north end of Building C. (13 RT 2922, 2939.) When one of his students proceeded to walk out of the classroom and into the hallway, Mr. Kaze followed her. (13 RT 2922.) Mr. Kaze saw appellant at the north end of the building. (13 RT 2924-2925; see also 13 RT 2929 [Mr. Kaze identifies appellant].) Appellant was "coming from that hallway that goes westerly from the northeast entrance, . . . at roughly a forty-five degree angle across the northern foyer." (13 RT 2925.)

As he walked, appellant looked up and saw Mr. Kaze. (13 RT 2925-2927.) Appellant then changed his direction and started walking toward Mr. Kaze. (13 RT 2927.) Appellant was carrying a shotgun with its butt end on his waist; the shotgun was pointed "up and away from him at about a forty-five degree angle, held by his right hand."[11] (13 RT 2927-2929.) Appellant "had kind of a light spring to his step," and "he looked like he was having a good time." (13 RT 2927; see also 13 RT 2940 [appellant "kind of had a swagger"]; 13 RT 2941 [appellant had "a slight smile on his face"].) Appellant wore a

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11. Mr. Kaze also thought he saw a pistol of some sort "hanging underneath the butt of the shotgun" on appellant's right-hand side. (13 RT 2946-2947; see also 13 RT 2951-2952 [item "wasn't necessarily a firearm, it just gave the appearance"].)

"bandolier of bullets" across his chest. (13 RT 2929, 2945-2946.)

Mr. Kaze turned his head to the right in preparation of returning to his classroom; before he had moved any other part of his body appellant shot him from the "area roughly opposite the center post on the northern half of the double stairway opposite the library." (13 RT 2928-2929.) Mr. Kaze returned to classroom C-110B after being shot. (13 RT 2931.) When he saw that the students had all gathered in room C-110A, he joined them. (13 RT 2931.)

Mr. Kaze lay on the floor of room C-110A, in pain. (12 RT 2892; 13 RT 2931.) After a few seconds he got up and left the room, fearing that if he remained lying there he would bleed to death. (12 RT 2892; 13 RT 2931-2932.) He headed toward the building's northeast entrance; as he approached classroom C-109B, Mr. Kaze observed a student up on the balcony. The student, who appeared to be reporting to someone, said "there's a loan [*sic*] man coming out, and he's been wounded." (13 RT 2931-2933.) Mr. Kaze ducked into classroom C-109B and found the room in "total chaos." (13 RT 2933; see also 12 RT 2859-2860.) At that point, Mr. Kaze decided "to go for it." (13 RT 2934.) He exited classroom C-109B and ran down the hallway and out of Building C's northeast entrance. (13 RT 2934.) Mr. Kaze was bleeding "quite profusely" from his nose and shoulder. (13 RT 2935.) Four pellets had entered his right shoulder when appellant shot him; two pellets had entered at the base of his neck on the right side and went "down and under" his collar bone; and three pellets had "caught" him on the left side of the nose. (13 RT 2936-2937.) An ambulance transported Mr. Kaze to Rideout Hospital. (13 RT 2936.) He remained there overnight and was then transported to UCDMC, where he remained for a week. (13 RT 2936.)

Gipson, meanwhile, remained in room C-110A after Mr. Kaze had left. She tied a shirt around her wound to keep it from bleeding. (12 RT 2892-2893.) After about eight hours, a student (Victor Hernandez) came into the

room and told Gipson and the other students that "the man was on the other side of the building and to leave." (12 RT 2902-2903; see also 12 RT 2913-2914; and see 14 RT 3278.) When the students exited the classroom there were two law enforcement officers in the hallway; the officers led the students out the building's northeast exit. (12 RT 2911-2912.) Gipson was carried out of the building and taken to a waiting ambulance. (12 RT 2904.)

Classroom C-104

During sixth period on May 1, 1992, Gregory Howard, Ketrina Burdette, and Bee Moua were in their Driver's Education class, classroom C-104A. (13 RT 2953-2954, 3009-3010, 3111-3113.) While watching a video, Howard heard some "real loud bangs" coming from the other end of the building, down by classroom C-107. (13 RT 2953-2954.) Upon hearing the bangs, Howard ran out of the classroom and down to the south end of the double staircase in front of the library. (13 RT 2955.) Unable to see anything, Howard ran next to the library's southwest door and looked inside the library. He saw "a lot of people" (students and a couple of teachers) in the library; everyone was rushing to the library's northwest exit. (13 RT 2955-2956.) Next, Howard heard "a couple more bangs." (13 RT 2956-2957.) Howard looked up and saw "a flash of light" coming from the area immediately south of the staircase opposite classroom C-106. (13 RT 2956.) He then saw people rushing back into the library and, once inside, running south across the library. (13 RT 2957.)

Howard began to run back to classroom C-104, but then he remembered that his girlfriend, Lucy Lugo, was in classroom C-110. (13 RT 2957; see also 13 RT 2988.) Howard proceeded to run to that classroom. (13 RT 2957-2958.) When Howard got there, he saw Mr. Kaze exiting the door to classroom C-110B, and then he (Howard) heard another "loud bang." (13 RT 2958.) Howard proceeded to join Lugo and the others, including Wayne Boggess, in room C-110A. (13 RT 2958.) Awhile later, Mr. Kaze returned; he was

"bleeding real bad" from the areas of his nose, neck, and shoulders. (13 RT 2959.) Upon seeing Mr. Kaze, Howard "kind of freaked out." (13 RT 2959.) Howard, Lugo, and Boggess ran out of room C-110A. (13 RT 2960; see also 13 RT 2991.) Boggess stopped outside of the room, "at the door . . . on the corner"; Howard and Lugo kept running, headed toward classroom C-103, the career center. (13 RT 2960; see also 13 RT 2991-2992.) When Howard and Lugo arrived at classroom C-103A, they found the door to the room closed and locked. (13 RT 2960, 2983.) Howard and Lugo tried to hide by standing up against some lockers in the hallway. (13 RT 2961; see also 13 RT 2992.) When they heard someone yelling in a loud voice for everyone to "'get down,'" they dropped to the ground. (13 RT 2961; see also 13 RT 2992-2993.) Boggess, who was still at the doorway to room C-110A, "just stood out there like in a daze" and did not respond to the order to get down. (13 RT 2961-2962; see also 13 RT 2993.) Howard and Lugo watched as Boggess was shot (by appellant) in the face; Boggess "flew up pretty high in the air," landed on his back, and went into "real bad" convulsions. (13 RT 2962; see also 13 RT 2993.)

At that point, appellant entered Howard's field of vision, traveling from the general area of classroom C-104. Howard watched as appellant, who was armed with a gun, walked to classroom C-102. After appellant had entered the classroom, Howard heard another loud bang, which he realized was a gunshot. (13 RT 2963-2964; see also 13 RT 2972-2973 [Howard identifies appellant].) Appellant then came back out into the hallway and back into Howard's field of vision. (13 RT 2964.) Next, appellant reentered classroom C-102, and after "a lot of silence," he once again returned to the hallway. (13 RT 2964.) At that point, appellant spotted Howard and Lugo lying on the ground and pointed a long gun at their faces from a distance of between five to eight feet away. (13

RT 2964-2966, 2994.) Appellant stood there for a minute, looking very calm,[12] and then he pulled the gun back up and made a gesture with the gun in the direction of Howard and Lugo. Appellant then brought the gun down, turned around, and ran up the stairs in the south end of the foyer. (13 RT 2981, 2984, 2966-2970, 2996.)

Howard jumped up at that point, intending to run out of the building. He watched as appellant went up the stairs, and he observed that appellant "had a lot of shells and stuff falling out." (13 RT 2970; see also 13 RT 2997 [Lugo, too, observed appellant dropping shotgun shells].) Before appellant, who at that point was carrying a gun in each hand, reached the top of the stairs, he dropped the gun that he was holding in his right hand (a gun that was about two or three feet long and that appellant had initially worn on a strap that was hanging over his shoulder (13 RT 2971; see also 13 RT 2998)); the gun fell all the way back down the stairs. (13 RT 2970, 2974; see also 13 RT 2997.) Howard immediately ran back to where he had been before and lay back down. (13 RT 2970.) Appellant came back down the stairs, retrieved the gun, and then ran back up the stairs. (13 RT 2971, 2997-2998.) Howard then got back up, grabbed Lugo by the arm, and dragged Lugo (who, although not physically injured, was unable to walk) out of Building C through the southeast exit. (13 RT 2971-2972, 2998.)

For her part, when Burdette first heard noises while watching a video in classroom C-104, she thought the noises might have been caused by someone hitting the lockers. (13 RT 3010.) Burdette got up and went partially out into

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12. The parties stipulated that, before the grand jury, Howard testified as follows when asked whether appellant had an expression on his face: "'He was really like there was no one inside, no one home, no one in there, in his body. He was just really, you know, it's hard to explain.'" (21 RT 5079-5080.) When asked to elaborate, Howard testified: "'He looked like he didn't have a soul; like a robot, kind of a robot.'" (21 RT 5080.)

the hallway to find out what was causing the noise. (13 RT 3010-3011.) She "kept hearing shots," apparently coming from the area of the north foyer. (13 RT 3011.) She then saw appellant, who was shooting a gun with his right hand, come walking "out of the foyer." (13 RT 3012; see also 13 RT 3015 [Burdette identifies appellant].) Appellant held the butt end of the gun near his arm pit, and his left hand was extended out in front of him at about shoulder height. (13 RT 3012-3013.) He was wearing a camouflage vest "with bullets in the . . . pocket or the sleeves." (13 RT 3035.) Burdette saw appellant go to the area outside the entrance to room C-110A. (13 RT 3013-3014.) She also saw him fire two shots into classroom C-102. (13 RT 3023-3024.)

Burdette went back inside classroom C-104 and for about one and a half hours she and some of her classmates stayed in the "back of the classroom where the little room back there [i.e., room C-104B] is." (13 RT 3014.) They eventually left the room when they heard the telephone that was outside the room ringing. (13 RT 3014.) When they went to answer the phone, a "guy" came and told them that it would be safer upstairs. (13 RT 3014.) Burdette and the others went upstairs and into the classroom "where everyone was held hostage" by appellant, i.e., classroom C-204B. (13 RT 3015, 3019.) Appellant was inside classroom C-204B, armed with a gun. (13 RT 3015.) About 30 or 40 students were already in classroom C-204B when Burdette and the up to 20 other students from classroom C-104 joined them. (13 RT 3025.)

As for Moua, when he first heard "some several shots" while sitting in his desk in classroom C-104 he thought they were "stink bombs." (13 RT 3111-3114.) Moua saw another student run out of the building, and he decided to do the same. (13 RT 3113.) As Moua was getting up from his desk, appellant fired two shots into the classroom.[13/] (13 RT 3113-3114; see also 13

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13. Moua clarified on cross-examination that he did not see appellant shoot directly at any student. (14 RT 3142.)

RT 3121-3122 [Moua identifies appellant].) Moua and the other students dropped down to the ground and just lay there. (13 RT 3114-3116.) After awhile, some students, including Moua, ran to the classroom window and lay on the floor behind the curtain. (13 RT 3116-3117.) Other students took cover in the "teacher's office" (i.e., room C-104B). (13 RT 3116.)

After about an hour, a student entered the room and told the students they should go upstairs and that, if they did, appellant would not shoot them. (13 RT 3117-3118, 3120-3121.) The students complied and went upstairs to classroom C-204B. (13 RT 3118.)

Classroom C-106

On May 1, 2002, Johnny Mills was in Mr. McCauliffe's sixth period Careers class, classroom C-106 (commonly referred to as the auditorium), watching a video, when he "heard some bangs." (18 RT 4304.) Mr. McCauliffe looked outside the classroom door and told his students to "hit the ground. There was [*sic*] shots fired." (18 RT 4304.) Mills complied and dropped to the ground; he then crawled over to a "corner space" and "just waited." (18 RT 4305.)

After about 15 minutes, there was a knock at the classroom door; against Mills's advice, another student opened the door. (18 RT 4305.) The student on the other side of the door said that "if they didn't let us in that [appellant] would shoot 'em." (18 RT 4306.) The student asked Mills and one of his classmates, Craig, "who was all in that room"; Craig said it was just him and Mills. (18 RT 4306.) The student then asked Mills and Craig to come with him because he did not want them to be shot; Mills and Craig complied and went with the student to classroom C-204B. (18 RT 4306-4307.)

When Mills and Craig got to classroom C-204B, appellant was there; appellant instructed Mills to lift his shirt and turn around so he could see if

Mills had any weapons on him. (18 RT 4307.) Appellant was wearing a "net camouflage like jacket . . . with big pockets," and "he had a ammo belt going like across his waist." (18 RT 4307-4308.) He was holding a 12-gauge shotgun. (18 RT 4308.)

Classroom C-102

On May 1, 1992, Robert Ledford was teaching his sixth period World Studies class in classroom C-102 when, a few minutes before 2:00 p.m., he heard "some loud popping sounds." (13 RT 3041-3042.) After about the third sound, Mr. Ledford walked from the front of the classroom to the back area and then looked northward down the corridor toward the common area of the building. (13 RT 3042-3043.) Mr. Ledford then "saw and heard gunshots in the north end of the building." (13 RT 3044; see also 13 RT 3074 [Mr. Ledford heard three gunshots in the second set of shots].) He then saw two boys running in a southerly direction (i.e., in the direction of his classroom) from the boys' bathroom that was immediately adjacent to classroom C-109A. (13 RT 3044.) One of the boys "cut and went out of the building past the library." (13 RT 3044.) The other boy, Daniel Spade, ran straight toward Mr. Ledford and "yelled something to the effect of a man with a gun." (13 RT 3044.) When the boy slipped and fell, Mr. Ledford yelled for him to "'get down.'" (13 RT 3044.) Mr. Ledford also turned and yelled "'get down'" into his classroom. (13 RT 3044.) After directing Spade into his classroom (13 RT 3076), Mr. Ledford remained outside and yelled down the hall to Donald Graham, who was teaching in classroom C-101A: "'911. Man with a gun. Shots fired.'" (13 RT 3044.)

Mr. Graham leaned out into the hallway from his classroom with a telephone in his right hand and asked Mr. Ledford to repeat himself. (13 RT 3045.) After Mr. Ledford had done so, Mr. Graham gestured to Mr. Ledford with his left hand that something or someone was behind him. (13 RT 3045.)

Mr. Ledford walked rather rapidly to the area just east of the entrance to classroom C-102 and hid behind a sound wall. (13 RT 3045-3046.) As the source of the gunshots continued to move southward towards him, Mr. Ledford pressed his back up against the wall. (13 RT 3046; see also 13 RT 3082.)

Mr. Ledford heard a gunshot fired in the direction of Mr. Graham, and he observed Mr. Graham leap backwards into his classroom. (13 RT 3046-3047; see also 13 RT 3084-3085.) Mr. Ledford then heard clicking sounds that sounded like a shotgun being reloaded. (13 RT 3047; see also 13 RT 3085, 3108.) Mr. Ledford peered around the wall and saw appellant standing right outside of classroom C-102. (13 RT 3047; see also 13 RT 3054 [Mr. Ledford identifies appellant].) Appellant was carrying a shotgun and he had a rifle, with the stock cut off at the pistol grip, attached to a strap over his right shoulder. (13 RT 3047, 3055, 3100.) Appellant had two "bands of shotgun shells" strapped in an X across his chest, and he had a green pouch attached to his waist area. (13 RT 3047.) He was wearing a camouflage vest. (13 RT 3048; see also 13 RT 3090.)

Mr. Ledford watched as appellant, who had a blank stare on his face and showed no emotion, brought the shotgun to his right shoulder, leveled it with his left arm extended, and fired it into classroom C-102. (13 RT 3049, 3054, 3096.) Appellant then proceeded forward (i.e., into the classroom) and out of Mr. Ledford's view. (13 RT 3049, 3093.) Appellant reentered Mr. Ledford's view a few seconds later and faced in the direction of the "open area." (13 RT 3049-3050.) Next, appellant walked slowly in the direction of the library, with the butt of the shotgun at about waist level and the gun "up at nearly a 45 degree angle in front of him." (13 RT 3093-3095.) Appellant then proceeded up the building's southernmost staircase, but as he approached the "landing in the middle of the steps," the rifle came loose and slid down the stairs. (13 RT 3050, 3094, 3097.) Appellant retreated down the stairs to retrieve the rifle and

then proceeded back up the stairs. (13 RT 3050.)

Angela Welch was a student in Mr. Ledford's class. For her part, Welch heard about three or four loud booms coming "from the other end of the hall" (i.e., from the area of Building C's north foyer). Wayne Boggess then came running into classroom C-102 and said, "Mr. Ledford, call 911 because my teacher has been shot." (14 RT 3153-3156.) Mr. Ledford immediately went running out of the classroom and down the hall. (14 RT 3156.) Boggess then turned around and started to take a few steps. As Boggess was passing in front of classroom C-110, appellant came walking down the hallway (headed toward classroom C-102) and shot him. (14 RT 3157-3160; see also 14 RT 3163-3164 [Welch identifies appellant].)

After shooting Boggess, appellant continued to walk toward classroom C-102. (14 RT 3161.) Right before he entered the classroom, he stopped and looked right at Welch, making eye contact with her. (14 RT 3161.) Beamon Hill, who was standing next to Welch, yelled, "'No.'" (14 RT 3162.) Hill pushed Welch out of the way, causing her to fall to the ground. Appellant shot Hill in the head, and then he turned around and walked away. (14 RT 3162-3163, 3165.) Welch climbed under a table with some of her fellow students. (14 RT 3163.) A couple of seconds later, from under the table, Welch could see appellant from the waist down as he had returned to the classroom. (14 RT 3163.) Appellant apparently looked around the room, and then he again walked away. (14 RT 3163.)

After seeing that appellant had reached the second floor of the building, Mr. Ledford returned to his classroom. (13 RT 3050.) Upon entering the classroom, Mr. Ledford saw Hill's body, which was lying near the entrance in a pool of blood. (13 RT 3050-3052.) It appeared to Mr. Ledford that Hill was dead. (13 RT 3051-3052.) Mr. Ledford immediately instructed the students who remained in the classroom to evacuate the building as quickly as possible;

the students (including Welch) complied. (13 RT 3051; see also 14 RT 3164.) Mr. Ledford proceeded down the hall to classroom C-101A and told the students in that room to run from the building. (13 RT 3052.) As the students in classroom C-101A exited the building, many students from classroom C-101B followed suit. (13 RT 3052.) Mr. Ledford himself then exited the building through the southeast exit. (13 RT 3053.) He proceeded to run to the east edge of the building, where he banged on the window of classroom C-101B and yelled at the remaining students to exit the building through the southeast door. (13 RT 3053.)

Classroom C-101A

On May 1, 1992, Donald Graham was in classroom C-101A, teaching his sixth period Civics class, when, at about 2:05 p.m., he heard a series of what he thought were firecracker explosions coming from the north end of the building. (14 RT 3169-3170.) As the explosions continued, they seemed to be coming from closer and closer to classroom C-101A. (14 RT 3170-3171.) After the explosions had continued for awhile, Mr. Graham got up from his desk and walked out into the hallway. (14 RT 3171.) Mr. Graham looked to the west, where he saw Robert Ledford step out of his classroom, classroom C-102. (14 RT 3172.) Mr. Graham watched as Mr. Ledford "made a hasty retreat back towards his classroom, only he had put himself on the east side of the little wall that's about two and a half, three feet long and was scooching himself up into the corner as though he were extremely fearful of something." (14 RT 3172.) Next, Mr. Graham saw appellant come "into the intersection of the walkways" (i.e., "the point at which the east/west hallway from the southeast entrance crosses the north/south hallway that goes opposite Rooms 110 and 109"). (14 RT 3173-3174.) Appellant had one gun in his hands and another gun strapped to his back. (14 RT 3174.) When appellant saw Mr. Graham, he

lowered the gun that he was holding in his hands. As the gun started to come down in Mr. Graham's direction, Mr. Graham jumped back into his classroom. (14 RT 3174; see also 14 RT 3175-3176.) As he did so, he heard a gunshot. (14 RT 3176.) A few moments later, Mr. Graham saw blood coming from his left forearm, which had "apparently caught a fragment of metal." (14 RT 3176; see also 14 RT 3181.) Mr. Graham subsequently heard another gunshot coming from the same general location as the preceding one. (14 RT 3176.) After about a minute or so he heard additional gunshots, and then there was silence. (14 RT 3177.) At that point, Mr. Graham heard Mr. Ledford yell for his students to leave the building. (14 RT 3177.) As Mr. Ledford's students streamed past Mr. Graham's classroom and out of the building's southeast door, Mr. Graham instructed his students to follow suit; his students complied. (14 RT 3177.) Mr. Graham followed his students out of the classroom and the building. (14 RT 3177.)

Once outside, Mr. Graham realized he did not have his keys with him. (14 RT 3177.) Mr. Graham went around through the parking lot to the building's northeast entrance and went back inside the building. (14 RT 3177-3178.) Mr. Graham walked through classroom C-108B and saw Mr. Brens's body lying against the wall, with a student (Judy Davis) lying face down next to him; no sounds were coming from either of them. (14 RT 3178.) From there, Mr. Graham went down to his staff room, located between classrooms C-108A and C-101B, to call 911. (14 RT 3179.) Mr. Graham encountered between 12 to15 students who had taken refuge in the staff room; he instructed the students to exit the building through the northeast exit. (14 RT 3179-3180.) Mr. Graham exited the building as well. (14 RT 3180.)

Classroom C-204B

On May 1, 1992, Joshua Hendrickson, Erik Perez, Eddie Hicks, and Olivia Owens were students in Ms. Cole's sixth period English class, classroom C-204B. (14 RT 3183-3184; 15 RT 3379-3380, 3436-3438; 16 RT 3603-3604.) At approximately 2:00 p.m., Hendrickson heard three "loud banging noises" in rapid succession coming from the first floor of Building C, in the area of the northeast entrance and the northern foyer (i.e., below classroom C-205). (14 RT 3183-3184, 3218-3220.) Hendrickson got up from his seat and went to the balcony railing immediately outside the entrance to classroom C-204B. (14 RT 3184-3185.) A classmate, Jason Bisell, went with him. (14 RT 3186.) When Hendrickson heard a fourth loud bang, he looked over the railing and saw appellant, who was holding a shotgun at waist level and parallel to the ground; appellant was standing on the east side of the northern foyer. (14 RT 3186, 3222-3228; see also 14 RT 3192-3193 [Hendrickson identifies appellant].) Appellant looked up at Hendrickson, pointed the shotgun at him, and fired. (14 RT 3186, 3225-3226.) Hendrickson backed away from the railing and ran back into classroom C-204B. (14 RT 3187-3188.) Bisell, who had been standing behind Hendrickson at the railing, took off running as well. (14 RT 3188.) Once back in the classroom, Hendrickson got down on the ground, as did his classmates; the students pushed over their desks and took cover behind them. (14 RT 3189-3190, 3228.) Hendrickson thereafter heard at least four or five more gunshots. The shots were spaced out and appeared to be coming from the area of the southern foyer. (14 RT 3189-3190, 3228-3229.)

As for Perez, he too heard the gunshots coming from downstairs as he sat in class; Perez believed the shots to be coming from the area of the staircase at the northern end of the building. (15 RT 3379-3380, 3399-3400, 3402-3404.) Like Hendrickson, Perez ran to the balcony railing. (15 RT 3380, 3404-3405.) When Perez looked over the railing, he saw appellant holding a shotgun

in front of him and parallel to the ground. (15 RT 3380-3382, 3405-3407; see also 15 RT 3386 [Perez identifies appellant].) Perez heard one or two more gunshots, and then he ran back into the classroom and got behind a desk. (15 RT 3381, 3407-3408.)

For Hicks's part, he heard two or three "[r]eally loud booms," seemingly coming from downstairs. (15 RT 3436-3438.) At first he "didn't really think nothing of it," but then someone yelled out in the classroom that "somebody's shooting." (15 RT 3438.) Hicks and his classmates ran and hid against the wall. (15 RT 3438.) Hicks subsequently "looked down and . . . seen [*sic*] [appellant] walking up with the gun." (15 RT 3438; see also 15 RT 3440-3441 [Hicks identifies appellant].) Hicks then "ran back over and sat down by the podium." (15 RT 3438.) Subsequently, a "gunshot flew up and . . . went by Josh [Hendrickson]." (15 RT 3438.) Hicks thereafter heard additional gunshots; over time the gunshots seemed to be coming from closer to the classroom. (15 RT 3438.)

As for Owens, she heard what she thought were firecrackers coming from downstairs. (16 RT 3603-3604.) She heard about 12 sounds, one right after another. (16 RT 3603-3604.) Owens was going to join some of her classmates in looking over the balcony railing, but when a student turned around and said the noises were gunshots, Owens and the other students returned to the classroom and lay down on the floor. (16 RT 3604.)

After the gunshots had stopped, Hendrickson saw appellant upstairs; specifically, Hendrickson saw appellant walk by classroom C-204B, traveling from south to north. (14 RT 3190-3191.) Hendrickson lost sight of appellant for about three seconds, and then appellant returned to classroom C-204B. (14 RT 3191.) Appellant was holding a 12-gauge shotgun, which had a "strap and shotgun shells" attached to its stock. (14 RT 3200-3201.) He was wearing a belt on either his shoulder or around his waist; the belt held additional shotgun

shells. (14 RT 3198.) Appellant had even more shotgun shells in the pockets of the camouflage hunting vest he was wearing. Appellant, who appeared to Hendrickson to be worried and angry, told the students who were in classroom C-204B (there were approximately 24 of them, in Hendrickson's estimation) to get on one side of the classroom; he ordered Ms. Cole to leave the room. (14 RT 3191, 3196, 3208-3209, 3232-3233.) Ms. Cole complied with appellant's order and left. (14 RT 3191-3192.)

Perez also saw appellant walk by classroom C-204B, traveling from south to north. (15 RT 3382.) Appellant then returned and entered the classroom. Appellant, who Perez described as wearing a camouflage vest with bulging pockets, ordered the students at gunpoint to get against the classroom wall; he instructed Ms. Cole to leave the room. (15 RT 3382-3383, 3388, 3396, 3412-3413.)

Hicks observed appellant peer into classroom C-204B the first time he walked by it. He then proceeded to the classroom "just right down" the hallway from classroom C-204B (i.e., classroom, C-204A). Appellant looked into classroom C-204A and then returned to classroom C-204B. (15 RT 3439-3440.) Appellant was wearing a hunting vest with bulging pockets. (15 RT 3443-3444.) He was armed with a pump action shotgun[14]; on the back of the stock he had a "side kick" with shotgun shells in it. (15 RT 3442-3443; see also 17 RT 3971.) Appellant pointed the shotgun at the students who were in the classroom (there were approximately 29 of them in Hicks's estimatation) and at Ms. Cole. (15 RT 3438-3440.) Appellant yelled at Ms. Cole to leave the classroom. (15 RT 3440.)

From Owens's vantage point, appellant at first walked by classroom C-204B but he then turned back around and entered the classroom. (16 RT 3604.)

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14. Hicks later heard appellant say "that he had a .22 with him and that he had lost it." (15 RT 3456.)

Appellant, who was armed with a "big gun" and was wearing a camouflage vest, ordered the students who were in the classroom (there were approximately 28 of them in Owens's estimation) to get up and move so that they were up against the wall. (16 RT 3605-3606, 3610, 3619.) The students complied with appellant's order. (16 RT 3606.)

Library

On May 1, 1992, Victorino (Victor) Hernandez was in the library, along with the rest of the students in his sixth period class, when he heard the sound of what he at first thought were two or three exploding firecrackers coming from the area of "the hallway to the northeast entrance" to Building C. (14 RT 3258-3262.) Hernandez was going to go to the door and look out, but then he saw some students upstairs in classroom C-204B (Josh Hendrickson, Monica Chavez, and Jason Bissell); the students were looking down from upstairs and were apparently "real scared."[15/] (14 RT 3260.) Hernandez got down on the floor and crawled to the audiovisual room, where about eight or nine other students and two teachers (Mr. Burris and a "migrant aid" teacher) took cover with him. (14 RT 3260, 3262-3263, 3289-3290.) After awhile, one of the students, Matt Torres, opened the door that led to the "vent room"; the students and teachers then went into that room and closed the door. (14 RT 3263.) After about an hour and a half or two hours, the group heard one more gunshot; they were unable to tell whether it was coming from upstairs or downstairs though. (14 RT 3263-3264.)

At about 5:00 p.m., after about three hours in the vent room, Hernandez and the others looked through the cracked-open vent room door and observed a group of students emerge from an office. (14 RT 3264, 3272.) Figuring that

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15. The library had no ceiling, which allowed Hernandez to see upstairs. (14 RT 3288.)

"it was over," one of the teachers told Hernandez and the others they could exit the vent room. (14 RT 3264.) Hernandez did so, but Andrew Parks thereafter came up behind him and told him to put his hands up and that "[h]e wants to see your hands." (14 RT 3264.) Hernandez looked up and saw appellant, who was looking down at him from the entranceway to classroom C-204B. (14 RT 3264-3265; see also 14 RT 3266 [Hernandez identifies appellant].) Appellant said to Hernandez, "[W]hat the fuck are you looking at." (14 RT 3264.) Appellant was holding a 12-gauge shotgun, with the strap wrapped around his wrists, and with one hand on the pump and the other hand by the trigger. (14 RT 3265-3266.) The strap had some shotgun shells "in it." (14 RT 3281-3282.) Appellant was wearing a vest, and he had a "strap" with "pouches" around his waist; inside the pouches he had bullets and shotgun shells. (14 RT 3283-3284.)

Hernandez put his hands up, as did the others with whom he had been hiding in the vent room. As per appellant's orders, Hernandez and his fellow students went upstairs, using the north side of the building's double staircase, and entered classroom C-204B.[16] (14 RT 3264, 3266-3267, 3291-3293.)

Classroom C-201

On May 1, 1992, Esther Baker, Andrew Parks, and Raymond (Cole) Newland were students in Mr. Robinson's sixth period Shakespeare English class, classroom C-201. The class was watching the Rodney King trial verdict being read when Baker heard about four gunshots. (15 RT 3490-3492, 3523-3524; 16 RT 3649-3650.) Baker and others in the room, including Mr. Robinson, went to the classroom doorway; from there, Baker could see people

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16. Appellant ordered Mr. Burris and the other teacher who had been in the vent room to leave the building, saying that "he didn't want any teachers." (14 RT 3276, 3281; see also 14 RT 3291-3292.) The teachers complied with appellant's order. (14 RT 3292.)

downstairs, running from the library. (15 RT 3492-3493.)

As for Parks, he heard a loud noise, followed seconds later by a burst of about three loud noises, apparently coming from the north area of the building. (15 RT 3523-3524; 16 RT 3568-3570.) Upon hearing the noises, Parks joined others in rushing up to the front of the classroom; from there, Parks looked over the balcony. (15 RT 3524-3525.) Parks saw a teacher or librarian and a "bunch" of students running in the library. (15 RT 3525.)

As for Newland, he heard "a loud bang or a crack sound." (16 RT 3649-3650.) After hearing two or three more "crashes" or "bangs," Newland ran to the classroom doorway. (16 RT 3651, 3653.) Mr. Robinson, meanwhile, turned off the television and the classroom lights. He instructed the students to get down on the ground, and the students complied. (15 RT 3493, 3525, 3530; see also 16 RT 3651.) Newland hid "in the corner in the book storage closet" along with four of his classmates. (16 RT 3651-3652.)

At some point thereafter, Baker and Parks saw appellant coming upstairs by way of the building's south staircase; he was holding a 12-gauge pump action shotgun. Once upstairs, appellant turned the corner and approached classroom C-201. (15 RT 3493, 3525-3527; 16 RT 3572-3575; see also 15 RT 3497-3498 [Baker identifies appellant]; 15 RT 3533 [Parks identifies appellant].) Appellant, who was wearing a camouflage vest with ammunition in the pockets, looked inside the classroom and made "a sweeping motion back and forth" in front of him with the shotgun before proceeding northbound down the hallway. (15 RT 3493-3494, 3498, 3525-3526, 3536-3537; see also 16 RT 3659-3660.) During the brief time appellant was in the classroom doorway, Parks observed that he had a shotgun strap wrapped around his arm, and he had "kind of a sidekick" on the stalk of the shotgun to hold more rounds of ammunition. (15 RT 3527-3529; see also 16 RT 3659-3660 [Newland later observed that appellant was wearing "a belt for shotgun shells" and he had a

pair of "thumb cuffs" in one of his pockets].)

About an hour or so later, at roughly 3:30 or 4:00 p.m., one or two students came to the door of classroom C-201, turned on the classroom lights, and told the students that they had to go to classroom C-204B, where the gunman (appellant) was; they also reported that he (appellant) wanted their teacher to leave. (15 RT 3495, 3530-3532; 16 RT 3577-3578, 3580, 3653-3654, 3674.) The approximately 14 to 17 students in classroom C-201 followed the instructions and went to classroom C-204B where appellant, who was still armed with the shotgun and was hiding behind a bookcase that was at an angle across the doorway, instructed the students to lift up their arms and turn around so he could make sure they were not armed. Appellant, who appeared to be agitated, pointed the shotgun at each student as they walked around the bookcase and into classroom C-204B. Once they were inside the classroom, appellant ordered the students to sit on the floor and not to move or say anything. (15 RT 3495-3497, 3532-3535; 16 RT 3579, 3653-3655, 3675-3676; see also 16 RT 3656 [Newland identifies appellant].) Meanwhile, Mr. Robinson went down the south stairs and exited the building. (15 RT 3496, 3531.)

Classroom C-202

On May 1, 1992, Jennifer Kohler was in her sixth period Spanish class, classroom C-202, when she heard "[s]ome pops" coming from "like to the right of us downstairs." (16 RT 3632-3634.) Kohler and her classmates went to go look over the balcony to see what was causing the sounds, but their teacher, Mr. Alba, told them to get down. (16 RT 3634-3635.) The students complied with his order. (16 RT 3635.) Not very long after, appellant walked by the classroom. (16 RT 3635; see also 16 RT 3637 [Kohler identifies appellant].) The students "looked up at him and he pumped his shotgun." (16 RT 3635; see

also 16 RT 3644.) Appellant, who was wearing an "army vest," was in view for "[j]ust a couple seconds" and then he walked by, headed in the direction of classroom C-204B. (16 RT 3635.)

Kohler and the others remained in classroom C-202 for about two hours, and then a student came to the classroom and said, "'He [appellant] wants you to come down here with us.'" (16 RT 3636.) The students got up and went to classroom C-204B. (16 RT 3636.)

Classroom C-205

On May 1, 1992, Robert Daehn, Jocelyn Prather, and Jake Hendrix were students in Ms. Lazaro's sixth period English class, classroom C-205. (16 RT 3743-3744, 3767-3769, 3801-3802.) Daehn heard "two bangs," apparently coming from downstairs, right beneath classroom C-205. (16 RT 3743-3744.) Daehn heard students screaming and then he heard "a few more big shots and then smaller shots." (16 RT 3744.)

As for Prather, she heard "[l]ike loud popping noises" coming from downstairs, apparently from right underneath classroom C-205 (i.e., the north part of the building). (16 RT 3767-3769.) At first Prather heard one loud popping noise, and then there were "just so many you couldn't explain it or count." (16 RT 3769.) As the shots continued, they seemed to be coming from farther away in the building. (16 RT 3769-3770.)

As for Hendrix, he heard loud noises coming from downstairs, apparently from right underneath classroom C-205. (16 RT 3801-3802.) At first there was one loud noise, then there was a pause, and then there were two more loud noises. (16 RT 3803.) The noises sounded to Hendrix "like a .12 gauge shotgun." (16 RT 3802.)

Ms. Lazaro turned off the classroom lights and instructed her students first to get down on the ground and then to get up against the far wall. (16 RT

3744-3745, 3770, 3803.) The students followed her instructions. (16 RT 3745-3746.) The students thereafter heard more gunshots. (16 RT 3803-3804.) They also heard screaming and yelling. (16 RT 3804.)

Awhile later Daehn and some of his fellow students peeked outside the entrance to classroom C-205 and saw appellant running up the stairs (specifically, the south side of the double staircase at the center of the building); appellant was carrying what Daehn thought was a "black stick." (16 RT 3746-3748; see also 16 RT 3748 [Daehn identifies appellant].) Daehn and the others got back down on the ground. (16 RT 3748.)

Daehn thereafter heard appellant shouting that he wanted everyone to come out of their classrooms and that he "didn't want no teachers in the building." (16 RT 3748; see also 16 RT 3805-3806.) Ms. Lazaro turned on the lights and the students (there were approximately 15 of them) got up, exited the classroom, and, with their hands up in the air, walked in a single-file line to where appellant was, classroom C-204B. (16 RT 3748-3749, 3770-3771, 3777, 3806-3807.) Appellant yelled at Ms. Lazaro to leave and threatened that he would kill her if she did not do so; Mr. Lazaro complied with appellant's order and left. (16 RT 3777.)

As the students from classroom C-205 entered classroom C-204B appellant pointed a .12-gauge pump action shotgun at them. Appellant ordered the new arrivals to sit down against the wall along with the students who were already in the room. (16 RT 3749-3750, 3753, 3806-3807.) As per Prather, appellant was wearing a camouflage vest that had "like bullets or ammunition in the pockets." (16 RT 3774; see also 16 RT 3809 [Hendrix's description of appellant].) He had a "thing around his waist" that was full of "bullets." (16 RT 3774-3775; see also 16 RT 3809 [Hendrix's description].) The shotgun had an item attached to the stock with shotgun shells on it; it also had a strap attached to it. (16 RT 3773-3774, 3809-3810.)

Hostage Situation

When appellant first arrived in classroom C-204B, he ordered that a bookshelf be moved so that it was situated "[k]ind of diagonally" across the room's entrance. (14 RT 3201-3201; see also 15 RT 3383, 3415-3418, 3446; 16 RT 3807-3809.) According to some of the students who were present in the classroom at the time, appellant said that the reason for this was so that he would not be shot; according to others, he said that the reason was so that the students would not be shot if law enforcement tried to shoot him; and according to yet others, appellant said the reason was both. (See, e.g., 14 RT 3201-3202, 3216-3217; 15 RT 3418, 3510; 16 RT 3611, 3625-3626, 3780-3781, 3817.)

Appellant positioned students at different locations within Building C as "lookouts" for law enforcement officers. (See, e.g., 14 RT 3202-3205, 3270-3270; 15 RT 3384, 3446-3447, 3497, 3540-3541; 16 RT 3585, 3612, 3640, 3664, 3781; 18 RT 4312.) Appellant threatened the students at gunpoint that if they saw law enforcement officers inside the building and did not tell him he would shoot them. (See, e.g., 14 RT 3202-3203; 16 RT 3640, 3781; 18 RT 4322.)

After Victor Hernandez had been in classroom C-204B for about an hour or an hour and a half, appellant assigned him to act as a lookout "on the [northern] stairway." (14 RT 3276.) At some point, Hernandez looked down to the classroom directly beneath classroom C-204B and saw Ms. Brown stick her head around the corner. Hernandez told Ms. Brown that appellant had said the teachers could leave. (14 RT 3276, 3280-3281.)

Andrew Parks, meanwhile, acted as a lookout "at the top of the middle of the north staircase" (i.e., on the landing (15 RT 3551)). (15 RT 3549, 3551, 3555; 16 RT 3586.) At one point while on the landing, Parks glanced down the stairwell and into classroom C-109B and saw some people in the room. (15 RT 3551-3552.) Parks yelled up for someone to tell appellant that he had to use the

bathroom. (15 RT 3552.) Parks then went downstairs and told the teacher (Ms. Brown) that appellant did not know they were in the building and to leave; Parks proceeded to go to the bathroom and then returned to his lookout position. (15 RT 3552; 16 RT 3585.)

Parks's efforts notwithstanding, the number of students in classroom C-204B continued to increase over time due to appellant sending students downstairs to look for additional students with orders that they return to classroom C-204B with any students they found. (14 RT 3209; 15 RT 3390, 3448; see also 16 RT 3620-3621, 3628-3629, 3777-3778.) The maximum number of students in classroom C-204B reached between 80 and 90. (15 RT 3390, 3451; 16 RT 3778.)

Appellant talked quite a bit to the students in classroom C-204B. (14 RT 3205, 3208.) Appellant told the students that he had been fired from his job and that it was the school's fault because he did not have a high school diploma. Appellant also told the students that his girlfriend had left him. (See, e.g., 13 RT 3018, 3122; 14 RT 3205-3208, 3267-3269; 15 RT 3361-3362, 3386-3387, 3441-3442, 3537; 16 RT 3607, 3637, 3648, 3659, 3750-3751, 3753, 3775-3776, 3791, 3811; 18 RT 4308-4309.)

Appellant told the students that Mr. Brens was the teacher who had flunked him. (See, e.g., 13 RT 3018-3019, 3122-3123; 14 RT 3205; 15 RT 3441, 3498, 3537; 16 RT 3637, 3751, 3775-3776, 3811; 18 RT 4308-4309.) According to Olivia Owens, appellant told the students he was at the school because he "had a grudge" against Mr. Brens and "he wasn't happy with the way the school system worked." (16 RT 3607; see also 16 RT 3609.) According to Ketrina Burdette, appellant said that he had come to the school to talk with Mr. Brens because "he flunked him, and . . . it ruined his life." (13 RT 3015-3016.) Burdette also heard appellant say that one of the reasons he had come to the school was "because of his – his thoughts about how the school had

mistreated students." (13 RT 3032.) According to Johnny Mills, appellant said that "he came in to take out Mr. Brens and then leave." (18 RT 4309.) According to Parks, appellant said that he wanted to "make Mr. Brens pay." (15 RT 3537.) Also according to Parks, appellant said that he had come to the school to "make a point" and that "he was going to make sure that none of these teachers ever made a mistake again like this." (15 RT 3538.) According to Cole Newland, appellant told the students "the whole reason he was in this mess was because Mr. Brens . . . had betrayed him, that he didn't like him, and that – and that he just had it out for him." (16 RT 3658.)

Despite these clear expressions by appellant that Mr. Brens was the impetus for his actions, the students gave varying accounts of whether or not appellant expressed clear knowledge of the fact that he had shot Mr. Brens. According to Owens, when the students asked appellant why, if he had a grudge against Mr. Brens, he was not downstairs talking to him, appellant told them "that Mr. Brens was taken care of already." (16 RT 3609.) According to Parks, appellant said at one point that "Mr. Brens will never do it again. Mr. Brens will not flunk him ever again." (15 RT 3546; see also 16 RT 3600.) According to Eddie Hicks, appellant said that "he shot a teacher downstairs, and that . . . he was there for Mr. Brens." (15 RT 3442.) According to Burdette, appellant said that he had shot Mr. Brens "in the ass." (13 RT 3016; see also 13 RT 3021.) According to Robert Daehn, appellant told the students he had shot Mr. Brens in the stomach but that he was still alive. (16 RT 3751; see also 16 RT 3765-3766.)

According to Hernandez, appellant said he had shot a teacher; when a couple of students said it was Mr. Brens he had shot, appellant said, "[O]h, well, he failed me anyway." (14 RT 3269.) According to Joshua Hendrickson, appellant said that he had shot a teacher, although at the time of trial Hendrickson could not remember whether appellant specified that it was Mr.

Brens he had shot.[17] (14 RT 3205-3206, 3237-3238.) Appellant said that he had "wanted to shoot the teacher." (14 RT 3206.)

According to Newland, appellant stated that he had shot a teacher and also a few students. (16 RT 3669.) Appellant related "where the room was that he shot the teacher, and he asked if [the students] could tell him who that teacher was." (16 RT 3669; see also 16 RT 3690-3691.) The students told appellant that it sounded like he had shot Mr. Brens and they asked appellant if the teacher had a beard. (16 RT 3669.) Appellant answered that he did not know, and he added, with a smile, "'But I shot him in the butt. I got right [*sic*] in the butt.'"[18] (16 RT 3670; see also 16 RT 3691.)

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17. The parties stipulated that, before the grand jury, Hendrickson answered "'No'" when asked whether appellant had said "'whether or not he had shot Mr. Brens.'" (21 RT 5080.)

18. As respondent will describe more fully *post*, during the hostage situation law enforcement sent a portable telephone into classroom C-204B by which they negotiated with appellant for the release of students and for appellant's ultimate surrender. The telephone had recording capabilities and was able to record sounds made in classroom C-204B even when the phone was not in use. (17 RT 3900, 3906-3907; see also 18 RT 4145, 4216-4219.) The tape recordings were admitted into evidence as Exhibits 82 through 88 and were played for the jury as part of the prosecution's case-in-chief. (See 3 CT 831; 18 RT 4225-4226, 4240-4241, 4243-4247, 4254-4256, 4261-4268, 4274-4279, 4286-4290.) As recorded on side A of Exhibit 85, appellant had the following exchange with certain unidentified students:

> UNIDENTIFIED MALE STUDENT: (Inaudible) one of the teachers.
>
> MR. HOUSTON: I shot one of the teachers, yeah. Everybody was downstairs, and the last one (inaudible).
>
> UNIDENTIFIED MALE STUDENT: Was it Brens?
>
> [¶] . . . [¶]
>
> MR. HOUSTON: I don't think – it might have been Brens.

Several students in addition to Newland reported that appellant stated he had shot not only a teacher but also some students. (See, e.g., 14 RT 3206 [Hendrickson]; 16 RT 3751 [Daehn]; see also 15 RT 3366, 3372 [according to Hernandez, appellant mentioned having shot two teachers and a student].) According to several students, appellant said that he had shot the people to maim them, not to kill them. (13 RT 3030 [Burdette]; 14 RT 3234 [Hendrickson]; 15 RT 3426-3427 [Erik Perez]; 16 RT 3600 [Parks]; 16 RT 3765-3766 [Daehn]; see also 16 RT 3776 [according to Jocelyn Prather, appellant said that he had tried not to shoot the people in the vital organs, "just like the legs or feet"].) According to several students, appellant said that he did not know if he had killed anyone. (15 RT 3426 [Perez]; 15 RT 3461 [Hicks]; 15 RT 3520 [Esther Baker].) According to others, appellant said that he hoped no one was dead. (See 15 RT 3546 & 16 RT 3600 [Parks]; 16 RT 3626 [Owens]; 16 RT 3823 [Jake Hendrix].)

UNIDENTIFIED MALE STUDENT: Little – little short guy with (inaudible)?

MR. HOUSTON: (Inaudible) because Mr. Brens is the one that fucked (inaudible).

[¶] . . . [¶]

MR. HOUSTON: I think it was.

[¶] . . . [¶]

UNIDENTIFIED MALE STUDENT: (Inaudible) hope it was?

MR. HOUSTON: Shot him in the ass.

UNIDENTIFIED MALE AND FEMALE STUDENTS: (Laughing.) (Inaudible.)

(See 4 CT Supplemental - 6 at p. 1013 [jointly-prepared revised transcript of Exhs. 82-88].)

Appellant told the students that he had visited the school previously in preparation of his actions of that date. (14 RT 3207, 3269; 15 RT 3359-3361, 3397, 3442, 3507, 3538, 3546; 16 RT 3608, 3638, 3673, 3776, 3813; 18 RT 4311.) He also indicated that he had placed gasoline around the building and that he could ignite it if his plan did not work out. (See 14 RT 3269; 15 RT 3397-3398, 3442, 3499, 3538, 3546; 16 RT 3608-3609, 3638-3639.)

Appellant informed the students that he had read up on police tactics and, in particular, on the tactics of Special Weapons and Tactics (SWAT) teams. (14 RT 3208; 15 RT 3359, 3442, 3538; 16 RT 3608, 3673, 3776, 3815.) He also said that he had read the Penal Code and was aware of the potential sentence he faced for his crimes. (See 13 RT 3017; 14 RT 3269-3270; 15 RT 3442; 16 RT 3814-3815.)

Appellant continued to hold the shotgun in his hands during the time he was in classroom C-204B, and he would aim it at the students when he ordered them to do something. Also, when appellant gave students permission to go downstairs to use the bathroom he would threaten them that if they did not return he would shoot some of their classmates. (See 14 RT 3209-3210, 3212, 3270, 3272, 3280; 15 RT 3392-3393, 3432, 3444, 3501, 3541-3542; 16 RT 3609-3610, 3616, 3622, 3662-3663, 3639, 3752, 3776-3777, 3814.) When the male students returned from using the bathroom appellant would make them lift up their shirts so he could make sure they were not bringing anything back with them. (See, e.g., 15 RT 3542; 16 RT 3587, 3642, 3777.)

Appellant sent some students downstairs to make sure that all of the wounded students were out of the building so they could receive medical attention. (See 13 RT 3029-3030; 15 RT 3449, 3455-3456; 16 RT 3626, 3810; see also 18 RT 4310 [appellant permitted Johnny Mills to go downstairs to place a tourniquet on the arm of an injured student (Sergio Martinez)].) Appellant told the students he wanted them to report back to him where on the

body he had shot the students. (16 RT 3810.) Not all of the students returned, but one did; when he related to appellant where some of the students had been shot appellant responded, "'Oh my God.'" (16 RT 3810.) Appellant said that "he wasn't trying to shoot 'em there. He was trying to – he said he didn't – he just wanted to hurt 'em. He wanted to shoot 'em like towards the legs." (16 RT 3811.)

There was a telephone/intercom in classroom C-204B that connected directly to the "front office"; at some point, appellant used the telephone/intercom. (See 15 RT 3451; see also 15 RT 3420, 3544; 16 RT 3677.) Later, at approximately 4:00 or 4:15 p.m., a portable telephone was delivered to the classroom by law enforcement, whom had arrived on the scene. (See 15 RT 3385, 3544; 16 RT 3641, 3667, 3817; see also 18 RT 4220.) Appellant ordered students – mainly, Erik Perez – to communicate over the phone with law enforcement on his behalf. (See 14 RT 3273, 3299; 15 RT 3544-3545; see also 15 RT 3388, 3421-3422, 3450-3451, 3501-3502; 16 RT 3599-3600, 3612-3613, 3641-3642, 3667.) Appellant instructed Perez what to say, and he demanded that Perez tell him exactly what law enforcement was saying. (15 RT 3388, 3422-3423, 3545; 16 RT 3667-3668; see also 13 RT 3034; 16 RT 3817-3818.) Appellant told Perez to refer to him by the name of "George" because he did not want "them" to know his real name.[19/] (15 RT 3388-3389; 16 RT 3614, 3667.) Perez had several conversations on appellant's behalf with the hostage negotiators before appellant "got mad and wanted to talk to [the negotiators] himself." (15 RT 3389-3390.) After that, appellant

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19. When the students had earlier asked appellant what his name was, appellant told them they did not need to know and he was not going to tell them. When someone asked what they should call him, appellant told them to "'[c]ome up with something.'" (16 RT 3667.) Someone came up with the name "George," which is what the students proceeded to call appellant for some time. (16 RT 3667.)

would get on the phone and talk when he wanted to; if he did not want to talk, he would order Perez to get on the phone and tell the negotiators that. (15 RT 3390.)

At some point, after appellant noticed that some students had not returned from going downstairs to use the bathroom,[20] appellant demanded that law enforcement deliver a key to the faculty bathroom, which, unlike the student bathroom, he could see from classroom C-204B. (14 RT 3215; 15 RT 3393-3394, 3444-3445, 3500-3501, 3553-3554; 16 RT 3615, 3640, 3663-3666, 3778, 3812.) When the key was not delivered in a timely manner, appellant became angry. (15 RT 3393-3394, 3554; 16 RT 3615, 3779, 3812.) According to Baker, appellant "kept yelling he wanted the bathroom key, and he wanted it now or else he was going to start killing people." (15 RT 3501; see also 17 RT 3965.) According to Parks, appellant wondered why "they" were taking so long and said "they better not be trying anything." (15 RT 3554.) Appellant threatened law enforcement that if they did not bring the key he was going to shoot someone. (16 RT 3595-3596; see also 4 Supplemental - 6 at pp. 824-825 [as reflected in the jointly-prepared revised transcript of Exhs. 82-88, appellant made the following statement to an unidentified student: "Tell them they got two minutes, and then I'm serious; I'm gonna have to shoot somebody."], p. 826 ["Tell him I want that fucking key here now, or someone's gonna die."].) Also at some point, appellant fired a shot down into the library; the shot (which appellant told the students beforehand would only be a "warning shot") took out a window. (13 RT 3022-3023, 3038, 3122; 14 RT 3142-3143, 3215, 3239-

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20. When Parks and Hicks went downstairs to use the bathroom they saw a law enforcement officer in the hallway. The officer wanted them to leave the building with him, but they refused, telling him that if they left, appellant would kill someone upstairs. (16 RT 3584.) When the officer tried to grab them, they dodged away from him and then returned upstairs. (16 RT 3584-3585.)

3240; 15 RT 3445, 3458-3459, 3503, 3515-3516, 3539; 16 RT 3595-3596, 3598, 3640-3641, 3813; 18 RT 4322.)

After the key had finally been delivered upstairs,[21] appellant sent Baker and another student, Israel Gonzalez, downstairs to use the bathroom; appellant instructed them to stay close together and not to make any sudden moves. (15 RT 3500, 3508-3509.) Baker and Gonzalez went downstairs; instead of heading toward the faculty bathroom, though, they exited the building at the instruction of law enforcement officers. (15 RT 3500, 3515.)

At some point, appellant asked if the students were hungry. (13 RT 3033.) After some of the students had indicated that they were in fact hungry, appellant negotiated a deal with law enforcement negotiators pursuant to which he would exchange hostages for pizza and sodas; appellant also asked the negotiators for Advil after some students had complained that they had headaches. (14 RT 3274, 3301-3302; see also 13 RT 3034; 14 RT 3451; 18 RT 4144.) Appellant asked the negotiators for 12 pizzas after Hernandez had counted 85 students in the classroom. (14 RT 3274, 3330.)

At about 5:00 p.m., appellant wanted to know what was happening outside. (15 RT 3547; see also 16 RT 3590-3592.) When Parks mentioned that there was a television in the classroom a couple of doors down the hall (i.e., classroom C-201), appellant ordered him to go get it; appellant threatened Parks that if he did not return he would start shooting. (15 RT 3547; see also 16 RT 3590.) Parks went and got the television and wheeled it back to classroom C-204B. When he got it there, however, they could not get any reception. (15 RT 3547; 16 RT 3591-3592; see also 14 RT 3321.) Appellant asked the students if there was anything else he could use; the students said there was a radio and

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21. Law enforcement officers slid the key to a student who was positioned on the building's north stairway; the student came downstairs, picked up the key, and took it back upstairs. (17 RT 3966.)

appellant sent another student to go get it. (15 RT 3547-3548.) Appellant said that he wanted the radio tuned into a station that was covering what was taking place at the school. (14 RT 3322-3323; see also 15 RT 3458, 3548.)

At some point appellant told the negotiators that he wanted a news reporter, dressed only in shorts, to come up to the classroom. (15 RT 3463, 3498; 16 RT 3607-3608.)

At approximately 5:30 p.m., appellant allowed Hendrickson to leave after Hendrickson reported that he was not feeling well. (14 RT 3214; see also 14 RT 3310.) Appellant also allowed one female student who "was crying like hysterically" and another who said she was pregnant to leave. (14 RT 3215-3216.)

At about 5:30 or 6:00 p.m., appellant sent Daehn downstairs to help carry wounded students out of the building. (16 RT 3752, 3756, 3762.) Daehn carried Mireya Yanez out of Ms. Ortiz's classroom, and then law enforcement officers prevented him from going back inside the building. (16 RT 3757, 3762-3763.)

At some point, Newland was speaking over the telephone with the hostage negotiators when they instructed Newland to suggest to appellant "that he should let some of the hostages go and that it would be a sign of good faith, and that he should just let a few people go and it will be easier for him and it will be easier to manage." (16 RT 3686.) Newland told appellant: "'The police want you to release hostages. They think you can't handle them and they're trying to – they're trying to trick you.'" (16 RT 3687; see also 16 RT 3688.) Appellant responded, "'No, no. Tell them, "No, I'm not going to fall for that. I'm not going to play along with that."'" (16 RT 3687; see also 16 RT 3688.)

About 10 to 15 minutes later, Newland suggested to appellant that, even though the police were trying to trick him, maybe it would be a good idea to let some students go "'because after it gets dark, they're going to get nervous if

you haven't let anybody go, and it would just look good and relieve their tension somewhat if you let people go.'" (16 RT 3688.) Appellant agreed and asked Newland if 10 to 15 students would be a good number to release; Newland answered in the affirmative. (16 RT 3688-3689.) Appellant told Newland to pick which students to release. (16 RT 3686, 3689.) Newland selected the students "that were sick and seemed to be the most distraught." (16 RT 3689.)

The hostage negotiation team made a tactical decision to not deliver the pizzas and soda too soon, as "inherently history [had] told [them] in hostage situations where demands are met immediately, generally the hostage-taker will always require more before hostages are released"; also, "the longer the situation goes on, generally the safer the hostages are." (18 RT 4293-4294.) Thus, the first of the pizzas did not arrive at the school until 7:30 or 8:00 p.m. (14 RT 3275, 3301; see also 16 RT 3815.) Appellant sent Hernandez and another student down to pick up the pizzas and the ice chest holding the soda.[22/] (14 RT 3274-3275; see also 14 RT 3306, 3317.) In exchange for the pizzas, appellant released approximately 20 to 30 students. (14 RT 3329.) Hicks was one of the students who was exchanged for the pizzas. (15 RT 3441-3442, 3451.) When Hicks was released, the number of students in the classroom was down to about 50. (15 RT 3452.)

Before Hicks was released, he wrote his name and phone number on a document that appellant said was intended to allow "persons outside" to call the students' parents and "let them know what was going on." (15 RT 3462.) Other students signed the paper as well. (See, e.g., 15 RT 3356-3357, 3557; 16 RT 3581-3582, 3617, 3818-3819.) The list had been requested by the negotiators, and appellant was aware that the students were signing it. (15 RT

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22. When Hernandez picked up the ice chest law enforcement officers informed him that it had a camera hidden inside. (14 RT 3317.)

3357.)

A decision was made by law enforcement to not let the information out over the radio and television that several persons had died. (17 RT 3912; see also 18 RT 4294.) Also, out of concern that appellant would view television broadcasts on one of the televisions within the building, law enforcement asked the cable company to cut cable to the building. (17 RT 3913.)

At some point, appellant had Perez ask the hostage negotiators the condition of the people who had been wounded downstairs; appellant later asked the same question himself when he personally spoke with the negotiators over the telephone. (16 RT 3685-3686.) According to Newland, appellant seemed relieved when he was reassured "that someone was in critical condition but no one was dead and . . . they all had good prospects in recovery."[23] (16 RT 3686; see also 18 RT 4302 [main hostage negotiator (Officer Tracy) lied to appellant when appellant asked him if he had killed anyone].)

According to several students, appellant's demeanor changed throughout the course of the afternoon and evening. In the beginning, appellant was "jumpy" and "panicky"; over time, though, he appeared to calm down. (See, e.g., 14 RT 3146, 3280, 3300; 15 RT 3367, 3452; 16 RT 3627-3628, 3817, 3819-3821, 3824-3825.) However, at times when he was speaking with the hostage negotiators, appellant seemed to become "more like nervous of what was going to happen to him." (15 RT 3460.) Appellant communicated over the telephone to the negotiators that he did not want to get shot and that he wanted "them" to be able to "help him out" and get him a "lesser sentence." (15 RT 3556-3557.)

As for the students, their mood changed over time as well. In the beginning, the students were "extremely scared"; later, they were "relaxed, and

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23. According to Jennifer Kohler, appellant also appeared relieved when he heard on the radio that no one at the school had been killed. (16 RT 3646.)

waiting for it to be over." (15 RT 3433; see also 13 RT 3031-3032; 16 RT 3822.) There was even some laughter and joking around amongst those in the classroom. (15 RT 3433; see also 13 RT 3032; 15 RT 3458.)

Appellant discussed with hostage negotiators the possibility of him "getting off with a light sentence, and he wanted to guarantee that the police wouldn't double-cross him." (16 RT 3670.) A typed "contract" that provided "something to the effect he wouldn't get more than five years in a minimum security facility" was subsequently sent up by law enforcement. (16 RT 3670-3671; see also 18 RT 4147.) The purported contract incorporated certain demands made by appellant, "one of which was that he not serve . . . more than five years. And he wanted to serve that in a minimum security facility that would offer him educational opportunities and employment opportunities so that he could pursue his career when he was released."[24/] (18 RT 4177.) The document was signed by Yuba County Undersheriff Gary Finch, Sergeant Virginia Black of the Yuba County Sheriff's Department, and Captain Scott Berry of the Yuba City Police Department. (See 16 RT 3737; 18 RT 4147-4148.)

Sensing that appellant was still concerned that he would be double-crossed by law enforcement, Newland attempted to reassure appellant by writing up a document to the effect that the students had all seen the aforementioned purported contract; 16 of the students (including Newland) then

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24. The purported contract (Exh. 54, part 1), which was dated May 1, 1992, and had the time of 9:30 p.m. on the top of it, stated as follows:

> I Gary Finch, UnderSheriff of Yuba County, hereby enter into an agreement with Eric Houston, agreeing that any sentence he may receive will be less than five years. I also agree that any time he is sentenced to is to be served at a minimum security facility out of this area. I further agree that the facility will have a program providing education opportunities and job training that will assist Mr. Houston in his effort to improve himself.

signed the document and they "sent it down with a library aide to be photocopied."[25] (16 RT 3671-3672; see also 16 RT 3682-3683; 18 RT 4148.) The document (Exh. 54, part 2) read: "'We, students of Lindhurst High School and hostages of Eric Houston, do hereby certify that an agreement between Undersheriff Gary Finch and the aforementioned . . . hostage taker to guarantee that Mr. Houston's sentence will not exceed five years.'" (16 RT 3681.)

As the standoff neared a conclusion, appellant permitted groups of students to leave classroom C-204B and the building. (14 RT 3149.) About a half hour before appellant let the last of the students go, at a time when there were about 15 to 20 students remaining, appellant instructed Hernandez and some of the other students to go around the building and tell anyone who was still in the building to leave.[26] (14 RT 3277, 3330.) Hernandez went down to Mr. Howe's classroom and saw some students; he told them they could leave "but to stay under the balcony so [appellant] couldn't see them." (14 RT 3277.) The students, including Danita Gipson (who had been shot and injured), complied and left the building. (14 RT 3278.)

One of the students who was going around the building looking for people found in classroom C-203 a .22-rifle "that had the butt of the gun cut off" so that it could be used as a pistol. (14 RT 3278-3279, 3292, 3312-3313.)

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25. Bee Moua was another student who signed the document. (See 13 RT 3124; 14 RT 3149.) At trial, Moua explained what he was thinking when he signed it: "I was scared and there was only a couple of us left so he might have just like shot at anyone [*sic*] of us, so we all signed it." (14 RT 3147-3148; see also 14 RT 3152 ["I was scared, upset, angry; and I don't [*sic*] know what to do, so just signed it."].)

26. As some of the students were walking around the building they were met by law enforcement officers who escorted them out of the building against their will. (14 RT 3308-3309.) Officers tried to get Kevin Benivides to leave, but he refused for the same reason that Hernandez refused to leave: he was worried that appellant would kill someone if he did not return to classroom C-204B. (14 RT 3307-3308.)

The rifle had a bullet jammed in the chamber.[27] (14 RT 3279, 3314.) Before letting the final students leave, appellant sent a student to classroom C-203 to retrieve the rifle. (14 RT 3282-3283, 3314.)

Appellant released the final group of six students at about 10:00 or 10:30 p.m. (See 14 RT 3272, 3280, 3305; 16 RT 3670, 3691.) He then undressed to a certain point (as instructed by negotiators) and came down the north stairway to be taken into custody. He was arrested, taken out of the building, placed in a patrol car, and taken to the Yuba County Sheriff's Office. (17 RT 3925, 3966-3967; see also 18 RT 4148-4149.)

Law Enforcement Response

Sergeant Steve Durfor of the Yuba County Sheriff's Department arrived at Lindhurst High School at about 2:05 or 2:10 p.m on May 1, 1992. (17 RT 3882-3883.) Lieutenant Robert Escovedo arrived on scene at about 2:15 p.m. (17 RT 3902-3903); Sergeant Alan Long, Sergeant Ron Johnson, and Sergeant Virginia Black also arrived at the school subsequent to Sergeant Durfor. (17 RT 3885, 3915, 3955; 18 RT 4135-4136.) At Lieutenant Escovedo's request, Sergeant Durfor activated the department's Special Enforcement Detail (SED), which was the equivalent to a SWAT team. (17 RT 3885, 3903.)

Sergeant Durfor, Lieutenant Escovedo, and Sergeant Long observed about 12 students exit Building C through the northeast exit; Sergeant Durfor

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27. Perez and Benivides succeeded in unjamming the gun, but when they did so they discovered that something else was also wrong with it. (14 RT 3314-3315.)

In his May 2, 1996, interview with law enforcement, the videotapes of which (Exhs. 57-A & 57-B) were played for the jury (as respondent will discuss *post*), appellant related that he had dropped the .22-caliber rifle while coming up the stairs and that he had then thrown the rifle into a classroom on the second floor. (See CT Supplemental - 5 at pp. 9-11 [Exh. 89 (transcript of Exhs. 57-A & 57-B that was provided to jury)]; CT Supplemental - 5 at pp. 111-113 [jointly-prepared revised transcript].)

and Lieutenant Escovedo, along with Sergeants Long and Johnson, ran over and assisted the students, some of whom had been physically injured and some of whom were hysterical. (17 RT 3885-3886, 3894-3895, 3903, 3956.) The four deputies then made entry into Building C through the northeast entrance and proceeded immediately to classroom C-108B. (17 RT 3886-3887, 3904, 3916-3917, 3956-3957.)

Upon entering classroom C-108B, Lieutenant Escovedo and Sergeants Durfor, Long, and Johnson observed two persons, one male (Robert Brens) and one female (Judy Davis), lying on the ground in relatively close proximity to one another; Sergeant Durfor checked the bodies for signs of life and found none. (17 RT 3887, 3956-3957.)

Sergeants Durfor, Johnson, and Long left classroom C-108B and proceeded to check various classrooms for additional victims. (17 CT 3888; see also 17 RT 3957-3958.) Upon entering classroom C-102, they observed a male victim (Beamon Hill) lying on the floor; again Sergeant Durfor checked for signs of life and found none. (17 RT 3883, 3958-3959.) Next, from the entryway to classroom C-102, Sergeant Long pointed out to Sergeant Durfor a person (Wayne Boggess) on his back on the ground just outside of room C-110A. (17 RT 3889-3890, 3959.) Sergeant Long preceded to leave classroom C-102, grab Boggess by the feet, and drag him "back to down the southern hallway east into room C101A." (17 RT 3890; see also 17 RT 3959-3960.) From there, Sergeant Long picked up Boggess and carried him outside to rescue personnel. (17 RT 3891, 3960.)

Meanwhile, while located in the northwest corner of classroom C-108, Lieutenant Escovedo observed a student standing in Building C's northern stairwell. (17RT 3904.) Lieutenant Escovedo ordered the student to come to him but the student sat down and said he could not; meanwhile, the student "kept looking to his right and up" and was talking to someone on the second

floor.[28] (17 RT 3904.) Lieutenant Escovedo could hear the person the student was communicating with say, in a commanding tone, that he knew police tactics and did not want to see any police officers in the building and "did not want to see anybody dressed in camouflaged [*sic*] or black" (which is common dress for SWAT teams); the person threatened that if he saw any such persons "he would start shooting students again." (17 RT 3905.) At Lieutenant Escovedo's request, the student in the stairwell asked the person upstairs if law enforcement could make a search of the downstairs for injured persons and remove them; the person responded that "he was not going to allow that, and if he saw anyone he would start shooting." (17 RT 3905-3906.)

Sergeant Black, meanwhile, talked to persons who had been in Building C, "trying to determine exactly how many suspects [they] had in that building and what kind of weapons they were armed with. And where that person might be inside the building." (18 RT 4136-4137.) Some of the students she spoke with "came out knowing that the suspect's first name was Eric" and gave her a physical description of him. (18 RT 4137.) One of the female students told Sergeant Black that the gunman "was named Eric, and she said that Eric had told him [*sic*] he should have graduated in 1988, but Mr. Brens had failed him, and that was why he was at the school." (18 RT 4137; see also 18 RT 4212-4213 [the student (Marilyn Eves), who had gotten out of the building after going downstairs to use the bathroom, also told Sergeant Black that appellant had said "he didn't want to hurt anyone and had not intended to shoot anyone in the stomach" and he "kept promising he wouldn't shoot anyone"].) A school employee obtained a 1988 yearbook, and this female student, and also Ms. Morgan and Ms. Cole, identified appellant as the gunman in Building C. (18 RT 4137-4138.) That information was passed on to Lieutenant Escovedo and

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28. At this same time, Lieutenant Escovedo saw about six students come running down the hallway and exit the building. (17 RT 3919.)

also to the people in the command post that had been set up. (18 RT 4138.)

Subsequently, at about 2:45 p.m., Sergeant Black took a telephone call that had come into the Administration Building "over the intercom system set up at the school." (18 RT 4138-4139.) Appellant was the caller; he demanded that the school bells that had started ringing at about that time be shut off immediately as they were interfering with him hearing what was taking place in the building. (18 RT 4139.) Appellant said that if the bells were not turned off "[h]e was going to shoot some kids." (18 RT 4176.) Sergeant Black asked appellant "why he had come to the school, and . . . what it was he needed from us." (18 RT 4139.) Sergeant Black described the conversation that followed:

> He told me that he had lost his job because of Bren [*sic*] and because of Brens he didn't pass and get his diploma, and that's what he was there for. I asked him if he had alot [*sic*] of expenses. He told me he paid $420 a month rent. I asked him who he lived with. He told me he lived with his parent. He then said, "I'll call you back later on channel six." And he hung up the phone, the intercom.

(18 RT 4140; see also 18 RT 4211.)

At about 4:30 p.m., Sergeant Black received a telephone call from David Rewerts, who called to say "that he believed the gunman in the school was [appellant]." (18 RT 4140.) Rewerts said that appellant, who he described as his best friend, "had been talking about going in C Building shooting a few people just to see if he could get away with it." (18 RT 4140.) Rewerts also told Sergeant Black that appellant had been laid off from his job at Hewlett-Packard. (18 RT 4140-4142.) Sergeant Black passed this information along to Lieutenant Escovedo in the command post. (18 RT 4142.)

Sergeant Durfor remained on scene as part of the SED team "for the duration" of appellant's standoff with law enforcement and helped establish an "inner perimeter" within Building C. (17 RT 3891-3892.) The majority of the time Sergeant Durfor was "covering" from classroom C-101A "the southern hallway and the south staircase." (17 RT 3892; see also 17 RT 3895-3896.)

When students came into his field of vision he motioned for them to come toward him and then "to exit them outside." (17 RT 3893; see also 17 RT 3897-3899.) A couple of students responded to Sergeant Durfor by shaking their heads "no" and continued to walk. (17 RT 3899.) He learned later from other SED members that students were saying they had to return to the room upstairs or other students would be shot. (17 RT 3899.)

Sergeant Long was another of the SED members who remained inside Building C for the duration of the hostage situation. (17 RT 3963.) According to Sergeant Long, approximately 45 minutes to an hour after the SED team's arrival in the building students began coming down the stairways "in the middle of the building" and attempting to use the bathrooms "in the lower building area" (i.e., the faculty bathrooms). (17 RT 3964.) The bathrooms were locked, however. (17 RT 3964.) This upset appellant, who began yelling out from upstairs that he wanted a key and that he "wanted it now." (17 RT 3964.) Shortly thereafter, students began going downstairs to use the bathrooms on the east side of the building; those bathrooms were directly accessible to the SED members. The members grabbed the first pair of students who went to use those bathrooms and succeeded in talking them into leaving the building (although the students protested that appellant had told them that if they did not return after using the bathroom he would shoot two people for each of them). (17 RT 3964-3965.) The SED members were able to talk several more students into leaving the building in this same manner; eventually, though, the students "started staying away" from them when they went downstairs to use the bathroom. (17 RT 3965.)

In addition to the SED members, about 60 individuals from the Yuba County Sheriff's Department were on scene at the school. (17 RT 3908.) Officers from numerous other law enforcement agencies were on scene as well, including officers from the Marysville Police Department, the Yuba City Police

Department, the Sutter County Sheriff's Office, the California Highway Patrol, and the Federal Bureau of Investigation (FBI). (17 RT 3909.) While the SED members maintained the building's inner perimeter, the other officers remained outside the building.[29/] (17 RT 3908.) Three fire departments, an ambulance company, and a UCDMC helicopter were involved in the effort to rescue the wounded.[30/] (17 RT 3909.)

Law enforcement "had a military field phone running from the command post [which had been set up inside the Administration Building] into Building C which [was] a direct line." (17 RT 3900, 3906-3907; see also 18 RT 4145, 4216-4217.) Law enforcement was able to get this phone, which was used to conduct hostage negotiations with appellant, into the building and upstairs "through one of the children." (17 RT 3907; see also 18 RT 4219 [SED team members placed the phone at the bottom of the stairs and someone brought it up to the "hostage room"].) The phone was deployed at approximately 4:00 or 4:15 p.m. (18 RT 4220.) The phone had tape recording abilities and was able to record what was going on inside classroom C-204B even when the phone was not in use. (18 RT 4217-4219.)

Officer Chuck Tracy of the Yuba City Police Department served as the primary negotiator with appellant. (17 RT 3910, 3995-3996; 18 RT 4216, 4220.) Among the other individuals on the hostage negotiation team was Special Agent Roger Davis of the FBI. (17 RT 3994-3995; see also 18 RT 4143-4144, 4216, 4223-4224.) Officer Tracy did all of the talking with

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29. Late in the siege, however, the SED members were joined inside the building by Yuba City Police Department SWAT team snipers, who were placed in classroom C-105B. (17 RT 3908-3909.)

30. At appellant's demand, the use of helicopters was curtailed at some point during the standoff. Appellant expressed fear that the helicopters would be used to place SWAT team members on the roof of the building in an attempt to get to his position. (17 RT 3909-3910.)

appellant, "except for one short time when Roger Davis tried to talk to him." (18 RT 4144-4145; see also 18 RT 4220.)

The first person Officer Tracy spoke to over the "throw phone" was Erik Perez. (18 RT 4220-4221.) That conversation was recorded, as were the rest of the conversations held over the phone during the course of the approximately six and one-half hours the hostage negotiations took place. (18 RT 4146, 4221.) The audiotapes of the phone conversations – as well as the other voices and sounds in the room that were picked up by the listening device when the phone was not in use – were admitted into evidence as Exhibits 82 through 88 and were played for the jury. (See 3 CT 831; 18 RT 4225-4226, 4240-4241, 4243-4247, 4254-4256, 4261-4268, 4274-4279, 4286-4290.)

As recorded on side A of Exhibit 82, the following exchange occurred during Officer Tracy's first conversation with appellant over the throw phone:

OFFICER TRACY: I'm here to try to help you.

MR. HOUSTON: Yeah.

OFFICER TRACY: Okay?

MR. HOUSTON: You know, Mr. Brens tried to fucking help me, too.

[¶] . . . [¶]

MR. HOUSTON: Yeah, he tried to help me. He tried to help me fucking pass. And he fucking flunked my ass with one fucking grade. Fucking knocked everything down, all my fucking dreams.

OFFICER TRACY: Okay. It seems like – it's very apparent to me that this upset you, and I'd like to – I'd like to –

MR. HOUSTON: Upset me? It ruined my fucking life. You try getting a fucking job around here without a diploma. I was making just enough money to fucking survive on, let alone trying to go to fucking college. I had everything planned. I had the fucking prom. I had a date. I had everything. And he fucking blew it away.

(See 4 Supplemental CT - 6 at pp. 845-846 [jointly-prepared revised transcript of Exhs. 82-88].) Shortly thereafter, the following exchange occurred:

OFFICER TRACY: It's obvious that you've had some bad raps in life.

MR. HOUSTON: Bad raps? They totally fucked up my life. . . .

[¶] . . . [¶]

Bad fucking raps? With one fucking class he fucking destroyed someone's life. I tried my fucking hardest every fucking day, trying to bust my ass to get just enough grades to pass, and he fucking blew it out of the water.

(See 4 Supplemental CT - 6 at p. 849 [jointly-prepared revised transcript of Exhs. 82-88].) Appellant subsequently added:

MR. HOUSTON: See, I have a learning process [*sic*]. I can learn stuff, but it takes a little bit more than some people, and a lot of teachers just – just didn't understand. They didn't take the time to sit there and teach me. And that's one of the biggest fucking problems, is like people like Mr. Brens. I need to pass – he just looked at me and fucking goes, "You didn't pass," and just like walked on and didn't say fucking nothing, like no fucking – no big deal. And he just totally ruined a fucking kid's whole life, just like it was nothing. He didn't sit down and talk to me about it or nothing. He just says, "You didn't pass."

That means you don't graduate. You don't – it's all the shit you had with the prom – it's all fucked out the door, everything. . . .

(See 4 Supplemental CT - 6 at pp. 852-853 [jointly-prepared revised transcript of Exhs. 82-88].)

As recorded on side A of Exhibit 85, appellant made the following statements during a subsequent phone conversation with Officer Tracy: "I didn't mean to – to shoot those people."; "I mean, if I wanted to kill them, I would have killed them. All right?"; "But I didn't. I maimed them, or I tried to maim them." (See 4 Supplemental CT - 6 at p. 986 [jointly-prepared revised transcript of Exhs. 82-88].) Later during the same conversation appellant referred to the fact that he had shot "about five people." (See 4 Supplemental CT - 6 at p. 997 [jointly-prepared revised transcript of Exhs. 82-88].)

As stated *ante*, appellant's standoff with law enforcement ended when at about 10:00 or 10:30 p.m. appellant released the final hostages. (See 14 RT

3272, 3280, 3305; 16 RT 3670, 3691.) Appellant came downstairs and was arrested. He was then transported to the Yuba County Sheriff's Department. (17 RT 3925, 3966-3967; see also 18 RT 4148-4149.)

Aftermath

Robert Brens was found dead in classroom C-108B. (11 RT 2524-2525.) Judy Davis was found dead in the same room as Mr. Brens. (11 RT 2525.) Davis was "[t]owards the left front of the room, and Mr. Brens just to the left of her." (11 RT 2525.) Beamon Hill was found dead in classroom C-102. (11 RT 2525.) And Jason White was found dead in classroom C-107. (11 RT 2526; see also 17 RT 3968.)

Mr. Brens, who was 28 years old at the time of his death, suffered "multiple puncture type wounds, projectile type wounds predominantly on the right side also involving the back and chest, and also . . . somewhat on the right arm." (11 RT 2636-2637.) He had a total of 51 external injuries, some of which were entry wounds, some of which were exit wounds, and some of which were burns caused by a projectile passing by the skin. (11 RT 2637.) Mr. Brens suffered extensive internal injuries, including injuries to the right lung, the heart, and the liver, and he died from internal bleeding. (11 RT 2637-2638.) Thirteen projectiles (number four buckshot (18 RT 4112)) were recovered from his body. (11 RT 2638-2639.)

Davis suffered multiple "puncture type" or "projectile type wounds" that "involved the head, face, chest, and hands"; eight of the wounds were to her head, neck and upper chest, and the remaining twelve were to her hands. (11 RT 2644; see also 11 RT 2645.) She suffered multiple internal injuries to her chest (including to her lungs and aorta) and died from internal bleeding. (11 RT 2644-2645.) Two projectiles (number four buckshot (18 RT 4113)) were recovered from her body. (11 RT 2645.)

Hill suffered four head wounds: one in the "lower portion"; one in the "mid forehead"; one in the left temple; and one in the mid-scalp region, which appeared to be an exit wound. (11 RT 2639.) "Inside the head the projectile that had progressed from the left temple area had passed through the brain and through the brain stem causing his demise." (11 RT 2640.) One projectile (number four buckshot (18 RT 4113)) was recovered from Hill's brain. (11 RT 2641.)

White suffered four "punctated projectile type injuries both . . . of entry and exit wounds"; the wounds were "essentially from the right side" of his body, from the chest cavity to the abdominal cavity. (11 RT 2632-2633.) White died from bleeding due to extensive injuries within both chest cavities. (11 RT 2632-2633.) The injuries were caused by the seven lead pellets (number four buckshot (18 RT 4113)) that were recovered from his body. (11 RT 2633-2635.)

Among the items of evidence collected from Building C were the following items, all collected from classroom C-204B: a 12-gauge shotgun (Exh. 10) (18 RT 4190); a .22-caliber rifle with the butt sawed off (Exh. 11)[31] (18 RT 4190); a black web belt with shotgun shell loops (with 16 unexpended shotgun shells in the loops) and an attached ammunition pouch (with 64 unexpended .22-caliber bullets in the pouch) (Exh. 14) (18 RT 4191-4192); a brown and tan camouflage hunting vest, with 13 unexpended shotgun shells in the left front pocket, 15 unexpended shotgun shells in another pocket, two slugs in a pocket, and a 50-count box of CCI brand .22-caliber long-rifle bullets (with

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31. Ronald Ralston, the supervisor of the California Department of Justice's (DOJ's) Chico crime laboratory, examined Exhibit 11. (18 RT 4114.) When he received the rifle, it was not capable of being fired. (18 RT 4114.) "There were the remains of . . . at least one or two cartridges in the chamber and in the bolt area that were jammed and broken up inside there. So that the bolt would not close nor could it be loaded properly." (18 RT 4114-4115.)

49 unexpended bullets in the box) in the right front pocket (Exh. 13) (18 RT 4192-4193); and, finally, a pair of thumb cuffs (Exh. 73) (18 RT 4189-4190).

Law Enforcement Investigation

Sometime around 3:00 p.m. on May 1, 1992, appellant's mother, Edith Houston, learned that there was "trouble" at Lindhurst High School. (16 RT 3707-3708.) At some point thereafter, Ms. Houston was contacted at home by the Yuba County Sheriff's Department. (16 RT 3708-3709.) A deputy sheriff came to the door and asked if she was Ms. Houston; when she answered that she was, he asked her to please come with him and she did. (See 16 RT 3709.) The deputy drove her to the high school. (16 RT 3709-3710.) After they had arrived at the school, someone took her back to where "the FBI man" was and he "explained." (16 RT 3710.)

Sometime between approximately 8:00 and 9:00 p.m., Ms. Houston accompanied Officer Michael Johnson of the Marysville Police Department back to her house. (16 RT 3710, 3718; see also 17 RT 3911, 3986, 3990.) Once there, she accompanied Officer Johnson to appellant's bedroom. (16 RT 3710.) While in appellant's bedroom, Officer Johnson collected a handwritten supply list that was on the bed (Exh. 31); the items on the list included types and quantities of ammunition (for example, "8 boxes of 00 buck"), lighter fluid, a "[p]ocket" to hold .22-caliber shells, and a rifle sling. (17 RT 3987-3989.) While still in the residence, Officer Johnson received a telephone call from Sergeant Jim Downs of the Yuba County Sheriff's Department who instructed him to look between the sheets of appellant's bed for a note. (17 RT 3989; see also 17 RT 3995-3996 [during hostage negotiations, appellant asked Officer Tracy if law enforcement had located a note he had left at home on his bed].) Officer Johnson pulled back either the sheets or a blanket and found a handwritten note (Exh. 16-A) addressed "'to my family.'" (17 RT 3989.) The note read:

> I know parenting had nothing to do with what happen's [*sic*] today. It seem's [*sic*] my sanity has slipped away and evil tooken [*sic*] it's [*sic*] place. The mistakes the loneliness and the failures have built up to [*sic*] high. Also I just wanted to say I love my family very very much . . . . . .
>
> Also I just wanted to say I also love my friend David Rewert [*sic*] too. And if I die today please bury me somewhere beautiful.

Officer Johnson also collected from appellant's bedroom the following items: "four [empty] Federal brand three inch magazine, No. 4 buckshot, 12 gauge boxes," each box designed to hold five rounds of 12-gauge shells (Exh. 32-A); "five [empty] boxes of Winchester Super X hollow point rifle slugs, five shells per box, two and three quarter inch," with a maximum load of a one-ounce slug (Exh. 32-B); two empty boxes of Remington two and three-quarter inch rifle slugs (Exh. 32-C); "two boxes, empty, of Remington brand buckshot, 12 gauge, two and three quarter double ought buck" (Exh. 32-D); "one box of Winchester, which [was] empty, Double X magazine number, center buckshot loads, copperplated buckshot" (Exh. 32-E); and "two empty boxes of Winchester center Double X magazine number, center buckshot loads, copperplated buckshot, number four buck" (Exh. 32-F). (16 RT 3727-3729; see also 17 RT 3986-3987)

Officer Johnson additionally collected from appellant's bedroom a cash register receipt from Big 5 Sporting Goods in Yuba City, dated May 1, 1992, 12:49 p.m (Exh. 18). (16 RT 3729-3730.)

Based on information provided by Ms. Houston, Sergeant Mikeail Williamson of the Yuba County Sheriff's Department located appellant's vehicle on the campus of Lindhurst High School. (16 RT 3717-3718.) The vehicle was parked in the driveway to the staff parking lot, directly in front of Building C. (16 RT 3718.)

On November 4, 1992, Sergeant Downs searched appellant's vehicle pursuant to a search warrant. (17 RT 3998, 4001.) He found a paperback book

entitled "Modern Law Enforcement Weapons and Tactics" (Exh. 58) on the front passenger's seat. (17 RT 3999-4000.) On multiple pages, text had been circled or underlined, including on page 131, where the following words were underlined: "[L]et's look at the results of some informal shooting experiments that we performed to see if the classic load of #00 is really the best choice for anti-personnel use in law enforcement." In addition, the upper corner of the first page (page 186) of chapter 13, pertaining to SWAT groups, had been "turned down." (See 17 RT 4000; see also Exh. 58 [page 131].) In the vehicle's center console, Sergeant Downs found a receipt from Mission Gun Shop (Exh 17) dated May 1, 1992, and a receipt from Peavey Ranch & Home dated May 1, 1992 (Exh. 19-A). (17 RT 4000-4001.)

On the morning of May 3, 1992, Sergeant Williamson, accompanied by Sergeant Downs, executed a search warrant for appellant's residence. (16 RT 3730-3731.) On that date they seized a sheet of graph paper with writing (including types and quantities of ammunition) and some drawings (including a vest) (Exh. 60-A); the paper was located "at the lower right hand side of a waterbed" in appellant's bedroom. (16 RT 3731-3732.) Exhibits 61 through 67 were also collected from appellant's residence. (16 RT 3733-3734.) Exhibits 61-A and 61-B, torn pieces of paper with writing on them, were found in a large cardboard box located in appellant's bedroom closet. (16 RT 3734.) When restructured, both papers included writings to the effect that it was appellant's hatred toward humanity that had forced him to do what he had done. One of the papers (Exhibit 61-A) included words to the effect that appellant had been fascinated with weapons and with death and had been set on killing. Exhibit 62-A, torn pieces of paper with writing on them, was found in a clear plastic bag in the garbage outside the residence. (16 RT 3735.) When restructured, the paper included writings to appellant's family, telling them that appellant loved them and asking that if he died that they please bury him

somewhere beautiful. Exhibit 63, a tablet of graph paper with writing on some of the pages, and Exhibit 64, a separately-marked part of the tablet with an apparent diagram of Building C – labeled "Mission Profile" and with notations including "Mission Gun Shop" and "first shot" – were found on the left side of appellant's bed, near the headboard and on top of the quilts and bedspread. (16 RT 3735-3736.) Exhibit 65, a "S.W.A.T. magazine" and a magazine entitled "Modern Law Enforcement Weapons and Tactics, All New Second Edition," was located on top of the headboard on the right side of appellant's bed. (16 RT 3736.) Exhibit 66, "A Penal Code of California Peace Officer's abridged edition with index," 1982 edition, was located on the floor to the left of appellant's bed. (16 RT 3736.) Exhibit 67, a bedsheet containing several sheets of sandpaper and the sawed-off butt of a rifle, was located on the floor of the closet in appellant's bedroom.[32/] (16 RT 3737.)

Bill Connor, a questioned document examiner for DOJ's Bureau of Forensic Services, reconstructed Exhibits 61-A, 61-B, and 62-A. (18 RT 4073-4076.) Connor examined each of those documents, and also Exhibits 16-A, 60-A, and 64, and determined that the writings had all been authored by the same person. (18 RT 4076-4077.) Connor also determined that Exhibit 16-A (the letter that began "to my family") had been written on and pulled from Exhibit 64 (the tablet of graph paper found on appellant's bed). (18 RT 4083-4085.)

Firearms Evidence

Sergeant Alan Long, who was the Yuba County Sheriff's Department's firearms instructor, testified that there are two standard methods for firing a shotgun from a standing position: aimed fire (in which "you use the sights on

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32. DOJ criminalist Ronald Ralston examined Exhibit 67. (18 RT 4115.) He determined that the gun stock (which was more specifically the rear part of a gun stock) had been cut from Exhibit 11, the .22-caliber rifle with the butt sawed off that was collected from classroom C-204B. (18 RT 4115-4116.)

the shotgun") and point fire (in which "you lock your body into the gun and swivel the gun on the trunk of your body and discharge the shotgun"). (17 RT 3972; see also 17 RT 3973-3974.)

Sergeant Long explained that a shotgun is "a multi-projectile weapon." (17 RT 3975.) For a shot fired from 15 feet away, the pellets "will expand in a circular diameter" of five inches. (17 RT 3975.)

Turning to particular types of shotgun ammunition, Sergeant Long testified that there are multiple types of buckshot. (17 RT 3976.) The majority of law enforcement agencies use double aught buck; some use number four buckshot. (17 RT 3976-3977.) Both are "anti-personnel type rounds," best used for large game, with a "devastating" impact power due to multiple projectiles "hitting you all at the same time." (17 RT 3977.) Sergeant Long further testified that slugs "are used for bears and larger game." (17 RT 3980.)

Testimony Of David Rewerts

David Rewerts met appellant during his (Rewerts's) freshman, and appellant's sophomore, year in high school (i.e., the school year which started in 1986) and the two became best friends. (18 RT 4060, 4067, 4071.)

About four or five months prior to May 1, 1992 (after appellant and Rewerts had watched the movie "Terminator 2" together (18 RT 4068-4069)), appellant said something to Rewerts about going to Lindhurst High School and, "due to the openness of C Building he would walk in and shoot a couple rounds and go outside the back and off the – around the fence on the back of Lindhurst High School [baseball] field." (18 RT 4063.) The subject came up two or three times after that, with appellant telling Rewerts "he would like to go to the school and shot [*sic*] a couple of people." (18 RT 4062-4063.) On one specific occasion when appellant brought this up, Rewerts was staying over at appellant's house. (18 RT 4063-4064.) Rewerts was going through a couple of appellant's books when he (Rewerts) made some "pretty absurd" statements

about "destroying things"; appellant responded, "[A]ll I was talking about was going back" to the high school and "shooting a couple people." (18 RT 4064.) At the time appellant said this he was reading aloud to Rewerts "quotes out of a book and [*sic*] military tactics and police procedures" and "hostage situations." (18 RT 4064.)

Rewerts knew that appellant owned a shotgun, two .22-caliber semi-automatic rifles, and "a small little like machine gun thing." (18 RT 4066.) On one occasion appellant and Rewerts went to a shooting range in Spenceville to "practice shoot." (18 RT 4066.) On other occasions Rewerts would call over to appellant's residence and his parents would tell him that appellant was out shooting, or appellant would tell Rewerts that he was going to go shooting up at Spenceville. (18 RT 4067.)

When Rewerts was told by a neighbor on May 1, 1992, that there was "a gunman loose" at Lindhurst High School, Rewerts thought "that it could have been [appellant] doing it." (18 RT 4061.) Rewerts called appellant's house and was told he was not at home. (18 RT 4061.) Rewerts subsequently called the police department; the police department in turn connected Rewerts with the high school, and Rewerts spoke with Sergeant Virginia Black. (18 RT 4061-4062.) Rewerts told Sergeant Black that he believed appellant was the gunman and he offered that, if it was appellant, he could maybe help by talking to him. (18 RT 4062.)

Appellant's Actions Leading Up To His Arrival At The School

On May 1, 1992, appellant lived in the home of his mother (Edith Houston) on Powerline Road in Olivehurst; appellant's older (half) brother (Ronald Caddell) lived with them. (16 RT 3704-3706, 3711-3712.) At about 8:00 a.m. that morning, appellant gave his mother a ride to the dentist; he dropped her off and returned home. (16 RT 3705.)

Ms. Houston arrived back home at about 10:00 a.m. (16 RT 3705.) Appellant was at home, polishing his car and waiting for the mailman as the first of the month was the day that he received his unemployment check. (16 RT 3705.) The mailman arrived at the house sometime around 11:00 a.m. (16 RT 3705-3706.) Appellant got his check and then left. (16 RT 3707.)

Between approximately 11:00 a.m. and 12:00 p.m. on May 1, 1992, appellant entered the Mission Gun Shop on First Street in Marysville. (17 RT 3842-3843; see also 17 RT 3853-3854, 4035.) Appellant had a piece of white notebook paper on which the "stuff" he wanted was listed. (17 RT 3843-3844.) Appellant asked Georgia Tittle, who owned the shop with her husband, if she had "slugs." (17 RT 3843.) When she answered that she did, appellant requested five boxes; Tittle only had four, though. (17 RT 3843.) Appellant asked for "double-aught buck," which she did not have. (17 RT 3843.) He also "wanted some .22 shells." (17 RT 3843.) Doreen Shona, a friend of Tittle's who was in the shop at the time and was helping out, rang up the transaction and wrote a receipt (Exh. 17) for it. (17 RT 3842, 3844-3847, 3851-3852, 3855.) Appellant purchased "[f]our boxes of Winchester slugs twelve gauge, and one box of Blazer .22 long rifle shells." (17 RT 3855.)

At about 12:23 p.m. on May 1, 1992, appellant purchased from Peavey Ranch & Home in Linda a box of 12-gauge shells, "[t]wo-and-three-quarter inch buck shot, number four" ("Double X"), and a black pouch of the type that is worn around the waist and holds .22-caliber shells; the transaction, which was conducted in cash, produced a sales receipt (Exh. 19-A). (See 17 RT 3872-3875, 3879.)

At about 12:49 p.m. on May 1, 1992, appellant purchased from Big 5 Sporting Goods in Yuba City two types of 12-gauge ammunition: two boxes (five shells to a box) of Remingon "two and three-quarter inch" and four boxes (five shells to a box) of Federal three-inch buckshot, number four; the

transaction produced a sales receipt (Exh. 18). (See 17 RT 3863-3867, 3870; see also Exh. 18.)

Appellant's Post-Arrest Interview With Law Enforcement

At approximately 10:30 a.m. on May 2, 1992, Sergeant Jim Downs – later joined by Sergeant Mikeail Williamson (see CT Supplemental - 5 at pp. 17, 119) – interviewed appellant in an interview room at the Yuba County Sheriff's Department. (17 RT 4001-4002, 4005.) Before beginning the interview, Sergeant Downs advised appellant of his "rights per *Miranda*." (17 RT 4002-4003.) Appellant indicated that he understood his rights and agreed to speak with Sergeant Downs about the events of the preceding day. (17 RT 4002-4004.) After conducting a "preliminary interview" with appellant, "they" turned on a videotape recorder and videotaped the remainder of the interview. (17 RT 4005.) The videotapes of the interview were admitted into evidence as Exhibits 57-A and 57-B and were played for the jury.[33/] (17 RT 4019, 4032-4033.)

During the interview, Sergeant Williamson asked appellant when he had "decide[d] to do this." (CT Supplemental - 5 at p. 20 [Exh. 89]; see also CT Supplemental - 5 at p. 122 [jointly-prepared revised transcript].) Appellant answered as follows:

> Houston Uhh . . . Actually I, I more thought about it, but actually not until I drove out there and I saw Mrs. Morgan that everything, cuz I was thinking about just turning around and going back to Spenceville, once I saw Mrs. Morgan, she says, Where . . . where . . . Why you got that gun and do you have a permit for it, I just ran in there and uh, I just ran in there and started shooting.

(CT Supplemental - 5 at p. 20 [Exh. 89]; see also CT Supplemental - 5 at pp.

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33. Exhibit 89, a transcript of the interview, was entered into evidence and copies were provided to the jurors. (See 3 CT 834-835; 18 RT 4336-4337.)

2, 21 [Exh. 89]; CT Supplemental -5 at pp. 104, 122-123 [jointly-prepared revised transcript].) Appellant acknowledged that about a month or so before he had "told David [Rewerts] that [he] had dreams about going into the school and shooting," but he said "it was just talk." (CT Supplemental - 5 at p. 21 [Exh. 89]; CT Supplemental - 5 at p. 123 [jointly-prepared revised transcript]; see also CT Supplemental - 5 at pp. 24, 50 [Exh. 89]; CT Supplemental - 5 at pp. 126, 152 [jointly-prepared revised transcript].) When Sergeant Downs confronted appellant with the fact that they had found at his house the list of the ammunition he had wanted to buy, appellant said that although he had "planned it," it was "more like thinking about doing it but not really going through it [*sic*]." (CT Supplemental - 5 at p. 21 [Exh. 89]; CT Supplemental - 5 at p. 123 [jointly-prepared revised transcript].) Appellant also said that, although three or four days before going to the school he "drew up the plans," "drawing is one thing and doing one thing." (CT Supplemental - 5 at p. 25 [Exh. 89]; CT Supplemental - 5 at p. 127 [jointly-prepared revised transcript].)

Appellant said that his plan had involved bringing lighter fluid to the school and to "have lighter fluid on all four of the doors so there would be no way to get out" once he went inside. (CT Supplemental - 5 at pp. 25-26 [Exh. 89]; see also CT Supplemental - 5 at pp. 127-128 [jointly-prepared revised transcript].) However, he "never bought any of that stuff." (CT Supplemental - 5 at p. 26 [Exh. 89]; CT Supplemental - 5 at p. 128 [jointly-prepared revised transcript].)

The following exchange took place between Sergeant Williamson and appellant after Sergeant Williamson asked appellant why he had done what he had done:

Williamson	Why were you taking the guns in there? What were your plans for the guns? . . . What were you going to do?
Houston	First of all I, actually I didn't plan on killing anyone,

> okay? If anyone died I don't know. But uh, actually I was just thinking about, there's a lot of people I shot, I shot them in the legs and the hips and stuff, but actually I just thought about maybe shooting, winging a couple of people when I was in there and then uh. . .
>
> Williamson That way they'd take you seriously?
>
> Houston Well yeah. And then have uh, have the uh, news guys come in here and maybe get down some of the stuff that I was uh, that I was needing, needed here.

(CT Supplemental - 5 at p. 27 [Exh. 89]; see also CT Supplemental - 5 at p. 129 [as per jointly-prepared revised transcript, appellant said he "thought about maybe shooting, wounding," not "winging," "a couple of people"]; and see CT Supplemental - 5 at pp. 60, 85, 87, 90 [as per Exh. 89, appellant reiterates that his intentions were not to kill anyone]; CT Supplemental - 5 at pp. 162, 187, 189, 192 [as per jointly-prepared revised transcript, appellant reiterates the same].)

When told that he had shot Mr. Brens, appellant claimed that he did not know it was Mr. Brens at the time he shot him. (CT Supplemental - 5 at pp. 28-29 [Exh. 89]; CT Supplemental - 5 at pp. 130-131 [jointly-prepared revised transcript]; see also CT Supplemental - 5 at pp. 34, 69, 75, 86-87, 89, 91-92, 94 [Exh. 89]; CT Supplemental - 5 at pp. 136, 171, 177, 188-189, 191, 193-194, 196 [jointly-prepared revised transcript].) He said that he "didn't even recognize him" as he "hadn't seen him in four years." (CT Supplemental - 5 at p. 28 [Exh. 89]; CT Supplemental - 5 at p. 130 [jointly-prepared revised transcript]; see also CT Supplemental - 5 at pp. 33, 89 [Exh. 89]; CT Supplemental - 5 at pp. 135, 191 [jointly-prepared revised transcript].)

Appellant told Sergeants Williamson and Downs that, with regard to shooting people, the only "real image" he could remember was shooting the teacher who turned out to be Mr. Brens and the student who turned out to be Judy Davis, shooting at "the Mexicans that were in the Spanish [i.e., ESL]

class," shooting at a student who "popped his face" out of a classroom, and shooting at another student who was hiding behind a blackboard or bulletin board and had his "butt" sticking out. (See CT Supplemental - 5 at pp. 4-8, 30-31, 34-35, 37-38, 64-67, 78-80, 90, 95-98 [Exh. 89]; CT Supplemental - 5 at pp. 106-110, 132-133, 136-137, 139-140, 166-169, 180-182, 192, 197-200 [jointly-prepared revised transcript].) Appellant said that he did not target the students in the ESL class – or any other persons – to shoot at; rather, he shot "anything that came in the sight of fire." (CT Supplemental - 5 at p. 31 [Exh. 89]; CT Supplemental - 5 at p. 133 [jointly-prepared revised transcript]; see also CT Supplemental - 5 at pp. 38, 65, 70-71, 91 [Exh. 89]; CT Supplemental - 5 at pp. 140, 167, 172-173, 193 [jointly-prepared revised transcript].)

Appellant acknowledged to Sergeants Williamson and Downs that "he told some people upstairs that [he] wished Mr. Brens was here." (CT Supplemental - 5 at pp. 31-32 [Exh. 89]; CT Supplemental - 5 at pp. 133-134 [jointly-prepared revised transcript].) Appellant also acknowledged that he hated Mr. Brens. (CT Supplemental - 5 at pp. 32, 91-92 [Exh. 89]; CT Supplemental - 5 at pp. 134, 193-194 [jointly-prepared revised transcript].) Appellant also stated, however, that he had gone to the school "[n]ot just because of [Mr. Brens] but everything that got stolen and not just because of the diploma, but everything, all the disappointments in my life and everything else that's been leading up to this, all the disappointments, and my parents, everything else." (CT Supplemental - 5 at p. 33 [Exh. 89]; CT Supplemental - 5 at p. 135 [jointly-prepared revised transcript]; see also CT Supplemental - 5 at p. 92 [Exh. 89]; CT Supplemental - 5 at p. 194 [jointly-prepared revised transcript].)

Appellant claimed that, once he went upstairs, it "kicked in" that what he was doing was wrong. (CT Supplemental - 5 at pp. 35-36 [Exh. 89]; CT Supplemental - 5 at pp. 137-138 [jointly-prepared revised transcript].) As

described by appellant, "that's when a little bit more of [his] sanity popped back in"; before that, he was "out of mind" and working "on instinct." (CT Supplemental - 5 at p. 36 [Exh. 89]; CT Supplemental - 5 at p. 138 [jointly-prepared revised transcript]; see also CT Supplemental - 5 at p. 71 [Exh. 89]; CT Supplemental - 5 at p. 173 [jointly-prepared revised transcript].)

Appellant expressed his purported lack of knowledge that he had killed anyone as follows:

Downs	Did they have any idea upstairs that anybody downstairs was dead:
Houston	Well, yeah, well not dead, but they . . . Why, was there someone dead?
Williamson	Four people dead.
Houston	Four. I . . .
Downs	Did you guys know that upstairs?
Houston	No. They all said that one person was in critical condition, one was going to the operation and the other ones were shot.
Williamson	They heard that on the radio?
Houston	Yeah.
Williamson	They didn't know about the deaths. Kids had no idea. You had no idea, did you?
Houston	Well, well, only from the radio.

(CT Supplemental - 5 at pp. 58-59 [Exh. 89]; see also CT Supplemental - 5 at p. 94 [Exh. 89]; CT Supplemental - 5 at pp. 160-161, 196 [jointly-prepared revised transcript].)

Defense

Warren Cook testified that he was one of the students held hostage by appellant in classroom C-204B of Lindhurst High School on May 1, 1992. (See 19 RT 4358-4360.) Cook heard appellant say that "he'd talked with one of his

friends that it would be neat to go to school one day and just shoot some people." (19 RT 4363.) Appellant said that he did not know he had killed anyone. (19 RT 4363.) He also said "that he wasn't aiming to kill anybody." (19 RT 4363.)

Darren Hodkinson testified that he was also among the students held hostage by appellant in classroom C-204B. (See 19 RT 4370-4371.) According to Hodkinson, when appellant ordered some students in classroom C-204B to go downstairs to take out the injured students, he said that "he did not want the injured students that were still alive to die." (19 RT 4372-4374.) Hodkinson also heard appellant say that he did not know how he was "going to get out of" having shot "all those people." (19 RT 4374-4375.)

Lovette Hernandez (maiden name: Lovette Lucase) testified that she too was among the students held hostage by appellant in classroom C-204B. (See 19 RT 4378-4381.) Hernandez was in the final group of four students that appellant released from the classroom. (19 RT 4380-4381.) Before the four students left, appellant shook each of their hands and told them he was sorry for "what happened." (19 RT 4382.)

Nubia Vargas testified that she was also held hostage by appellant in classroom C-204B. (See 19 RT 4389-4390.) According to Vargas, when some news reports came over the radio, appellant "couldn't believe that he did that," i.e., that he had shot and injured people. (19 RT 4390.) At one point appellant said, "'Oh, my God. Oh my God. What have I done? What have I done?'" (19 RT 4394-4394.)

Ronald Caddell, appellant's older (half) brother, testified that in May 1992, appellant was living with him and his mother on Powerline Road in Olivehurst (Yuba County). (19 RT 4399-4400, 4403-4404.) Appellant and Caddell lived together for about a year in Yuba County; before that, they lived together for about two years in Fair Oaks (Sacramento County). (19 RT 4399-

4400.) They had lived together before that, as well. (19 RT 4404-4405.)

Caddell testified that he (Caddell) had been employed at Hewlett-Packard since about 1987. (19 RT 4400.) During part of the time appellant lived with Caddell in Yuba County the two worked together at Hewlett-Packard. (19 RT 4401.) However, appellant was not employed by Hewlett-Packard but by a temporary agency that "was contracted to" Hewlett-Packard. Appellant was working under a one-year contract, which expired in about February 2002.[34/] (19 RT 4401; see also 19 RT 4402.) After the contract expired, appellant did not work but instead started collecting unemployment. (19 RT 4401.)

According to Caddell, from about the age of "[p]robably 12 or 13," appellant had been "fascinated with military equipment, be it airplanes, helicopters, and . . . he went out and bought the local swap [*sic*] magazine and stuff, and the handgun magazines, and stuff." (19 RT 4405.) Appellant "kept a big collection" of gun magazines. (19 RT 4413.)

Caddell was aware that, in May 1992, appellant owned a shotgun and a couple of .22-caliber rifles. (19 RT 4410.) About two or three times, Caddell went with appellant to Spenceville, which is in Yuba City, about a 30-minute drive from Marysville, which Caddell described as follows:

> That's an – it's kind of like a park up in the hills above Beale Air Force Base. And they have a very primitive gun range set up up there with, you know, it's where nobody can be injured at. And they have some picnic tables. It is up there. And everybody from the local area goes up there shooting. Set up their own targets. There's no range master up there or any kind of an authority figure to watch over you. It's kind of like shoot at your own risk type of thing.

(19 RT 4411.) Caddell was aware that appellant also went up to Spenceville

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34. According to Caddell, appellant could have gone to work for Hewlett-Packard as a "fluxor" if he had a high school diploma or a GED; appellant had neither, however. (19 RT 4436.)

without him.[35] (19 RT 4412.) During the time appellant was working at Hewlett-Packard, appellant "went up on his days off quite a bit." (19 RT 4412.) When he was unemployed, he had the habit "each time he got his unemployment check" of going to "buy weapons or buy some pellets for his guns" and then going up to Spenceville. (19 RT 4412.) "Sometimes he would save his ammo and go the following week." (19 RT 4412.)

Caddell testified that appellant would commonly have in his bedroom "live rounds and empty shells." (19 RT 4412.) A lot of times they would be "all over his dresser top. And you could see the boxes there and stuff...." (19 RT 4413.)

According to Caddell, during the time that appellant was working at Hewlett-Packard – and even before that (see 19 RT 4433-4434) – appellant would "every now and then . . . get into these quiet spells where he didn't want to talk to me or my mom and kind of go like by himself." (19 RT 4413-4414.) After his employment contract expired, "it got worse." (19 RT 4414.) "His mood swings tended to be, instead of being short one or two days, started to be longer periods of time."[36] (19 RT 4415.) Appellant would lock himself in his bedroom. (19 RT 4415-4416.) He would remain in his room except for a "very short time unless he went out with somebody." (19 RT 4417.)

Caddell testified that, about two weeks prior to May 1, 1992, he had a confrontation with appellant about appellant not looking for work. (19 RT 4415-4416.) Caddell yelled at appellant through his door to turn the radio

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35. Caddell acknowledged on cross-examination that appellant "was a good shot" and that "when he pointed a gun and fired it, he generally hit what he wanted to hit." (19 RT 4428-4429.)

36. Caddell testified that when appellant was not in one of his mood swings, he was a friendly, "happy go lucky type individual. Very up beat, very positive." (19 RT 4422-4423.) When he was in one of his mood swings, it was like he was a different person. (19 RT 4423.)

down and come out and talk to him. (19 RT 4416.) "After about five minutes of threats and so forth he came out." (19 RT 4416.) Caddell proceeded to try to motivate appellant to get a job. (19 RT 4416.) During the next two weeks, Caddell spoke to appellant "maybe a couple times." (19 RT 4420.) He also spoke to appellant the night before May 1, 1992. (19 RT 4420-4421.) On that occasion, Caddell knocked on appellant's bedroom door to show him some new movies he had bought. (19 RT 4435.) Appellant answered the door and came out of his room; he seemed to be "up beat," leading Caddell to believe he was "out of his mood." (19 RT 4435.)

Caddell testified further that, during the two weeks prior to May 1, 1992, he observed appellant eat very little food. (19 RT 4420.) It appeared to Caddell that appellant was staying up late at night, as Caddell would walk by appellant's bedroom door and hear the radio on and appellant "moving around in his bedroom and stuff." (19 RT 4421-4422.) Also through the closed door, Caddell would hear appellant "with his weapons." (19 RT 4422.)

According to Caddell, during the two months prior to May 1, 1992, appellant had access to Caddell's large selection of movies on videotape. (19 RT 4417.) Caddell and appellant also rented movies from the video store "all the time"; the two were "big fans of action packed movies." (19 RT 4417.) Appellant was particularly fascinated with the movie "The Terminator." (19 RT 4418.)

Finally, Caddell testified that, during the two months prior to May 1, 1992, David Rewerts would come over to the house frequently. (19 RT 4420.) When asked how many times a week Caddell would see Rewerts at the house, Caddell answered: "Oh, toward May 1st it was less and less. But I say maybe once, maybe twice a week, he would come sometimes. And then there would be a period where [appellant] didn't want anything to do with David and wouldn't see him for maybe two or three weeks." (19 RT 4420.)

Dr. C. Jess Groesbeck, board certified in psychiatry, psychoanalysis, and forensic psychiatry, testified as an expert in the field of psychiatry. (19 RT 4448-4449, 4450-4454, 4456-4457.) Dr. Groesbeck testified that he had been retained by the defense to evaluate appellant. (19 RT 4460.) As part of the evaluation process, he had been provided with numerous documents, including the following: reports by the Yuba County Sheriff's Department (including summaries of witness interviews); reports by Drs. Captane Thomson and Charles Schaffer, and also "the work and evaluation of Dr. Helaine Rubinstein" (including the results of tests Dr. Rubinstein had administered to appellant); "brief reviews" of appellant's early medical records; and "some school records concerning [appellant's] psychological records." (19 RT 4460-4462; see also 19 RT 4509-4521.) Dr. Groesbeck had consulted several times with Dr. Rubinstein (who had treated appellant). (19 RT 4576.) He had also interviewed appellant, both at the Yuba County and Napa County Jails. (19 RT 4462.) Dr. Groesbeck's first interview with appellant took place on April 9, 1993, and lasted two and a half hours; the second interview took place on April 26, 1993, and lasted an hour and a half; and the third interview took place on May 12, 1993, and lasted two and a half hours. (19 RT 4462-4463; see also 19 RT 4509.) In addition to interviewing appellant on May 12, 1993, Dr. Groesbeck conducted a mental status examination of appellant, which was "an attempt to ascertain from [appellant] the broad areas of the mind and how it functions, the thoughts, feelings, intellectual abilities, affective ability, behavioral responses, internal life, dreams, fantasies, those kinds of things." (19 RT 4464.)

Dr. Groesbeck described for the jury what he termed "trauma" in appellant's familial background (e.g., his mother had been abused by several members of her family; a maternal aunt had been molested by "the grandfather" and had received psychiatric treatment; a maternal uncle had killed three people

in a fight; his maternal grandmother had committed suicide; and his father, who was an alcoholic, had left the family at an early age). (19 RT 4465-4466, 4562-4563.)

Turning to biological issues, Dr. Groesbeck testified that, according to the results of psychological testing that had been administered to appellant, and also based on Dr. Groesbeck's review of earlier records pertaining to appellant, appellant had an "organic brain syndrome" (defined as "a chronic, permanent problem in which your brain is damaged in some form" (19 RT 4469)); Dr. Groesbeck described the syndrome as "a developmental disorder, as well as a hyperactivity syndrome, which he had as a child, most likely. Adult developmental defect. Adult developmental disorder." (19 RT 4467; 19 RT 4488.) According to Dr. Groesbeck, appellant's "serious cognizant [*sic*] deficits" had been noted in his early school years and continued through May 1, 1992. (19 RT 4467-4468.) The deficits manifested themselves in appellant's serious difficulties in learning in school and the reports that he had trouble paying attention and controlling his behavior in the classroom. (19 RT 4468.)

In regard to appellant's developmental background, Dr. Groesbeck testified that appellant had apparently suffered from spinal meningitis as an infant, which was a "traumatic experience" and "did not help his brain." (19 RT 4472.) Also as an infant, appellant developed severe asthma, which presumably caused appellant to have "higher levels of needs than most infants." (19 RT 4472.)

Dr. Goesbeck noted that there had been a photograph taken of appellant as a child in which he was wearing a girl's dress. (19 RT 4473.) Dr. Groesbeck found this to be "a serious and important part about . . . [appellant's] sexual identity confusion." (19 RT 4472.)

Dr. Groesbeck speculated that appellant may have been abused as a child. (19 RT 4473-4474; see also 19 RT 4545-4547.)

With respect to personality, Dr. Groesbeck diagnosed appellant as suffering from a personality disorder, made up of two prominent areas. (19 RT 4475.) The first area was "dependent." (19 RT 4475.) Dr. Groesbeck testified: "It's clear throughout his history that he had a lot of dependency on his mother, with needs that were never met. [¶] There appeared to be abandonment. The mother was gone a lot, brought a lot of men into the home. And he had a lot of need seeking behavior to satisfy those needs." (19 RT 4475.) The second, more important, area was a borderline personality disorder, which was "very serious" and "suggest[ed] that [his] contact with reality and day-to-day functions [were] unstable and very shaky." (19 RT 4475.) One of the traits of a borderline personality disorder that appellant exhibited was "affective mood shifts" (i.e., "[o]ne can become very high, very low"). (19 RT 4476.) Another trait he exhibited was "suicide attempts," as he had attempted suicide in March 1988 after the loss of a female relationship (and had attempted it again the month before trial, in May 1993). (19 RT 4476; see also 19 RT 4548-4549.) Most important to Dr. Groesbeck was "a disturbance in [appellant's] self-image." (19 RT 4476.) Appellant "had a serious conflict" in his sexual identity. (19 RT 4477.) Dr. Groesbeck postulated that it was appellant's sexual identity problem that caused him to become fascinated with "guns and shooting." (19 RT 4495-5596.)

In addition to diagnosing appellant as suffering from a personality disorder, Dr. Groesbeck diagnosed appellant as suffering from certain "axis one" disorders, "axis one being the primary diagnosis that someone has when they have a psychiatric disorder." (19 RT 4490-4491.) In so doing, Dr. Groesbeck utilized the Diagnostic and Statistical Manual of Mental Disorders, revised third edition, which was published in 1987 by the American Psychiatric

Association as their official diagnostic book. (19 RT 4491.)

Dr. Groesbeck diagnosed appellant as suffering from post-traumatic stress disorder (i.e., he felt "overwhelmed of [his] normal coping mechanism" (19 RT 4480)). (19 RT 4478, 4488-4489.) Dr. Groesbeck opined that the condition could have begun during appellant's childhood. (19 RT 4478-4479, 4489.) But certainly appellant "developed this condition as a result of the molestation experience with Mr. Brens, the teacher, that occurred on two, possibly three occasions in 1989."[37] (19 RT 4479; see also 19 RT 4489.) Dr. Groesbeck related to the jury that, according to appellant, Mr. Brens "made a direct attempt to fondle him in the genitals the first time" in the first three months of the school year in 1989 when appellant went to Mr. Bren's classroom to discuss academic matters with him. (19 RT 4479, 4552.) Appellant became "obsessed with what this meant, what did it mean about him." (19 RT 4479.) His sexual identity, which was already in some question, became even more fragile. (19 RT 4479.) Dr. Groesbeck testified in regard to appellant's sexual identity:

> It became worse the second time it occurred, some months later, when apparently he, Mr. Brens, put his hands inside his pants and fondles his penis, and apparently caused him some pain.[38]
>
> There's a third account, which has also come from witnesses, that [appellant] may have been orally copulated by Mr. Brens, somewhat

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37. On cross-examination, Dr. Groesbeck acknowledged that the information about Mr. Brens having molested appellant came from appellant himself and from the summary of a statement Ricardo Borom, a friend of appellant's, gave to a law enforcement officer on May 4, 1992, in which Borom related a statement appellant had earlier made to him. (See 19 RT 4549-4552.)

38. As related by appellant to Dr. Groesbeck, appellant had not wanted to be alone with Mr. Brens after the first incident but nonetheless found himself alone with him two or three months later when he had to go to his classroom during the lunch period. (19 RT 4552.)

later.[39/]

(19 RT 4480; see also 19 RT 4552, 4559-4560.) Dr. Groesbeck informed the jury that there was evidence to suggest that appellant ruminated about this and also became "quite depressed" and "did some drinking about it." (19 RT 4480.) "And as a result of that, [he] actually had some homosexual experiences with a friend, David Rewerts . . . ." (19 RT 4480.) This, in turn, "generated more guilt and more denial for him to deal with." (19 RT 4481.)

Dr. Groesbeck noted that appellant had not reacted with overt rage to being molested by Mr. Brens. (19 RT 4481.) Instead, the rage "went underground," and "he dissociated it." (19 RT 4481.) Dr. Groesbeck explained:

> A dissociative reaction and a depersonative reaction occurs as one form of handling anxiety and trauma. [¶] And by that, one basically steps out of his memory or consciousness of what's happened, and you begin to detach yourself.
>
> You begin to see your behavior and your actions as kind of a third party. That isn't really me doing this, or you may have no memory at all. You may screen the memories out.

(19 RT 4481-4482.)

Later, according to Dr. Groesbeck, "other facts emerged": the failure of appellant's relationships with women; a conflict with Rewerts, who wanted appellant "more as a lover," whereas appellant wanted to establish "a girl relationship"; the lack of a strong sense of a relationship with his mother and brother, coupled with pressure from them to support himself financially; and the loss of his job in March 1992 because he did not have a high school diploma. (19 RT 4482-4483.)

> And then, of course, this resurrects the whole experience back at high school as to why he didn't graduate, and he didn't get a diploma,

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39. Appellant did not relate to Dr. Groesbeck that there had been an incident of oral copulation between himself and Mr. Brens. (19 RT 4561.)

because there was one class he didn't pass, the econ course with Mr. Brens, which he couldn't go on to complete because of the fear of molestation. Again, a serious problem.

(19 RT 4483.)

Dr. Groesbeck opined that, "from here . . . we have developing the next diagnosis, which was a psychotic schizophreniform disorder," "the most serious of all mental illness" according to Dr. Groesbeck. (19 RT 4483; see also 19 RT 4490.) He explained:

> Schizophrenia, meaning split mind, it's where the mind literally disorganizes at all levels. So, basically, you see on top of the post-traumatic stress disorder, the experiences tend to detach. He then develops at the core of this disorder a delusional system.

(19 RT 4484; see also 19 RT 4490.) The delusional system consisted of two frames. (19 RT 4484.) "The first frame was the abused child," i.e., the victim of Mr. Brens. (19 RT 4484.) The other part of the delusional system was illustrated by appellant's preoccupation with the movies "Terminator I" and "Terminator II" and "Predator I" and "Predator II," which he watched the night before May 1, 1992, and specifically with his preoccupation with "Terminator I," which he had reportedly watched 23 times. (19 RT 4484.) Dr. Groesbeck explained:

> In short, I think that movie illustrates dramatically what happened to this man, who is now in a delusional state, or who identified with that in the build up.
>
> Number one, reality becomes – reality and fantasy becomes fused. The inability to distinguish between flesh and blood and metal, or what is – what is nonhuman versus human, becomes blurred. Most importantly, violence becomes romantic, fascinating and a way to do good.
>
> Number two, those movies illustrate the idea to save the child, you have to have the father sacrifice yourself. You have to destroy the evil in the adults.
>
> All these themes took place in this delusional setting, because what [appellant] was going to do was right the wrongs for all the children

who had failed at school, at his old high school.

(19 RT 4484-4485.)

Dr. Groesbeck opined that, during the events of May 1, 1992, appellant was "dissociated, disattached, living in an unreal world." (19 RT 4485; see also 19 RT 4490 [Dr. Groesbeck opined that, for the three months prior to May 1, 1992, and afterwards, appellant would have dissociative states, lasting anywhere from a minute to hours at a time].) Dr. Groesbeck continued:

> So, basically, what I see happening in short is that on that morning then when he went to the school, I'm not sure what he really had in mind, maybe to shoot people up, he wanted to bring the media in, he felt the SWAT team would come, he wanted to expose, particularly, Brens.
>
> He wanted to advertise the molestation. But he wanted to save the children. And then he would die. He would die, much like, interestingly, the movie's character does, some of the movie characters. A tragic situation.
>
> But basically what I'm describing here is a delusional system generated by all of the factors I have tried to describe.[40]

(19 RT 4486.)

With respect to Exhibit 16-A (the handwritten note addressed "to my family"), Dr. Groesbeck opined that appellant was in "desperate straights" at the time he wrote it. (19 RT 4492.) As described by Dr. Groesbeck, "There's a statement that sanity has slipped away, evil has taken its place. Failures have built too high. And there's a statement about love of the family, as well as love for the friend, Dave Rewerts, too." (19 RT 4492.) This fit into Dr.

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40. On re-direct examination, Dr. Groesbeck testified that, with appellant's psychotic disorder, "the level of consciousness can change dramatically" in moments. (19 RT 4580.) Dr. Groesbeck noted that appellant had described "going into one of the floors [of Building C] after the earlier shootings and becoming more aware." (19 RT 4580.) In Dr. Groesbeck's opinion, his diagnosis of appellant would be consistent with appellant having entered the building and shot people and then later in the evening "he is concerned about wounded students, orders pizza for students, aspirin, sends out the wounded students and so on." (19 RT 4580.)

Groesbeck's diagnosis of appellant's state of mind during the three months leading up to May 1, 1992, in which "he was desperately trying to hang onto reality, but being overwhelmed by his internal struggles." (19 RT 4492.)

With respect to Exhibits 61-A and 62-A (torn pieces of paper from what apparently had been letters appellant had written to his family), Dr. Groesbeck viewed them as "very good additional evidence of [his] diagnosis of [the] psychotic delusional state [appellant] was in at the time this was happening" in that, in a "kind of disorganized" fashion, appellant denied that his upbringing "caused the problems," expressed his fascination with "weapons and death and killing," and asserted his hatred toward humanity. (19 RT 4493.)

Finally, Dr. Groesbeck testified that in talking to appellant about the events of May 1, 1992, at Lindhurst High School, appellant acknowledged having a "spotty recollection" of his actions. (19 RT 4498.) Dr. Groesbeck had trouble ascertaining what appellant actually remembered of his actions and what he had merely been told of them after-the-fact. (19 RT 4499.)

Appellant's next witness, Ricardo Borom, testified that he had met appellant in the early part of 1989, when they had worked together at McDonald's for about five months. (20 RT 4615, 4617-4618.) From that association they developed a friendship, which was intact as of May 1, 1992. (20 RT 4616-4618.) Borom visited appellant at appellant's home in Sacramento, and appellant was in Borom's home in Sacramento on "many occasions." (20 RT 4616-4617.) The two would go to movies together, and appellant would come over when Borom had friends over and barbecued. (20 RT 4618.) After appellant moved to Yuba County, Borom did not visit appellant in his home; he did "[b]riefly" converse with him over the phone, however. (20 RT 4616-4617.)

Borom testified that on one occasion in October 1989, appellant was at Borom's residence and the two of them were drinking; after Borom told

appellant about his (Borom's) "experiences with homosexuality," appellant told Borom that he had been molested by a teacher in high school. (20 RT 4619-4621.) Appellant said to Borom that "he was having problems with one of his grades in school, and in order to graduate he had to have sexual, you know, he had to do a sexual favor for the teacher in order to graduate." (20 RT 4620.) Appellant "spoke of him pulling out his penis and the teacher fondling it. And then oral copulation." (20 RT 4621.) Appellant said that the incident occurred in the gymnasium and that the teacher's first name was "Robert."[41/] (20 RT 4621.) When appellant talked about the molestation, he became "withdrawn," depressed, and "more reclusive." (20 RT 4621.)

In November 1989, appellant again discussed with Borom the fact that he had been molested. (20 RT 4622-4623.) Again appellant was in a "depressed, reclusive state" when he talked about it. (20 RT 4623.)

The next time appellant discussed the subject with Borom was about two or three weeks before May 1, 1992. (20 RT 4623-4624.) Borom ran into appellant at Bojangles, a "[t]een gay bar." (20 RT 4623.) Appellant told Borom that "he blamed the teacher for his feelings of homosexuality. He blamed the teacher for the depression and frustration that he was having in his life at that particular time. Because not being able to graduate, you know, from high school –." (20 RT 4624.)

Borom testified that he became aware of the events of May 1, 1992 (i.e., that a high school teacher and possibly some students had been shot) through viewing news reports on television. (20 RT 4618-4619, 4630-4631.) After appellant's name was released as the person who had committed the shootings, Borom called his favorite television station (Channel 13) to "report information that [he] had about the situation." (20 RT 4619; see also 20 RT 4624, 4630-

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41. Borom testified that "the last name was vague" but "what stood out in [Borom's] mind was Bent." (20 RT 4621.)

4634.) Channel 13 sent a reporter, Mark Saxenmeyer, out to Borom's home, and Borom "convey[ed] this information to [him]." (20 RT 4619, 4624-4625.) Subsequently, Borom was interviewed by Sergeant Downs. (20 RT 4625; see also 20 RT 4644-4645.)

Dr. Helaine Rubinstein, a licenced psychologist with half of her practice devoted to psychotherapy and the other half devoted to "medical legal evaluations,"[42/] testified as an expert in the field of psychology. (20 RT 4647, 4650, 4656.) Dr. Rubinstein described her areas of specialty as the "diagnosis and treatment of the mental disorders of youth" (i.e., "young people between the ages of 14 and 22)" and neuropsychology (defined as "disorders or syndromes of the brain as these disorders or syndromes influence cognition, behavior, emotions, child development and so forth"). (20 RT 4657-4658.)

Dr. Rubinstein first met appellant on June 4, 1992, after having been retained by the Yuba County Public Defender's Office to evaluate appellant's mental state and to provide any psychological services she deemed necessary.

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42. Dr. Rubinstein testified that, since 1987, she had been performing psychological evaluations with a group known as "C. Jess Groesbeck, M.D. and Associates," which she described as "medical legal evaluators." (20 RT 4648; see also 20 RT 4656-4657.) On voir dire, she testified that in the year preceding trial, "[o]f the fifty percent of my practice that is devoted to medical legal evaluations, probably fifty, sixty percent were injured workers"; other than her work in the instant case, she had performed a psychological evaluation in only one criminal matter during that year. (20 RT 4653; see also 20 RT 4653-4654 [again with respect to medical legal evaluations, since 1987 when she had joined up with Dr. Groesbeck, about five percent of her patients and about twenty percent of her service hours had been criminal].) However, on direct examination, she testified that in her 10-plus years working with the "Youth Development Program," a residential treatment center for moderately to severely disturbed youth, and the "Young Men's Creative Alliance Program," a treatment program for youth who had been taken into custody following the commission of a crime and determined to be in need of specialized psychological services, "all of [her] clients were probation referrals. They were all criminal offenders." (20 RT 4723; see also 20 RT 4647-4648.)

(20 RT 4658-4659.) She met with appellant at the Yuba County Jail and could tell that he was "gravely disabled." (20 RT 4659.) Her observations indicated that he was "barely, partially oriented" (e.g., he could tell her his name and age and that he was in jail) and "significantly disoriented" (e.g., he could not tell her the date, time of day, or day of the week and he did not know the name of the president, vice-president, or governor). (20 RT 4659-4660.) Some of appellant's thought content was cogent and rational. He knew, for example, "his mother's name and where she lived and his brother and his sister." (20 RT 4662.) Some of his thought content, however, was delusional. He told Dr. Rubinstein that he had been born in Arizona and adopted at birth (which Dr. Rubinstein later learned was not true); he said that he did not know who his biological parents were and that his adoptive parents (i.e., Bud and Edith Houston) had withheld that information from him but "it was contained on secret documents that were in a secret box," hidden in his brother's bedroom he believed. (20 RT 4663.) Appellant reported to Dr. Rubinstein that he was experiencing auditory hallucinations in the form of a male voice that was running a commentary on his interaction with her. (20 RT 4663-4664.) He also reported that he was "[s]eeing the faces of figures come into his cell, come into the room, come around the corner." (20 RT 4664.) Twice during the June 4, 1992, interview appellant "dissociated" in front of Dr. Rubinstein so that he was there in body but not in mind. (20 RT 4664.) The first time it happened she "called [him] back" and asked where he was; he answered: "A witch is burning me. My hands are tied. The fire is under me. The town's people are laughing at me, putting firewood under me." (20 RT 4664.) The second time it happened he answered: "I am in the kitchen with my mother. She says, You are the Devil's child. I wish you had never been born." (20 RT 4664.) Dr. Rubinstein concluded on June 4, 1992, that appellant was severely regressed and psychotic but that she needed to examine him further because some of his

symptoms could signify more than one "psychiatric disorder or condition." (20 RT 4665.)

Defense counsel subsequently provided Dr. Rubinstein with materials to review, including: police reports; a videotape of appellant's post-arrest interview with law enforcement; a videotape of an interview of David Rewerts; audiotapes of interviews of appellant's mother and brother; audiotapes of the May 1, 1992, hostage negotiations; medical reports from appellant's early childhood; appellant's elementary school records; and some notes appellant had written. (20 RT 4660-4661.)

Subsequent to the three hours Dr. Rubinstein spent with appellant on June 4, 1992, Dr. Rubinstein spent an additional 12 hours with appellant in the month of June 1992.[43/] During those 12 hours, Dr. Rubinstein administered multiple psychological tests to appellant while also continuing to examine him clinically. (20 RT 4665-4666, 4669.) She gave appellant the Wechsler Adult Intelligence Scale Revised (WAIS-R) to measure his IQ. (20 RT 4666-4667.) Next, she performed "a statistical computation known as the Deterioration Index" so as to determine whether appellant's IQ had "gone up, gone down or stayed the same." (20 RT 4667-4668.) "The results of that were zero significance for measurable lapse and intellectual functionings within the past five years." (20 RT 4668.) Dr. Rubinstein computed a Topeka Lateralization Index, another statistical measurement based on IQ test data, useful for "isolating and defining the region of significance in cases of lateralized brain damage or brain syndrome that affects only one-half of the brain." (20 RT 4668-4669.) The results of that were "significant for organic brain syndrome lateralized in the left hemisphere of the brain." (20 RT 4668.) Dr. Rubinstein administered the Wechsler Memory Scale, Form Two, which "tests general,

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43. Subsequent to June 1992, Dr. Rubinstein met with appellant "no less than two times each month, every month." (20 RT 4774.)

rational orientation and immediate, recent and remote memory functions and some memory function derivatives like learning abilities" and provides "primarily left hemisphere information." (20 RT 4670, 4672.) She administered the Bender Visual Motor Gestalt Test, which is used to diagnose "brain syndrome primarily lateralized in the right hemisphere of the brain, and it also is a projective test of personality." (20 RT 4671.) She administered the Hooper Visual Organization Test, which is part of the neurological screening battery and requires the transfer of information from the right to the left hemisphere of the brain. (20 RT 4672.) She administered the Trail Making Test, which is another neurological screening instrument, and which "draws upon the right hemisphere of the brain for visual scanning and psychomotor operations. . . . [A]nd upon the left hemisphere of the brain for understanding the stimulus, being able to comprehend the test and the instructions and maintaining serial orders." (20 RT 4673.) She administered the Thematic Apperception Test (TAT), which is a "projective test of personality," used for evaluating personalities and psychopathology. (20 RT 4674-4675.) Finally, she administered the Minnesota Multiphasic Personality Inventory (MMPI), a personality inventory designed to divide people into psychiatric and non-psychiatric groups. (20 RT 4675-4677.)

All together, Dr. Rubinstein spent about 50 hours working directly with appellant, "being in the room with him, examining him, giving him a test, talking to him, et cetera." (20 RT 4678.) She spent an additional 25 hours or so "[r]eviewing medical records, scoring tests, watching videos of interviews and so forth." (20 RT 4678.)

After administering the above-described tests to appellant, Dr. Rubinstein concluded based on the data that appellant exhibited or manifested "pathology that belonged to more than one category or syndrome." (20 RT 4678-4679.) She diagnosed him, in accordance with the Diagnostic and

Statistical Manual of Mental Disorders, revised third edition (see 20 RT 4809-4810), as suffering from "Specific Developmental Disorder, Not Otherwise Specified, Chronic," which "translates into organic brain syndrome lateralized in the left hemisphere, manifesting primarily as auditory processing deficits. An inability or an impairment in the ability to process complex auditory information like verbal directions, mental reasoning, arithmetic reasoning." (20 RT 4679.) In lay terms, Dr. Rubinstein opined, appellant "is brain damaged. The lesion is in the left hemisphere of the brain. And it impairs his ability to understand information that is presented orally as opposed to in writing or visually." (20 RT 4680.) In general, this disorder can be congenital; it can be acquired during the birth process due to a lack of oxygen; it can be the result of early childhood illness (such as spinal meningitis); it can be the result of an accidental head injury; and it can be the result of a deliberately inflicted blow to the head.[44/] (20 RT 4681-4682.)

Dr. Rubinstein also diagnosed appellant as suffering from "Attention Deficits, Hyperactivity Disorder, Residual Phase," which is "[a]nother disorder arising in infancy, childhood or adolescence" and is "a neuromaturational delay where the central nervous system is ineffective, developmentally ineffective in organizing the impulses." (20 RT 4683-4684.) As described by Dr. Rubinstein, in lay terms this disorder is "the hyperactive kid, the kid who can't

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44. Based on her interviews of appellant and on her "ultimate understanding of the world of [appellant's] mind, his personality and psychopathology," Dr. Rubinstein suspected that appellant had been psychologically abused as a child. (20 RT 4682-4683.) In particular, he had a "masochistic component to his character and a self-destructive, self-punative [*sic*] quality," which she believed was the result of "being on the losing end of a sadomasochistic relationship with another party." (20 RT 4682-4683.) She was certain that there was a sadomasochistic dynamic to appellant's relationship with his mother, and that this constituted psychological abuse; she had no evidence, however, that appellant had been physically abused. (20 RT 4683.)

sit still, the kid who's fidgeting, who can't concentrate, who can't attend." (20 RT 4683; see also 20 RT 4684.) The disorder starts remitting in adolescence and "often lasts until an individual is firmly planted in adulthood." (20 RT 4683-4684.) Dr. Rubinstein testified that appellant had that disorder "and still has its residuals." (20 RT 4684.) According to Dr. Rubinstein, this diagnosis was corroborated by appellant's school records, which indicated that he had been classified as "learning handicapped" at the end of third grade (at which time he had tested at the beginning first grade level in reading, writing, and arithmetic). (20 RT 4684.) It was also reflected in his Individualized Education Plan, which indicated that appellant had been officially classified as learning handicapped and made eligible for special education pursuant to the State of California's Special Education Law.[45] (20 RT 4685.)

Dr. Rubinstein additionally diagnosed appellant as suffering from "Post Traumatic Stress Disorder," which "refers to a psychiatric reaction that develops in response to an actual environmental trauma with the provision that that trauma would be upsetting to almost anyone and would be outside the realm of almost everyone's common normal experience." (20 RT 4687.) Dr. Rubinstein opined that appellant had first developed that disorder at the age of 16 years. (20 RT 4687.) Dr. Rubinstein testified that she had information that appellant had "suffered severe trauma at that time, that of homosexual molestation."[46]

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45. Dr. Rubinstein testified that appellant "was in special education through the ninth grade." (20 RT 4692.)

46. On cross-examination, Dr. Rubinstein clarified that the information regarding the molestation had come from appellant himself. (See 20 RT 4790-4791.) She testified in that regard:

> [Appellant] reported to me that he had been homosexually molested by Robert Brens on the premises of Lindhurst High School on two occasions, dating the first to March and dating the second to April of his eleventh grade year [i.e., 1988].

(20 RT 4688.) Based on discussions she had had with appellant, she testified that the age of 16 is

> the first time I can pinpoint the dissociation phenomena happening that I described before; that he started to develop obsessive and intrusive thoughts; that he started to have nightmares; that he started to develop a very strange idiosyncratic way of coping with the bad thoughts that were in his mind.

(20 RT 4688.) In regard to manifestations of the disorder post-May 1, 1992, Dr. Rubinstein testified:

> He described the first event as his entering Mr. Brens' office for the purpose of discussing a homework assignment with the teacher. He described Mr. Brens as standing, as being in a standing position standing in front of the desk, leaning against the desk. And he described and he pantomimed the manner in which Mr. Brens fondled his genitals.
>
> On the second occasion, [appellant] described himself as attempting to see the teacher on the matter of a paper that [appellant] was caused to produce for Mr. Brens' class and that [appellant] could not complete on his own. He attempted, [appellant] explained that he attempted to see Mr. Brens at the lunch period a certain time of day because he believed there would be other children on the premises and in the vicinity.
>
> [Appellant] described himself as going into Mr. Brens' office, and then he described Mr. Brens' actions as putting – Mr. Brens putting his hand down [appellant's] pants, grabbing his penis, twisting it with sufficient force to lacerate it, and then in two or three minutes removing his hand, whereupon [appellant] left Mr. Brens's office.

(20 RT 4792.) Dr. Rubinstein testified that she had discussed with appellant whether there had been any oral copulation involved in the molestations. He indicated that he could not recall. (20 RT 4818.)

On re-direct examination, Dr. Rubinstein was asked whether it would be unusual if appellant had not told his mother, his brother, or David Rewerts about the molestations. Dr. Rubinstein answered: "Teen-agers don't talk. They don't report sexual molestations, especially homosexual molestations. No." (20 RT 4821.)

After May 1st [appellant] was having dreams, nightmares about body bags, funerals. He was hearing the voice of Robert Brens. He was seeing the face of Robert Brens coming into his cell, coming around the corners. . . .

(20 RT 4688.) She continued:

Between June 20th and June 24th, 1992, [appellant] had five dreams regarding his molestation experience by Robert Brens in which [appellant] is saying, You are mentally killing me. You are destroying the inside of my mind.

(20 RT 4689.) She further testified:

[Appellant] also had some flashbacks, which are common Post Traumatic Symptoms. Flashback photos of Robert Brens and the events of the molestation, and also flashbacks of his arrival at the parking lot of the school on May the 1st, 1992.

(20 RT 4689.) Dr. Rubinstein informed the jury that post traumatic stress disorder affects memory, and she was sure that appellant's memory was so affected. (20 RT 4693.) The fact that appellant had stated during his post-arrest interview with law enforcement that he could not recall certain facts was consistent with the diagnosis.[47/] (20 RT 4693-4694; see also 20 RT 4715-4716.)

Dr. Rubinstein testified that she had consulted briefly with Dr. Groesbeck in either January 1993 or February 1993 and, subsequent to the initiation of Dr. Groesbeck's evaluation of appellant, they had consulted about "an hour a week, sometimes more." (20 RT 4696-4697.) She testified, however, that she had formulated her opinion before she had started to discuss the case with Dr. Groesbeck. (20 RT 4697-4698.)

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47. Dr. Rubinstein noted that, during her interactions with appellant, he had reported to her having no recollection of having shot anyone on May 1, 1992 (even though she had raised the issue with him approximately 25 times). (20 RT 4696, 4714-4715.) In administering the TAT to appellant, Dr. Rubinstein attempted to evoke any consciously withheld memories; she concluded that they were "not there." (20 RT 4717-4718; see also 20 RT 4719.)

In addition to the previously-described diagnoses, Dr. Rubinstein diagnosed appellant as suffering from a schizophreniform disorder, which she described as "an acute psychotic reaction that takes the form, contains the manifestations clinically of one or another of the sub-types of schizophrenia."[48] (20 RT 4726; see also 20 RT 4769-4770.) She opined that appellant's schizophreniform disorder was of the paranoid type. (20 RT 4728.) She tracked the disorder's genesis to "his experience of homosexual sexual molestation" at the age of 16 years and to "the deterioration of the ego that occurred as a result of his psychological reaction to those molestations." (20 RT4729.) She elaborated:

> I developed a picture of [appellant] at the age of 16 as highly traumatized but not in a generalized global way. In a specific way that had to do with the development and reinforcement of feelings of helplessness, powerlessness, fears of being overwhelmed by bigger and more powerful people and circumstances.

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48. In regard to the distinction between a schizophreniform disorder of a certain type and a schizophrenia of the same sub-type, Dr. Rubinstein testified:

> In the schizophreniform disorder we expect to see more acute emotional turmoil, more flagrant blaring symptoms. We expect the crisis point to be bigger. Louder. The disorganization of the personality to be more dramatic and acute.
>
> We expect hallucinations, for example, to be very vivid and sharp and colorful. In other words, it's a very, very intense schizophrenia process that is condensed and it is encapsulated within an episodic concept, and that episode must be confined to six months . . . .
>
> It's also a disorder of youth. This is a young people's disorder. The schizophreniform disorder is expected to strike populations of young people ages 15 to 25. And in fact in clinical practice we usually see it in the older adolescent, early adult. . . .

(20 RT 4727-4728.)

> Gender identity confusion. Fears about his own future, about his own identity. Not understanding where these feelings and thoughts came from.
>
> I also track[ed] the first episodes of dissociation . . . . The spontaneous alterations in consciousness where an individual suffers an acute temporary disintegration of the ego and is no longer oriented or present. And whose mind becomes occupied with memories, thoughts, flashbacks from other places, other eras, other times . . .
>
> And all of these combined . . . I believe with [appellant's] growing sense of helplessness, hopelessness, loss, powerlessness, and that these matters built up and built up and built up were [*sic*] represented in additional traumas and additional representational experiences that later occurred to result in the ultimate development of the paranoid core.

(20 RT 4729-4730.)

Dr. Rubinstein testified that she had detected the "Savior Syndrome" in appellant, which she described as "a delusion of grandeur in which an individual manifestly consciously views himself as bigger and more powerful and mightier than any normal or average human being" and which usually involves a belief that the individual is a special servant of a higher power and has been assigned a special project of "saving a piece of his world." (20 RT 4730-4732.) Appellant specifically told Dr. Rubinstein that he had been on a special mission on May 1, 1992, to "right the wrongs," specifically, to save the school system so that children would not continue to "fall through the cracks." (20 RT 4732-4733.) He described his plan as follows:

> [H]e planned to go to Lindhurst High School on May the 1st to take the teacher Robert Brens hostage. To handcuff this teacher to a doorknob. And to cause this teacher and school administrators to allow reporters and members of the press on to the school premises. At which time he [appellant], would disclose to the media all of the wrongdoings that he believed were occurring in the school system. And in this way he expected to save the children.

(20 RT 4733.) Appellant told Dr. Rubinstein that he had selected Mr. Brens to take hostage because "in his view it had been the circumstances and conditions that prevailed between [appellant] and Mr. Brens that had resulted in

[appellant's] failure to graduate," and he attributed his loss of his job at Hewlett-Packard to his failure to graduate. (20 RT 4734-4735.) Appellant stated that he had intended to disclose that Mr. Brens had sexually molested him and, after making the disclosure, to turn the gun on himself and take his own life (if he had not yet been gunned down by the SWAT team). (20 RT 4735-4736.) Dr. Rubinstein opined that appellant had not planned what ended up actually happening at Lindhurst High School on May 1, 1992. (20 RT 4767-4768.)

Dr. Rubinstein opined that appellant had manifested symptoms of the diagnosed mental disorders prior to May 1, 1992. (20 RT 4737.) Specifically in regard to the schizophreniform disorder, she stated that her "target date" for its onset was April 1, 1992, and by mid-April it had "escalate[d] to such proportions that there was no going back." (20 RT 4737-4738.)

Dr. Rubinstein concluded that appellant's interest in "weaponry, guns and military subjects" "represented a maladaptive effort to cope with castration anxiety. Feelings of helplessness, powerlessness, weakness, and that these symbolized power and might and strength and protection against being overwhelmed by those who would harm him." (20 RT 4739; see also 20 RT 4740.) In reaching that conclusion, Dr. Rubinstein considered a photograph of an approximately three-year-old boy, whom she believed to be appellant, which she had come across while reviewing appellant's family photo album. (20 RT 4740-4743.) In the photograph, the boy was clothed in a dress and a girl's hat. (20 RT 4741.) On the back of the photograph, the following writing appeared: "To Daddy. Love Christopher."[49/] (20 RT 4741.) The following writing also appeared: "See, daddy, Chris was a good girl. You never believe he's a boy." (20 RT 4741.)

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49. Dr. Rubinstein testified that, as a young boy, appellant's family had referred to him by his middle name, Christopher. (20 RT 4741.)

Dr. Rubinstein related to the jury that, according to appellant's medical records, he had attempted suicide in 1988 by swallowing a bottle of his mother's pills. He was treated at the hospital and released; he was then examined by a clinical psychologist at a community mental health agency. (20 RT 4745.) Dr. Rubinstein further testified that, when she first met with appellant on June 4, 1992, she learned that he had been placed on suicide watch at the Yuba County Jail. (20 RT 4745-4746.) She also related that in May 1993, following his transfer to the Napa County Jail, appellant had experienced "[s]uicidal thoughts and feelings." (20 RT 4746.)

With respect to the movie "The Terminator," Dr. Rubinstein testified that she had been informed that appellant had seen the movie a total of 23 times and that he had watched it the evening before May 1, 1992. (20 RT 4768.) Dr. Rubinstein found that the concept of that movie – changing the future by changing the past – "was pertinent to the paranoid form of [appellant's] schizophreniform disorder," and she believed that seeing the movie "must have served to validate his already distorted view of the world." (20 RT 4768-4769.)

Rebuttal

David Rewerts testified, as he had during the prosecution's case-in-chief, that he first met appellant in 1986, when he (Rewerts) was in the middle of his freshman year at Lindhurst High School and appellant was in the middle of his sophomore year at the same school. (21 RT 4916-4917.) They became best friends. (21 RT 4916.) Rewerts asserted that up until appellant's senior year, when they had a falling out (due to the fact that appellant was dating Rewerts's ex-girlfriend whereas Rewerts wanted to have an "exclusive homosexual relationship" with appellant (21 RT 4922-4923)), the two spent a lot of time together, both at school and after school. (21 RT 4917.) They "went out to the movies a lot and did a lot of things together." (21 RT 4917.) Appellant and

Rewerts discussed the goings-on in each others' lives, including their sexual desires and sexual experiences. (21 RT 4918-4919.)

Late one night, about seven or eight months after Rewerts had graduated from high school (as a member of the class of 1990), appellant telephoned Rewerts; the two proceeded to reestablish a relationship and again became best friends. (21 RT 4916, 4918.) They resumed discussing what was occurring in each others' lives, including their sexual desires and sexual experiences. (21 RT 4919.) On July 4, 1991, Rewerts's relationship with appellant became more intimate as the two had sexual contact with one another on that date (for the one and only time). (21 RT 4919-4920.) The two remained good friends up until May 1, 1992. (21 RT 4920.)

Rewerts testified that at no time during his friendship with appellant did appellant say anything to him about Mr. Brens having touched him in a sexual manner. Nor did appellant say anything about appellant having touched Mr. Brens in a sexual manner. (21 RT 4920-4921.) Given the nature of their relationship, Rewerts believed that if either of these things had occurred, appellant would have told him about it. (21 RT 4920-4921.)

Richard Loveall, who at the time of trial was employed by the Marysville Joint Unified School District as an assistant superintendent for educational services, testified that, according to Robert Brens's personnel file, Mr. Brens was first employed by the school district in November 1988 (i.e., the Fall of appellant's senior year). (21 RT 4926-4928.) Specifically, he was employed in a temporary position for the school year 1988/89 to teach in the area of Social Sciences at Lindhurst High School. (21 RT 4928.)

Loveall testified that, according to records pertaining to appellant, in 1989 appellant attended a summer school session for non-graduating seniors. (21 RT 4928-4929.) Appellant took two courses that summer: typing and economics. (21 RT 4930.) In the economics course (which was taught by a

teacher other than Mr. Brens), appellant received a grade of F. (21 RT 4930-4931.) Records further indicated that, in the school year 1988/89, appellant took two courses taught by Mr. Brens. (21 RT 4931.) In the Fall he took a civics course, which he passed. (21 RT 4931.) In the Spring, he took "the tandem to that which is the economics course," which he failed. (21 RT 4931.)

Sanity Phase

Defense Case

Dr. Groesbeck testified on appellant's behalf that, subsequent to his guilt-phase testimony, he had reviewed his earlier interviews with appellant, re-interviewed appellant two times, and reviewed a number of documents he had not seen before, namely, "several important dreams that [appellant] had right after the episode, reviewed the details of some psychological testing that had been done right near the episode, [and] reviewed the report of Dr. Paul Wuehler who saw [appellant] right after the episode and did a psychological evaluation that was quite valuable." (22 RT 5324-5325; see also 22 RT 5326, 5332-5333.) Dr. Groesbeck also re-reviewed the videotaped interview of appellant conducted by Sergeants Downs and Williamson on May 2, 1992. (22 RT 5325-5326.) Dr. Groesbeck's diagnosis of appellant remained the same as it had been at the time of his guilt-phase testimony. (22 RT 5326.)

With respect to the materials pertaining to appellant's dreams (the source of which was Dr. Rubinstein, who had described the dreams during her guilt-phase testimony), Dr. Groesbeck opined that the dreams linked "the molestation experience with Mr. Brens to [appellant's] current experience that had taken place on 1 May, 1992." (22 RT 5327.) Dr. Groesbeck explained that the dreams "were post traumatic stress dreams,"[50] and he opined that appellant "had

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50. Dr. Groesbeck described the dreams as having taken place in June 1992 and having as a general theme "re-experiencing the molestation, feeling

a post traumatic stress disorder experience with the relationship with Mr. Brens, and that that reactivated when he went through the 1 May, 1992 shootings." (22 RT 5327-5328.) Dr. Groesbeck gave the following testimony on direct examination:

> Q. Dr. Groesbeck, how important was it to you that there was a link between the dreams you were able to review and your current diagnosis?
>
> A. I think it was very important because that link in my mind is strong evidence that the molestation experiences that he described did in fact happen as he described them. That's my opinion. [¶] And I think it's important to note that this gives evidence then for part of a core and maybe the basic core of his delusional system around Mr. Brens. So in that sense my diagnosis were [*sic*] fully supported by the evidence from these dreams.

(22 RT 5329.)

With respect to his review of Dr. Wuehler's report, Dr. Groesbeck found that the testing of appellant conducted by Dr. Wueler was "quite valuable in that that occurred close to the time of the events 1 May, 1992 first off." (22 RT 5334.) He related that Dr. Wuehler had conducted the following tests: the Minnesota Multiphasic Personality Inventory (MMPI), the Millon Clinical Multiaxial Inventory (MCMI), and the Thematic Apperception Test (TAT). (22 RT 5334-5335.) With respect to the results of the first two tests, Dr. Groesbeck testified:

> The testing suggested that [appellant's] ability to abstract was diminished initialed [*sic*] and compromised. He demonstrated thought disorganization such as one sees in the schizophrenic reaction and psychotic reaction.
>
> There was evidence of a long standing depressive affect, a lot of

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powerless, being mentally weakened, being alone, the other students graduating, a reminder the school wasn't over, that he was flunking and not graduating. [¶] And then finally a delusional part in which, 'Brens was molesting me, strapping me to a gas chamber.' Basically in other words all the themes of the delusional system and its outcome were in this, in these dream series." (22 RT 5329-5330.)

psychological testing, a lot of psychological confusion and tension, with evidence for dissociation and depersonalization. Those terms meaning that he would consciously be outside himself, feel detached.

There was suggestion that he had conflicting feelings. It's as though both sides of his brain were functioning in opposition to one another.

There was evidence that he had hallucinations or voices in his head telling him to do things of an unrealistic nature. But he would snap in and out of reality. The testing suggested poor impulse control, tendencies to act out when you may least expect it.

(22 RT 5334-5335.) Dr. Groesbeck concluded that "[t]here was a suggestion there pointing to the diagnosis of psychosis delusional system and a post traumatic stress disorder." (22 RT 5335.) With respect to the results of the third test (i.e., the TAT), Dr. Groesbeck stated that the results further corroborated his diagnosis in that they revealed the types of themes that appellant "was working over in his relationship with Mr. Brens and the delusional relationship he had with him." (22 RT 5336-5337.)

As to whether appellant was capable of knowing or understanding the nature and quality of his acts when he went to Lindhurst High School on May 1, 1992, Dr. Groesbeck opined:

The data that I collected from a number of sources suggested to me that when the events of 1 May, 1992 began he was in a dissociated depersonalized state. And I believe he did know the nature and the quality of his acts though he was dissociated from those acts at least and certainly in the first part of the activity when the first four people were shot. Later on he was more aware after he had gone up the stairs in terms of the nature and quality of his act [*sic*].

(22 RT 5341.) As to whether appellant was capable of distinguishing between right and wrong, Dr. Groesbeck opined:

I felt he did not meet the qualities of that test. He did not know the different [*sic*] between right and wrong. And I base that on the fact that he was suffering from a psychotic delusion that led him to believe that what was right was right in terms of that psychotic delusion rather than what's based on a rational view of reality of what was going on in the real world.

(22 RT 5341-5342.)

Dr. Groesbeck testified that, even assuming arguendo Mr. Brens did not molest appellant and appellant was fabricating the molestation allegations, his diagnosis of appellant would remain the same. (22 RT 5349.) He explained:

> The image of Mr. Brens has all the responsibility for all the failures in [appellant's] life. And then he is imbued with sexual persecutory feelings as well as the rest of the conflicts [appellant] had. And that is a very common response in people who are psychotic in imputing motives that are beyond all the realities of the individual outside.

(22 RT 5349.)

Dr. Groesbeck opined that going to Lindhurst High School on May 1, 1992, was the "focal point" of appellant's "psychotic solution." (22 RT 5358.) He described the solution as follows:

> He would go to the school, take guns, he would shoot things up, maybe wound a few people. And most importantly take handcuffs and handcuff Mr. Brens, call in the media, and before the media have Brens explain the molestation, and of course with it the flunking of people of young people.
>
> [¶] . . . [¶]
>
> So now in the process he concedes himself dying. And here is where I think as part of that psychotic solution was his own self-destructive motivation. He thought from the beginning he would die. The SWAT team, whatever, would come in. And in some way he would die a martyr, a hero.
>
> Repeated questioning, repeated interviews from various sources does not suggest that he either when he was conceiving this solution or when he was carrying it out did he have in mind killing anybody. The only person he really thought was going to die was himself.

(22 RT 5358-5359.)

Dr. Groesbeck then testified:

> So with that mind set as I've just described it he then prepared to go into the school which he did. And briefly his mind set, as I can reconstruct it, he entered the school. It was observed he had a glazed look in his eye. I believe that he was in an altered state, dissociated. Though he was present, he was not present. He had been brooding now

for weeks. . . . He comes in and he sees what turns out to be Mr. Brens there with others. And he sees him on the edge of a desk much like Brens had stood or leaned on during the time of molestation experiences as well as other experiences during the teaching process.

And in my opinion in this dissociated state that's when all this was re-triggered in terms of the molestation, the anger. And here we have a psychotic response of anger. And I think that's where the shooting then took place in terms of killing Brens and the others. I think this was a massive discharge, a wild basic instinct. That shoot without really a full conscious knowledge of what he was doing. . . .

(22 RT 5360.) Dr. Groesbeck continued:

He came to his senses to some degree when he dropped his gun going up the stairs. And he was now somewhat puzzled when a girl thought he was going to shoot her. And he makes a statement, "I wasn't going to hurt you." He seems to have no recollection of bodies, sounds, smells, all the violence that had taken place that he had been part of. And repeatedly, at least for a long time, he did not know that Brens had died. So still in his mind was this mind set of the media, of Brens, the molestation, the publicizing of the failures.

The hostage situation what that was about he felt he would have to take hostages to get the control, to get their attention. Constantly throughout the theme of this whole process was getting their attention. You see we must remember he perceived himself as so inadequate, so incapable of calling anyone's attention to anything, he was a non-graduate.

(22 RT 5361.) Finally, Dr. Groesbeck testified:

[H]is mind set was he was now a little more aware of what was happening. And I think he began to have the dawning on him that his whole plan was unraveling, falling apart. He wondered where Brens was. He did not know Brens was shot. And then the whole collapse of his delusional solution of calling Mr. Brens and the media began to fall apart.

And it certainly did when the media never appeared even though he made maybe 10 different requests to get the media. And by the – by then the whole thing began to collapse.

(22 RT 5365.)

With regard to the fact that appellant did not tell the students in classroom C-204B about the molestations, Dr. Groesbeck opined that that did not necessarily mean "that it is all a made up after the fact point." (22 RT 5366.) He explained:

> [T]his again was part of the deepest, darkest secret he carried from the beginning of time, from the molest much like any abuse victim.
>
> And he was – we must remember he was so embarrassed about it himself. And now without the chance to have Brens exposed he himself would feel shame. As he described it they would look upon him badly. And if he were killed, he would be remembered that way. I think there's more to it even than that.
>
> I think that because he had at one time was [*sic*] a willing participant that engendered enormously great guilt. And for those reasons he did not reveal that. He was going to take it to the grave.
>
> In other words if it could not be revealed in this dramatic way then it was not going to be revealed. And this is not different than many many molested victims in keeping a secret such as that to themselves.

(22 RT 5366-5367.)

Prosecution Case

Dr. Captane Thomson, board certified in both general and forensic psychiatry, testified that, following appellant's entry of a plea of not guilty by reason of insanity, the Yuba County Superior Court had requested that he evaluate appellant. (22 RT 5410-5412; see also 22 RT 5432-5433.) As such, Dr. Thomson interviewed appellant in jail in Marysville for three and one-quarter hours on December 12, 1992; he also reviewed numerous documents that were provided to him. (22 RT 5412-5413, 5434-5436, 5449-5451.) Dr. Thomson formed the opinion that, at the time he committed the crimes, appellant understood the nature and quality of his acts and that "what he allegedly did was legally and morally wrong." (22 RT 5413; see also 23 RT 5511-5512 [on re-direct examination, Dr. Thomson reiterated his opinion that appellant "knew or understood the nature and quality of his acts" and "that he

knew right from wrong," both in a legal and a moral sense, when he committed those acts].)

With respect to Dr. Groesbeck's evaluation of appellant, Dr. Thomson testified he "was not sure [he] could agree that the evidence supported" the diagnosis of "schizophreniform disorder which is a schizophrenia like psychosis." (22 RT 5419-5420.) He elaborated:

> I did not find the evidence which would support that [diagnosis]. That is disturbance in his affect. He did not have flat blunted or inappropriate affect. He did not have a disorganization of thinking that would support that kind of that [*sic*] diagnosis.
>
> I did find him to be depressed. He did report hearing voices. And that would fit with a diagnosis of psychotic depression, if you like.
>
> But I found his disturbance to be more of mood disorder than a thought disorder.

(22 RT 5420-5421.) In any event, according to Dr. Thomson, "[e]ven a person who has a psychosis may still understand the nature and quality of his act. That is he may understand what he's doing, what he intends to do. He may think through what he intends to do." (22 RT 5421.) Moreover, Dr. Thomson found that Exhibit 16-A (the note addressed by appellant to his family) and Exhibit 62-A ("the pieced together scraps" of an apparent previous attempt by appellant to write an explanatory note to his family) suggested that appellant was planning to do something that he understood to be both legally and morally wrong. Specifically, in Exhibit 16-A appellant wrote, "[I]t seems my sanity has slipped away and evil has taken its place." (22 RT 5425-5426.) In Exhibit 62-A he wrote, "God forgive me." (22 RT 5428.)

Dr. Charles Schaffer, board certified in psychiatry, testified that the Yuba County Superior Court had requested that he too evaluate appellant following appellant's entry of a plea of not guilty by reason of insanity. (23 RT 5513-5514, 5519-5520.) Dr. Schaffer concluded that appellant "was capable of understanding the quality and nature of his acts during the incident in question."

(23 RT 5519.) He further concluded that appellant "could distinguish right from wrong during that time." (23 RT 5520.) He based his opinion on the following sources: his November 19, 1992, and November 23, 1992, interviews of appellant (lasting a total of three and one-quarter hours (23 RT 5583)); his review of police reports; his review of psychological test results; his review of summaries of witness interviews; his review of psychiatric and medical records; and his review of school records. (23 RT 5520-5522, 5538.) He also based his opinion on appellant's May 2, 1992, interview with Sergeants Downs and Williamson, the videotape of which he had watched. (23 RT 5539.) In addition, Dr. Schaffer had listened to the audiotapes of the hostage negotiations. (23 RT 5540.)

Dr. Schaffer diagnosed appellant as suffering from a "depressive disorder that is diagnosed as major depression with psychotic features." (23 RT 5545.) Dr. Schaffer noted that he thought it was possible that appellant "had a bipolar illness and that this depressive episode was part of that." (23 RT 5545.) Dr. Shaffer asserted that appellant also had symptoms of a post-traumatic stress disorder and "possible caffeine intoxication."[51] (23 RT 5546.) Dr. Schaffer opined that the fact that appellant was suffering from these disorders and symptoms did not impair his ability to understand the nature and quality of his acts on May 1, 1992; nor did it impair his ability to know whether his acts were right or wrong. (23 RT 5546-5548.)

Dr. Schaffer further diagnosed appellant as suffering from a probable personality disorder, not otherwise specified. (23 RT 5548.) Again, however, Dr. Schaffer did not think that "that played a role in impairing [appellant's]

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51. Appellant told Dr. Schaffer (as he had told others) that on May 1, 1992, about two hours before his arrival at Lindhurst High School, he had taken eight or nine NoDoz (caffeine) pills in addition to drinking four or five cups of coffee. (23 RT 5527.) Appellant told Dr. Schaffer that he had taken the pills to "'[p]ep [him] up.'" (23 RT 5534.)

ability to know the nature and quality of his acts or whether his acts were wrong on May 1st." (23 RT 5548.)

Dr. Schaffer testified that he had reviewed the guilt-phase testimony of Drs. Groesbeck and Rubinstein. (23 RT 5548.) In contrast to Drs. Groesbeck and Rubinstein, Dr. Schaffer did not diagnose appellant as suffering from a schizophrenic disorder. (23 RT 5548-5550.) Even assuming that diagnosis were correct, however, it would not change Dr. Schaffer's opinion with respect to appellant's ability to know or understand the nature and quality of his acts or his ability to distinguish right from wrong. (23 RT 5550; see also 23 RT 5584 [on re-direct examination, Dr. Schaffer testified that none of the "things" Drs. Groesbeck and Rubinstein diagnosed "as being problems that [appellant] suffered" would change his conclusion].)

Penalty Phase

Prosecution Case

The prosecution introduced into evidence photographs (seven total) taken during the autopsies of Robert Brens, Judy Davis, Jason White, and Beamon Hill. (See 23 RT 5721-5723.) Also, with Sergeant Black serving as the narrator, the prosecution played for the jury a videotape of the crime scene (Exh. 68). The videotape showed the bodies of Mr. Brens, Davis, White, and Hill as they were found. (See 23 RT 5723-5730.)

Defense Case

Appellant's mother, Edith Houston, testified that appellant was born in Santa Barbara. (24 RT 5742-5743.) He had an older sister (by two years), Susan; he also had an older half-brother, Ron (i.e., Ronald Caddell), who was Ms. Houston's child from a previous marriage. (24 RT 5743, 5752.)

When appellant was three months old he had "encephalitis; meningitis really bad." (24 RT 5743.) It was "real serious"; he required a spinal tap, and

he was in "isolation for probably two weeks something like that." (24 RT 5743-5744.)

When appellant was almost one year old "he had pneumonia really bad."[52] (24 RT 5744.) As a result, "he went backwards" and was "really slow" in terms of his development (e.g., potty training and weaning off of the bottle). (24 RT 5744; see also 24 RT 5744 [appellant was also "really slow" in learning to walk and talk].)

Appellant's father moved out when appellant was about one year old; his parents "totally split up completely" when appellant was two years old. (24 RT 5747.) Ms. Houston explained: "My husband was drinking and running around with other women; fighting. There was a lot of fighting going on. A lot of a really bad scene. [¶] I went through some suicidal things myself and tried to hold my marriage together. It wasn't working so I brought my children and I moved to Folsom." (24 RT 5747.) Appellant's father only infrequently visited the family after the move to Folsom. (24 RT 5748.)

While appellant was attending school in Folsom, "between the second and the third grade they tested him." (24 RT 5750.) The school informed Ms. Houston that appellant was a "slow learner." (24 RT 5750.) Appellant started to attend "special classes" one hour a day. (24 RT 5751.) The next summer, he attended a "special school" in Rancho Cordova for six weeks; during that time he "started learning more." (24 RT 5751.)

That same summer (i.e., the summer after appellant's third grade year) the family moved to Orangevale. (24 RT 5751; see also 24 RT 5748.) Appellant's academic progress continued over the three years he attended school in Orangevale and was taught by a "special teacher." (24 RT 5751.)

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52. Ms. Houston testified that, as a result of the pneumonia, appellant caught a lot of colds during his childhood; every time he caught a cold he had asthma. (24 RT 5744.) Appellant required a lot of medication for his asthma and other breathing problems (e.g., bronchitis). (24 RT 5744.)

Appellant's father continued to visit the family only infrequently following the move to Orangevale. (24 RT 5748.)

When appellant was about to begin junior high school, the house in which the family was living in Orangevale was put up for sale. Ms. Houston moved with appellant and Susan to Marysville to be closer to Ms. Houston's family; Ron continued to live in Sacramento, where he had a job. (24 RT 5751, 5755.)

Appellant continued to attend special education classes while attending junior high and then high school in Marysville. (24 RT 5753-5755.) During appellant's junior year in high school, "from the week before the flood [in Marysville in 1985] to the 4th of July," appellant went to live with his father and step-mother in Arkansas. (24 RT 5748, 5750.) Ms. Houston explained that she had been "having a lot of problems controlling [appellant] at home" because he had been "bullying" his sister a lot; they talked it over and decided "he needed a man's hands." (24 RT 5750.) In the middle of June, appellant called and begged his mother to let him come back home "because it wasn't working out there. His dad was drinking and into a lot of heavy drugs." (24 RT 5749.) Appellant also told his mother that his father and step-mother would not permit him to "go anyplace or do anything except to and from school. He had to exercise in his bedroom just to get tired so he could sleep at night." (24 RT 5749.)

Following appellant's return to Marysville, he and his mother and sister remained living together in Marysville through appellant's senior year in high school; they then remained in Marysville through the summer while appellant "tried to make up the classes and stuff." (24 RT 5755.) The three then moved to Sacramento and lived with Ron for two years before the family moved back to Marysville. (24 RT 5755.)

Ms. Houston testified that appellant consistently worked during the summers, beginning when he lived in Arkansas with his father and continuing after he moved back to Marysville to live with her. (24 RT 5756.) After appellant moved with his mother and his sister to Sacramento, he got a job at a McDonald's restaurant; he worked there from September until May. (24 RT 5757.) Appellant worked several part-time jobs the following summer. (24 RT 5757.)

Ms. Houston testified that when appellant was in high school, he had attempted suicide by ingesting a handful of her respiratory medicine. (24 RT 5746.) She further testified that, during the time appellant was in high school, she was aware of him "trying to help other students who had indicated they were thinking of committing suicide." (24 RT 5757-5758.) According to Ms. Houston, appellant talked quite a few students out of attempting suicide. (24 RT 5758.)

Ms. Houston noticed that appellant "started changing" after he had "finished his contract with Hewlett Packard." (24 RT 5759.) Appellant became "more depressed"; he stayed in his bedroom more; and he did not talk to her as much. (24 RT 5759.) Ms. Houston elaborated:

> He started totally changing. He just like he didn't have nothing left going for him. [¶] I don't know how to explain it except he was depressed more. He was more – when somebody called, he wanted me to answer the phone; somebody come to the door, he wanted me to go to the door even though it was still for him. He didn't talk to David [Rewerts] anymore hardly. Backed off away from Ron a lot. Him and Ron didn't spend very much time together.

(24 RT 5759-5760.) Appellant also became "very touchy, easy to argue with." (24 RT 5760.)

Ms. Houston testified that she had never seen appellant use illegal drugs, although she was aware he "drank some" and had "tried pot," and she suspected he had "probably tried [other] things." (24 RT 5761.) To Ms.

Houston's knowledge, appellant had never been in trouble with the law prior to May 1, 1992. (24 RT 5761; see also 24 RT 5766-5767.)

Ms. Houston described appellant as a "one-on-one person" who would typically have only one friend at a time; she also described appellant as "[v]ery, very shy." (24 RT 5762.) According to Ms. Houston, appellant got along with younger children better than he got along with people his own age. (24 RT 5762-5764.)

Other than maybe hitting his sister, Ms. Houston did not know appellant to intentionally hurt other people. (24 RT 5767.) At most appellant might push someone if "he got really super physically mad." (24 RT 5767.) Ms. Houston never knew appellant "to take a stick or rock and hit another person his [*sic*] didn't know for any reason"; she also never knew him to pick on other people. (24 RT 5767.)

Ms. Houston testified that, although she hated what appellant had done on May 1, 1992, she continued to love him very much. (24 RT 5769.) She further testified that when she talked to appellant "[t]he other night" on the telephone he cried and told her he was sorry that he had caused "problems" for the family.[53] (24 RT 5770.) Ms. Houston testified that she "want[ed] her son to live" (24 RT 5775.) She added:

> He's my son and I love him, but he's also got – even locked up, he would contribute to society, I think.
>
> He's a good artist. He plays the keyboard. How do you know he's not going to write a great song and paint a great picture or write a great book or story?

(24 RT 5775-5776.)

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53. When asked by defense counsel whether appellant had "spoken about the victims, the people he killed," Ms. Houston answered: "Not very much, not hardly any. He's mostly talked about how sorry he is for what happened to us, how it made our family – how our family felt." (24 RT 5770-5771.)

Donna Mickel testified that, in association with another person, she had supervised appellant for the year that he was a temporary employee of Hewlett-Packard in Roseville. (24 RT 5784-5786.) During that year, appellant helped build computer terminals; he rotated through numerous different operations on the assembly line. (24 RT 5787.) There were no "reportable disciplinary or work related complaints or corrections" involving appellant. (24 RT 5787.) He took no unplanned time off during the year. (24 RT 5788.) He was an "ideal" employee. (24 RT 5788; see also 24 RT 5790-5791.) In fact, Ms. Mickel wanted to rehire appellant "as a flex force instead of a temporary." (24 RT 5788.)

During the period that Ms. Mickel supervised appellant, she observed that appellant was very quiet. However, there was nothing about his personality or emotional state that gave her any concern as his supervisor. (24 RT 5790.) He appeared to be "well adjusted as a subordinate." (24 RT 5790.)

Appellant, 22 years old at the time of trial, testified that he was 20 years old on May 1, 1992. (24 RT 5802.) He was born on June 8, 1971, in Santa Barbara. (24 RT 5802-5803.) At the age of three or four, he moved to Folsom with his mother, sister, and brother[54]; his father moved to Arkansas. (24 RT 5803-5804.)

Appellant testified that the next time he saw his father was when he went to live with his father and step-mother in Arkansas for about four months "between 1986 to 1987" because he was not getting along with his mother and his sister. (24 RT 5804-5806.) Appellant returned to Sacramento because he was not getting along with his father and step-mother, who, according to appellant, were "heavy drinkers." (24 RT 5805-5806.)

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54. At the time of trial, appellant's sister was 23 years old; his brother, Ron, was 34 years old. (24 RT 5808.)

Appellant testified that the first school he attended was in Folsom, where he was living at the time with his mother, sister, and brother. (24 RT 5807-5808.) He attended school in Folsom for "[a]t least two or three years." (24 RT 5807.) The family moved from Folsom to Orangevale (a suburb of Sacramento), where they lived for four or five years. (24 RT 5808.) They then moved to Marysville; appellant was approximately 10 or 11 years old at the time of that move. (24 RT 5809.) Appellant attended junior high school in the Orangevale area, before the move to Marysville. (24 RT 5811.)

Appellant started Lindhurst High School as a freshman at the age of about 14 years. (24 RT 5811-5812.) He was living on North Beale Road in Linda (in Yuba County) at the time. (24 RT 5812.) Appellant described his freshman year at Lindhurst High School as "rather nice." (24 RT 5812.)

The summer after either his freshman, sophomore, or junior year of high school appellant got his first job, which was in a warehouse at Beale Air Force Base. (24 RT 5813-5814; see also 24 RT 5818-5819.) Appellant performed well at the job and really enjoyed it. (24 RT 5813.) Also during high school appellant worked for a "latch key program," which was "like a child care" center. (24 RT 5814-5816.)

As far as appellant could remember, the first time he was placed into special education classes was his freshman year in high school, and he continued to take special education classes throughout his four years of high school. (24 RT 5816-5817, 5819.) Some of appellant's classes, however, continued to be "regular classes." (24 RT 5816-5817, 5819.)

Appellant made friends his freshman year at Lindhurst High School. (24 RT 5812-5813.) He had the same friends his sophomore year. (24 RT 5818.) His friends included several females; appellant also had girlfriends. (24 RT 5818.) Appellant made some other friends his junior year in high school. (24 RT 5820.)

Appellant became friends with David Rewerts in 1986, during his (appellant's) sophomore year in high school. (24 RT 5820.) Appellant continued to consider Rewerts his friend at the time of trial. (24 RT 5820-5821.)

During appellant's senior year of high school he took a drama class. (24 RT 5821.) Ms. Morgan was the teacher. (24 RT 5821.) Jason White was in the class with appellant. (24 RT 5821-5822.) According to appellant, he and White were "pretty good friends"; they performed two or three skits together. (24 RT 5822.)

Appellant first had Mr. Brens as a teacher in the second semester of his junior year of high school, when he was in Mr. Brens's United States History class. (24 RT 5824-5825, 5836.) Appellant considered the class to be "quite easy." (24 RT 5824.) Appellant testified that his relationship with Mr. Brens at that time was "pretty good," but they did get into a couple of "fights." (24 RT 5826-5827; see also 24 RT 5827.) Appellant attributed that to the fact that toward the end of the year Mr. Brens would get a "snotty attitude[]" toward appellant and a couple of other students. (24 RT 5827.) Appellant described the attitude as "[a]n attitude like I don't care, get out of my face type attitude." (24 RT 5827.) On one occasion, appellant "was going to ask him about a paper, and he [Mr. Brens] was talking to someone else, and he told [appellant] to get the hell away from him, and he's busy. And so [appellant] left." (24 RT 5827.) On another occasion, appellant wore a hat to class because his friend had given him a bad hair cut. Appellant explained to Mr. Brens why he was wearing the hat. At first Mr. Brens said it was not a problem. In the middle of class, however, he told appellant to take off his hat. Appellant did not comply. Instead, he went up to Mr. Brens's desk, pushed everything off of it, and then left the classroom and went to the principal's office. (24 RT 5828.) Despite these two incidents, however, appellant felt that his junior year in Mr. Brens's

class was not "that bad" and that Mr. Brens was "pretty professional" and a "good teacher." (24 RT 5829.)

Appellant had Mr. Brens as a teacher again in his senior year of high school, when he was in Mr. Brens's Economics class.[55] (24 RT 5825, 5836.) There were two or three students in the class who Mr. Brens had a hard time controlling and who seemed to agitate Mr. Brens. (24 RT 5829-5830.) Mr. Brens, in turn, would take out his frustrations on other students in the class. (24 RT 5829-5830.)

On one occasion, in about December or January of appellant's senior year, appellant went to talk to Mr. Brens before class about a paper. (24 RT 5831-5834.) Mr. Brens, who was alone in his classroom, was sitting on his desk; appellant sat next to him. (24 RT 5831.) Mr. Brens rubbed his hand against appellant's penis over the outside of his (appellant's) jeans. (24 RT 5831-5832.) Appellant did not report what Mr. Brens had done to him because he was afraid of Mr. Brens. (24 RT 5832.)

As appellant's senior year continued, appellant and Mr. Brens had a couple of arguments over "classroom stuff." (24 RT 5833-5834.) According to appellant, Mr. Brens would "rag" on the students "for no apparent reason, just because he was irritated over the day." (24 RT 5833.) Mr. Brens "would say something and [appellant] would say something." (24 RT 5833.)

A second incident of a sexual nature took place between appellant and Mr. Brens later in appellant's senior year, as the end of the school year was approaching. (24 RT 5834, 5836-5838.) Appellant went to Mr. Brens's classroom (at the time, classroom C-101A) during lunch to discuss a paper. (24 RT 5834-5836.) Again Mr. Brens was sitting on, or against the side of, his

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55. According to appellant, he did not have Mr. Brens as a teacher at the beginning of his senior year. Rather, he had Mr. Brens as a teacher "from around Thanksgiving time through the new year, on to June." (24 RT 5836-5837.)

desk, "just like on the first time." (24 RT 5834, 5837-5838.) Appellant was wearing cotton elastic pants on this occasion. (24 RT 5838.) Mr. Brens "just reached in [his] pants and grabbed [his] penis." (24 RT 5838.) Mr. Brens then twisted appellant's penis "to excruciating pain."[56] (24 RT 5838.)

Appellant did not graduate with his senior class because he did not have enough credits. (24 RT 5839.) Specifically, he was lacking "Mr. Brens' class." (24 RT 5839, 5841.) When appellant went to discuss the matter with Mr. Brens and to find out "what improvements [he] could make up in his class," Mr. Brens "brushed [him] off" and said that he was busy and did not have time for appellant.[57] (24 RT 5839-5840.) A school counselor later told appellant that he could make up the class during summer school. (24 RT 5840.) Appellant took the class but did not pass. (24 RT 5841.) Appellant attributed his failure to pass on "the mental strain of the molestation." (24 RT 5842.)

Appellant subsequently moved with his mother and brother to Sacramento. (24 RT 5842.) Appellant got a job at McDonald's, which is where he met Ricardo Borom. (24 RT 5843.)

Appellant testified that he attempted suicide in 1988 by taking his mother's asthma medicine. (24 RT 5849.) He did so after having a "falling out" with a girl. (24 RT 5849.) In addition to going to the hospital afterwards, he went to Sutter-Yuba Mental Health, where he talked to a Dr. Park. (24 RT 5849-5850.) Appellant was advised to return if there were "any reoccurring

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56. Appellant testified that he may have told Ricardo Borom about the fact that Mr. Brens had molested him. Appellant was uncertain if he had done so, though, because on the night that conversation may have taken place he (appellant) was intoxicated. (24 RT 5847-5848.)

57. On cross-examination, appellant testified that Mr. Brens wanted him "to stay after class . . . to make up grades" but that he (appellant) "wasn't going to put him or me in that situation again. So I decided I wasn't going to make up those grades." (24 RT 5898-5899.)

things like this happening"; he never returned, not thinking it was necessary. (24 RT 5850.)

Appellant related that three months prior to May 1, 1992, his assignment with Hewlett-Packard was terminated after a year due to his lack of a high school diploma. (24 RT 5851.)

Appellant described his mental state during the month prior to May 1, 1992, as "very distorted." (24 RT 5848.) "It was like a – kind of like a cloud. Dissipating over [him] on a two to three week period." (24 RT 5848.) The thoughts he was having then were different from the thoughts that had led to his 1988 suicide attempt. (24 RT 5850.) Both when he was awake and when he was asleep he would hear the voice of Mr. Brens. (24 RT 5853.) Also, appellant was "seeing things" in his sleep, which, according to appellant, were hallucinations. (24 RT 5853.) Appellant was seeing "a lot of people laughing at [him]"; in addition to laughing at him, the voices were telling him to go to Lindhurst High School. (24 RT 5854.)

Appellant acknowledged that, prior to May 1, 1992, he twice spoke with David Rewerts about going to Lindhurst High School; he claimed, however, that it was in "joking terms." (24 RT 5854-2855.) Appellant asserted:

> [W]e were just kidding around. He was quite upset about some of his friends, and he wanted to get back at someone. And he thought of some ways to get back at 'em, when I told him that there was [*sic*] a couple other ways that we could get back at him. And he talked about going to the guy's house and shooting it up. And I talked about, well, why don't you just shoot him at the kneecap so it would be a lot easier.

(24 RT 2854-2855.)

With respect to Exhibits 61-A and 62-A (torn pieces of paper with writing on them that were found during a search of his house), appellant described them as "rough drafts" of the goodbye note to his family that was found in his bed (i.e., Exh. 16-A). (24 RT 5856-5859.) Appellant wrote the final draft of the note (Exh. 16-A) the night before he went to Lindhurst High

School. (24 RT 5858-5859.) With respect to his statement in the letter that "[i]t seem's [*sic*] my sanity has slipped away and evil tooken [*sic*] it's [*sic*] place," appellant explained that he wrote that because, at the time, he "thought [he] was slipping into a – out of reality with – with myself out of touch with reality. And I knew it was something I couldn't – couldn't stop at the time. It was – it was like a cloud coming over me." (24 RT 5859-5860.) Appellant was hearing voices as he was writing the note, as he had been for hours before that and continued to for hours after. (24 RT 5860.) He felt that he was losing control. (24 RT 5860.) When he wrote that "[t]he mistakes the loneliness and the failures have built up to [*sic*] high," the mistakes he was referring to were the loss of his job, breaking up with his fiancee, and "[f]inancial matters." (24 RT 5860.) The failures he was referring to were not graduating from high school and the molestations. (24 RT 5861.) He considered the molestations to be failures because he "felt like [he] shoulda [done] something, but [he] didn't." (24 RT 5861.) When appellant wrote the note he assumed he would be killed while at Lindhurst High School. (24 RT 5861.) Appellant testified that it bothered him that he had not been killed. (24 RT 5861-5862.)

Appellant drew the map labeled "Mission Profile" (Exh. 64) two or three days prior to May 1, 1992. (24 RT 5862.) According to appellant, however, at the time he drew it he still did not take going to Lindhurst High School "under real consideration. [He] thought it was just something that would pass, and [he'd] never do it." (24 RT 5863.) But as the days went by what was going to happen became beyond his control. (24 RT 5863.) Voices (that of Mr. Brens and "everyone else") were "[c]onstantly nagging" appellant to go to Lindhurst High School "[t]o do something about it." (24 RT 5863.)

Appellant got up early on the morning of May 1, 1992, to drive his mother to the dentist. (24 RT 5863-5864.) At the time he drove his mother to the dentist it was going through his mind that he might be going to Lindhurst

High School that day. (24 RT 5864.) Appellant returned home after dropping off his mother. (24 RT 5864.) After receiving his unemployment check he went and cashed it; he then went to Peavey Ranch & Home, Mission Gun Shop, and Big 5 Sporting Goods and bought ammunition.[58] (24 RT 5865.) He then returned home where he took "everything out of the package, assemble[d] it in a [*sic*] orderly fashion." (24 RT 5866-5867.) Specifically, he "load[ed] the belt," and he put .22-caliber shells in a black pouch that went on the belt. (24 RT 5868.) As he did so, he heard voices that were saying to him: "'Hurry up.' 'Let's get going.' 'Let's get this shit over with.'" (24 RT 5869.) Appellant loaded up his car; after putting gas in the car, he proceeded to Lindhurst High School. (24 RT 5869-5870.) On the way, he was thinking that "something really big's going to happen." (24 RT 5870.)

When appellant arrived at Lindhurst High School he pulled into the parking lot. (24 RT 5870.) Meanwhile, the voices in his head were "getting more apparent, louder. More fiercer." (24 RT 5870.) After parking his car, appellant turned his head and saw what he believed to be "an Oriental student." (24 RT 5870-5871.) The student started to run when he saw appellant's shotgun. (24 RT 5871.) At that point appellant "start[ed] hurrying up"; he closed his car and "[took] off." (24 RT 5871.) Next, appellant saw Ms. Morgan, who asked him, "'Do you have a permit for that weapon'?" (24 RT 5871-5872.) Appellant continued walking. (24 RT 5872.)

Appellant entered Building C, and then, according to appellant, "[e]verything starts getting very blurry." (24 RT 5872.) In the classroom "to the left," appellant saw "an outline figure of an apparent man" (i.e., Mr. Brens). (24 RT 5872; see also 24 RT 5873.) Appellant could not make out the man's

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58. Appellant testified that, the night before, he had sawed off the stock of his .22-caliber rifle "to make it smaller and more versatile." (24 RT 5866.)

facial features; nor did he otherwise know who the man was.[59] (24 RT 5872-5874.) Appellant described what happened next as follows:

> And then I see – I see him – his expression like oh shit. And then I see him fall down on the ground, and then I see a big cloud of smoke go by me. And I was kind of scared. I just didn't know what it was.

(24 RT 5873.) Right after he saw the puff of smoke, appellant saw the outline of a second person (Judy Davis) fall to the ground. (24 RT 5873.)

Appellant told the jury that he remembered pumping the shotgun but not actually pulling the trigger. (24 RT 5874.) When asked what he was intending to do when he fired the gun, appellant answered: "I was just firing. Whatever. It didn't matter if it was moving or if it was a book or a desk, anything." (24 RT 5874.) When asked if he was intending to kill someone, appellant answered: "My initial – thought was just – just start blowing stuff up. Shooting stuff." (24 RT 5874.) He continued: "[I]t could have been a person, it could have been a locker." (24 RT 5875.) He added: "Wasn't after anyone pacific (sic)." (24 RT 5875.) Appellant explained that his intent was to make a lot of noise "[t]o start getting the attention." (24 RT 5875.) When asked "get attention to do what?" appellant answered:

> To – to get the media there to bring up some of the problems that the administration were [*sic*] having. And the apparent child molest that happened with me and Mr. Brens.[60]

(24 RT 5875.)

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59. Appellant testified that in 1989, when he had last had Mr. Brens as a teacher, Mr. Brens's classroom had been situated on the opposite side of the building from where it was on May 1, 1992. (24 RT 5874.)

60. Appellant testified that he had brought thumb cuffs with him to the high school and that he was going to use them to restrain Mr. Brens and then "bring the media up there and explain to 'em what he did to me those – twice, those times." (24 RT 5880.)

Appellant's next memory was of walking and then looking to the right and seeing a "stocky" figure (who appellant later learned was Jason White). (24 RT 5876.) Next, he saw a teacher (Mr. Kaze), who "said go back into into [*sic*] the classroom, and then he slammed the door." (24 RT 5877.) The next thing appellant remembered was "making a left" and then walking south down the building's main corridor; meanwhile, he continued to hear voices. (24 RT 5877-5878.) Appellant "walked all the way down to the end where Beamon Hill was apparently shot." (24 RT 5878.) When he got to the south end of the building he made "a U-ee" and headed upstairs. (24 RT 5878.)

On the way up the stairs, appellant dropped the .22-caliber rifle, causing it to discharge. (22 RT 5878-5879.) The sound caused a ringing in appellant's ears. (22 RT 5879.) According to appellant, that was when "everything started coming back into reality, in a sense. Everything started coming clearer, focusing more." (22 RT 5879.) He no longer was hearing voices. (22 RT 5879.) Appellant picked up the .22-caliber rifle and continued upstairs. (22 RT 5879.)

Once upstairs, appellant threw the rifle into a "small room right above the stairs"; he then walked down the hallway to classroom C-204B, where he ordered the students to "sit down and shut up and don't say anything." (24 RT 5879.) Over the course of the next three hours, additional students "trickled in." (24 RT 5881.)

Appellant only fired the shotgun one time upstairs, and that was only a warning shot intended to get the attention of law enforcement. (24 RT 5881-5882.) Appellant informed the students beforehand that it was just going to be a warning shot. (24 RT 5882.)

While upstairs in classroom C-204B appellant was concerned that there might be injured people downstairs (i.e., that he "probably shot someone"). Accordingly, he sent some students downstairs with directions to look through

the classrooms for any injured students and, if they found any, to take them out of the building so that they could receive medical treatment. (24 RT 5882-5883.)

At about 7:00 or 8:00 p.m., "[a]fter the pizzas and after the Advil and after everything else," appellant began "trying to figure a way out of this whole thing for [him] and the students." (24 RT 5883.) He explained that when he arrived at the school, he

> had thoughts and ideas, writings and pictures, but – really didn't plan on doing – I really had no idea what was going to happen, happen as to the deaths and the amount of people shot.

(24 RT 5883.)

Appellant testified that, prior to going to Lindhurst High School on May 1, 1992, he drank three or four cups of coffee; prior to that day, he had never drunk coffee. (24 RT 5883-3884.) When asked what effect he thought the coffee would have on him, appellant answered: "Hiding [*sic*] my senses. Keep me awake. I was pretty tired that night before." (24 RT 5884.) Appellant also took a handful of NoDoz caffeine pills, the purpose of which he said was to wake him up. (24 RT 5884-5885.)

Appellant informed the jury that he knew he had a mental problem. (24 RT 5885.) When asked to describe it, appellant testified: "Besides my learning disorders, my mental disorders, there is [*sic*] so many of 'em, it's just hard to grasp. Speech impairment." (24 RT 5885.) He continued: "Stress. I have stress disorder. Anything stressful gets to me. It totally – my body shuts down." (24 RT 5885.)

Appellant testified that when he was placed in the Yuba County Jail following his arrest he continued to hear voices. (24 RT 5885-5887.) Also, he was seeing "more apparent pictures, visions." (24 RT 5885.) He elaborated that those visions included "Brens. Him tying me down to the electric chair. Nightmares, stuff like that." (24 RT 5885-5886.) He also saw one or two of

the students he had shot; the students, who appeared "[v]ery hideous" to appellant (i.e., they had through-and-through gunshot wounds, were constantly bleeding, and looked like they had "just came out of the earth") were appearing at the doorway of his cell. (24 RT 5886.)

Three or four months after May 1, 1992, after appellant had been put on medication, appellant "stop[ped] seeing things." (24 RT 5887.) The voices stopped "[o]ff and on." (24 RT 5887.) Appellant explained: "[B]etween court dates, it's not very apparent. But when I'm under a lot of stress, they're more apparent." (24 RT 5887.) During trial he heard voices after court was done for the day and he was back in his cell. (24 RT 5887.)

Appellant testified that it hurt him to think "about what they have to go through, the parents of the kids that are deceased." (24 RT 5889.) He stated that he was sorry for what he had done on May 1, 1992, at Lindhurst High School; he was sorry what he had done to the victims' families; he was sorry for what he had done "[t]o the children"; and he was sorry "[t]o Sergio Martinez who gets up here and testifies he has to pull his arm back." (24 RT 5889-5890.)

Appellant told the jury that he did not think it would "serve its purpose" or "accomplish anything" to execute him. (24 RT 5890.) He informed them that, if he was not executed, he would spend the rest of his life "[t]ry[ing] to make something out of [his] life."[61] (24 RT 5890.) He would try to "[l]earn why it happened." (24 RT 5890.) Appellant testified that he did not want to be executed and that life in prison without the possibility of parole would constitute punishment for him. (24 RT 5890.) When asked if that would be a fair punishment, he answered: "Guess it depends whose parents – who the victims of – the parents, how they feel about it." (24 RT 5890-5891.)

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61. Appellant testified that, at the time of trial, it was still his desire to "graduate from high school or get a high school equivalency diploma." (24 RT 5841.)

ARGUMENT

I.

VIDEOTAPES OF APPELLANT'S INTERROGATION BY LAW ENFORCEMENT AND AUDIO TAPES CONTAINING STATEMENTS MADE BY APPELLANT WHILE HE WAS HOLDING STUDENTS HOSTAGE IN CLASSROOM C-204B WERE PROPERLY ADMITTED INTO EVIDENCE

Appellant contends that the judgement in its entirety must be reversed due to the admission of videotapes of appellant's May 2, 1992, interrogation by law enforcement (Exhs. 57-A & 57-B) and due to the admission of audiotapes containing statements made by appellant while he was holding students hostage in classroom C-204B on May 1, 1992 (Exhs. 82-88). (AOB 194-264.) In short, appellant urges that the trial court erred by letting the prosecution play the videotapes and audiotapes for the jury "without an accurate and reliable record of the intelligible and unintelligible words said on those tapes." (AOB 194.) As respondent will explain, appellant's claim is unavailing for multiple reasons.

A. Background

1. Admission Of Exhibits 57-A And 57-B: Videotapes Of Law Enforcement's May 2, 1992, Interrogation Of Appellant

a. Trial Proceedings

On July 1, 1993, during the guilt phase of appellant's case, Sergeant Jim Downs testified for the prosecution that, at approximately 10:30 a.m. on May 2, 1992, he interviewed appellant in an interview room at the Yuba County Sheriff's Department. (17 RT 4001-4002, 4005.) Before beginning the interview, Sergeant Downs advised appellant of his "rights per *Miranda*." (17 RT 4002-4003.) Appellant indicated that he understood his rights and agreed to speak with Sergeant Downs about the events of the preceding day. (17 RT

4002-4004.) After conducting a "preliminary interview" with appellant, "they" turned on a videotape recorder and videotaped the remainder of the interview; the interview took up two videotapes, which were labeled for purposes of trial as Exhibits 57-A and 57-B. (17 RT 4005.)

The videotapes were received into evidence on July 1, 1993. (3 CT 827; 17 RT 4017-4018.) On that same date, prior to the prosecution beginning to play the first tape for the jury, the court asked counsel whether "[t]he court reporter need not try to take down the audio portion" of the videotapes; both the prosecutor and counsel for appellant indicated that it was acceptable if the court reporter did not transcribe the videotapes as they played. (3 CT 827; 17 RT 4018-4019.) On July 6, 1993, before the playing of the tapes resumed and ultimately concluded, the prosecution provided the defense with a 102-page transcript of Exhibits 57-A and 57-B, which the prosecution intended to offer as an exhibit. (See 17 RT 4029.) Defense counsel requested, and the court granted, time to review the transcript for accuracy. (17 RT 4029-4031.)

On July 8, 1993, defense counsel indicated that, following a review of the transcript, the defense had "no vigorous objection" to its introduction as an exhibit, "[w]ith the understanding that the Court will instruct the jury that the tape is the evidence and not the transcript." (18 RT 4329.) On that same date, the transcript, which was marked as Exhibit 89, was entered into evidence. (3 CT 834-835; 18 RT 4336.) The court instructed the jury as follows in regard to that exhibit:

> THE COURT: . . . [¶] As to number 89, I need to explain to the jury what number 89 is.
>
> 89, ladies and gentlemen, is what we will call a transcript of the audio portion of the videotaped interrogation of the defendant that you saw earlier this week.
>
> There will be 12 copies of that, or maybe 15. I'm not sure how they set it up because you won't be seeing it until deliberations. But in any event, there will be 12 copies certainly for the 12 of you who are in

deliberations and an original that would be the court's record.

It's important that you understand that Exhibit 89 is intended to assist you in following the interrogation that's on the videotape. [¶] It is not the best evidence of what happened. The videotape is the best evidence of what happened.

89 is an attempt to get as much of the conversation down accurately as possible. But if there is any conflict between what's on number 89 and what's on the videotape the videotape prevails.

In other words, Exhibit 89 was prepared by somebody later taking time to watch the videotape and type down what he or she believed he or she was seeing and hearing on the videotape.

But the videotape is the evidence. 89 is nothing more than something that hopefully will facilitate the understanding of the evidence.

(18 RT 4336-4337.)

b. Record Correction

During record correction, counsel for appellant and counsel for respondent jointly prepared a revised version of Exhibit 89. (See 5 CT Supplemental - 4 at p. 1329.) The revisions to the transcript "were the result of attorneys and/or staff on each side repeatedly replaying the video tape in a quiet setting on a number of occasions and listening, rewinding, and replaying passages that were difficult to make out." (5 CT Supplemental - 4 at p. 1330.) On September 15, 2004, counsel for appellant and counsel for respondent entered into a stipulation to the effect that the jointly-prepared revised transcript of Exhibits 57-A and 57-B "is a more accurate and complete written version of what is actually recorded on the tapes than what is set forth on Exhibit 89." (5 CT Supplemental - 4 at p. 1330.) However, the stipulation specified that, by it, neither party was agreeing that either Exhibit 89 or the revised transcript "represent what the jury heard when Exhibits 57a and 57b were played for the jury at trial." (5 CT Supplemental - 4 at p. 1330.)

Supplemental - 5 to the Clerk's Transcript on Appeal includes both, at pages 1 through 102, the transcript of Exhibits 57-A and 57-B that was admitted into evidence at trial as Exhibit 89, and, at pages 103 through 204, the jointly-prepared revised transcript of Exhibits 57-A and 57-B.

2. Admission Of Exhibits 82 Through 88: Audiotapes Containing Statements Made By Appellant While He Was Holding Students Hostage In Classroom C-204b

a. Trial Proceedings

On May 1, 1992, while appellant was holding students hostage in classroom C-204B, law enforcement "had a military field phone running from the command post [which had been set up inside the Administration Building] into Building C which [was] a direct line." (17 RT 3900, 3906-3907; see also 18 RT 4145, 4216-4217.) Law enforcement used the phone to conduct hostage negotiations with appellant. (17 RT 3907.) The phone had tape recording capabilities and was capable of recording what was going on inside classroom C-204B even when the phone was not in use. (18 RT 4217-4219.)

Officer Chuck Tracy of the Yuba City Police Department served as the primary negotiator with appellant. (17 RT 3910, 3995-3996; 18 RT 4216, 4220.) The first person Officer Tracy spoke to over the throw phone was Erik Perez (18 RT 4220-4221.) That conversation was recorded, as were the rest of the conversations held over the phone during the course of the hostage negotiations. (18 RT 4146, 4221.)

The audiotapes of the phone conversations – as well as the other voices and sounds in the classroom that were picked up by the listening device when the phone was not in use – were labeled for purposes of trial as Exhibits 82 through 88; the tapes were entered into evidence and began to be played for the jury on July 7, 1993, as part of the prosecution's guilt-phase case-in-chief. (See 3 CT 831; 18 RT 4225-4226, 4240-4241, 4243-4247, 4254-4256, 4261-4268,

4274-4279, 4286-4290.) It was stipulated on that date that the court reporter need not take down what was on the tapes. (18 RT 4227.) When on that date and the next the tapes were played for the jury, the jury was not provided with a transcript of the tapes. (See 18 RT 4227.)

The audiotapes lasted approximately six to six and one-half hours. (18 RT 4226-4227, 4230.) The arrangement was for Officer Tracy to operate the tape player and stop it from time to time, at the prosecutor's request, to answer questions. (18 RT 4227.) Before Officer Tracy started to play the tapes, he testified that the voices on the tapes would have more clarity when the speakers were talking directly into the phone; when the voices were recorded while the phone was "hung up and the information [was] coming over the listening device," they would be less clear. (18 RT 4239.) The court then informed the jury that the tapes and a player would be available to them during deliberations if they desired to replay any portions of the tapes. (18 RT 4239.)

At some point while the first tape (Exh. 82) was playing, Officer Tracy stopped the tape and the following exchange took place between the prosecutor (Mr. O'Rourke), Officer Tracy, and the court:

> Q Officer Tracy, it would appear that the sound on this portion of the tape has deteriorated; is that correct?
>
> A That is correct.
>
> [¶] . . . [¶]
>
> Q And do you know why that is happening?
>
> A Well, actually, the sound didn't deteriorate. The sound was recorded this way due to a problem. Someone in our police department took our recorders out of an air conditioned building, put them in the back of a S.W.A.T. pickup truck about a week prior to this and the heat that we suffer in Yuba/Sutter Counties, unfortunately, warped the tape recorders. And we weren't aware of it until about towards the end of this particular tape and we switched to another recording device.
>
> THE COURT: How much longer do we have this gobbledygook that is all but unintelligible?

THE WITNESS: Until the end of the first side of the tape, as far as I can tell without taking it out of the machine.

THE COURT: There are things that you can understand from time to time on the tape. Is that true until you get another, better machine?

THE WITNESS: This is about as best as it gets.

THE COURT: Does it get better from time to time?

THE WITNESS: To be honest, your Honor, I've been listening to second and third generation copies that doesn't have the problem.

THE COURT: Good quality that we've got?

THE WITNESS: They have better quality, unfortunately, and I can't tell you how long for sure on this tape but I do know at least until the end of this one.

THE COURT: Well, unless anyone thinks otherwise, I don't think we've got any choice but to play the hand out and roll it until because [*sic*] there are things from time to time that you can understand.

(18 RT 4245-4246.) Officer Tracy proceeded to resume playing the tape (Exh. 82), which had about one-third remaining on the first side (i.e., side A). (18 RT 4247.)

The court thereafter asked Officer Tracy to stop the tape and excused the jury from the courtroom. (18 RT 4247.) The court inquired of Officer Tracy as to the "second or third generation tapes" he had that were of better quality than the ones that were in evidence. (18 RT 4248.) The court asked how those tapes had been made; Officer Tracy answered: "They've been copied off of the original tapes and then I have one set that's directly off the originals and then a second set that's off of that which is clearer than what the originals are using a different higher quality tape recorder dubbing machine." (18 RT 4248; see also 18 RT 4259 ["The only thing that is missing from the copies is that inaudible sound and the clicking noise. You actually hear clear, audible voices and it's done through a filtering system on a home stereo system that I have."].) Officer Tracy affirmed that, as best as he could tell, the copies were "clearer because less background noise gets picked up." (18 RT 4248; see also 18 RT

4250 [the prosecutor states that the prosecution's copies "don't have all this background" and that "[y]ou can hear what's going on in the room, you don't have the interruptions with mechanical type of noises that we're hearing in here that's making it sound inaudible"].) The court ultimately ruled that, although the copies may be less "grating" to listen to than the originals, it was "not inclined to play for the jury something that has less sound on it without a showing that the elimination of sounds enhances accuracy in some way. Just because it's less unpleasant, I'm not sure that you actually can hear more of the important information." (18 RT 4249-4250.)

After the jury was back in the courtroom, and at the court's instruction, Officer Tracy resumed playing the tape (Exh. 82). (18 RT 4253-4254.) After the tape had reached the end of its first side, it became clear that the second side of the tape (side B) was blank. (18 RT 4255.) At that point, Officer Tracy went to play the second tape (Exh. 83) and ascertained that both sides of that tape were blank. (18 RT 4255-4257.) He then recalled that, after recording onto the first side of the first tape (Exh. 82, side A), the negotiating team switched both recording devices and tapes; in the process, they went from recording on the first side of the first tape (Exh. 82, side A) to the first side of the third tape (Exh. 84, side A). (18 RT 4257; see also 18 RT 4262-4263.) Officer Tracy thereafter continued playing the rest of the tapes (Exhs. 84-88) for the jury. (See 18 RT 4264-4268, 4275-4280, 4286-4290.) During the playing of the first side of the sixth tape (Exh. 87, side A), the court asked Officer Tracy to stop the tape and commented that there was "a significant difference in the sound of this tape than the tapes we've been listening to. The background noise is much stronger." (18 RT 4287.) Officer Tracy offered the following simple explanation: "People are more noisier." (18 RT 4287.) During the playing of the first side of the seventh and final tape (Exh. 88, side A), the court again asked Officer Tracy to stop the tape. (18 RT 4288.) The

prosecutor observed that there appeared to be "additional background noise that's entered into the tape" and asked Officer Tracy if he knew the cause of the noise; Officer Tracy answered that his belief was that it was "a fan motor" caused by the students having "moved a fan over."[62] (18 RT 4288-4289.)

b. Record Correction

In 1999, as part of record correction, and pursuant to a court order, Denise Doucette, a certified shorthand reporter, prepared a transcript of Exhibits 82 through 88; however, the transcript included only the discussions that took place over the telephone between hostage negotiators and appellant and/or certain students. (See 5 CT Supplemental - 4 at pp. 1326, 1330.) In February 2004, again as part of record correction and pursuant to a court order, Ms. Doucette prepared a second transcript, this time including "additional portions of the content of the audiotapes, specifically the background voices and noises in the room recorded both during telephone conversations and when the telephone was not in use."[63] (5 CT Supplemental - 4 at p. 1326; see also 5 CT

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62. Respondent adamantly objects to appellant's assertion that, in listening to Exhibits 82 through 88, the jury had to "endure listening to six hours of 'grating' noise" (AOB 213) and his suggestion that the entirety of Exhibits 82 through 88 "are 'gobbledygook that is all but unintelligible'" (AOB 248). It is clear from the just-recited portion of the record that, background noise notwithstanding, it was only the first side of the first tape (i.e., Exh. 82, side A) that contained "gobbledygook that is all but unintelligible" and was "grating" to listen to. (See 18 RT 4245-4246, 4255-4257, 4262-4268, 4275-4280, 4286-4290.)

63. In preparing the February 2004 transcript, Ms. Doucette "used high quality professional grade audio equipment, including headphones" and she "listened to the tapes from beginning to end a minimum of four times," frequently stopping and starting the tape player to rewind and listen again to sections of the tape as necessary to ascertain the content. (5 CT Supplemental - 4 at p. 1327.) Ms. Doucette represented that the February 2004 transcript "conveys transcription of speech that was audible only through a process of

Supplemental - 4 at pp. 1330-1331.)

Subsequently during record correction, counsel for appellant and counsel for respondent jointly prepared a revised version of Ms. Doucette's February 2004 transcript of Exhibits 82 through 88. (See 5 CT Supplemental - 4 at p. 1331.) The revisions "were the result of attorneys and/or staff on each side repeatedly replaying the audio tapes in a quiet setting on a number of occasions and listening, rewinding, and replaying passages that were difficult to make out." (5 CT Supplemental - 4 at p. 1331.) On September 15, 2004, counsel for appellant and counsel for respondent entered into a stipulation to the effect that "neither the initial transcript provided by Ms. Doucette in 1999, the second transcript prepared by Ms. Doucette in February, 2004, nor the revised transcript . . . necessarily represents what the jury heard when Exhibits 82 through 88 were played for the jury at trial." (CT Supplemental - 4 at p. 1331.)

Supplemental - 6 to the Clerk's Transcript on Appeal includes, at pages 1 through 270 (Volume 1), Ms. Doucette's 1999 transcript of Exhibits 82 through 88; at pages 271 through 821 (Volumes 2 & 3), Ms. Doucette's February 2004 transcript of Exhibits 82 though 88; and, at pages 822 through 1376 (Volumes 4 & 5), the jointly-prepared revised version of Ms. Doucette's February 2004 transcript.

B. Analysis

Appellant contends that the judgement in its entirety must be reversed due to the admission of the videotapes of appellant's interrogation by law enforcement (Exhs. 57-A & 57-B) and due to the admission of the audiotapes containing statements made by appellant while he was holding students hostage

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listening to the audiotapes repeatedly on high quality equipment," and she opined that the February 2004 transcript "contains more comprehensible speech than would be available to a jury listening to the tapes one time utilizing speakers in a courtroom." (5 CT Supplemental - 4 at pp. 1327-1328.)

in classroom C-204B (Exhs. 82-88). (AOB 194-264.) The gist of his argument is that it was error to admit the videotapes and audiotapes "without an accurate and reliable record of the intelligible and unintelligible words said on those tapes." (AOB 194.) More specifically, he argues that, because the court reporter did not report the audio portion of the tapes as they played, it can never be known exactly what the jurors heard while listening to the tapes. He urges further that "[w]ithout transcripts this appeal cannot be argued or decided" and that, "[w]ithout transcripts, any review of the major issues raised by this appeal will be in substantial violation of Defendant's constitutional process rights [*sic*] to a fair, complete, and reliable appellate review under both the California Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution." (AOB 247; see also AOB 220-221.) Appellant's argument is without merit.

As an initial matter, appellant appears to contend that, whether or not transcribed, the audiotapes (Exhs. 82-88) – if not also the videotapes (Exhs. 57-A & 57-B) – should have been ruled inadmissible on the basis that they were not "sufficiently audible and comprehensible to satisfy due process and Eighth Amendment reliability standards for their admission." (AOB 219; see also AOB 220, fn. 36, 252-253, citing, inter alia, *United States v. Robinson* (6th Cir. 1983) 707 F.2d 872, 876.) However, appellant forfeited the right to bring such a claim on appeal as, at trial, he did not object to the admission of either the videotapes or the audiotapes. (See Evid. Code, § 353, subd. (a) [a judgment shall be reversed due to the erroneous admission of evidence only if an objection to the evidence or a motion to strike it was "timely made and so stated as to make clear the specific ground of the objection"].)

In any event, an objection to the admissibility of the videotapes and audiotapes would have been baseless. Appellant complains that there are numerous instances in the videotapes in which the words of the speaker are

unintelligible (AOB 206-207), and he argues that the audiotapes "are even less intelligible" (AOB 248). Thus, according to appellant, the jury was left to speculate as to what was said on the tapes in those instances and, as a result, the tapes should have been excluded. (AOB 206-207; see also AOB 249.) His argument is unavailing.

> "'To be admissible, tape recordings need not be completely intelligible for the entire conversation as long as enough is intelligible to be relevant without creating an inference of speculation or unfairness.' [Citations.]" [Citation.]
>
> Thus, a partially unintelligible tape is admissible unless the audible portions of the tape are so incomplete the tape's relevance is destroyed. [Citations.] . . .

(*People v. Polk* (1996) 47 Cal.App.4th 944, 952-953, footnote omitted.)

In the case at bar, it simply cannot be said that the audible portions of the videotapes (Exhs. 57-A & 57-B) and the audiotapes (Exhs. 82-88) are so incomplete that the tapes' relevance is destroyed. Beginning with the videotapes, as per both Exhibit 89 and the jointly-prepared revised transcript, there are approximately 85 discreet instances in which a word or words are unintelligible. At first blush, this may sound like a large number, but the number becomes much less daunting when it is realized that both of the transcripts are 102 pages long and single-spaced. Moreover, the fact that some statements made by appellant are not fully intelligible does not prevent numerous admissions made by appellant from clearly coming through. To cite just three examples, appellant clearly acknowledges that about a month or so prior to May 1, 1992, he "told David [Rewerts] that [he] had dreams about going into the school and shooting" (CT Supplemental - 5 at p. 123 [jointly-prepared revised transcript]; see also CT Supplemental - 5 at pp. 126, 152 [same]; and see CT Supplemental - at pp. 21, 24, 50 [Exh. 89].) When Sergeant Downs confronts appellant with the fact that law enforcement found at his house a list of ammunition to buy, appellant clearly admits that he "planned it"

(although he claims it was "more like thinking about doing it but not really going through it [*sic*]"). (CT Supplemental - 5 at p. 123 [jointly-prepared revised transcript]; see also CT Supplemental - 5 at p. 21 [Exh. 89].) Appellant also clearly acknowledges that three or four days before going to the school he "drew up the plans" (although he adds that "drawing is one thing and doing one thing"). (CT Supplemental - 5 at p. 127 [jointly-prepared revised transcript]; see also CT Supplemental - 5 at p. 25 [Exh. 89].) Thus, the videotapes remained relevant despite the fact that not every word said by appellant was intelligible.

Turning to the audiotapes, it is true that at least part of the time during the playing of the first side of the first tape (Exh. 82, side A) the words spoken were "all but unintelligible" (18 RT 4245-4246) and the tape was "grating" to listen to (18 RT 4249-4250). It is also true that through the duration of the playing of the tapes there was background noise, which became particularly strong during the playing of the first side of the sixth tape (Exh. 87, side A) (18 RT 4287) and the first side of the seventh tape (Exh. 88, side A) (18 RT 4288-4289). As Officer Tracy explained, though (18 RT 4239), the voices on the audiotapes were particularly clear when the speakers were talking directly into the phone, such as when appellant was speaking over the phone (either directly or through an intermediary) with Officer Tracy. The jointly-prepared revised transcript of the tapes confirms that the statements made over the phone were largely intelligible – at least enough to preserve the tapes' relevance. (See, e.g., 4 CT Supplemental - 6 at pp. 825-836, 842-857, 871-890, 892-904, 914-927, 932-935, 938-952, 957-962, 966-1002, 1014-1020, 1038-1047, 1049-1058, 1071-1075, 1078-1091; 5 CT Supplemental - 6 at pp. 1102-1125, 1132-1148, 1172-1271, 1292-1303, 1305-1317, 1319-1352, 1356-1374.) Moreover, whether or not all of the words spoken by appellant to the students in the classroom were intelligible, the manner in which they were spoken served the

purpose of conveying to the jury appellant's disposition. In particular, as the prosecutor noted in his guilt-phase final argument, the tapes displayed appellant's (at least initial) hostility. (See 22 RT 5146; see also 22 RT 5158.) Thus, like the videotapes, the audiotapes remained relevant and admissible.[64/]

Appellant argues that, even assuming the videotapes and audiotapes were admissible, the fact that the court reporter did not transcribe the audio portions of the tapes as they were played for the jury constituted a violation of section 190.9. (See, e.g., AOB 196, 218-219, 248-250, 254.) At the time of appellant's trial, that statute provided in pertinent part as follows: "In any case in which a death sentence may be imposed, all proceedings conducted in the justice, municipal, and superior courts, including proceedings in chambers, shall be conducted on the record with a court reporter present." (§ 190.9, subd. (a), as amended by Stats. 1989, ch. 379, § 2.)

Appellant's argument must fail for the simple reason that appellant stipulated that the court reporter need not transcribe the playing of either the videotapes or the audiotapes. (17 RT 4018-4019; 18 RT 4227.) Appellant acknowledges as much. (See AOB 195, 209-210.) He asserts, however, that defense counsel's agreement that the court reporter need not transcribe the playing of the tapes must be presumed to be coercive, and he points to the fact that defense counsel (Mr. Macias) initially stated that he was "afraid [he] would get in trouble" if he did not so stipulate at the time the videotapes were to be played. (AOB 195, fn. 27, citing 17 RT 4018.) Appellant neglects to mention,

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64. Appellant argues that the jury should have been admonished to disregard any unintelligible portions of the videotapes and audiotapes and that the failure to do so "constituted a violation of Defendant's due process rights to a fair trial under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution." (AOB 248; see also AOB 208, 249, 258; and see AOB 260-264.) Appellant engages in pure speculation, however, in assuming that the jurors guessed as to what was being said on the tapes in the places in which they could not make out the words spoken.

however, that the following exchange ensued between the trial court and defense counsel:

> THE COURT: I don't want you to be intimidated in the diligent exercise of your duty as defense counsel. If you wish to say otherwise, you may.
>
> MR. MACIAS: No, we have no objection.

(17 RT 4019.) Thus, appellant's claim of coercion is clearly without merit.

Another matter that appellant neglects to mention is that, at the time of his trial, California Rules of Court, rule 203.5, provided in pertinent part as follows: "Unless otherwise ordered by the trial judge, the court reporter need not take down or transcribe an electronic recording that is admitted into evidence." (Cal. Rules of Court, former rule 203.5, as adopted, eff. July 1, 1988.)[65/]

Although appellant does not mention this language in former rule 203.5, he does rely on another part of the rule in support of his charge that the trial court erred by allowing the prosecution to offer into evidence and play for the jury the audiotapes (Exhs. 82-88) without providing the jury with a transcript of their content. (See, e.g., AOB 218-219.) Specifically, appellant relies on the following language:

> Unless otherwise ordered by the trial judge, a party offering into evidence an electronic sound or sound-and-video recording shall tender to the court and to opposing parties a typewritten transcript of the electronic recording. The transcript shall be marked for identification and shall be part of the clerk's transcript in the event of an appeal.

(Cal. Rules of Court, former rule 203.5, as adopted, eff. July 1, 1988.)

Appellant asserts that there was "a total failure to comply with [former rule 203.5] with respect to Exhibits 82-88." (AOB 219.) Appellant's argument should fail as he did not object during the playing of the audiotapes based on

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65. Rule 203.5 has since been amended and renumbered. The pertinent language is currently found in rule 2.1040 of the California Rules of Court.

the prosecution's failure to provide a transcript. (See 18 RT 4227.) If appellant had objected below, the prosecutor would have had the opportunity to produce a transcript. Appellant should not be permitted to sit idly by at trial and to then raise on appeal an error that could have been corrected if appellant had raised it below. (See *People v. Wright* (1990) 52 Cal.3d 367, 415 [holding in context of incomplete polling of jury that defendant cannot sit idly by and then claim error on appeal as inadvertence could have readily been corrected if defendant had not remained silent below].)

With respect to the videotapes of appellant's interrogation by law enforcement (Exhs. 57-A & 57-B), appellant acknowledges that the prosecution proffered a transcript of that videotaped interrogation on July 6, 1993, after the playing of the videotapes had commenced on July 1, 1993. To the extent appellant complains that the transcript (Exh. 89) was not provided *prior* to the start of the playing of the videotapes, again, appellant's argument should fail as he did not object during the playing of the first portion of the videotapes based on the prosecution's failure to provide a transcript. (See 17 RT 4018-4019.) Once again appellant should not be permitted to sit idly by at trial and to then raise on appeal an error that could have been corrected if appellant had raised it below. (See *People v. Wright*, *supra*, 52 Cal.3d at p. 415.)

Appellant complains that there are inaccuracies in Exhibit 89 and he alleges that the inaccuracies were prejudicial to his case. (See, e.g., AOB 201-206, 259-260.) He urges:

> A comparison of Exhibit 89 with the stipulated revised Exhibit 89 . . . shows substantial discrepancies between what the prosecution transcriber heard (or believed he/she had heard) listening to Exhibits 57a and 57b, and what appellate counsel heard (or believe they heard) listening to the same tapes. The discrepancies are not immaterial. Rather, the two versions have Defendant making diametrically opposed statements to the interrogating officers relevant to Defendant's *mens rea*.

(AOB 201-202.)[66]

Appellant's argument must fail as, at trial, after having been provided with an opportunity to review Exhibit 89 for accuracy (17 RT 4029-4031), defense counsel stated that the defense had "no vigorous objection" to the transcript's admission as long as the court instructed the jury – which it did – that it was the tapes themselves that was the evidence, not the transcript.[67] (18 RT 4329, 4336-4337.)

In any event, appellant cannot demonstrate that he was prejudiced by any inaccuracies in Exhibit 89. First, as just noted, the jury was instructed that it was the tapes themselves that was the evidence, not the transcript. Specifically, the court instructed the jury as follows:

> THE COURT: . . . [¶] As to number 89, I need to explain to the jury what number 89 is.

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66. To the extent that appellant also points to "twelve different instances [in Exhibit 89] where counsel for the state and for Defendant have agreed that the prosecution transcriber misidentified the speaker as Defendant when the actual speaker was a police interrogator, or vice-versa" and speculates that "it is reasonable to believe that the jurors hearing the tape only once would also have attributed statements made by the interrogators to Defendant or statements made by Defendant to the interrogators" (AOB 206), respondent disagrees given that Exhibits 57A and 57B are *videotapes*. As the jurors had the ability to not only listen to but to also view the interrogation of appellant by Sergeant Downs (later joined by Sergeant Mikeail Williamson), it seems unlikely that the jury would have attributed any of the statements on the tape to the wrong individual.

67. Appellant claims that, by its instruction, the court thereby endorsed Exhibit 89 "as the most accurate transcription possible." (AOB 259.) Clearly appellant is wrong. The court advised the jury that Exhibit 89 was "*an attempt* to get as much of the conversation down accurately as possible" and that it was "prepared by somebody later taking time to watch the videotape and type down what he or she *believed* he or she was seeing and hearing on the videotape." (18 RT 4337, italics added.) Given this wording, no reasonable juror would have construed the court's instruction to mean that Exhibit 89 was "the most accurate transcription possible."

89, ladies and gentlemen, is what we will call a transcript of the audio portion of the videotaped interrogation of the defendant that you saw earlier this week.

There will be 12 copies of that, or maybe 15. I'm not sure how they set it up because you won't be seeing it until deliberations. But in any event, there will be 12 copies certainly for the 12 of you who are in deliberations and an original that would be the court's record.

It's important that you understand that Exhibit 89 is intended to assist you in following the interrogation that's on the videotape. [¶] It is not the best evidence of what happened. The videotape is the best evidence of what happened.

89 is an attempt to get as much of the conversation down accurately as possible. But if there is any conflict between what's on number 89 and what's on the videotape the videotape prevails.

In other words, Exhibit 89 was prepared by somebody later taking time to watch the videotape and type down what he or she believed he or she was seeing and hearing on the videotape.

But the videotape is the evidence. 89 is nothing more than something that hopefully will facilitate the understanding of the evidence.

(18 RT 4336-4337.)

Second, with respect to the majority of the discrepancies cited by appellant, respondent disagrees with appellant's characterization of them as "substantial" and "not immaterial." (AOB 202.) For example, as per Exhibit 89, after appellant told Sergeants Downs and Williamson that he had "told some people upstairs that [he] wished Mr. Brens was here," Sergeant Williamson asked appellant why he had wished that. (CT Supplemental - 5 at pp. 31-32.) Appellant answered: "Cause. *He's the one that tortured me.*" (CT Supplemental - 5 at p. 32, italics added.) As per the jointly-prepared revised transcript, in contrast, appellant answered the question as follows: "Cause. *He's the one who flunked me.*" (CT Supplemental - 5 at p. 134, italics added.) Respondent fails to see a material difference between appellant indicating that, in his mind, Mr. Brens had "tortured" him versus "flunked" him. This becomes

apparent when it is considered that, as per Exhibit 89, after appellant stated that Mr. Brens had "tortured" him, he went on to explain that Mr. Brens was the one who had failed him. (See CT Supplemental - 5 at p. 32.) In any event, this inaccuracy could only have been to appellant's advantage as central to his defense was his claim that Mr. Brens had not only failed him but had also sexually assaulted him – a claim appellant did not make while speaking with Sergeants Downs and Williamson but a claim which involved conduct that could be considered to be a form of "torture."

To the extent any of the discrepancies cited by appellant may be deemed material when viewed in isolation, respondent posits that, considering the Exhibit 89 in its entirety, no reasonable juror would have been mislead by the inaccuracies. For example, appellant points to the fact that, as per Exhibit 89, when Sergeant Downs asked appellant why he had gone to Lindhurst High School on May 1, 1992, appellant answered as follows:

> Houston I don't know. I just thought, be, should do something, find something to actually do it, I don't know. I did have lots (unintelligible)
>
> Downs So you went to finally accomplish something?
>
> Houston No. Not to accomplish, just to, I don't know, *I was in the right frame of mind* (unintelligible).

(CT Supplemental - 5 at p. 3, italics added.) As per the jointly-prepared revised transcript, in contrast, appellant answered Sergeant Downs's question as follows:

> Houston I don't know. I just thought (unintelligible) feeling shitty all my life, do something, find something to actually do it, I don't know. I didn't have lots of (unintelligible).
>
> Downs So you went to finally accomplish something?
>
> Houston No. Not to accomplish, just to, I don't know, *I wasn't in the right frame of mind and I was a little hesitant. I don't know what frame of mind I was in even when I went in there.*

(CT Supplemental - 5 at p. 105, italics added.) Despite the fact that Exhibit 89 apparently contained an inaccuracy insofar as it had appellant stating that he "was in the right frame of mind" when he arrived at Lindhurst High School on the afternoon of May 1, 1992, a reasonable juror would have understood that to be an error in the transcript (or possibly an accurate recitation of a misstatement made by appellant during the interrogation). This is so because, immediately before appellant said, according to Exhibit 89, that he "was in the right frame of mind," appellant repeatedly stated that he did not know why he went to the school. (CT Supplemental - 5 at p. 3 [Exh. 89]; CT Supplemental - 5 at p. 105 [jointly-prepared revised transcript].) Morever, later in the interview appellant clearly stated that it was not until after he went upstairs in the C Building that it "kicked in" that what he was doing was wrong. (CT Supplemental - 5 at pp. 35-36 [Exh. 89]; CT Supplemental -5 at pp. 137-138 [jointly-prepared revised transcript].) As described by appellant, "that's when a little bit more of [his] sanity popped back in"; before that, he was "out of mind" and working "on instinct." (CT Supplemental - 5 at p. 36 [Exh. 89]; CT Supplemental - 5 at p. 138 [jointly-prepared revised transcript]; see also CT Supplemental - 5 at pp. 70-71 [as per Exh. 89, appellant subsequently reiterated that he was "totally out of it" when he opened fire in C Building]; CT Supplemental - 5 at pp. 172-173 [jointly-prepared revised transcript reflects same].) Thus, no reasonable juror would have been misled by the indicated inaccuracy in Exhibit 89.

For another example, appellant points to the fact that, as per Exhibit 89, when Sergeant Downs asked appellant "Did you hate him?" (referring to Mr. Brens), appellant answered as follows:

> Houston At that time I did and it built up, at, all the disappointments I guess built up, to . . . all the disappointments built up to that I hated him *by I knew that was him* when I shot him.

(CT Supplemental - 5 at pp. 91-92, italics added.) As per the jointly-prepared

revised transcript, in contrast, appellant answered Sergeant Downs's question as follows:

> Houston At that time I did and it built up, at, all the disappointments I guess built up, to . . . all the disappointments built up to that I hated him *but I didn't know that was him* when I shot him.

(CT Supplemental - 5 at pp. 193-194, italics added.) Despite the fact that Exhibit 89 apparently contained an inaccuracy insofar as it had appellant stating in one instance during the interrogation that he had known it was Mr. Brens when he shot him, a reasonable juror would have understood that to be an error in the transcript (or possibly an accurate recitation of a misstatement made by appellant during the interrogation). This is so because, throughout the interview, appellant repeatedly – and adamantly – indicated that he had *not* known it was Mr. Brens. (See CT Supplemental - 5 at pp. 28-29 [Exh. 89]; CT Supplemental - 5 at pp. 130-131 [jointly-prepared revised transcript]; see also CT Supplemental - 5 at pp. 33-34, 69, 75, 86-87, 89, 91-92, 94 [Exh. 89]; CT Supplemental - 5 at pp. 135-136, 171, 177, 188-189, 191, 193-194, 196 [jointly-prepared revised transcript].)

To summarize, then, counsel stipulated that the court reporter need not take down the audio portions of Exhibits 57-A and 57-B and Exhibits 82 through 88 as the tapes were played for the jury; thus, appellant cannot complain on appeal that the procedure violated section 190.9. Insofar as the prosecution failed to provide the court and opposing counsel with a transcript of Exhibits 82 through 88 as required under former rule 203.5 and did not provide a transcript of Exhibits 57-A and 57-B until midway through their playing, appellant could have but did not object on that basis below; accordingly, he should not be allowed to raise it as a claim on appeal. And insofar as the transcript of Exhibits 57-A and 57-B contained inaccuracies, appellant forfeited the right to complain on appeal on that basis given his lack of an objection below; in any event, appellant cannot demonstrate that he was

prejudiced due to any of the inaccuracies.

Appellant appears to suggest that, even if counsel are willing to stipulate that the court reporter not transcribe the playing of tapes, a trial court must refuse the stipulation in order to fully comply with section 190.9 – at least if what is said on the tapes is not indisputably clear and/or the party who proffers the tapes does not provide error-free transcripts contemporaneous with their playing. Appellant implies that such a rule is necessary in order to ensure the right to meaningful appellate review. This is so, according to appellant, because without a court reporter's transcription of the tapes, there is no way for a reviewing court (or for appellate counsel) to know exactly what the jurors heard as the tapes were playing. (See, e.g., AOB 198-199, 213-220, 251-252.) Appellant fares no better, though, even assuming arguendo that in fact section 190.9 was violated in the case at bar.

This Court recently reiterated in *People v. Rundle* (2008) 43 Cal.4th 76 that a violation of section 190.9, subdivision (a), is not reversible error per se; rather, the defendant must demonstrate prejudice. (*People v. Rundle, supra*, at p. 110, citing *People v. Freeman* (1994) 8 Cal.4th 450, 509, and *People v. Cummings* (1993) 4 Cal.4th 1233, 1333, fn. 70.) As this Court stated in *Rundle*:

> "[S]tate law entitles a defendant only to an appellate record 'adequate to permit [him or her] to argue' the points raised in the appeal. [Citation.] Federal constitutional requirements are similar. The due process and equal protection clauses of the Fourteenth Amendment require the state to furnish an indigent defendant with a record sufficient to permit adequate and effective appellate review. [Citations.] Similarly, the Eighth Amendment requires reversal only where the record is so deficient as to create a substantial risk the death penalty is being imposed in an arbitrary and capricious manner. [Citation.] The defendant has the burden of showing the record is inadequate to permit meaningful appellate review. [Citation.]" (*People v. Rogers* (2006) 39 Cal.4th 826, 857-858 (*Rogers*).)

(*People v. Rundle, supra*, at pp. 110-111, parallel citations omitted.)

Appellant acknowledges that "this Court's jurisprudence under Penal Code § 190.9 has usually held that while it is error for the trial court to fail to have all proceedings recorded, the burden is on the appellant to demonstrate that they [*sic*] complained of deficiency is prejudicial." (AOB 222.) He argues, however, that "[a]t some point the 'substantiality' of the missing record must relieve appellant of the burden of showing specifically how the missing record was prejudicial," and he "submits this is such a case." (AOB 224; see also AOB 229-236.) Appellant asserts further that his research of this Court's jurisprudence pertaining to violations of section 190.9 has revealed "no case where the record was missing eight hours of evidence presented to the jury." (AOB 224.) Appellant's argument misses the mark, however, as the record on appeal is not "missing" a record of the presentation of Exhibits 57-A and 57-B and Exhibits 82 through 88 to the jury. This is because the exhibits themselves were admitted into evidence and are part of the record on appeal (see Cal. Rules of Court, former rule 39.5(c), as adopted, eff. Jan. 1, 1983); moreover, copies of these exhibits have been provided to counsel.

The question thus becomes whether appellant has demonstrated that the fact the court reporter did not transcribe the playing of the videotapes of appellant's interrogation by law enforcement (Exhs. 57-A & 57-B) and the audiotapes containing statements made by appellant while he was holding students hostage in classroom C-204B (Exhs. 82-88) has infringed upon his right to meaningful review. Appellant has utterly failed in this regard.

The right to meaningful appellate review is ensured here because, as just noted, the videotapes and audiotapes were admitted into evidence and are part of the record on appeal (see Cal. Rules of Court, former rule 39.5(c), as adopted, eff. Jan. 1, 1983); in addition, counsel have been provided with copies of the tapes. Appellant acknowledges as much. (See AOB 216, fn. 35.) He argues, however, that this is not adequate to ensure the right to meaningful

appellate review in that this Court and the parties cannot be sure that what they hear when they listen to the audiotapes and the audio portion of the videotapes is the exact same thing that the jurors heard when the tapes were played for them at trial. He urges that this is due to the following reasons: the sound quality of the tapes (which, as discussed *ante*, was particularly poor with respect to Exhibit 82); the fact that the conditions in which the tapes were played for the jury (i.e., the acoustical properties of the trial courtroom and the equipment on which the tapes were played) cannot realistically be replicated; and the uncertainty as to whether the tapes have physically deteriorated since the time of trial in a manner that would alter their sound quality. (See AOB 199 & fn. 29; see also AOB 216-217, fn. 35.) Appellant's argument falls flat for multiple reasons.

First, for appellant's claim to succeed, this Court would have to assume that, if the court reporter had transcribed the audio portions of the tapes as they were played for the jury, the resultant transcript would answer definitively the exact words that each and every juror heard while listening to the tapes. Such an assumption would be entirely unfounded. If the court reporter had attempted to transcribe the playing of the tapes, it is fanciful at best to say that the transcript could be relied upon as an accurate representation of exactly what any, much less all, of the jurors specifically heard. This is borne out by the fact that, during record correction, counsel for appellant and respondent found it necessary to listen to the tapes repeatedly in a quiet environment in an attempt to prepare an accurate representation of what is said on the tapes. (See 5 CT Supplemental - 4 at pp. 1330-1331.) It seems ludicrous to assume that even the most experienced court reporter, listening to the tapes a single time as they were played for the jury in open court, would have been able to provide a transcript that accurately represented every spoken word on the tapes. And, even if he or she would have been able to do so, it still could not be assumed that every

single juror – each with their own auditory abilities – accurately heard every word that was spoken on the tapes.

Appellant fares no better with regard to his argument that the tapes' availability does not ensure meaningful appellate review. As noted *ante*, appellant contends that the acoustics in the courtroom and the equipment on which the tapes were played may have affected what the jury heard while listening to them; he further contends that the tapes may have deteriorated over time. Appellant's contentions, however, are purely speculative. Such speculation should not be deemed sufficient to satisfy appellant's burden of demonstrating that the court reporter's failure to transcribe the playing of the tapes has impaired his right to meaningful appellate review.

In sum, then, having stipulated below that the court reporter need not take down the audio portions of the videotapes of appellant's interrogation by law enforcement (Exhs. 57-A & 57-B) and the audiotapes containing statements made by appellant while he was holding students hostage in classroom C-204B (Exhs. 82-88), appellant should not be heard to complain on appeal that the procedure violated section 190.9. Even if this Court finds a violation of section 190.9, though, appellant has not met his burden of demonstrating that the court reporter's failure to transcribe the playing of the tapes has infringed upon his right to meaningful appellate review. Thus, appellant's first claim on appeal must fail.

II.

THE GRAND JURY PROCEEDINGS WERE NOT PREJUDICIALLY FLAWED, AND THE MEMBERS OF THE GRAND JURY WERE NOT SELECTED BY CONSTITUTIONALLY IMPERMISSIBLE METHODS

Appellant contends that the judgment must be reversed because the indictment was handed down by a grand jury whose proceedings were "prejudicially flawed" and whose members were selected by "constitutionally impermissible methods." (AOB 264; see also AOB 269-277.) Respondent disagrees with appellant's arguments.

A. Procedural Background

On November 12, 1992, the defense filed a motion to discover grand jury information and augment the grand jury transcript and record. (1 CT 189-190; see also 1 CT 191-198 [memorandum of points and authorities in support of motion]; 1 CT 199-200 [declaration in support of motion].) The defense specifically sought "discovery of certain information regarding the procedures utilized before the grand jury and in its selection to facilitate the filing of a motion to set aside the indictment based on defects apparent in the transcript [of the grand jury proceedings]." (1 CT 192.) The prosecution filed a response to the motion on November 18, 1992. (1 CT 202-205.) On November 23, 1992, the trial court granted the motion in part and continued the hearing on the motion until November 25, 1992. (1 CT 213-214; 3 RT 568-576.) On November 25, 1992, after further briefing by the parties (1 CT 215-232), the court issued its final ruling with respect to the motion. (1 CT 233-234; 3 RT 579-584; see also 2 CT 437-439 [written order].)

On January 15, 1993, the defense filed a motion for supplemental discovery of grand jury information. (2 CT 457-458; see also 2 CT 459-465 [memorandum of points and authorities in support of motion]; 2 CT 466-467 [declaration in support of motion].) The defense specifically sought "discovery

of certain information regarding the composition of the Grand Jury and whether it comprised a constitutionally representative cross-section of eligible residents of Yuba County." (2 CT 460.) The prosecution filed an objection to the motion on January 27, 1993. (2 CT 528-530.) On February 1, 1993, the court denied the motion without prejudice, stating that if the defense requested the information from the jury commissioner and the jury commissioner denied or refused the request the defense could bring the motion back before the court. (2 CT 531; 3 RT 625-628.)

On February 23, 1993, the defense filed a motion to set aside and dismiss the indictment on the following grounds: (1) the prosecution ordered critical portions of the grand jury proceedings to be unreported in violation of section 190.9; (2) the prosecution failed to comply with the requirements of sections 934 and 935 by refusing to produce evidence requested by the grand jury; (3) the selection and composition of the grand jury that indicted appellant violated the due process clause of the United States Constitution and the United States Constitution's Sixth Amendment right to a trial by a fair cross-section of the community; and (4) the grand jury was not adequately voir dired regarding extensive, prejudicial pre-indictment publicity. (2 CT 544-587.) The prosecution filed a response to the motion on March 3, 1993. (3 CT 593-604.) The following day, March 4, 1993, the defense filed an errata to its motion. (3 CT 616-631.) A hearing on the motion commenced on May 17, 1993, and concluded on May 21, 1993. (3 CT 682, 685-686; 4 RT 839-912; 5 RT 916-968, 970-972, 977-985, 989-1038, 1041-1091.) On May 27, 1993, after both the defense and the prosecution had filed supplemental briefing (3 CT 721-729 [appellant's supplemental briefing]; 3 CT 730-734 [prosecution's supplemental briefing]), the court denied the motion.[68/] (3 CT 720; 5 RT 1096-1103.)

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68. At the conclusion of its rulings, the trial court urged the defense to "get this issue resolved before the expense of trial" by filing a writ petition in

B. Analysis

1. Conducting Non-Testimonial Portions Of The Grand Jury Proceedings With No Court Reporter Present

Appellant correctly observes that, "[o]n three occasions at least, . . . the prosecutor chose to conduct aspects of the Grand Jury proceedings off record." (AOB 269, citing 1 RT 50 [jury foreperson states that prosecutor "may proceed. We'll be going off the record at this time"; notation in transcript thereafter states: "(Off the record for opening statement.)"]; 1 RT 87-88 [prosecutor requests to foreperson that "we go off the record, I need to address one of the questions that was forwarded by the jurors"; foreperson states, "[W]e'll go off the record at this time"]; 2 RT 346 [prosecutor requests to go off the record to discuss "questions that were offered at the conclusion of Jocelyn Prather's testimony [that] had to do with counseling, which were not questions that were necessarily appropriate to ask the witness"; subsequent notation in transcript states: "(Off-the-record discussion.)"].) Appellant contends he "was entitled to a complete transcript of the entire grand jury proceeding – not just a transcript of testimony." He relies solely on the majority opinion in *Dustin v.*

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the appropriate appellate court. (5 RT 1101.) Defense counsel responded that the defense would determine whether it would file such a writ petition as soon as possible and inform the court and prosecutor of the decision. (5 RT 1102-1103.) Counsel stated:

> [W]e're also looking at some absolute realities in this case, that if in fact the grand jury document is defective in some degree, so what. And if in fact the indictment is thrown out and [the prosecutor] has to proceed with a preliminary examination and through some other – that other vehicle, we're looking at it very realistically. [¶] We plan on discussing our options with Mr. Houston. . . .

(5 RT 1103.) It does not appear from the record before this Court that the defense filed a pretrial writ petition contesting the rulings at issue.

Superior Court (2002) 99 Cal.App.4th 1311 (*Dustin*), a case that was decided over nine years after the trial court's denial of his motion to set aside the indictment. He also contends that, as discussed in *Dustin*, "the burden is on the prosecution to demonstrate that there was no prejudice to [him] from the failure to ensure a record of the entire proceedings." (AOB 269, citing *Dustin v. Superior Court, supra*, at p. 1326.) An examination of *Dustin* shows that appellant is wrong about this second contention, and respondent submits the dissenting opinion in *Dustin* is better-reasoned with regard to the first contention.

In *Dustin,* a panel of the Fifth Appellate District considered a pretrial petition for writ of mandate challenging a Stanislaus County trial court's denial of a motion to dismiss an indictment charging murder with special circumstances. Similar to the issues presented in the case at bench, the issues in *Dustin* were (1) whether the prosecutor's intentional failure to have his opening and closing statements to the grand jury that issued the indictment reported and transcribed was a violation of section 190.9 and, (2) if so, whether dismissal of the indictment was an appropriate remedy for the violation. (*Dustin v. Superior Court, supra*, 99 Cal.App.4th at p. 1315.) In the majority opinion in *Dustin*, the two justices who signed it (Wiseman and Vartabedian) began by quoting *People v. Superior Court (Mouchaourab)* (2000) 78 Cal.App.4th 403 (*Mouchaourab*), which had undertaken "a comprehensive analysis" of grand jury proceedings and had reached the following general conclusion:

> "In sum, California law provides that a defendant has a due process right not to be indicted in the absence of a determination of probable cause by a grand jury acting independently and impartially in its protective role. [Citations.] An indicted defendant is entitled to enforce this right through means of a challenge under section 995 to the probable cause determination underlying the indictment, based on the nature and extent of the evidence and the manner in which the proceedings were

> conducted by the district attorney. [Citations.] In reviewing the merits of such a challenge, courts have routinely considered relevant nontestimonial portions of the record of the grand jury proceedings." [Citation.] . . .

(*Dustin v. Superior Court*, *supra*, at p. 1318, quoting *People v. Superior Court (Mouchaourab)*, *supra*, at pp. 424-425.)

The *Dustin* majority next addressed the People's argument in the case before it, agreeing that only sections 938 and 938.1 "expressly authorize disclosure of grand jury proceedings" and that neither of those statutes contain "any language that requires the prosecutor to record or report any advice that is given to the grand jury."[69] (*Dustin v. Superior Court*, *supra*, 99 Cal.App.4th at pp. 1318-1319.) The People also relied on *Stern v. Superior Court* (1947) 78 Cal.App.2d 9 (*Stern*), in which the court held:

> "The grand jury is entitled to the legal advice of the district attorney [citation] and the law does not require the presence of a reporter while such advice is being given, the only requirement being that 'the testimony that may be given' be reported [citation]." . . .

(*Dustin v. Superior Court*, *supra*, at p. 1319, quoting *Stern v. Superior Court*, *supra*, at p. 13.)

The *Dustin* majority opined that the People's position was properly rejected by the *Mouchaourab* court, which held that "'[t]he holding of *Stern* is a narrow one'" and observed that this Court, in *Johnson v. Superior Court* (1975) 15 Cal.3d 248,

> "later found that section 939.7 provided a separate statutory basis for allowing defendant to obtain nontestimonial portions of the proceedings

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69. Subdivision (a) of section 938 requires that, "[w]henever criminal causes are being investigated before the grand jury," a "competent stenographic reporter . . . shall report in shorthand the testimony given in such causes . . . ." (§ 938, subd. (a).) Section 938.1 "provides the procedural requirements for filing the transcript with the court and delivering copies to the parties." (*Dustin v. Superior Court*, *supra*, 99 Cal.App.4th at p. 1319.)

> in order to determine whether the prosecutor had advised the grand jury regarding exculpatory evidence.[70/] And cases decided thereafter indicate that nontestimonial portions of the proceedings were routinely provided to defendants mounting a challenge to the indictment, even though no statute specifically required transcription. [Citations.] [¶] ". . . Thus even though, as the *Stern* court held, sections 938 and 938.1 require only transcription of testimony, that does not prohibit discovery of other portions of the record permitted under other statutes and subsequent law."

(*Dustin v. Superior Court*, *supra*, 99 Cal.App.4th at pp. 1319-1320, quoting *People v. Superior Court (Mouchaourab)*, *supra*, 78 Cal.App.4th at p. 430.) The *Dustin* majority concluded that, "[c]ontrary to the People's position, sections 938 and 938.1 and *Stern* are not necessarily controlling on whether defendant is entitled to a complete transcript of the entire grand jury proceeding." (*Dustin v. Superior Court*, *supra*, at p. 1320.)

The *Dustin* majority next addressed the People's argument that section 190.9, subdivision (a)(1) (hereafter section 190.9(a)(1)), did not apply to grand jury proceedings in death penalty cases.[71/] (*Dustin v. Superior Court*, *supra*, 99

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70. Section 939.7 provides that "[t]he grand jury is not required to hear evidence for the defendant, but it shall weigh all the evidence submitted to it, and when it has reason to believe that other evidence within its reach will explain away the charge, it shall order the evidence to be produced, and for that purpose may require the district attorney to issue process for the witnesses."

71. At the time of appellant's trial, section 190.9(a) provided in relevant part that,

> [i]n any case in which the death sentence may be imposed, all proceedings conducted in the justice, municipal, and superior courts, including proceedings in chambers, shall be conducted on the record with a court reporter present. The court reporter shall prepare and certify a daily transcript of these proceedings.

(§ 190.9, subd. (a), as amended by Stats. 1989, ch. 379, § 2.)

Section 190.9(a)(1) now provides that,

Cal.App.4th at p. 1321.) The majority observed that, in *People v. Holt* (1997) 15 Cal.4th 619, 708, this Court held that section 190.9(a)(1) mandates "that all proceedings in a capital case be conducted on the record and reported." (*Dustin v. Superior Court, supra*, at p. 1321.) Quoting *People v. Superior Court (1973 Grand Jury)* (1975) 13 Cal.3d 430, 438-439, the majority rejected the People's argument that the then-reference in section 190.9(a)(1) to "all proceedings conducted in the municipal and superior courts" did not apply to grand jury proceedings because those proceedings are not conducted in the municipal and superior courts.[72] (*Dustin v. Superior Court, supra*, at pp. 1321-1322.)

The *Dustin* majority next addressed, and found "[e]ven less persuasive," the People's argument that grand jury proceedings are not a "case" within the meaning of section 190.9(a)(1). (*Dustin v. Superior Court, supra*, 99 Cal.App.4th at p. 1322.) The majority opined that the argument was "disingenuous because this matter had earlier been filed as a complaint . . . . The charging decision had already been made by the district attorney prior to

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> [i]n any case in which the death penalty may be imposed, all proceedings conducted in the superior court, including all conferences and proceedings, whether in open court, in conference in the courtroom, or in chambers, shall be conducted on the record with a court reporter present. The court reporter shall prepare and certify a daily transcript of all proceedings commencing with the preliminary hearing. Proceedings prior to the preliminary hearing shall be reported but need not be transcribed until the court receives notice as prescribed in paragraph (2).

(§ 190.9, subd. (a)(1).)

72. The references to municipal court in section 190.9(a)(1) were deleted in 2002 when California's municipal and superior courts were unified. (See Stats. 2002, ch. 71, § 6.)

presenting evidence to the grand jury."[73] (*Id.* at p. 1322, fn. 2.) The majority held that, "[w]here an indictment is returned in a death penalty case, . . . section 190.9 unequivocally requires 'all proceedings . . . be conducted on the record with a court reporter present.'" (*Id.* at p. 1322.) The majority stated that "nothing in the legislative history suggests the Legislature intended to exclude grand jury proceedings from the scope of section 190.9." (*Ibid.*) The majority concluded that, "in grand jury proceedings where the death penalty may be imposed, section 190.9 supplements the requirements of sections 938 and 938.1" and a defendant in such a case "is entitled to a complete transcript of the entire grand jury proceeding – not just a transcript of the testimony." (*Id.* at p. 1323.) The majority suggested that to hold otherwise might raise "equal protection and due process concerns vis-à-vis death penalty cases processed through the complaint and preliminary hearing procedure." (*Ibid.*) The majority found it "difficult to imagine an innocent reason why a prosecutor would instruct a court reporter to leave only during his or her comments to the grand jury" and speculated "[i]t seems inescapable that the prosecutor's exclusion of the court reporter was done for the express purpose of precluding discovery by the defendant" of those comments. (*Ibid.*) The majority quoted the prosecutor's comments to the court considering the motion to dismiss the indictment, showing that the prosecutor was aware of the *Mouchaourab* opinion, which was decided in February 2000, well before the prosecutor went to the grand jury and obtained the indictment, on January 16, 2001. (*Id.* at pp. 1323-1324; see *id.* at p. 1315; *People v. Superior Court (Mouchaourab), supra*, 78 Cal.App.4th at p. 403.) The majority found the prosecutor's "behavior" to be "relevant in addressing whether dismissal is the appropriate remedy for the

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73. In the case at bench, the prosecutor also apparently filed a complaint prior to seeking an indictment. (See 1 CT 14-18 [complaint filed on May 4, 1992]; 1 CT 124-130 [indictment filed on Sept. 15, 1992].)

failure to provide a complete transcript of the grand jury proceedings." (*Dustin v. Superior Court*, *supra*, at p. 1324.)

The *Dustin* majority next addressed the appropriate remedy. The majority observed that the trial court had basically found that, assuming error occurred, it was harmless because the evidence against the defendant was overwhelming, and it could not "'envision what the prosecution could have said in those ten minutes that would have compromised the independence of the jury.'" (*Dustin v. Superior Court*, *supra*, 99 Cal.App.4th at p. 1325.) The majority observed that the People were arguing in the appellate court, with no supporting authority, that any error was subject to a harmless error analysis and that the burden should be on the defendant to show prejudice. (*Ibid.*) The majority observed that the People were relying on "*post*conviction cases, which require a showing of prejudice by the defendant." (*Ibid.*; see *People v. Holt*, *supra*, 15 Cal.4th at p. 708; *People v. Freeman*, *supra, 8* Cal.4th at pp. 509-511; *People v. Cummings* (1993) 4 Cal.4th 1233, 1333-1334, fn. 70; *People v. Roberts* (1992) 2 Cal.4th 271, 325-326.)[74] The majority concluded that, "[s]ince this is a pretrial matter, these cases are not applicable," finding the situation before it "more analogous to a violation of a substantial right at a preliminary hearing" which, under *People v. Pompa-Ortiz* (1980) 27 Cal.3d 519, 529, is not reversible error in a postconviction appeal absent a showing of prejudice but, if raised before trial, is reversible per se because prejudice is presumed. (*Dustin v. Superior Court*, *supra*, at pp. 1325-1326, also quoting *People v. Laney* (1981) 115 Cal.App.3d 508, 513, for the proposition that

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74. All of these postconviction appeals involved a failure to have all proceedings in a death penalty case recorded under section 190.9(a)(1). The dissenting opinion in *Dustin* would add another case to this list, *People v. Samayoa* (1997) 15 Cal.4th 795, 819-821. (See *Dustin v. Superior Court*, *supra*, 99 Cal.App.4th at p. 1332.)

"[r]elief without prejudice is limited to pretrial challenges.") The majority further concluded that

> the intentional failure to record the proceedings as mandated by statute in death penalty cases resulted in the denial of a "substantial right," i.e., the ability to raise prosecutorial misconduct and to receive meaningful review of any alleged error. Under these circumstances, defendant does not need to show he suffered prejudice beyond his right to the records [citation], and prejudice is presumed [citation to *People v. Pompa-Ortiz*].

(*Dustin v. Superior Court*, *supra*, at p. 1326.) Accordingly, the majority granted the writ petition and directed the trial court to dismiss the indictment "without prejudice to the People continuing to prosecute these charges by seeking another indictment free of the charged defects or by filing another complaint."[75] (*Id.* at p. 1328.)

In a dissenting opinion in *Dustin*, the dissenter (Presiding Justice Ardaiz) stated at the outset that he had "no problem" with the holding in *Mouchaourab*, *supra*, 78 Cal.App.4th at pages 428-429 and 437 "that a trial court has discretion to order disclosure of a transcription of portions of grand jury proceedings beyond the testimony given in such cases." (*Dustin v. Superior Court*, *supra*, 99 Cal.App.4th at p. 1329.) He also agreed with *Mouchaourab*, *supra*, at at pages 424-425, that a defendant may challenge an indictment under section 995 based upon the manner in which the proceedings were conducted by the prosecutor. (*Dustin v. Superior Court*, *supra*, at p. 1329.) However, while he agreed that "the better practice is to have a stenographic reporter transcribe the complete grand jury proceeding," he concluded that "nothing in

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75. The majority noted that, because the prosecutor had elected not to seek the death penalty in the case after it was submitted for decision on the writ petition, the defendant might "wish to formally waive the prosecutor's error by withdrawing his motion to dismiss the indictment." (*Dustin v. Superior Court*, *supra*, 99 Cal.App.4th at pp. 1328-1329, fn. 3.)

the statutes or case authorities explicitly *requires* that a complete transcript be available." (*Ibid.*) He agreed with the prosecutor that a grand jury proceeding is not a "case" within the meaning of section 190.9(a)(1):

> With exceptions not relevant here, "[e]very public offense must be prosecuted by indictment or information . . . ." (§ 682.) "An indictment is an accusation in writing, presented by the grand jury to a competent court, charging a person with a public offense." (§ 889.) Thus, it, like an information, is an "'accusatory pleading'" (§ 691, subd. (c)), and it is the first pleading filed on the part of the People in superior court in a felony case (§ 949). It is the indictment which initiates the prosecution [citation]; prior to its filing, there is no case. There is, at most, simply an investigation which may or may not ultimately have resulted in the defendant's arrest and which may not ultimately result in an indictment – a charge – being brought. (See *Cummiskey v. Superior Court* (1992) 3 Cal.4th 1018, 1026 [grand jury is part of charging, not adjudicative, process]; *People v. Brown* (1999) 75 Cal.App.4th 916, 931-932 [grand jury process is investigatory]; § 924 [grand juror not to disclose fact of indictment until defendant's arrest].) It would be unreasonable to interpret section 190.9, subdivision (a) as requiring the reporting and transcription of an entire investigation.

(*Dustin v. Superior Court, supra*, at pp. 1329-1330, parallel citations omitted.)

The *Dustin* dissenter set forth the "significantly different" procedures in cases initiated by an indictment as opposed to an information. (*Dustin v. Superior Court, supra*, 99 Cal.App.4th at p. 1330.) He stated that "[i]t stands to reason, then, that the rights and protections afforded the accused party in the two proceedings are also different," citing the fact that an accused at a preliminary hearing enjoys the rights to counsel, to personally appear, to cross-examine witnesses, to present exculpatory evidence, and to exclude illegally obtained evidence, but does not have those rights at a grand jury proceeding (although the prosecutor is required to inform the grand jury about any exculpatory evidence of which he or she is aware). (*Id.* at p. 1331.) He again cited *People v. Brown, supra*, 75 Cal.App.4th at page 931 for the proposition that grand jury proceedings are "investigatory," not "adjudicatory," concluding

that, in his view, "section 190.9 refers to adjudicatory proceedings." (*Dustin v. Superior Court*, *supra*, at p. 1331.) He contested the majority's position that the prosecutor displayed "some sort of blameworthy intent," agreeing with the prosecutor that "*Mouchaourab* does *not* hold that every portion of a grand jury proceeding *must* be reported." (*Ibid.*) He agreed with the People that, assuming an accused's access to a transcript of the testimonial portions of the grand jury proceeding implicates the due process right not to be indicted absent probable cause, the right to other portions of the transcript is *not* constitutionally based, meaning it is "subject to harmless-error analysis under *People v. Watson* (1956) 46 Cal.2d 818, 836." (*Id.* at p. 1332.)

Finally, the *Dustin* dissenter disagreed with the conclusion of the majority that the case before it involved the violation of "a substantial right" within the meaning of *People v. Pompa-Ortiz*, *supra*, 27 Cal.3d 519. (*Dustin v. Superior Court*, *supra*, 99 Cal.App.4th at p. 1332.) He agreed that denial of a transcript of any portion of the testimony presented to the grand jury would constitute such a violation but opined that

> the same cannot be said about denial of a transcription of other portions of the proceedings. Accordingly, the *Pompa-Ortiz* rule does not apply and prejudice must be shown in order to obtain relief, even in case of a pretrial challenge.

(*Dustin v. Superior Court*, *supra*, at p. 1332.) Because the defendant had not shown prejudice (i.e., he had not shown the record was inadequate to permit meaningful review), the dissenter would have denied the petition. (*Id.* at p. 1333.)[76/]

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76. A petition by the People to this Court to review the *Dustin* majority opinion was denied with two justices (Chin and Brown) voting to grant review and another justice (Baxter) not participating in the denial. (*Dustin v. Superior Court*, *supra*, 99 Cal.App.4th at p. 1333.)

Respondent submits the dissenting opinion in *Dustin* is better-reasoned than the majority opinion and should be adopted by this Court. Most notably, a grand jury proceeding is investigatory and is not part of a "case" within the meaning of section 190.9. In *Cummiskey v. Superior Court, supra*, 3 Cal.4th 1018, this Court agreed with a sister state court that "the primary function of the grand jury is to investigate the crime charged and to determine whether probable cause exists to return an indictment for that offense." (*Id.* at p. 1036.) Earlier, in *Hawkins v. Superior Court* (1978) 22 Cal.3d 584, this Court quoted with approval Witkin's explanation of

> the vital and critical distinction between the indictment and information proceedings: "The rule that the person under investigation is not entitled to appear or offer evidence is long established. It is based on the fundamental distinction between the investigatory and judicial functions: The grand jury is not a court, and its proceedings are not a criminal trial; hence the constitutional rights of confrontation of witnesses and production of evidence do not apply until the subsequent trial on an indictment found." (Witkin, [Cal. Criminal Procedure (1963) Proceedings Before Trial, § 175], p. 167.)

(*Hawkins v. Superior Court, supra*, at pp. 617-618.) Indeed, as one court observed over six decades ago, the grand jury "is an investigatory and inquisitorial body and takes evidence to determine whether any crimes have been committed which warrant the return of one or more indictments." (*Stern v. Superior Court, supra*, 78 Cal.App.2d at p. 14.) Until an indictment is returned, there is no "case" within the meaning of section 190.9.

This point is made clear by the text of the statutes. Section 949 is unambiguous: "The first pleading on the part of the people in the superior court in a felony case is the indictment, information, or the complaint in any case certified to the superior court under Section 859a." (§ 949.) Thus, prior to the indictment, there is no pleading in the superior court, and therefore, no case. The text of section 190.9 is expressly limited to cases in superior court:

> (a)(1) In any case in which a death sentence may be imposed, all proceedings conducted in the superior court, including all conferences and proceedings, whether in open court, in conference in the courtroom, or in chambers, shall be conducted on the record with a court reporter present. . . .

(§ 190.9, subd. (a)(1).) It is apparent that whatever occurs in the grand jury proceedings, or anywhere else, prior to the indictment is not a case within the ambit of section 190.9. Were it otherwise, there would be no logical reason not to extend the reporting and transcription requirement to the "case" being investigated by police officers. Indeed, under the rule of *Dustin*, it would seem that any time a police officer sought a search warrant from the superior court in a "case in which a death sentence may be imposed" (§ 190.9, subd. (a)(1)), the reporting and transcription requirement would arise, even though there had been no accusatory pleading filed in the superior court.

The statutory framework suggests that grand jury proceedings are neither "cases" nor "proceedings conducted in the superior court" as that phrase is used in section 190.9 (nor were they "proceedings conducted in the justice, municipal, and superior courts" as section 190.9 read at the time of appellant's trial (see *ante*, fn. 71)). Section 889 defines an indictment as "an accusation in writing, presented by the grand jury to a competent court, charging a person with a public offense." (§ 889.) As the grand jury must present the indictment to "a competent court" (and because a superior court would of course be "competent"), the implication is that the grand jury proceedings themselves that lead to the indictment are not "proceedings conducted in the superior court." Rather, the statutory scheme suggests that the grand jury is an independent entity that has before it "matters," not "cases." Pursuant to sections 914, subdivision (b), and 915, the grand jury deals with "civil matters" and "offenses and matters of civil concern," respectively. (§§ 914, subd. (b), 915.) Similarly, under section 923, subdivision (a), the grand jury investigates "matters of a

criminal nature." (§ 923, subd. (a).)

The majority opinion in *Dustin* rejected the argument that grand jury proceedings are not "cases" within the meaning of section 190.9, but its logic is internally inconsistent and, therefore, unpersuasive. The majority stated:

> Even less persuasive is the People's argument that this matter "is not a 'case'" within the meaning of section 190.9. It is true that if an indictment had not been presented, this matter would not be a "case" to which section 190.9 would apply. . . .

(*Dustin v. Superior Court*, *supra*, 99 Cal.App.4th at p. 1322, footnote omitted.) Following such logic, a grand jury proceeding is a case even before an indictment is presented. However, if no indictment is in fact presented, then the grand jury proceeding was not a case. In other words, whether a grand jury proceeding is a "case" depends not on what occurs during the grand jury proceedings but rather on something occurring later: the presentment of an indictment. According to the *Dustin* majority, then, the determination of whether a grand jury proceeding is a "case" can only be made retroactively. Such an approach would give section 190.9 "a Cheshire-cat like quality, both there and not there at the same time." (*Fernandez v. Sternes* (7th Cir. 2000) 227 F.3d 977, 980.)

Respondent further notes that, in the case at bar, appellant's motion to dismiss the indictment was litigated and decided almost seven years before the decision in *Mouchaourab* was issued, and over nine years before the decision in *Dustin* was issued; the dissenter's opinion in *Dustin* that there was no compelling evidence that the prosecutor in that case had acted in bad faith is even more compelled in the case at bench, where there is no reasonable suggestion that the prosecutor acted other than in good faith when allowing certain non-testimonial portions of the grand jury proceedings to go unreported, and where the prosecutor's argument to the court on the motion to dismiss the indictment was reasonably based upon the state of the law at that time

(including *Stern v. Superior Court*, *supra*, 78 Cal.App.2d at page 13). (See 3 CT 593-596.)

In any event, even under the majority opinion in *Dustin*, because this is a postconviction appeal, appellant must show prejudice to prevail, a showing he has not made. Had he wished to avoid that requirement, he should have taken the trial court's advice and sought pretrial review of the contested ruling. (See fn. 68, *ante*.)

2. Responses To Grand Jury Questions About Whether It Would Receive Certain Evidence

Near the conclusion of the testimonial portion of the grand jury proceedings, the prosecutor stated that he had "a number of questions that probably should be referred back to" the grand jury, offered that the grand jury had "the authority to require the production of additional witnesses" if it "so desire[d]," and observed that

> [o]ne of the questions that came to us [i.e., the prosecution] states "Will we be able – will we be seeing the tape of the interview?" And I take that to refer to the interview with Eric Houston.

(2 RT 479.) The prosecutor stated:

> It was not . . . our intent to show that interview for the purposes of these hearings, which is basically the purposes of bringing an indictment. *However, if the jury so wishes, then we will do that.* I should tell you that that tape runs, my recollection is, about two hours.

(2 RT 479, italics added.)[77]

The prosecutor continued that "[t]here was also a question as to . . . 'Did the police tape a portion of the May 1st event, can we see it?'" (2 RT 480.) The prosecutor responded that there was "a tape of the negotiations which took

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77. As did appellant's trial counsel (see 2 CT 557), his counsel on appeal has omitted the italicized sentence from his summary of the relevant facts. (See AOB 270.)

place with the negotiators which is an audiotape which is approximately seven hours, I believe, seven or eight hours. Probably seven." (2 RT 480.) The prosecutor further responded that there was a videotape "in the possession of the FBI, which we have not received possession of yet," showing "what was going on inside the building" after the pizza and sodas were delivered. (2 RT 480.) The prosecutor represented that two witnesses who had already testified before the grand jury, "Hendrickson and Mills," had already "described in some detail" the "events" shown on the videotape. (2 RT 480.)[78]

The prosecutor then informed the grand jury foreperson that, before he presented "the instructions that would be applicable," it would be "probably appropriate" for the grand jury to meet outside his presence "to determine if there's any further things" it wished the prosecution

> to present at this time. What we've tried to do up to this point is to present you with sufficient evidence to make a decision as to indictment. However, if you feel you need more evidence . . . , . . . we're willing to serve whatever the needs of the Grand Jury feels are necessary [*sic*].

(2 RT 480-481.) The foreperson responded by agreeing to meet in closed session for a short period and by stating that, "if we do need additional evidence, we'll ask you for that." (2 RT 481.) After the grand jury had met in closed session, the prosecutor presented resumed testimony from one final witness (Sergeant Mikeail Williamson, see 2 RT 482 et seq.), then gave the grand jury certain standard instructions (2 RT 492 et seq.).

As he did below, appellant contends the "effect" of the statements by the prosecutor just discussed "was to dissuade the grand jury" from receiving

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78. See the testimony of victims Joshua Hendrickson at 2 RT 251 et seq. and Johnny Mills at 2 RT 349 et seq.

and considering evidence, in violation of sections 934, 935, and/or 939.7.[79] (AOB 271-272; see 2 CT 557-558.) As he did below, appellant further asserts the prosecutor's statements to the grand jury about the contents of the tapes being discussed was "inadmissible hearsay in violation of Penal Code section 939.6(b)" and that the grand jury did not receive certain instructions it should have received and was erroneously instructed in certain respects. (AOB 272-273; see 2 CT 558-559.) As he did below, appellant avers

> [t]he consequence of the prosecutors' manipulation of the grand jury proceedings fail [*sic*] to comport with the demands of the due process clause of the federal or state Constitution [citation] and requires that the indictment be set aside.

(AOB 273; see 2 CT 561.)

Respondent agrees with the prosecutor that he "in no way dissuaded or attempted to dissuade the grand jury from asking for additional evidence." (3

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79. At the time of appellant's trial, subdivision (a) of section 934 allowed a grand jury to "ask the advice of" the court, the district attorney, or county counsel. (§ 934, subd. (a), as amended by Stats. 1961, ch. 1940, § 1.) Section 935 allowed, as it does today, the district attorney to appear before the grand jury to give "information or advice relative to any matter cognizable by the grand jury" and to "interrogate witnesses before the grand jury." (§ 935.) Section 939.7 stated, as it does today:

> The grand jury is not required to hear evidence for the defendant, but it shall weigh all the evidence submitted to it, and when it has reason to believe that other evidence within its reach will explain away the charge, it shall order the evidence to be produced, and for that purpose may require the district attorney to issue process for the witnesses.

(§ 939.7.) Section 939.71, added in 1997, requires the prosecutor to inform the grand jury of the nature and existence of any exculpatory evidence about which he or she is aware. (§ 939.71, added by Stats. 1997, ch. 22, § 1.) That section codified the holding in *Johnson v. Superior Court*, *supra*, 15 Cal.3d at page 255. (See 4 Witkin & Epstein, California Criminal Law (3d Ed. 2000) Pretrial Proceedings, § 164, p. 369.)

CT 596.) Respondent further agrees with the trial court that appellant's argument is "similar" to, and "a lot less persuasive than," one made by the defendant in *Cummiskey v. Superior Court* (1992) 3 Cal.4th 1018, 1029-1034, and that it was "very clear that the grand jury knew that if it wanted to seek, have additional information brought to it, it had the right to make that happen." (5 RT 1098.)

Regarding appellant's argument that the prosecutor's statements to the grand jury about the contents of the video- and audiotapes being discussed was inadmissible hearsay under section 939.6, subdivision (b) (AOB 272; see 2 CT 558), respondent submits the prosecutor's statements were not intended as "evidence," and he was merely discharging his duty to advise the grand jury. (See fn. 79, *ante*.) Regarding appellant's argument that the prosecutor committed instructional error, it is apparently his position that, by instructing the jury that it should "use basically the same standards used by a regular jury except for the fact that you consider the evidence that's been presented as if there was no evidence brought from the other side" (2 RT 499), the prosecutor "erroneously instructed the jury that it could not consider or request evidence not already presented by the prosecution." (AOB 272; see 2 CT 559.) Respondent submits that, in light of the prosecutor's instructions and statements to the grand jury as a whole, including explicitly telling the grand jury that it could receive the tape of appellant's interview if it wished (2 RT 479), asking the grand jury to meet outside his presence "to determine if there's any further things" it wished the prosecution "to present at this time," and telling the grand jury that, if it felt it needed "more evidence," he was "willing to serve whatever the needs of the Grand Jury feels are necessary [*sic*]," with the foreperson responding that "if we do need additional evidence, we'll ask you for that" (2 RT 480-481), this position is patently unreasonable.

In sum, the prosecution did not refuse to produce evidence requested by the grand jury. In any event, appellant fails to demonstrate that the alleged errors before the grand jury resulted in any actual prejudice to his convictions. Thus, reversal of his convictions is not warranted. (See *People v. Towler* (1982) 31 Cal.3d 105, 123 & fn 9 [under the reasoning of *Pompa-Ortiz, supra*, 27 Cal.3d 519, a showing of actual prejudice is necessary to justify reversal of convictions due to alleged irregularities in the grand jury proceedings (including introduction of allegedly inadmissible evidence)]; *People v. Laney, supra*, 115 Cal.App.3d at p. 513 [holding the same in context of allegedly exculpatory evidence of which the prosecution failed to notify the grand jury].)

3. Fair Cross-Section Requirement

In appellant's written motion to dismiss the indictment, his trial counsel observed that he had a constitutional right to a grand jury drawn from a representative cross-section of the community and that he could establish a prima facie violation of that right if he showed (1) a cognizable group that was underrepresented, (2) the underrepresentation was not fair and reasonable in relation to the number of such persons in the community, and (3) the underrepresentation was due to systematic exclusion of the group in the selection process. Counsel observed that, if the defense made a prima facie showing, the burden would shift to the prosecution to show a lack of discrimination. (2 CT 562-563, citing, inter alia, *Duren v. Missouri* (1978) 349 U.S. 357; see also 3 CT 624-625.) Counsel represented that the grand jury that indicted appellant included no persons of African-American, American-Indian, East Indian (Punjabi), or Hmong descent "despite the existence of substantial numbers of each of the groups in Yuba County." (2 CT 563; 3 CT 625-626.) Counsel posited:

> It is statistically logical to assume that the grand jury selected for 1992-1993 was a reflection of the "pool" of jurors from which the grand

> jury was drawn and that, inferentially, the same exclusion and underrepresentation existed in the selection of the Yuba County grand jury for the preceding five years.

(2 CT 565; 3 CT 627.) Counsel submitted certain grand jury "rosters" for 1987 through 1993, allegedly obtained from the Yuba County Library and showing "only two possible Hispanic surnamed persons in the grand jury lists" prior to the 1992-1993 grand jury (2 CT 563-564; 3 CT 626; see 2 CT 571-575) and some "[c]ensus data regarding Yuba County clearly indicat[ing] the presence of" the four cited groups "in substantial numbers" (2 CT 563-564; 3 CT 625-626; see 2 CT 570).

In the prosecutor's written response to appellant's motion, he averred that, even if appellant's alleged "census data from an unidentified source" was accurate, it showed that persons of African-American descent made up only 4 percent of the population, persons of American-Indian descent made up only 2.9 percent of the population, persons of East Indian (Punjabi) descent made up only 0.7 percent of the population, and persons of Hmong descent made up only 3.7 percent of the population. Accordingly, the four identified groups combined comprised only about 11 percent of the population. (3 CT 599.) The prosecutor observed that the 1992-1993 grand jury that indicted appellant included four persons of apparent Hispanic descent, thus comprising about 21 percent of the grand jury. (3 CT 600; see 2 CT 570-571.)[80] The prosecutor represented that a named Asian-American had served on the 1989-1990 grand jury and that a named Asian-American and two named African-Americans had served on "the 1986-1987 grand jury," arguing that appellant could not show that those two groups had been systematically excluded "because they have

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80. The defense would subsequently agree with the prosecutor that there were four persons of Hispanic descent on the 1992-1993 grand jury that indicted appellant. (See 5 RT 1017.)

that those two groups had been systematically excluded "because they have been represented in the recent past." (3 CT 600; see 2 CT 574.)[81/] The prosecutor argued that appellant had failed to show that American-Indians in Yuba County shared a common perspective because they were members of that group, failed to show that American-Indians, East Indians, or Hmongs were underrepresented on petit juries, and failed to show that the interests of East Indians and Hmongs could not be represented by other members of the community. (3 CT 600-601.) The prosecutor concluded that appellant had not made a prima facie showing of systematic exclusion. (3 CT 601.)

At the hearing on appellant's motion, the defense presented several exhibits. (See 4 CT Supplemental - 1.)

The defense presented testimony from Bonita Marqua, the Yuba County Jury Commissioner from 1990 to May 1993. (4 RT 850 et seq.) Ms. Marqua testified that, during her tenure, the county used "a computer assisted selection process" called "the Burrough system," which was a "random draw" approach, to initiate the grand jury selection process. Regarding the 1992-1993 grand jury impaneled in July 1992, she started out with a list of about 10,000 persons, randomly taken by computer from "D.M.V. and voter registration tapes" that were regularly updated; these 10,000 persons were then sent a questionnaire; 200 of the persons who returned the questionnaire and were not otherwise disqualified were selected randomly by hand to become the grand jury venire, and the remainder became available for trial jury duty. In addition, a member of the public could be nominated or volunteer and could then complete and submit an application and, if approved by the judge, be placed on the list of 200

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81. It was subsequently stipulated that these two Asian-Americans and two African-Americans served on the indicated two grand juries. (See 5 RT 992-994.) The prosecutor declined to stipulate that "everybody else who served [on the grand jury] since 1985 was Caucasian." (5 RT 993.)

persons on the grand jury venire. Those 200 persons were interviewed by Presiding Judge Dennis J. Buckley if possible, and a list of 25 to 30 potential grand jurors was then randomly selected by hand and provided to Judge Buckley, with the others returning to the list of 10,000 available for trial jury duty. Persons on the original list of 10,000 who returned the questionnaire and who were not randomly selected for grand or trial jury duty during one grand jury session remained on the list. The list was brought back up to 10,000 every four months by "sending out new questionnaires." (4 RT 857-874, 889-894; 5 RT 924-929, 933-934.)

Ms. Marqua described the "screening" or "selection" process used to verify whether the persons who returned the questionnaire were qualified and required to serve, both as trial jurors and grand jurors. (4 RT 875, 879-889, 891-892, 900-904, 935-946.) She confirmed that the questionnaire asked nothing about "racial or ethnic identity." (4 RT 889; 5 RT 920, 958, 962.) She confirmed there was no "follow up" with persons who did not return the questionnaire. (4 RT 899-900.) She did not know if a person of Hmong descent had ever been on the grand jury venire list of 200 persons. (5 RT 922-923.) She was aware of no county campaign to encourage persons from minority racial or ethnic groups to volunteer for grand jury duty. (5 RT 923-924.)

Pursuant to stipulation, the defense presented a deposition of Judge Buckley, who was the presiding judge for the calendar year 1992 and so presided over the impaneling of the grand jury that indicted appellant. Judge Buckley basically agreed with and/or deferred to the testimony of Ms. Marqua on the grand jury selection process. (See 5 RT 990-991; Reporter's Transcript of the May 19, 1993, Deposition of Judge Dennis J. Buckley, hereafter Buckley RT, pp. 2-4 et seq.) While Judge Buckley agreed that there had been no "active seeking out" of "minority participation" on the grand jury, he stated he had

always encouraged any member of a minority group who appeared for an interview. (Buckley RT, pp. 24-25.) He had a vague recollection of interviewing a person of Southeast Asian descent, perhaps Hmong, who was willing but unable to participate because of problems with the English language. (Buckley RT, p. 26.)

Finally, the defense presented expert testimony from Dr. Peter Sperlich, a "statistician" who testified regarding "the composition of grand juries from Yuba County for the last five years." (4 RT 840; see 5 RT 998 et seq.) It was Dr. Sperlich's opinion that

> in the time span from 1986 to 1993 in Yuba County there was a substantial and significant under representation of Hispanics, Blacks, Asians, American Indians not attributable to random fluctuation or accident, but being of such magnitude that one must consider a systematic working in the system which lead to that sort of exclusion.

(5 RT 1030-1031.) Based upon his consideration of the testimony of Ms. Marqua and Judge Buckley, Dr. Sperlich opined that factors that "would disturb and possibly destroy randomness" and "might well explain the kind of under representation that we have encountered here" include (1) the failure to "follow-up" (a) with people on the list of 10,000 who did not return the questionnaire or (b) with the people on the list of 200 who did not make an appointment to be interviewed by the judge; (2) the lack of a clear written policy on the granting of excusals and deferrals; (3) the jury commissioner's practice of making random drawings from the alphabetized list of 200 by hand; (4) the ability of persons to apply or volunteer to serve on the grand jury; and (5) the carrying over from one grand jury term to the next of persons on the list of 200. (5 RT 1031-1037.) During cross-examination, Dr. Sperlich agreed that in forming his opinion he had relied entirely on information provided by the defense regarding the racial composition of the grand juries at issue. (5 RT 1042-1043.)

During argument on the defense motion at issue, the prosecutor posited that, while the defense may have shown that certain minority groups were underrepresented on certain Yuba County grand juries, it had not shown "systematic exclusion of anybody." (5 RT 1060.) As he had in his written response to appellant's motion (3 CT 600), he cited *Hirst v. Gertzen* (9th Cir. 1982) 676 F.2d 1252, 1260, for the proposition that a mere showing of underrepresentation, even when coupled with evidence that the selection procedure was susceptible of abuse, is insufficient to establish a prima facie case. (5 RT 1077.) He averred that the defense had made "no real attempt to go into" the actual racial composition of the grand juries at issue. (5 RT 1060-1062.) Defense counsel thereafter tacitly conceded that he knew nothing about the racial composition of the grand jury that indicted appellant except for that it contained four Hispanics; he knew nothing about the racial composition of the other grand juries "over the last five years" except for that they contained at least two African-Americans and two Asian-Americans; and he simply assumed that all of the other persons on those grand juries were "white." (5 RT 1062-1075.)

After the parties had filed their final briefing on this issue (see 3 CT 723-728 [defense pleading]; 3 CT 730-734 [prosecution pleading]), the court ruled that

> the Defense has not proven the second prong of the Duren test. Namely, there is no showing before me that the representation of any distinctive groups in the Yuba County venires is not fair and reasonable in relation to the number of such persons in the community.
>
> First of all, the Bell case[82/] makes it clear that venires are talking

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82. See *People v. Bell* (1989) 49 Cal.3d 502, 526-529, cited and discussed in the prosecutor's final brief at 3 CT 731-733 [similar to *Hirst v. Gertzen, supra,* 676 F.2d at page 1260, *Bell* also held that underrepresentation shown merely by statistics does not demonstrate a prima facie case of systematic

about the larger group from which individual panels are created, and we don't have any evidence about how the venires are made up in Yuba County.

Secondly, even looking at the grand juries over the last five or six years, the only evidence that was put before the Court was that there were two Asians – Asian-Americans, two African-Americans, and four Hispanic-Americans. The latter four, by the way, all having been on the grand jury that in fact indicted the defendant. But there wasn't in the evidence who else made up those six or seven grand juries or indeed who else made up the nineteen grand jurors that indicted the defendant.

So that all of the evidence respecting the way in which people were excused for hardship, the presence or absence of standards for excusal of people from [*sic*] hardship, the way in which the . . . names were pulled from file drawers and so forth is all ultimately analytically surplussage [*sic*]; because saying that it's possible that under representation could occur because of the way in which hardship excuses were dealt with or it's possible that under representation could have occurred by the way names were pulled from file drawers or any number of other things doesn't prove that under representation occurred. And the existence of under representation is the second prong of the Duren test.

And I would say in passing I don't think that under the Bell case and the Comisky [*sic*] case the third prong would be found to have been met because those cases make it pretty clear that even if you do show an under representation you have to go beyond that and demonstrate how the procedures that were undertaken were not racially neutral. But all of that is dicta, because the basis of his ruling is the . . . nonsatisfaction of the second prong of the test.

I might mention in passing, clearly, the first prong is met because African-Americans, Asian-Americans, Native Americans are all distinctive groups. . . . And if the other two tests were met, that test certainly would have been met.

(5 RT 1099-1101.)

Resolution of appellant's claim on appeal

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exclusion].

> presents a mixed question: Application of the constitutional standard is a question of law on which this [C]ourt rules de novo. With respect to the factual predicates, however, [this Court] defer[s] to the trial court's findings to the extent they are supported by substantial evidence. [Citation.] . . .

(*People v. Ramos* (1997) 15 Cal.4th 1133, 1154.)

At the outset, similar to the issues addressed *ante* in parts B.1 and B.2 of this same argument, respondent submits that appellant's failure to present the instant issue in a pretrial writ petition means that, under *People v. Pompa-Ortiz*, *supra*, 27 Cal.3d at page 529, his claim on appeal fails in the absence of demonstrable prejudice. In *People v. Towler*, *supra*, 31 Cal.3d 105, this Court held that "[t]he reasoning in *Pompa-Ortiz* applies with equal force in the grand jury context." (*Id.* at p. 123; accord, *People v. Laney*, *supra*, 115 Cal.App.3d at p. 513.)

Here, appellant could not conceivably have been prejudiced by the alleged underrepresentation of certain minority groups, to which he did not belong, on his grand jury. To preserve his challenge to the composition of his grand jury, it was thus incumbent on appellant to seek pretrial writ review of the trial court's ruling on his motion to dismiss the indictment. (See *People v. Brown*, *supra*, 75 Cal.App.4th at p. 931 [when brought on appeal, a due process challenge to the composition of a grand jury as underrepresentative of the proportion of minority groups in the community, even if established, is subject to harmless error analysis]; *People v. Corona* (1989) 211 Cal.App.3d 529, 537 [same]; cf. *People v. Stewart* (2004) 33 Cal.4th 425, 462 [citing *Arizona v. Fulminante* (1991) 499 U.S. 279, 309-310, for the proposition that unlawful exclusion of members of defendant's race from the grand jury is a structural defect requiring reversal without a showing of prejudice].) It does not appear that appellant sought pretrial writ review. (See fn. 68, *ante*.) Consequently, under the reasoning of *Pompa-Ortiz*, appellant's claim must fail due to the

absence of any showing of prejudice.

In any event, respondent submits the trial court's ruling on the motion to dismiss the indictment was correct. The record before this Court simply does not prove appellant's claim that the grand jury that indicted him "did not contain a person of African-American descent; a person of East Indian (Pujabi) descent or a person of Hmong descent . . . ." (AOB 275.) Instead, the record proves only that four Hispanic-Americans served on the grand jury that indicted appellant and that two African-Americans and two Asian-Americans served on other Yuba County grand juries within the prior eight years. Accordingly, it is *not* "statistically logical to assume" that "exclusion and underrepresentation existed in the selection of the Yuba County grand jury" from 1986 to 1993. (AOB 277; see *People v. Cohen* (1970) 12 Cal.App.3d 298, 310 [appellants' brief did not state "the makeup and characteristics" of the grand jury or cite the portion of the record, if any, where those facts might be ascertained]; *People v. Newton* (1970) 8 Cal.App.3d 359, 389 [defendant presented trial court "little or no evidence concerning the racial composition of any Alameda County grand jury or grand jury panel"].)

In addition, even if appellant showed some underrepresentation of certain groups during the period in question, he did *not* show systematic exclusion, the third *Duren* prong, which requires that the underrepresentation be "due to some rule or procedure of the selection system." (*In re Rhymes* (1985) 170 Cal.App.3d 1100, 1112.) The following statement by this Court in *People v. Ramos*, *supra*, 15 Cal.4th 1133 is on-point, as the jury commissioner in the case at bench, like the jury commissioner in *Ramos*, essentially testified that

> the master list [of 10,000] is compiled by merging randomly selected names of registered voters and motor vehicle licensees, both of which are neutral regarding ethnicity and national origin. [Citation.] The criteria for [grand] jury disqualification and for granting exemptions,

> excusals, and deferments disregard such considerations as well. [Citations.] Nor did defendant present any evidence the jury commissioner and [her] staff fail to apply them even-handedly . . . .

(*People v. Ramos*, *supra*, at p. 1156.)

Because appellant failed to make a prima facie showing of a violation of his constitutional right to a grand jury drawn from a representative cross-section of the community, the trial court correctly denied his motion to dismiss the indictment on that ground.[83]

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83. As described *ante*, appellant also moved to have the indictment dismissed on the ground that the grand jury was not adequately voir dired regarding alleged extensive, prejudicial pre-indictment publicity. (See 2 CT 566-567; 3 CT 628-629.) He suggests in this appeal that the denial of his motion on this ground was also erroneous (AOB 264), ignoring the fact that he never obtained a specific ruling in the court below on it (see 5 RT 1096-1103; see also *People v. Kaurish* (1990) 52 Cal.3d 648, 680 [defendant's lack of objection to court's omission to rule precludes raising issue on appeal]). Because appellant cites no specific facts and presents no specific argument on this issue (see AOB 264-277), respondent submits this Court should not address it. (See *People v. Wilkinson* (2004) 33 Cal.4th 821, 846, fn. 9 [proper to pass without consideration point raised without legal argument and citation to authority].)

III.

THE TRIAL COURT DID NOT FAIL TO QUESTION PROSPECTIVE JURORS UNDER OATH; THE FACT THAT THE OATH WAS NOT ADMINISTERED ON THE RECORD, EVEN IF ERROR, DID NOT PREJUDICE APPELLANT

Appellant argues that the trial court erred by failing to question prospective jurors under oath and, as a result, his constitutional right to an impartial jury was violated. He urges that the error is structural in nature, requiring that the judgment be reversed in its entirety; alternatively, he argues that the error was prejudicial under *Chapman v. California* (1967) 386 U.S. 18. (AOB 277-299.) Appellant's argument is unavailing. The trial court did not question prospective jurors without the prospective jurors first having been administered the oath required under Code of Civil Procedure section 232, subdivision (a). The fact that the oath was not administered on the record, even if error, did not prejudice appellant.

A. Procedural Background

On May 27, 1993, the trial court informed counsel that a "large group" of prospective jurors would be reporting to the courthouse on the morning of June 8, 1993; a second "large group" would be reporting the morning of June 9, 1993. (5 RT 1103-1104.) The court stated that, on those mornings, the court and counsel would meet in the courtroom and then proceed downstairs, where the court would distribute hardship questionnaires. (5 RT 1104, 1106-1107.) The court and counsel would then return upstairs and review the completed questionnaires, and then the court would rule who would and would not be excused for hardship. (5 RT 1106-1107.) The court and counsel would then return downstairs and announce the names of the prospective jurors who were excused for hardship. (5 RT 1107.) The remaining prospective jurors would

be given "voir dire questionnaires." (5 RT 1107.) After turning in their completed questionnaires, they would "be given an appointment at the rate of fifteen per half day starting" June 10, 1993. (5 RT 1107.) "Then at the rate of fifteen per day," the court and counsel would "go through those." (5 RT 1108.) Once 61 prospective jurors had been "cleared for cause," they would "just stop" and "adjourn until whenever [they] start[ed] those individual interviews. And then [they would] do the individual Hovey voir dire." (5 RT 1108.)

On the morning of June 8, 1993, the court stated that there were 173 prospective jurors downstairs (5 RT 1117); later that same date, the court stated that in fact 172 prospective jurors had reported that morning (5 RT 1181). The court and counsel went downstairs to the jury room, where the court distributed hardship questionnaires to those prospective jurors who were requesting to be excused due to the expected length of the trial. (See 5 RT 1158-1164.) Later that day, back upstairs in the courtroom, the court and counsel began to review the completed hardship questionnaires. (See 5 RT 1165, 1170.) Counsel ultimately stipulated to the excusal for cause of 38 prospective jurors, leaving 134 prospective jurors. (5 RT 1181, 1183.) The court then stated that it was going to "call off" the panel of prospective jurors scheduled to report the following morning and that it would "go through the people that one side or the other doesn't want to have excused for hardship" and determine which should be asked back for further questioning with regard to their asserted hardship. (5 RT 1181-1182.) Counsel thereafter stipulated to the excusal for cause of two additional prospective jurors, leaving 132 prospective jurors from the first group of 172. (5 RT 1185.) The court and counsel subsequently returned downstairs, where the court informed the prospective jurors whose hardship requests had not been granted to return the following day; as for the prospective jurors who had not requested hardships, the court instructed them to complete voir dire questionnaires and then to make appointments with the clerk in groups

of 15, with the first appointments set for June 10, 1993. (5 RT 1195-1199.)

On the morning of June 9, 1993, 35 of the prospective jurors whose hardship requests had not been granted the previous day returned to court. (6 RT 1210-1211.) Before the court and counsel began questioning the prospective jurors in regard to their hardship requests, the court made the following statement:

> THE COURT: My suggestion is that I just ask the people one at a time to stand. *They have already been sworn for voir dire in the – by the jury commissioner, true, or – they're nodding yes. That's the usual procedure*, and I'll just ask any questions that come to my mind and then each of you will be given the opportunity to ask questions if you wish to do so, and then I'll hear your positions and make a ruling. . . .

(6 RT 1211-1212, italics added.) Of these 35 prospective jurors, 14 were ultimately instructed to complete voir dire questionnaires and made appointments to return on a later date (see 6 RT 1221-1222, 1231-1232, 1245, 1254, 1260, 1264-1266, 1269, 1271-1273, 1275, 1278-1279, 1286-1287)[84]; the others were excused on the ground of hardship The same procedure was repeated on the afternoon of June 9, 1993, as to the remaining prospective jurors whose hardship requests had not been immediately granted. (See 6 RT 1295-1296.) Of the 32 prospective jurors in this latter group, 24 were excused on the ground of hardship; 8 were instructed to complete voir dire questionnaires and made appointments to return for voir dire. (See 6 RT 1326, 1330, 1334, 1338-1339, 1344-1345, 1356.) Thus, of the 172 prospective jurors who reported to court on the morning of June 8, 1993, 87 completed voir dire questionnaires and made appointments to return for voir dire.

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84. One of the prospective jurors out of this group of 14, Thomas Birkholz, ultimately served on appellant's jury. (See 3 CT 803; 6 RT 1264-1265.)

Jury voir dire of this group of 87 prospective jurors began on the morning of June 10, 1993. (See e.g., 6 RT 1377, 1392-1393.) Following excusals for cause, 50 prospective jurors remained. (See 9 RT 2069.)

On the morning of June 15, 1993, the second group of prospective jurors reported for jury service; the court stated that there were 120 prospective jurors downstairs. (9 RT 2086.) The court and counsel went downstairs to the jury assembly room, where the court distributed hardship questionnaires to those prospective jurors who were requesting to be excused due to the expected length of the trial. The jurors who did not request hardship questionnaires were given voir dire questionnaires to complete; they were instructed that when they turned in the completed questionnaires they were to make appointments with the clerk in groups of 15, with the first appointments set for that afternoon. (See 9 RT 2086-2089, 2091, 2096-2098, 2105-2106.) Later that morning, back upstairs in the courtroom, the court and counsel convened to review the completed hardship questionnaires. (See 9 RT 2107-2108.) At that time, the court noted that about 44 prospective jurors had not requested an excusal for hardship and were downstairs completing voir dire questionnaires. (9 RT 2108; see also 9 RT 2173 [the court later indicated that "the final count was 41"].) Counsel agreed to excuse all of the prospective jurors who had completed hardship questionnaires and proceed immediately with voir dire of the remaining prospective jurors. (9 RT 2108-2110.) When, during voir dire, there was a total of 69 prospective jurors who had "cleared for cause" (including the 50 prospective jurors from the first group who had passed for cause), the parties agreed to defer questioning the remaining prospective jurors from this second group. (See 10 RT 2317-2318.)

On June 17, 1993, some additional jurors were excused for cause. (See 10 RT 2335-2336, 2354-2355.) Following the parties' exercise of peremptory challenges (10 RT 2358-2366), a jury was selected and sworn to try the case.

(10 RT 2366; see also 10 RT 2366-2370 [alternate jurors selected and sworn].)

B. Record Correction

In his August 19, 2002, motion for "correction, augmentation, and settlement of record on appeal," counsel for appellant included a request that the record be augmented to determine whether the prospective jurors had been sworn for voir dire and when. The request read as follows:

> Neither the Clerk's Transcript nor the Reporter's Transcript reflect that jurors in the pool of prospective jurors were sworn for purposes of responding to voir dire. The only reference in the transcript is an incidental reference by the Court to the effect that jurors have been sworn by the Commissioner and that some prospective jurors nodded assent. The record suggests that the Court had no first hand knowledge that the jurors had been sworn, but was relying on its understanding of common practice. (RT 1211:24-28.) Nor does the record indicate *at what point* the prospective jurors might have been sworn, i.e., were they sworn before or after filling out questionnaires. While the hardship questionnaires contain verifications under penalty of perjury, the general questionnaires do not.[85/] Therefore, the record needs to be augmented to determine whether the persons on the two prospective panels were sworn and when.

(2 Supplemental CT - 4 at p. 400.)

Appellant's motion was heard on May 19, 2003. (See 26 RT 6180-6184.) Counsel for appellant explained to the court that, while the court's

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85. The voir dire questionnaires did not require a signature, either under penalty of perjury or not. (See, e.g., 1 CT Supplemental - 3 at pp. 4-21; 2 CT Supplemental - 3 at pp. 277-294.) However, the written instructions to the voir dire questionnaire did include the following statement: "Because this questionnaire is part of the jury selection process, you must answer the questions under penalty of perjury . . . ." (1 CT Supplemental - 3 at p. 2; 2 CT Supplemental - 3 at p. 275.)

Unlike the voir dire questionnaires, the hardship questionnaires required a signed declaration under penalty of perjury. (See, e.g., 10 CT Supplemental - 3 at p. 2314.)

comments to the prospective jurors in the assembly room had been reported, "administration of an oath, assuming one was administered [in the jury room]," had not been reported. (26 RT 6180-6181.) The court asserted as follows in regard to appellant's request to settle the record:

> THE COURT: . . . [U]nless we found somebody who remembered something more, as much as I'll be able to settle, if you will, is that the oath that was given is a the [*sic*] standard oath at the time was administered by jury assembly room staff because that, up until this became an issue in this case has been the uniform practice of the Superior Court throughout. . . .
>
> [¶] . . . [¶]
>
> THE COURT: . . . [I]t was the practice of the Court to do it in the way the law required. So, to the extent I can settle a statement those would be the pieces that would be in it. Beyond that I, we will have to live with the extent to which a record does or does not exist.

(26 RT 6182-6183; see also 26 RT 6184.) The court went on to clarify that the jury staff would have administered the oath prior to the trial judge (Judge Snowden) going downstairs to the jury assembly room to address the prospective jurors. (26 RT 6183.)

In a written order filed on September 18, 2003, the court granted appellant's request to settle the record regarding the swearing of jurors prior to voir dire as follows:

> a. On June 8, 1993, the first panel of jurors was summoned for voir dire. Prior to the panel being asked to fill out questionnaires concerning hardship excuses or questionnaires concerning qualification to serve on a death penalty jury, and prior to Judge Snowden coming down to the jury assembly room to make a statement to the prospective jurors, the staff in the jury assembly room administered to the assembled group of potential jurors an oath in accordance with Code of Civil Procedure Section 232. The Court's basis for settling the record of June 8, 1993 as set forth is (1) the presumption that official duties have been regularly performed (Evidence Code § 664) and (2) that the record reflects that the Court asked the first group of jurors to

appear for voir dire in the Courtroom on June 9, 1993 whether they had been sworn and the record indicates that certain jurors in the group nodded affirmatively. (RT 1211:12 - 1212:6.)

b. On June 15, 1993, the second panel of jurors was summoned for voir dire. Prior to the panel being asked to fill out questionnaires concerning hardship excuses or questionnaires concerning qualification to serve on a death penalty jury, and prior to Judge Snowden coming down to the jury assembly room to make a statement to the prospective jurors, the staff in the jury assembly room administered to the assembled group of potential jurors an oath in accordance with Code of Civil Procedure Section 232. The Court's basis for settling the record of June 15, 1993 as set forth is the presumption that official duties have been regularly performed. (Evidence Code § 664.)

c. During the period June 8, 1993, through June 15, 1993, Code of Civil Procedure Section 232 required the following oath to be administered to prospective jurors:

"Do you, and each of you, understand and agree that you will accurately and truthfully answer, under penalty of perjury, all questions propounded to you concerning your qualifications and competency to serve as a trial juror in the matter pending before this court; and that failure to do so may subject you to criminal prosecution."

(5 CT Supplemental - 4 at pp. 1344-1345.)

C. Analysis

At the time of appellant's trial (as it still does today), Code of Civil Procedure section 232, subdivision (a), provided as follows:

(a) Prior to the examination of prospective trial jurors in the panel assigned for voir dire, the following perjury acknowledgement and agreement shall be obtained from the panel, which shall be acknowledged by the prospective jurors with the statement "I do":

"Do you, and each of you, understand and agree that you will accurately and truthfully answer, under penalty of perjury, all questions propounded to you concerning your qualifications and competency to serve as a trial juror in the matter pending before this court; and that failure to do so may subject you to criminal prosecution."

(Code Civ. Proc., § 232, subd. (a).)

Appellant urges:

> At Defendant's trial only one group of potential jurors was sworn to tell the truth before jury selection *voir dire* was conducted. Additionally, the general questionnaire filled out by prospective jurors, which included questions relevant to an inquiry about attitudes toward the death penalty, did not require signing under penalty of perjury.[86/] Thus, a substantial number of the prospective jurors questioned in [appellant's] case, including all but one of those ultimately seated as jurors [the exception being Thomas Birkholz], were never sworn to tell the truth with regard to their qualification to serve on the jury.

(AOB 279-280, footnote omitted.) Appellant's position is directly contradicted by the court's finding in settling the record that, prior to the trial judge going down to the jury assembly room to make a statement to any of the prospective jurors, and prior to any of the prospective jurors being asked to complete voir dire questionnaires, the staff in the jury assembly room had administered to them an oath in accordance with Code of Civil Procedure Section 232, subdivision (a). (5 CT Supplemental - 4 at pp. 1344-1345.)

Appellant acknowledges that during the process of certifying the record on appeal the record was settled as indicated. (See AOB 282-286.) Nonetheless, appellant cites to the transcript of the May 15, 2003, record correction hearing (26 RT 6181-6184) and argues as follows:

> It is apparent on the face of this record that the trial court acted arbitrarily in settling the record with regard to administration of the oath of truthfulness to prospective jurors. The trial judge's remarks clearly indicate that he had no actual memory or knowledge of whether the oath

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86. As noted *ante* in footnote 85, the voir dire questionnaires did not require a signature, either under penalty of perjury or not. (See, e.g., 1 CT Supplemental - 3 at pp. 4-21; 2 CT Supplemental - 3 at pp. 277-294.) However, the written instructions to the voir dire questionnaire did include the following statement: "Because this questionnaire is part of the jury selection process, you must answer the questions under penalty of perjury . . . ." (1 CT Supplemental - 3 at p. 2; 2 CT Supplemental - 3 at p. 275.)

had in fact been administered to all prospective jurors, nor, specifically, to all those ultimately seated as jurors. . . . [T]he trial court relied on blind faith that all members of both panels had been given the oath outside of court and off the record, with neither the judge, nor counsel, nor Defendant present.

(AOB 285-286.) Appellant's argument is, to say the least, unpersuasive.

"[S]ettlement of the record is primarily a question of fact to be resolved by the trial court." (*People v. Clark* (1993) 5 Cal.4th 950, 1011.) The trial court has broad discretion in acting to settle the record. (See *ibid.* [specifically stating that, in context of settling record as to content of unreported in-chambers discussion, trial court has broad discretion in deciding whether "to accept or reject counsel's representations in accordance with its assessment of their credibility"].)

Here, the court did not abuse its discretion in settling the record to the effect that, prior to the trial judge going down to the jury assembly room to make a statement to any of the prospective jurors, and prior to any of the prospective jurors being asked to complete voir dire questionnaires, the staff in the jury assembly room had administered an oath to them in accordance with Code of Civil Procedure Section 232, subdivision (a). In so doing, the court relied on the presumption under Evidence Code section 664[87] that official duties have been regularly performed. Appellant provides no persuasive reason why it was arbitrary or an act of "blind faith" for the trial court to rely on this presumption in settling the record. In particular, appellant points to nothing in the record that directly contradicts a finding that the jury assembly room staff administered to the prospective jurors an oath in accordance with Code of Civil Procedure Section 232, subdivision (a), and, in the absence of such a showing, his claim must fail. (See *People v. Mello* (2002) 97 Cal.App.4th 511, 513-514,

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87. Evidence Code section 664 provides in pertinent part: "It is presumed that official duty has been regularly performed." (Evid. Code, § 664.)

fn. 1 [although oath required by Code of Civil Procedure section 232, subdivision (a), was not contained in appellate record, it could be presumed pursuant to Evidence Code section 664 that prospective jurors "so swore to tell the truth during voir dire"].)

Further undercutting appellant's position is the fact that there is evidence in the record confirming that the jury assembly room staff performed its official duties under Code of Civil Procedure Section 232, subdivision (a). The written instructions to the voir dire questionnaire included the following statement: "Because this questionnaire is part of the jury selection process, you must answer the questions under penalty of perjury . . . ." (1 CT Supplemental - 3 at p. 2; 2 CT Supplemental - 3 at p. 275.) This would seem to suggest that, prior to being given the questionnaire, the prospective jurors had sworn to "'accurately and truthfully answer, under penalty of perjury, all questions propounded to [them] concerning [their] qualifications and competency to serve as a trial juror in the matter pending before this court.'" (Code Civ. Proc., § 232, subd. (a).) Even more significantly, on the morning of June 9, 1993, the court inquired of a group of 35 prospective jurors whether, in accordance with the "usual procedure," the jury commissioner had sworn them for voir dire; the prospective jurors responded by "nodding yes." (6 RT 1211-1212.)

Appellant acknowledges this latter fact. (AOB 281, citing 6 RT 1211.) He urges, however:

> This is the only indication on the trial record that *any form of oath* was ever administered, and it does not establish that the oath was given to anyone other than these 35 from this first panel of 132 people, or that the 35 people received the oath required by Code of Civil Procedure § 332 [*sic*]. . . .

(AOB 281.) Respondent counters that appellant has it backwards. It would have been arbitrary for the court in settling the record to have presumed that jury assembly room staff had only administered an oath to a group of 35 of the

prospective jurors – and by coincidence it happened to be the same group of prospective jurors of which the court made an inquiry. It would have also been arbitrary for the court to have presumed that the staff had given the prospective jurors an oath other than the one required under subdivision (a) of Code of Civil Procedure section 232.

In short, appellant has failed to establish the primary premise of his argument: that only one group of 35 prospective jurors was sworn to tell the truth before answering questions on voir dire. (Cf. *People v. Carter* (2005) 36 Cal.4th 1114, 1174-1177 [prospective jurors *were not administered oath under Code of Civil Procedure section 232* but filled out juror questionnaires that were signed under penalty of perjury; defendant was not entitled to relief on appeal as he failed to establish prejudice]; *People v. Lewis* (2001) 25 Cal.4th 610, 629-631 [prospective jurors *were not administered oath under Code of Civil Procedure section 232* before answering voir dire questionnaires but were administered oath before orally answering questions on voir dire and signed voir dire questionnaires under penalty of perjury; although prospective jurors should have been sworn under Code of Civil Procedure section 232 before filling out questionnaires, defendant was not entitled to relief on appeal as he failed to establish that he was prejudiced by error].)

Appellant argues that, even if jury assembly room staff administered an oath of truthfulness to all of the prospective jurors, its failure to do so on the record "as required by Code of Civil Procedure section 232, subdivision (a) and Penal Code section 190.9, subdivision (a)," resulted in a denial of his right to meaningful appellate review and the elevated level of reliability that principles of due process require in a capital case. (AOB 278; see also AOB 279, 282, fn. 49, 295.) This argument, too, is unavailing.

By its own terms, Code of Civil Procedure section 232, subdivision (a), does not require that the oath pursuant to that section be administered on the

record. (See Code Civ. Proc., § 232, subd. (a).) Insofar as appellant relies on section 190.9, subdivision (a), for the proposition that, in capital cases, the oath required by Code of Civil Procedure section 232, subdivision (a), must be administered on the record, his reliance on that statute is misplaced. At the time of appellant's trial, section 190.9, subdivision (a), provided in pertinent part as follows: "In any case in which a death sentence may be imposed, all *proceedings conducted in the justice, municipal, and superior courts*, including proceedings in chambers, shall be conducted on the record with a court reporter present." (§ 190.9, subd. (a), as amended by Stats. 1989, ch. 379, § 2, italics added.) Respondent submits that administration of the oath required by Code of Civil Procedure section 232, subdivision (a), by jury assembly room staff – before the trial judge had gone down to the jury assembly room to address the prospective jurors for the first time – did not constitute a "proceeding[] conducted in the . . . court[]" within the meaning of section 190.9, subdivision (a). To hold otherwise would seemingly require that *all* discourse between jury assembly room staff and prospective jurors in capital cases be conducted on the record. Certainly the Legislature did not so intend in enacting section 190, subdivision (a).

In any event, as stated *ante* in Argument I, this Court recently reiterated in *People v. Rundle*, *supra*, 43 Cal.4th 76 that a violation of section 190.9, subdivision (a), is not reversible error per se; rather, the defendant must demonstrate prejudice. (*Id.* at p. 110, citing *People v. Freeman*, *supra*, 8 Cal.4th at p. 509, and *People v. Cummings*, *supra*, 4 Cal.4th at p. 1333, fn. 70.) As this Court held in *Rundle*:

> "[S]tate law entitles a defendant only to an appellate record 'adequate to permit [him or her] to argue' the points raised in the appeal. [Citation.] Federal constitutional requirements are similar. The due process and equal protection clauses of the Fourteenth Amendment require the state to furnish an indigent defendant with a record sufficient

> to permit adequate and effective appellate review. [Citations.] Similarly, the Eighth Amendment requires reversal only where the record is so deficient as to create a substantial risk the death penalty is being imposed in an arbitrary and capricious manner. [Citation.] The defendant has the burden of showing the record is inadequate to permit meaningful appellate review. [Citation.]" (*People v. Rogers* (2006) 39 Cal.4th 826, 857-858 (*Rogers*).)

(*People v. Rundle*, *supra*, at pp. 110-111, parallel citations omitted.)

Appellant attempts to meet his burden of showing that the record is inadequate to permit meaningful appellate review by asserting as follows:

> In the absence of any indication in the record in any form which might indicate that prospective jurors understood their legal obligation to answer all questions put to them fully, accurately, and truthfully, this Court must disregard the unsworn testimony of the prospective jurors at Defendant's trial, and rational review of the record of jury selection at Defendant's capital trial is not possible.

(AOB 295.) Appellant's argument misses the mark in that it presupposes that not all of the prospective jurors were administered the oath required by Code of Civil Procedure section 232, subdivision (a). As just discussed, however, such a presupposition is improper on this record. Thus, appellant's assertion that this Court must "disregard the unsworn testimony of the prospective jurors at [his] trial" is simply wrong.

The only question remaining is whether the record is inadequate to permit meaningful appellate review by virtue of the fact that the oath of truthfulness was administered to the prospective jurors in the absence of a court reporter. Appellant does not attempt to explain how the absence of the oath from the record on appeal renders the record inadequate to permit meaningful appellate review, as is his burden. (*People v. Rundle*, *supra*, 43 Cal.4th at p. 111; *People v. Rogers*, *supra*, 39 Cal.4th at p. 858.) And it would appear to be next to impossible for appellant to meet that burden here given the unrebutted presumption under Evidence Code section 664 that the oath was administered

in the language of Code of Civil Procedure section 232, subdivision (a). Thus, any error in failing to administer the oath was harmless under the applicable state (*People v. Watson*, *supra*, 46 Cal.2d 818, 836) and federal (*Chapman v. California*, *supra*, 386 U.S. at p. 24) standards. (See *People v. Rundle*, *supra*, at p. 112 [assessing violation of section 190.9, subdivision (a), for prejudice under both *Watson* and *Chapman*].)

In sum, the trial court did not question prospective jurors without the prospective jurors first having been administered the oath required under Code of Civil Procedure section 232, subdivision (a). The fact that the oath was not administered on the record, even if error, did not prejudice appellant. Accordingly, appellant's third claim for relief must fail.

IV.

THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION FOR ACQUITTAL ON THE ATTEMPTED MURDER CHARGES; APPELLANT'S CONVICTIONS FOR ATTEMPTED MURDER ARE SUPPORTED BY SUBSTANTIAL EVIDENCE

Appellant contends that the evidence was insufficient to convict him on any of the attempted murder counts, both at the close of the prosecution's case-in-chief when the trial court denied his section 1118.1 motion for acquittal and at the close of the guilt-phase evidence. (AOB 299-329.) In support, he asserts that the evidence was insufficient to support a finding beyond a reasonable doubt that he intended to kill the 10 particular persons who were the named victims of the attempted murder counts. (See, e.g., AOB 300, 302-303, 307-318, 327-329.) Appellant's argument is untenable. Both at the end of the prosecution's case-in-chief and at the conclusion of the guilt-phase evidence, the evidence was substantial enough that a reasonable trier of fact could find appellant guilty beyond a reasonable doubt of each of the attempted murder charges.

A. Procedural Background

By indictment filed on September 15, 1992, appellant was charged, inter alia, with the attempted murders (§§ 664/187) of the following 10 individuals: Thomas Hinojosai (count V); Rachel Scarberry (count VI); Patricia Collazo (count VII); Danita Gipson (count VIII); Wayne Boggess (count IX); Jose Rodriguez (count X); Mireya Yanez (count XI); Sergio Martinez (count XII); John Kaze (count XIII); and Donald Graham (count XIV). In association with counts V through XIV, the indictment alleged that in the commission or attempted commission of the offenses, appellant personally used a firearm (§§ 1203.06, subd. (a)(1), 12022.5), causing the offenses to become serious felonies (§ 1192.7, subd. (c)(8)). In association with counts VI through XIII, the

indictment alleged that in the commission of the offenses appellant personally inflicted great bodily injury on the victim (§ 12022.7). (1 CT 124-130; see also 1 CT 131 [indictment minutes].)

On June 17, 1993, a jury was empaneled to try the case. (3 CT 803.) On July 8, 1993, after the prosecution had rested its guilt-phase case-in-chief, the defense brought a motion for entry of judgment of acquittal pursuant to section 1118.1. (3 CT 835; 18 RT 4340.) Defense counsel argued, inter alia, that the prosecution had failed to prove beyond a reasonable doubt "the element of specific intent as it relates to . . . the charged ten attempted murders that are part of the indictment in this matter." (18 RT 4340-4341.) The court denied the motion on that same date. (3 CT 835; 18 RT 4342.) The court stated:

> The test on a motion pursuant to Section 1118.1 is whether there is evidence which would support a jury's verdict if a jury found beyond a reasonable doubt the guilt of the defendant. There is. The motion will be denied.

(18 RT 4342.)

The jury ultimately found appellant guilty of attempted murder as charged in counts V through XIV; the jury further found that the crime attempted was willful, deliberate, and premeditated murder. In addition, the jury found each of the allegations associated with counts VI through XIV to be true. (4 CT 1010, 1019-1020, 1031-1032, 1043-1044, 1055-1056, 1067-1068, 1079-1080, 1091-1092, 1103-1104, 1115.)

B. Standard Of Review

As the trial court indicated in ruling on appellant's section 1118.1 motion, "[t]he standard applied by the trial court under section 1118.1 in ruling on a motion for judgment of acquittal is the same as the standard applied by an appellate court in reviewing the sufficiency of the evidence to support a conviction." (*People v. Whisenhunt* (2008) 44 Cal.4th 174, 200, citing *People*

v. Mincey (1992) 2 Cal.4th 408, 432, fn. 2.) This Court has recently described that standard as follows:

> "In reviewing a challenge to the sufficiency of the evidence, we do not determine the facts ourselves. Rather, we 'examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence – evidence that is reasonable, credible and of solid value – such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citations.] We presume in support of the judgment the existence of every fact the trier reasonably could deduce from the evidence. [Citation.] [¶] The same standard of review applies to cases in which the prosecution relies primarily on circumstantial evidence and to special circumstance allegations. [Citation.] '[I]f the circumstances reasonably justify the jury's findings, the judgment may not be reversed simply because the circumstances might also reasonably be reconciled with a contrary finding.' [Citations.] We do not reweigh evidence or reevaluate a witness's credibility. [Citation.]"

(*People v. Whisenhunt, supra,* at p. 200, quoting *People v. Guerra* (2006) 37 Cal.4th 1067, 1129.)

C. Relevant Law

This Court has clearly stated that a conviction for attempted murder requires an intent to kill.[88] (*People v. Bland* (2002) 28 Cal.4th 313, 327-328.) It has further held that transferred intent does not apply to the crime of attempted murder, meaning that a defendant cannot be convicted of the attempted murder of person A – whom he does not intend to kill – if he fires a

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88. The trial court instructed the jury pursuant to CALJIC No. 8.66 that in order to find appellant guilty of the crime of attempted murder it had to find that he committed a direct but ineffectual act "towards killing another human being" and that in committing such an act he "harbored express malice aforethought, namely, a specific intent to kill unlawfully another human being." (4 CT 909; see also 22 RT 5200.) On appeal, appellant raises no claim that the trial court improperly instructed the jury on the elements of the crime of attempted murder. (See AOB 299-329.)

bullet at person B – whom he does intend to kill – and the bullet misses person B and inflicts a non-fatal injury upon person A. (*Id.* at pp. 326-331.) As this Court explained in *People v. Bland*, *supra*:

> Someone who in truth does not intend to kill a person is not guilty of that person's attempted murder even if the crime would have been murder – due to transferred intent – if the person were killed. To be guilty of attempted murder, the defendant must intend to kill the alleged victim, not someone else. The defendant's mental state must be examined as to each alleged attempted murder victim. Someone who intends to kill only one person and attempts unsuccessfully to do so, is guilty of the attempted murder of the intended victim, but not of others.

(*People v. Bland*, *supra*, at p. 328.) Hence, in the case at bar, in order for appellant to be convicted of the 10 counts of attempted murder with which he was charged, the prosecution had to prove appellant acted with specific intent to kill the named victim in each of the counts.[89] (See *People v. Smith* (2005) 37 Cal.4th 733, 739, citing *People v. Bland*, *supra*, at p. 331.)

In *People v. Smith*, *supra*, 37 Cal.4th 733, this Court elaborated as to the mental state required for attempted murder:

> Intent to unlawfully kill and express malice are, in essence, "one and the same." (*People v. Saille* (1991) 54 Cal.3d 1103, 1114.) To be guilty of attempted murder of the [victim], defendant had to harbor express malice toward that victim. (*People v. Swain*[(1996)] 12 Cal.4th [593,] 604-605.) Express malice requires a showing that the assailant "'"either desire[s] the result [i.e., death] or know[s], to a substantial certainty, that the result will occur." [Citation.]'" (*People v. Davenport* (1985) 41 Cal.3d 247, 262, quoting *People v. Velasquez* (1980) 26 Cal.3d 425,

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89. This Court has recently granted review to consider whether substantial evidence supports a defendant's conviction for attempted murder where the defendant fired a single gunshot into a crowd of rival gang members but ostensibly did not shoot at any one person in particular. (*People v. Stone* (2008) 160 Cal.App.4th 937, review granted June 25, 2008, S162675.) That issue is not presented in the case at bar, however. As respondent will set forth *post*, the evidence in the case at bar shows that appellant specifically shot at, and intended to kill, each of the named attempted murder victims.

434.)

(*People v. Smith*, *supra*, at p. 739, parallel citations omitted.)

Motive is not an element of the crime of attempted murder. (*People v. Smith*, *supra*, 37 Cal.4th at p. 740.) "[E]vidence of motive is not required to establish intent to kill, and evidence of motive alone may not always fully explain the shooter's determination to shoot at a fellow human being with lethal force." (*Id.* at p. 741.)

"Evidence of motive aside, it is well settled that intent to kill or express malice . . . may in many cases be inferred from the defendant's acts and the circumstances of the crime." (*People v. Smith*, *supra*, 37 Cal.4th at p. 741.)

> "There is rarely direct evidence of a defendant's intent. Such intent must usually be derived from all the circumstances of the attempt, including the defendant's actions. [Citation.] The act of firing toward a victim at a close, but not point blank, range 'in a manner that could have inflicted a mortal wound had the bullet been on target is sufficient to support an inference of intent to kill . . . .' [Citation.]"

(*People v. Smith*, *supra*, at p. 741, quoting *People v. Chinchilla* (1997) 52 Cal.App.4th 683, 690.) Moreover,

> "'[t]he fact that the shooter may have fired only once and then abandoned his efforts out of necessity or fear does not compel the conclusion that he lacked the animus to kill in the first instance. Nor does the fact that the victim may have escaped death because of the shooter's poor marksmanship necessarily establish a less culpable state of mind.' [Citation.]"

(*People v. Smith*, *supra*, at p. 741, quoting *People v. Chinchilla*, *supra*, at p. 690.)

D. Analysis

Appellant argues:

> The trial court's denial of the motion [for acquittal] with regard to the attempted murder counts was error because insufficient evidence had

> been presented [in the prosecution's case-in-chief] to sustain a conclusion beyond a reasonable doubt that, at the time that Defendant was walking through Lindhurst High School and shot the victims named in Counts V through XIV, he was actually, specifically, trying to kill those particular individuals.

(AOB 300.) Appellant argues that, for the same reason, the attempted murder convictions are not supported by sufficient evidence and thus the convictions stand in violation of his right to due process under the United States and California Constitutions. (AOB 300; see also AOB 308, 328.) Appellant's argument is without merit.

Beginning with a recitation of the facts pertaining to appellant's shooting of the 10 individuals whom he was charged with, and ultimately convicted of, attempting to murder:

Thomas Hinojosai (count V) and **Rachel Scarberry** (count VI) were both students in Robert Brens's sixth period United States History class, classroom C-108B. (11 RT 2551-2552, 2585-2586, 2591.) Scarberry testified that she witnessed appellant appear "in front of the [classroom] door with a gun pointed into the classroom"; she then saw him fire the gun, which in her perception he was holding in the area of his chest or waist and pointing towards her. (11 RT 2587-2588.) Appellant shot Scarberry in the chest. (See 11 RT 2590, 2593.) The bullet lodged between her sternum and heart. (See 11 RT 2595.)

Appellant proceeded to shoot and fatally wound Mr. Brens and Judy Davis, and then he aimed the gun at Hinojosai from about 15 feet away. (11 RT 2565.) Hinojosai fell over and, as a result, when appellant fired the gun the shot went right by Hinojosai's head.[90] (11 RT 2565.)

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90. Hinojosai knew the shotgun blast went right by his head because he "caught it on [his] ear and on [his] shoulder." (11 RT 2565.)

From classroom C-108B appellant walked quickly down the hallway towards classroom C-105A, Nancy Ortiz's sixth period ESL class, in which **Jose Rodriguez** (count X), **Patricia Collazo** (count VII), and **Mireya Yanez** (count XI) were students. (11 RT 2653-2654, 2657-2659, 2666, 2680-2683; 12 RT 2705-2707, 2727-2728.) From outside the classroom (and from about 14 or 15 feet away, in Collazo's estimation), with the shotgun held at mid-chest level, appellant fired at least one shot into the classroom. (See 11 RT 2659-2660, 2674-2677, 2688-2690; 12 RT 2708-2710, 2743-2744; see also 12 RT 2719 [Collazo testifies she was struck by the first shot, after which appellant fired about two more shots into the classroom].) Rodriguez, who was seated facing "in the direction of the [classroom] door," was struck in both feet; Collazo, who was standing in the vicinity of the doorway, was hit in the right knee; and Yanez, who was getting up from her seat so she could move away from the door, was struck on both knees. (11 RT 2660, 2688-2690, 2692; 12 RT 2729, 2732, 2736, 2738, 2744.)

Danita Gipson (count VIII) encountered appellant when she left her classroom, classroom C-110B, Mr. Howe's sixth period Spanish class, and went out into the hallway after hearing three to five "loud bangs" coming from toward the north end of Building C. (12 RT 2886-2888.) When appellant saw Gipson in the hallway, "[h]e picked the gun up to his face,[91/] same as you would a gun as you put it against your shoulder, and aimed it and he fired at [her]." (12 RT 2890.) As Gipson turned to run she was struck in the left buttock and fell to the ground. (12 RT 2890.)

John Kaze (count XIII), who was substitute teaching that day for Mr. Howe, also encountered appellant in the hallway after he (Mr. Kaze) had heard

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91. At first when Gipson saw appellant he had the gun down at his waist and was "doing something, either cocking it or loading it." (12 RT 2899.)

what sounded like gunshots coming from the north end of Building C. (13 RT 2921-2922, 2924-2925, 2939.) When appellant looked up and saw Mr. Kaze he changed his direction and started walking towards him. (13 RT 2925-2927.) Appellant was carrying the shotgun with its butt end on his waist; the shotgun was pointed "up and away from [appellant] at about a forty-five degree angle, held by his right hand." (13 RT 2927-2929.) Mr. Kaze turned his head to the right in preparation of returning to his classroom; before he had moved any other part of his body appellant shot him. (13 RT 2928-2929.) Four pellets entered Mr. Kaze's right shoulder; two pellets entered at the base of his neck on the right side and went "down and under" his collar bone; and three pellets "caught" him on the left side of the nose. (13 RT 2936-2937.)

As for **Wayne Boggess** (count IX), he ran out of room C-110A and into the hallway after seeing that Mr. Kaze had been shot. (See 13 RT 2959-2960.) Boggess stopped outside of the room, "at the door . . . on the corner." (13 RT 2960; see also 13 RT 2991-2992.) When someone thereafter yelled in a loud voice for everyone to "'get down,'" Boggess "just stood out there like in a daze" and did not respond to the order. (13 RT 2961-2962; see also 13 RT 2992-2993.) Appellant walked in the direction of Boggess and shot him in the face; Boggess flew up in the air, landed on his back, and went into convulsions. (13 RT 2962, 2993.)

Sergio Martinez (count XII), a student in Ms. Brown's sixth period ESL class, classroom C-109, ran to the corner of the classroom and hid when he first heard what sounded like four or five firecrackers going off, but louder, in Building C. (12 RT 2812-2816.) No more than 10 minutes later, Martinez "saw for about a second one man that was walking and looking straight inside

the classroom." (12 RT 2818.) The man (appellant) pointed a shotgun[92/] at Martinez, who was on his knees, and fired at him from about 16 to 18 feet away. Martinez moved to the side and, as a result, the shot struck him in the left arm rather than the chest. (See 12 RT 2820-2822, 2829-2831, 2839, 2842-2843, 2847.)

Finally, **Donald Graham** (count XIV) encountered appellant when he (Mr. Graham) walked out into the hallway from classroom C-101A, the sixth period Civics class he was teaching, to investigate a series of what he thought to be firecracker explosions coming from within Building C. (14 RT 3169-3171.) Appellant lowered the gun he was holding when he saw Mr. Graham. As the gun started to come down in Mr. Graham's direction, Mr. Graham jumped back into his classroom. (14 RT 3174; see also 14 RT 3175-3176.) As he did so, he heard a gunshot. (14 RT 3176.) A few moments later, Mr. Graham saw blood coming from his left forearm, which had "apparently caught a fragment of metal." (14 RT 3176; see also 14 RT 3181.)

In his opening brief, appellant recounts the evidence surrounding his shooting of each of the attempted murder victims and argues with respect to each that there was no evidence presented to show that appellant knew the victim, that he had a reason to want to kill him or her in particular, or that he shot the victim with the intent to kill. (AOB 309-318.) Appellant's argument is unpersuasive if not seriously misguided.

Beginning first with appellant's argument that there was no evidence presented to the effect that appellant knew the attempted murder victims and/or had a reason to want to kill those persons in particular, appellant's argument is untenable. To begin with, as will be discussed more fully *post* in Argument VI,

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92. Appellant had the shotgun positioned on his shoulder, and he had his head leaned down, looking down the barrel. (See 12 RT 2820-2822.)

the evidence suggested that appellant had a motive to shoot not only Mr. Brens but also teachers and students of Lindhurst High School in general – which would include the named victims of the attempted murder counts. That motive was his dissatisfaction with the way the school had treated him. (See, e.g., 13 RT 3032; 15 RT 3538; 16 RT 3607.) In any event, as stated *ante*, motive is not an element of the crime of attempted murder. (*People v. Smith*, *supra*, 37 Cal.4th at p. 740.) More specifically, "evidence of motive is not required to establish intent to kill." (*Id.* at p. 741.) The central question thus becomes whether the circumstances surrounding appellant's shooting of each of the attempted murder victims were such that a reasonable juror could conclude beyond a reasonable doubt that appellant shot each of the victims with the intent to kill. (*Ibid.*)

As stated *ante*, "'[t]he act of firing toward a victim at a close, but not point blank, range "in a manner that could have inflicted a mortal wound had the bullet been on target is sufficient to support an inference of intent to kill . . . ." [Citation.]'"[93] (*People v. Smith*, *supra*, 37 Cal.4th at p. 741, quoting

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93. Appellant argues that a finding he intended to kill the victims of the attempted murder counts could not be inferred from the fact that he shot the victims – or even from the fact that he intended to shoot them, if the jury so found. (AOB 307-308.) In support, he cites this Court's decisions in *People v. Ratliff* (1986) 41 Cal.3d 675 and *People v. Johnson* (1981) 30 Cal.3d 444. (AOB 307-308.) In *Ratliff*, the defendant was convicted of attempted murder by a jury which was not instructed on the need to find that the defendant intended to kill his victim. (*People v. Ratliff*, *supra*, at pp. 695-696.) In *Johnson*, the defendant was convicted of assault with intent to commit murder by a jury which was not instructed on the necessity of a finding of intent to kill. (*People v. Johnson*, *supra*, at pp. 447-449.) It was in the context of addressing whether the error was prejudicial that, in each case, this Court held that although the defendant had shot the victim at close range, the evidence was not *conclusive* on the issue of intent. (*People v. Ratliff*, *supra*, at pp. 695-696; *People v. Johnson*, *supra*, at pp. 447-449.) To say that evidence is not conclusive of guilt is, of course, far different from saying that the same

People v. Chinchilla, *supra*, 52 Cal.App.4th at p. 690.) Appellant does not appear to dispute the fact that he fired "'toward'" Thomas Hinojosai, Rachel Scarberry, Danita Gipson, John Kaze, Wayne Boggess, Sergio Martinez, and Donald Graham "'at a close . . . range "in a manner that could have inflicted a mortal wound had the bullet been on target."'" Nor could such an argument reasonably be made given the evidence summarized *ante*. (See, e.g., 11 RT 2587-2588, 2590, 2593 [appellant pointed his gun at Scarberry and shot her in the chest]; 11 RT 2565 [appellant aimed his gun at Hinojosai and fired a shot that passed right by his head]; 12 RT 2890 [appellant aimed his gun at Gipson and fired a shot that struck her in the left buttock as she turned to run]; 13 RT 2925-2929, 2936-2937 [appellant walked toward Mr. Kaze and fired his shotgun at him; pellets struck Mr. Kaze in the shoulder, neck, and nose]; 13 RT 2962, 2993 [appellant walked in the direction of Boggess and shot him in the face]; 12 RT 2820-2822, 2829-2831, 2839, 2842-2843, 2847 [appellant pointed a shotgun at Martinez, who was on his knees in a corner of the classroom, and fired; Martinez moved to the side and as a result the shot hit him in the left arm rather than the chest]; 14 RT 3174-3176 [when appellant saw Mr. Graham in the hallway he lowered his gun in his direction and fired; Mr. Graham jumped back into his classroom but was nonetheless struck in his left forearm by a "fragment of metal"].)

With respect to Jose Rodriguez, Patricia Collazo, and Mireya Yanez, appellant argues that there was no evidence presented that he actually aimed his gun at them before firing the shot or shots that hit them. (See AOB 311, 314.) Appellant's argument is unavailing. The evidence showed that, from outside classroom C-105A (and from about 14 or 15 feet away, in Collazo's

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evidence cannot serve as substantial evidence in support of a finding of guilt. Thus, appellant's reliance on *Ratliff* and *Johnson* is unavailing.

estimation), while holding the shotgun at mid-chest level, appellant fired at least one shot into the classroom through the open doorway. (See 11 RT 2659-2660, 2674-2677, 2688-2690; 12 RT 2708-2710, 2743-2744; see also 12 RT 2719 [Collazo testifies she was struck by the first shot, after which appellant fired about two more shots into the classroom].) Rodriguez, who was seated facing "in the direction of the [classroom] door," was struck in both feet; Collazo, who was standing in the vicinity of the doorway, was hit in the right knee; and Yanez, who was getting up from her seat so she could move away from the door, was struck on both knees. (11 RT 2660, 2688-2690, 2692; 12 RT 2729, 2732, 2736, 2738, 2744.) A jury could reasonably deduce from this evidence that, in firing one or more shotgun blasts through the doorway of classroom C-105A, appellant aimed at and specifically intended to strike Rodriguez, Collazo, and Yanez, who were all in the vicinity of the doorway.

A jury could also reasonably deduce that, although Rodriguez was struck in the feet, Collazo in the right knee, and Yanez on both knees, appellant intended to kill, not just injure, the three students. First, in accordance with a handwritten supply list found in appellant's bedroom (Exh. 31), appellant went shopping on the morning of May 1, 1992, for double aught buckshot and number four buckshot and also for slugs. According to the testimony of Sergeant Alan Long, the Yuba County Sheriff's Department's firearms instructor, both double aught buckshot and number four buckshot are "anti-personnel type rounds," best used for large game, with a "devastating" impact power due to multiple projectiles "hitting you all at the same time"; as for slugs, they "are used for bears and larger game."[94/] (17 RT 3843, 3855, 3872-3875,

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94. The evidence suggested that appellant specifically selected the ammunition for its impact power. When appellant arrived at Lindhurst High School he had a paperback book entitled "Modern Law Enforcement Weapons and Tactics" (Exh. 58) on the front passenger's seat of his car. (17 RT 3999-

3864-3866, 3870, 3976-3977, 3980.) These are the types of shotgun ammunition appellant chose to arm himself with and use during his May 1, 1992, assault on Lindhurst High School. (See 18 RT 4179-4186, 4188-4193.) Appellant's choice of ammunition – not to mention weapon[95] – suggested an intent much more depraved than an intent to injure. Second, as there was no evidence to suggest that, with the exception of Mr. Brens, appellant had a reason to select any particular victims, a jury could reasonably deduce that appellant acted with the same intent, i.e., the intent to kill, in shooting *all* of the victims. Third and lastly, the fact that Rodriguez, Collazo, and Yanez escaped fatal injury because of appellant's poor marksmanship did not necessarily establish that in shooting them appellant acted with a less sinister intent than the intent to kill. (See *People v. Smith*, *supra*, 37 Cal.4th at p. 741.)

4000.) On multiple pages, text had been circled or underlined, including on page 131, where the following words were underlined: "[L]et's look at the results of some informal shooting experiments that we performed to see if the classic load of #00 is really the best choice for anti-personnel use in law enforcement." (See 17 RT 4000; see also Exh. 58 [page 131].) In addition to double aught buckshot, the chapter or article in question discussed number four buckshot and slugs. (Exh. 58 [see, e.g., pages 131, 134, 137].) It concluded: "Bigger buckshot bests the bad guys." (See Exh. 58 [page 137].)

95. As described *ante*, appellant shot the victims with a shotgun. Appellant had another option at hand if his intent was merely to shoot to wound: He could have shot the victims with the .22-caliber rifle with which he had armed himself instead of shooting them with the shotgun. Although this would certainly not have insured that the people he shot would not die, it would have at least improved the odds. True, the .22-caliber rifle was inoperable at the time it was recovered from classroom C-204B. (See 18 RT 4114-4115.) In his May 2, 1992, interview with law enforcement, however, appellant made statements that strongly suggested the rifle did not become inoperable until appellant dropped it while climbing up the stairs of Building C (i.e., after shooting the victims downstairs). (See, e.g., CT Supplemental - 5 at pp. 9-11 [Exh. 89 (transcript of Exhs. 57-A & 57-B that was provided to jury)]; CT Supplemental - 5 at pp. 111-113 [jointly-prepared revised transcript].)

Appellant urges with respect to several of the attempted murder victims (e.g., Hinojosai, Scarberry, Gipson, Boggess, Rodriguez, Yanez, Mr. Kaze, and Mr. Graham) that the fact that he did not shoot the victims again after realizing that his first shot had not been fatal undercut a finding that he had shot them originally with the intent to kill. (AOB 309-317; see also AOB 319.) As stated *ante*, however, this Court has held that "'"[t]he fact that the shooter may have fired only once and then abandoned his efforts out of necessity or fear does not compel the conclusion that he lacked the animus to kill in the first instance. . . ." [Citation.]'" (*People v. Smith*, *supra*, 37 Cal.4th at p. 741, quoting *People v. Chinchilla*, *supra*, 52 Cal.App.4th at p. 690.) Here, a jury could reasonably deduce from the evidence that appellant did not pursue the victims after his first shot was not fatal because to do so, rather than to continue his progression through the building, would have placed him at greater risk for being overtaken by other students and/or teachers.[96/] A jury could also reasonably deduce from the evidence that, because appellant did not have an apparent reason to select these particular victims, he could just as satisfactorily fulfill his intent to kill by moving on and firing at other persons within the building.

Appellant points out that "he did nothing to prevent [Collazo] leaving the school when she did so about two and a half hours" after he shot her, and he argues that this was "conduct wholly inconsistent with his having an intent to cause her death." (AOB 311.) He further points out that "[w]hen on the second floor he supported the removal of the wounded victims so that they could receive medical care." (AOB 318.) The question for the jury, though, was whether *at the time appellant shot the attempted murder victims*, not hours

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96. This is buttressed by Cole Newland's testimony that, while holding the students hostage in classroom C-204B, appellant did not explain why he had shot at several people downstairs except to say "that they had come out at him, or that he was afraid that they would try and jump him." (16 RT 3669.)

later, he harbored the intent to kill. Moreover, a reasonable jury could deduce that appellant's expression of concern over whether the victims lived or died was the byproduct of his concern over the penal consequences he would face for his actions. This is particularly true given the following evidence: law enforcement found a copy of the California Penal Code (Exh. 66) on the floor of appellant's bedroom, next to his bed (16 RT 3736); appellant told the students in classroom C-204B that he had read the Penal Code and was aware of the potential sentence he faced for his crimes (see 13 RT 3017; 14 RT 3269-3270; 15 RT 3442; 16 RT 3814-3815); according to several students, at times while appellant was speaking with the hostage negotiators over the phone he appeared to become "nervous of what was going to happen to him" (15 RT 3460); and appellant discussed with hostage negotiators the possibility of him "getting off with a light sentence" and ultimately demanded that law enforcement prepare and sign a purported contract (Exh. 54, part 1) pursuant to which he "wouldn't get more than five years in a minimum security facility" (16 RT 3670-3671; see also 18 RT 4177).[97/] Also telling was the fact that after law enforcement first entered Building C – but before law enforcement established telephone contact with appellant – Lieutenant Robert Escovedo of the Yuba County Sheriff's Department had one of the students who was acting as a lookout ask appellant if law enforcement could make a search of the downstairs for injured persons and remove them; appellant responded that "he was not going to allow that, and if he saw anyone he would start shooting." (17 RT 3905-3906.) Thus, appellant's reliance on his expression of concern for his

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97. For these same reasons, the fact that, in his post-arrest interview with law enforcement, appellant never admitted that he had an intent to kill anyone – which appellant characterizes as affirmative evidence that he in fact had no intent to kill (see AOB 320-326) – was of limited evidentiary value at best.

victims as evidence that he did not intend to kill them is wholly unconvincing.

In sum, both at the end of the prosecution's case-in-chief and at the conclusion of the guilt-phase evidence, the evidence was substantial enough that a reasonable trier of fact could find appellant guilty beyond a reasonable doubt of each of the attempted murder charges. Thus, the trial court properly denied appellant's motion for acquittal with respect to those counts, and his convictions on those counts comport with principles of due process.

V.

THE JURY'S SPECIAL FINDINGS OF PREMEDITATION AND DELIBERATION WITH RESPECT TO THE 10 COUNTS OF ATTEMPTED MURDER, AND THE LIFE SENTENCES THAT WERE IMPOSED FOR THE ATTEMPTED MURDERS, ARE VALID

Appellant argues that the special findings of premeditation and deliberation with respect to the 10 counts of attempted murder were invalid and, accordingly, the imposition of life sentences for the attempted murders was "an act beyond the court's jurisdiction." (AOB 329; see also AOB 332-334.) He urges that this is so because the indictment failed to allege that the attempted murders were committed with premeditation and deliberation; thus, appellant's argument goes, the findings were obtained in violation of both statutory law and principles of due process. (AOB 329; see also AOB 330-332.) Appellant's argument should be rejected. Despite having ample opportunity to do so, appellant did not object that the indictment had not alleged premeditation and deliberation and that he lacked notice that the prosecution would attempt to prove premeditation and deliberation and obtain an enhanced sentence. Appellant should not now be heard to complain of a violation of the statutory pleading requirement or of his right to due process.

A. Procedural Background

The indictment in the case at bar charged appellant in counts V through XIV with attempted murder in violation of sections 664/187. (1 CT 125-129.) With respect to each count, the indictment alleged that appellant "did willfully and unlawfully attempt to commit the crime of murder in violation of Section 187 of the Penal Code of the State of California, in that he did willfully and unlawfully, and with malice aforethought, attempt to murder [the victim], a

human being." (1 CT 125-129.)

On July 12, 1993, after the prosecution had completed its case-in-chief and the defense case was underway, the trial court presented counsel with a preliminary draft of jury instructions and verdict forms for their review. The trial court stated in pertinent part as follows:

> And the final thing that is not completely clear in the verdict form, because I don't think I had it clear in my mind when I was putting it together, is the distinction between the two kinds of attempted murder, and if I understand what the prosecution is doing in Counts five through 15, or whatever it is, five through 15, I believe the prosecution is intending to charge premeditated attempted murder.
>
> If that's not right, you should tell me now, or as soon hereafter as you are able to, because it would help me.
>
> In other words, the type of attempted murder is that is [*sic*] punished by life imprisonment rather than five, seven, nine. . . .
>
> [¶] . . . [¶]
>
> . . . I have included in this, premeditated attempted murder includes attempted murder as a lesser included offense. And I just want to be sure that we're all on the same page in that respect.

(19 RT 4535-4536.) On July 19, 2003, after finalizing the jury instructions and verdict forms, the court stated in relevant part:

> [A]ttempted murder is not divided into two substantive crimes; namely, premeditated, deliberate attempted murder and regular old attempted murder. But rather the Cal Jic [*sic*] instructions treat attempted murder as a crime and deliberation, premeditation as a special finding. And so I do not have listed as a lesser included offense within deliberate premeditated attempted murder the crime of attempted murder, but rather have simply defined attempted murder and will in the verdict form have a special finding to the effect we do or do not find that that attempted murder was deliberate and premeditated.

(21 RT 5003.)

When the court ultimately instructed the jury on the crime of attempted murder, it stated as follows:

It is also alleged in Counts 5, 6, 7, 8, 9, 10, 11, 12, 13 and 14 of the Indictment, that the crime attempted was willful, deliberate and premeditated murder.

If you find the defendant guilty of attempt to commit murder, you must determine whether this allegation is true or not true.

(22 RT 5201; see also 4 CT 910.) After instructing the jury on the principles of law regarding deliberation and premeditation (22 RT 5201-5202; 4 CT 910), the court instructed the jury:

The People have the burden of proving the truth of this allegation. If you have a reasonable doubt that it is true, you must find it to be not true.

You will include a special finding on that question in your verdict, using a form that will be supplied for that purpose.

(22 RT 5202; see also 4 CT 910.) For each of counts V through XIV, the verdict forms given to the jury included an allegation that the attempted murder was willful, deliberate, and premeditated and required the jury to decide whether the allegation was true. (See 4 CT 1010, 1019, 1031, 1043, 1055, 1067, 1079, 1091, 1103, 1115.) At no time did the defense object on the ground that the indictment had not alleged that the attempted murders were committed with premeditation and deliberation. (See, e.g., 19 RT 4535-4536; 21 RT 5003, 5018-5028, 5073-5076; 22 RT 5164-5165, 5201-5202.)

The jury ultimately found true the allegation with respect to each of counts V through XIV that the attempted murder was "willful, deliberate, and pre-meditated murder." (4 CT 1010, 1019, 1031, 1043, 1055, 1067, 1079, 1091, 1103, 1115; 22 RT 5272-5277.) Accordingly, the trial court sentenced appellant on each count to life in prison. (5 CT 1459-1460 [minute order], 1478-1479 [abstract of judgment].)

B. Analysis

Appellant contends that the special findings of premeditation and

deliberation with respect to counts V through XIV, and the life sentences that were imposed for those crimes, were invalid because the indictment did not allege that the attempted murders were committed with premeditation and deliberation. (AOB 329-334.) He argues that the findings were made in violation of statute. (AOB 329-332.) He argues further that the findings were made in violation of his right to due process in that "[e]ach of the enhancement special findings was the practical equivalent of conviction and punishment of Defendant for an uncharged offense." (AOB 332; see also AOB 329.) Appellant's argument is untenable.

At the time of appellant's crimes and trial, section 664 provided in pertinent part as follows:

> Every person who attempts to commit any crime, but fails, or is prevented or intercepted in the perpetration thereof, is punishable, where no provision is made by law for the punishment of such attempts, as follows:
>
> 1. . . . [I]f the crime attempted is willful, deliberate, and premeditated murder, as defined in Section 189, the person guilty of that attempt shall be punishable by imprisonment in the state prison for life with the possibility of parole; provided, further, that if the crime attempted is any other one in which the maximum sentence is life imprisonment or death the person guilty of the attempt shall be punishable by imprisonment in the state prison for a term of five, seven, or nine years. *The additional term provided in this section for attempted willful, deliberate, and premeditated murder shall not be imposed unless the fact that the attempted murder was willful, deliberate, and premeditated is charged in the accusatory pleading and admitted or found to be true by the trier of fact.*

(§ 664, as amended by Stats. 1986, ch. 519, § 2, italics added.)[98/]

With respect to principles of due process, "[d]ue process requires that an accused be advised of the specific charges against him so he may adequately

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98. Equivalent language is currently found in section 664, subdivision (a).

prepare his defense and not be taken by surprise by evidence offered at trial." (*People v. Mancebo* (2002) 27 Cal.4th 735, 750; see also *People v. Thomas* (1987) 43 Cal.3d 818, 823.)

> "No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal."

(*People v. Thomas*, *supra*, at p. 823, quoting *Cole v. Arkansas* (1948) 333 U.S. 196, 201.)

As demonstrated *ante*, the indictment in the case at bar did not expressly allege that the attempted murders charged in counts V through XIV were deliberate and premeditated, as required by section 664. Instead, it accused appellant of attempted murder in violation of sections 664/187 and alleged with respect to each count that appellant "did willfully and unlawfully attempt to commit the crime of murder in violation of Section 187 of the Penal Code of the State of California, in that he did willfully and unlawfully, and with malice aforethought, attempt to murder [the victim], a human being." (1 CT 125-129.)

Nonetheless, appellant is incorrect in his assertion that "[e]ach of the enhancement special findings was the practical equivalent of conviction and punishment of Defendant for an uncharged offense." (AOB 332; see also AOB 329.) Section 664's provision for a life sentence for willful, deliberate, and premeditated attempted murder does not divide the crime of attempted murder into separate degrees – an attempt to commit willful, deliberate, and premeditated murder ("first degree attempted murder") and all other attempts to commit murder ("second degree attempted murder"). Rather, it is a penalty provision that increases the punishment (a greater base term) if the trier of fact, after finding the defendant guilty of the crime of attempted murder, finds that

the attempted murder was willful, deliberate, and premeditated.[99] (*People v. Bright* (1996) 12 Cal.4th 652, 656-657, 669, disapproved of on other grounds in *People v. Seel* (2004) 34 Cal.4th 535, 548-550.)[100]

It is true that, by its express terms, section 664 requires "the fact that the attempted murder was willful, deliberate, and premeditated [be] charged in the accusatory pleading." It is also true that "a defendant has a cognizable due process right to fair notice of the specific . . . allegations that will be invoked to increase punishment for his crimes." (*People v. Mancebo*, *supra*, 27 Cal.4th at p. 747.) However, as set forth *ante*, despite having ample opportunity to do so, defense counsel did not object to the jury instructions or the verdict forms on the grounds that the indictment had not alleged premeditation and

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99. Appellant contends that the findings of deliberation and premeditation violated not only section 664 but also section 1170.1. (See AOB 329-332.) Appellant reasons that (1) section 664's provision for a life sentence for willful, deliberate, and premeditated attempted murder imposes a penalty "enhancement," and (2) section 1170.1 provides in pertinent part that "'[a]ll enhancements *shall be alleged* in the accusatory pleading.'" (AOB 330, quoting § 1170.1, subd. (e), italics added by appellant.) What appellant overlooks is that section 664 is, strictly speaking, a penalty provision, not an enhancement. (See Cal. Rules of Court, rule 4.405(3) ["'Enhancement' means an additional term of imprisonment *added to the base term*." (Italics added.)].) Moreover, the language of section 1170.1 on which appellant relies was not included in section 1170.1 at either the time of appellant's crimes or trial. Instead, section 1170.1 specifically provided at the time in pertinent part as follows: "The enhancements provided in Sections 667, 667.5, 667.6, 667.8, 667.85, 12022, 12022.1, 12022.2, 12022.3, 12022.4, 12022.5, 12022.55, 12022.6, 12022.7, 12022.75, 12022.8, and 12022.9, and in Section 11370.2, 11370.4, or 11379.8 of the Health and Safety Code, shall be pleaded and proven as provided by law." (§ 1170.1, subd. (f), as amended by Stats. 1990, ch. 835, § 1; § 1170.1, subd. (f), as amended by Stats. 1992, ch. 235, § 1.)

100. In *Seel*, this Court held that, after *Apprendi v. New Jersey* (2000) 530 U.S. 466, a premeditation allegation under section 664 constitutes an element of the offense *for purposes of the federal Double Jeopardy Clause.* (*People v. Seel*, *supra*, 34 Cal.4th at pp. 548-550.)

deliberation; nor did defense counsel assert that the defense had lacked notice the prosecution would attempt to prove premeditation and deliberation and obtain an enhanced sentence. Under these circumstances, appellant should not now be heard to complain of a violation of the statutory pleading requirement or of his right to notice. (Cf. *People v. Bright, supra*, 12 Cal.4th at pp. 670-671 [information charged that defendant "did willfully, deliberately, and premeditatedly attempt to murder" the victim in violation of sections 664 and 189; although information should have charged defendant with the offense of attempted murder and *separately* alleged that the attempted murder was committed with premeditation, the jury instructions properly distinguished the premeditation allegation as separate from (rather than a greater degree of) the offense of attempted murder; as defendant did not object at trial to the adequacy of the notice he received, objection was waived].)

Respondent's position is supported by the fact that, if appellant had objected below on the ground that the indictment failed to allege that the attempted murders were committed with premeditation and deliberation, in all likelihood the trial court would have permitted the prosecution to amend the indictment. A court may permit amendment of an indictment "for any defect or insufficiency" at any stage of the proceedings – even as late as trial – unless defendant's substantial rights will be prejudiced.[101/] (§ 1009; *People v. Edwards* (1991) 54 Cal.3d 787, 827.) The whole thrust of appellant's defense at trial was that he did not deliberate or premeditate killing *anyone*. It is obvious from the record that appellant had advance notice that the prosecution

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101. An exception to this general rule is that "[a]n indictment . . . cannot be amended so as to change the offense charged." (§ 1009.) As discussed *ante*, though, section 664's provision for a life sentence for willful, deliberate, and premeditated attempted murder does not divide the crime of attempted murder into separate degrees; rather, it is a penalty provision. (*People v. Bright, supra*, 12 Cal.4th at pp. 656-657, 669.)

was trying to prove premeditation and deliberation. (See, e.g., 10 RT 2418-2420 [in his opening statement, defense counsel argues that only issue is whether murder was first degree or not].) There is nothing in the record to indicate that appellant thought that the prosecution was *only* trying to prove deliberation and premeditation with respect to the murders charged in counts I through IV and not with respect to the attempted murders charged in counts V through XIV. It is accordingly clear that amendment of the indictment would not have prejudiced appellant's substantial rights. For the same reasons, it is clear that appellant was not prejudiced by the indictment's failure to allege that the attempted murders were premeditated and deliberated. (See *Jones v. Smith* (9th Cir. 2000) 231 F.3d 1227 [omitted premeditation allegation under section 664, at least prior to *Apprendi*, was "a mere sentencing factor, rather than an offense element"; thus, discrepancy between charging document and jury instructions should be analyzed as a variance, which requires reversal under the federal Constitution only when defendant was prejudiced].)

In sum, defense counsel did not object below that the indictment had not alleged premeditation and deliberation with respect to the attempted murders. This is so even though twice on the record the court discussed with the parties the fact that the prosecution was asking the jury to find that the attempted murders were deliberate and premeditated. Appellant accordingly should not now be heard to complain of a violation of the statutory pleading requirement or of his right to due process. The findings of premeditation and deliberation should be upheld as valid.

VI.

THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION FOR ACQUITTAL ON THE FIRST DEGREE MURDER CHARGES; APPELLANT'S CONVICTIONS FOR FIRST DEGREE MURDER ARE SUPPORTED BY SUBSTANTIAL EVIDENCE

Appellant contends that the evidence was insufficient to support verdicts of first degree murder both at the close of the prosecution's case-in-chief when the trial court denied his section 1118.1 motion and at the close of the guilt-phase evidence. (AOB 334-387.) Specifically, appellant argues that the evidence of premeditation and deliberation was insufficient with respect to each of the four first degree murder charges. (See, e.g., AOB 334-335, 337-338, 343-387.) Appellant appears to also argue that the evidence was insufficient to support a finding of intent to kill – either premeditated and deliberated or not – with respect to each of the four murder charges. (See, e.g., AOB 338.) Appellant's argument is meritless. Both at the end of the prosecution's case-in-chief and at the conclusion of the guilt-phase evidence, the evidence was substantial enough that a reasonable trier of fact could find appellant guilty beyond a reasonable doubt of all four counts of first degree murder.

A. Procedural Background

By indictment filed on September 15, 1992, appellant was charged, inter alia, with the murders (§ 187) of Robert Brens (count I), Beamon Hill (count II), Judy Davis (count III), and Jason White (count IV). In association with counts I through IV, the indictment alleged the special circumstance that appellant committed at least one crime of first degree murder and one or more crimes of first or second degree murder (§ 190.2, subd. (a)(3)). Also in association with counts I through IV, the indictment alleged that in the commission or attempted commission of the offenses, appellant personally used a firearm (§§ 1203.06, subd. (a)(1), 12022.5), causing the offenses to become

serious felonies (§ 1192.7, subd. (c)(8)). (1 CT 124-130; see also 1 CT 131 [indictment minutes].)

On June 17, 1993, a jury was empaneled to try the case. (3 CT 803.) On July 8, 1993, after the prosecution had rested its guilt-phase case-in-chief, the defense brought a motion for entry of judgment of acquittal pursuant to section 1118.1. (3 CT 835; 18 RT 4340.) Defense counsel argued, inter alia, that the prosecution had failed to prove beyond a reasonable doubt "the element of specific intent as it relates to the charged four murders . . . that are part of the indictment in this matter." (18 RT 4340-4341.) The court denied the motion on that same date. (3 CT 835; 18 RT 4342.) The court stated:

> The test on a motion pursuant to Section 1118.1 is whether there is evidence which would support a jury's verdict if a jury found beyond a reasonable doubt the guilt of the defendant. There is. The motion will be denied.

(18 RT 4342.)

The jury ultimately found appellant guilty in counts I through IV of first degree murder. The jury found the special allegations associated with those counts to be true. (4 CT 956, 969, 982, 995, 1008.)

B. Standard Of Review

As the trial court indicated in ruling on appellant's section 1118.1 motion – and as respondent set forth *ante* in Argument IV – "[t]he standard applied by the trial court under section 1118.1 in ruling on a motion for judgment of acquittal is the same as the standard applied by an appellate court in reviewing the sufficiency of the evidence to support a conviction." (*People v. Whisenhunt*, *supra*, 44 Cal.4th at p. 200, citing *People v. Mincey*, *supra*, 2 Cal.4th at p. 432, fn. 2.) This Court has recently described that standard as follows:

> "In reviewing a challenge to the sufficiency of the evidence, we do not determine the facts ourselves. Rather, we 'examine the whole record in

the light most favorable to the judgment to determine whether it discloses substantial evidence – evidence that is reasonable, credible and of solid value – such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citations.] We presume in support of the judgment the existence of every fact the trier reasonably could deduce from the evidence. [Citation.] [¶] The same standard of review applies to cases in which the prosecution relies primarily on circumstantial evidence and to special circumstance allegations. [Citation.] '[I]f the circumstances reasonably justify the jury's findings, the judgment may not be reversed simply because the circumstances might also reasonably be reconciled with a contrary finding.' [Citations.] We do not reweigh evidence or reevaluate a witness's credibility. [Citation.]"

(*People v. Whisenhunt*, *supra*, at p. 200, quoting *People v. Guerra*, *supra*, 37 Cal.4th at p. 1129.)

C. Relevant Law

In the case at bar, the trial court instructed the jury on one theory of first degree murder: a willful, deliberate, and premeditated killing with express malice aforethought.[102/] (4 CT 901; 22 RT 5197-5198.) Express malice aforethought is the functional equivalent of an intent to unlawfully kill, and the trial court instructed the jury accordingly. (See 4 CT 900; see also *People v. Smith*, *supra*, 37 Cal.4th at p. 739; *People v. Moon* (2005) 37 Cal.4th 1, 29.)

In *People v. Anderson* (1968) 70 Cal.2d 15, this Court

". . . identified three categories of evidence relevant to resolving the issue of premeditation and deliberation: planning activity, motive, and manner of killing. However, . . . '*Anderson* does not require that these factors be present in some special combination or that they be accorded a particular weight, nor is the list exhaustive. *Anderson* was simply intended to guide an appellate court's assessment whether the evidence

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102. In instructing the jury on the crime of willful, deliberate, and premeditated first degree murder, the trial court utilized CALJIC No. 8.20. (See 4 CT 901.) On appeal, appellant raises no challenge to the instruction given. (See AOB 334-387.)

supports an inference that the killing occurred as the result of preexisting reflection rather than unconsidered or rash impulse. [Citation.]'" (*People v. Bolin*[(1998)] 18 Cal.4th [297,] 331-332.)

(*People v. Steele* (2002) 27 Cal.4th 1230, 1249.) This Court has subsequently clarified that when evidence of all three categories identified in *Anderson* is not present, it requires "'"either very strong evidence of planning, or some evidence of motive in conjunction with planning or a deliberate manner of killing." [Citation.] But these categories of evidence . . . "are descriptive, not normative." [Citation.] . . .'" (*People v. Elliot* (2005) 37 Cal.4th 453, 470-471, quoting *People v. Cole* (2004) 33 Cal.4th 1158, 1224.)

D. Analysis

Appellant argues that the trial court erroneously denied his motion for acquittal under section 1118.1 in that

> the evidence in the record at the time the motion [for acquittal] was made under Penal Code §1118.1 was insufficient as a matter of law to support any of the four convictions of first degree murder based upon premeditation and deliberation . . . .

(AOB 334.) Appellant argues further:

> [T]he evidence in the record at the close of the guilt phase and submission of guilt issues to the jury was insufficient as a matter of law to support any of the four convictions of first degree murder based upon premeditation and deliberation, as required by the due process clauses of the Fourteenth Amendment to the United States Constitution and article I, section 15 of the California Constitution.

(AOB 334-335.) Appellant's argument is without merit. The three factors identified by this Court in *People v. Anderson*, *supra*, 70 Cal.2d 1 – planning activity, motive, and manner of killing – all pointed to premeditation and deliberation. Alternatively, there was '"'"very strong evidence of planning"'" (*People v. Elliot*, *supra*, 37 Cal.4th at pp. 470-471) which was sufficient in and of itself to support an inference that the killings occurred as the result of

premeditation and deliberation rather than unconsidered or rash impulse. And even if this Court does not view the evidence of planning as """very strong""" (*ibid.*) there was """some evidence of motive in conjunction with planning or a deliberate manner of killing""" (*ibid.*) which served as a sufficient basis for an inference of premeditation and deliberation.

1. Planning Activity

Beginning first with the evidence of planning activity, on May 1, 1992, appellant told the students that he was holding hostage in classroom C-204B that he had visited the school previously in preparation for his actions of that date. (14 RT 3207, 3269; 15 RT 3359-3361, 3397, 3442, 3507, 3538, 3546; 16 RT 3608, 3638, 3673, 3776, 3813; 18 RT 4311.) He also indicated that he had placed gasoline around the building and that he could ignite it if his plan did not work out.[103/] (See 14 RT 3269; 15 RT 3397-3398, 3442, 3499, 3538, 3546; 16 RT 3608-3609, 3638-3639.)

Appellant informed the students that he had read up on police tactics and, in particular, on the tactics of SWAT teams.[104/] (14 RT 3208; 15 RT 3359, 3442, 3538; 16 RT 3608, 3673, 3776, 3815.) He also said that he had read the

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103. During appellant's May 2, 1992, interview with law enforcement, appellant said that his plan had involved bringing lighter fluid to the school and to "have lighter fluid on all four of the doors so there would be no way to get out" once he went inside. (CT Supplemental - 5 at pp. 25-26 [Exh. 89]; see also CT Supplemental - 5 at pp. 127-128 [jointly-prepared revised transcript].) However, he "never bought any of that stuff." (CT Supplemental - 5 at p. 26 [Exh. 89]; CT Supplemental - 5 at p. 128 [jointly-prepared revised transcript].)

104. When appellant arrived at Lindhurst High School he had a paperback book entitled "Modern Law Enforcement Weapons and Tactics" (Exh. 58) on the front passenger's seat of his car. (17 RT 3999-4000.) The upper corner of the first page (page 186) of chapter 13, pertaining to SWAT groups, had been "turned down." (17 RT 4000.)

Penal Code and was aware of the potential sentence he faced for his crimes. (See 13 RT 3017; 14 RT 3269-3270; 15 RT 3442; 16 RT 3814-3815.)

Sometime between approximately 8:00 and 9:00 p.m. on May 1, 1992, while the hostage situation was still ongoing, Officer Michael Johnson of the Marysville Police Department searched appellant's bedroom. (17 RT 3986, 3990.) Officer Johnson collected a handwritten supply list that was on appellant's bed (Exh. 31); the items on the list included types and quantities of ammunition (for example, "8 boxes of 00 buck"), lighter fluid, a "[p]ocket" to hold .22-caliber shells, and a rifle sling. (17 RT 3987-3989.) Officer Johnson also collected from on top of appellant's bed several empty ammunition boxes, including boxes that had once contained double aught buckshot, number four buckshot, and slugs. (16 RT 3727-3729; 17 RT 3986-3987.) Officer Johnson pulled back either the sheets or a blanket on the bed and found a handwritten note (Exh. 16-A) addressed "'to my family.'" (17 RT 3989.) The note read:

> I know parenting had nothing to do with what happen's [*sic*] today. It seem's [*sic*] my sanity has slipped away and evil tooken [*sic*] it's [*sic*] place. The mistakes the loneliness and the failures have built up to [*sic*] high. Also I just wanted to say I love my family very very much . . . . . .
>
> Also I just wanted to say I also love my friend David Rewert [*sic*] too. And if I die today please bury me somewhere beautiful.

After the hostage situation had ended with appellant's surrender and arrest, the following items of evidence were collected from classroom C-204B: a 12-gauge shotgun (Exh. 10) (18 RT 4190); a .22-caliber rifle with the butt sawed off (Exh. 11) (18 RT 4190); a black web belt with shotgun shell loops (with 16 unexpended shotgun shells in the loops) and an attached ammunition pouch (with 64 unexpended .22-caliber bullets in the pouch) (Exh. 14) (18 RT 4191-4192); a brown and tan camouflage hunting vest, with 13 unexpended shotgun shells in the left front pocket, 15 unexpended shotgun shells in another

pocket, two slugs in a pocket, and a 50-count box of CCI brand .22-caliber long-rifle bullets (with 49 unexpended bullets in the box) in the right front pocket (Exh. 13) (18 RT 4192-4193); and, lastly, a pair of thumb cuffs (Exh. 73) (18 RT 4189-4190).

On the morning of May 3, 1992, Sergeants Mikeail Williamson and Jim Downs of the Yuba County Sheriff's Department executed a search warrant for appellant's residence. (16 RT 3730-3731.) On that date they seized a sheet of graph paper with writing (including types and quantities of ammunition) and some drawings (including a vest with pockets) (Exh. 60-A) that they located in appellant's bedroom. (16 RT 3731-3732.) Exhibits 61 through 67 were also collected from appellant's residence. (16 RT 3733-3734.) Exhibits 61-A and 61-B, torn pieces of paper with writing on them, were found in a large cardboard box located in appellant's bedroom closet. (16 RT 3734.) When restructured, both papers included writings to the effect that it was appellant's hatred toward humanity that had forced him to do what he had done. One of the papers (Exhibit 61-A) included words to the effect that appellant had been fascinated with weapons and with death and had been set on killing. Exhibit 62-A, torn pieces of paper with writing on them, was found in a clear plastic bag in the garbage outside the residence. (16 RT 3735.) When restructured, the paper included writings to appellant's family, telling them that appellant loved them and asking that if he died that they please bury him somewhere beautiful. Exhibit 63, a tablet of graph paper with writing on some of the pages, and Exhibit 64, a separately-marked part of the tablet with an apparent diagram of Building C – labeled "Mission Profile" and with notations including "Mission Gun Shop" and "first shot" – were found on appellant's bed.[105/] (16 RT 3735-

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105. During appellant's May 2, 1992, interview with law enforcement, appellant said that he "drew up the plans" three or four days before going to the school, although he maintained that "drawing is one thing and doing one thing."

3736.) Exhibit 65, a "S.W.A.T. magazine" and a magazine entitled "Modern Law Enforcement Weapons and Tactics, All New Second Edition," was located on top of the headboard on the right side of appellant's bed. (16 RT 3736.) Exhibit 66, "A Penal Code of California Peace Officer's abridged edition with index," 1982 edition, was located on the floor to the left of appellant's bed. (16 RT 3736.) Exhibit 67, a bedsheet containing several sheets of sandpaper and the sawed-off butt of a rifle, was located on the floor of appellant's bedroom closet.[106/] (16 RT 3737.)

The evidence demonstrated that, in accordance with the handwritten supply list found in appellant's bedroom (Exh. 31), appellant went to the Mission Gun Shop, Peavey Ranch & Home, and Big 5 Sporting Goods on the morning of May 1, 1992, to shop for double aught buckshot and number four buckshot and also for slugs. (17 RT 3843, 3855, 3872-3875, 3864-3866, 3870.) The evidence also indicated that appellant had researched the impact power of the ammunition. Specifically, when appellant arrived at Lindhurst High School he had a paperback book entitled "Modern Law Enforcement Weapons and Tactics" (Exh. 58) on the front passenger's seat of his car. (17

(CT Supplemental - 5 at p. 25 [Exh. 89]; CT Supplemental - 5 at p. 127 [jointly-prepared revised transcript].)

106. Ronald Ralston, the supervisor of the California Department of Justice's Chico crime laboratory, examined Exhibit 11, the .22-caliber rifle with the butt sawed off that was collected from classroom C-204B. (18 RT 4114.) Ralston also examined Exhibit 67, the bed sheet with a gun stock and sandpaper wrapped in it collected from appellant's bedroom closet. (18 RT 4115.) He determined that the gun stock (which was more specifically the rear part of a gun stock) had been cut from Exhibit 11. (18 RT 4115-4116.) Appellant himself advised law enforcement during his May 2, 1992, interview that he had sawed off the butt of the rifle, and he said he had done so either one or two nights before his assault upon Lindhurst High School. (CT Supplemental - 5 at p. 55 [Exh. 89]; CT Supplemental - 5 at p. 157 [jointly-prepared revised transcript].)

RT 3999-4000.) On multiple pages, text had been circled or underlined, including on page 131, where the following words were underlined: "[L]et's look at the results of some informal shooting experiments that we performed to see if the classic load of #00 is really the best choice for anti-personnel use in law enforcement." (See 17 RT 4000; see also Exh. 58 [page 131].) In addition to double aught buckshot, the chapter or article discussed number four buckshot and slugs. (Exh. 58 [see, e.g., pages 131, 134, 137].) It concluded: "Bigger buckshot bests the bad guys." (Exh. 58 [page 137].)

Finally, according to the testimony of David Rewerts, about four or five months prior to May 1, 1992 (after appellant and Rewerts had watched the movie "Terminator 2" together (18 RT 4068-4069)), appellant said something to Rewerts about going to Lindhurst High School and, "due to the openness of C Building he would walk in and shoot a couple rounds and go outside the back and off the – around the fence on the back of Lindhurst High School [baseball] field." (18 RT 4063.) The subject came up two or three times after that, with appellant telling Rewerts "he would like to go to the school and shot [*sic*] a couple of people." (18 RT 4062-4063.) On one specific occasion when appellant brought this up, Rewerts was staying over at appellant's house. (18 RT 4063-4064.) Rewerts was going through a couple of appellant's books when he (Rewerts) made some "pretty absurd" statements about "destroying things"; appellant responded, "[A]ll I was talking about was going back" to the high school and "shooting a couple people." (18 RT 4064.) At the time appellant said this he was reading aloud to Rewerts "quotes out of a book and [*sic*] military tactics and police procedures" and "hostage situations." (18 RT 4064.)

Thus, the evidence of planning activity was very strong. The evidence showed that appellant took the following steps in preparation for his May 1, 1992, attack on Lindhurst High School: he "cased" the school prior to the

afternoon of May 1, 1992; he read up on police tactics (including the tactics of SWAT teams) and also the potential criminal penalties for his actions; he wrote up a supply list; he wrote a goodbye note to his family (after writing several drafts); he drew a "Mission Profile"; he sawed off the butt of a rifle; he researched and then went to purchase specific types of ammunition; and, finally, he assembled his equipment. In addition to taking those actions, appellant discussed with Rewerts his desire to go to Lindhurst High School and shoot people.

Faced with this abundant evidence of planning, appellant argues that "[a] close review of the record shows *no evidence* that Defendant's planning activities were based upon a calculated decision to take any person's life, or even that he anticipated his actions would result in any death other than possibly his own."[107] (AOB 341-342.) To put it differently, appellant argues that there was no evidence that appellant's plan was to kill rather than to merely injure. Appellant's argument is unavailing.

To begin with, as argued *ante* in Argument IV, appellant's choice of ammunition suggested an intent much more depraved than an intent to injure. Appellant argues that "[t]he prosecution was . . . unable to show that Defendant's conduct in purchasing ammunition in the amount and type that he used at the school was anything different than his normal ammunition purchases." (AOB 357.) Appellant's argument is unpersuasive as a reasonable

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107. As affirmative evidence that he did not intend to kill anyone, appellant points to the fact that, during his post-arrest interview with law enforcement, appellant maintained that his intention in going to the school was to at most wound some people. (See AOB 348.) As explained *ante* in Argument IV, though, the fact that appellant did not admit an intent to kill was of limited evidentiary value at best in light of the abundant evidence that both before and during his attack on the school appellant was concerned about the penal consequences he would face for his actions.

jury could deduce from the evidence that appellant made his ammunition purchases on the morning of May 1, 1992, specifically with his trip to Lindhurst High School in mind. Namely, a handwritten supply list was found on appellant's bed (Exh. 31) (17 RT 3987-3989; see also 17 RT 3843-3844 [when appellant entered the Mission Gun Shop on May 1, 1992, he had a piece of white notebook paper on which "stuff" he wanted was listed].) The items on that list included not only types and quantities of ammunition but also lighter fluid, a rifle sling, and a "[p]ocket" in which to hold .22-caliber shells. As noted *ante* in footnote 103, appellant's original plan involved bringing lighter fluid with him to the high school, and as described *ante* in this same argument, an attached ammunition pouch (with 64 unexpended .22-caliber bullets in the pouch) (Exh. 14) was recovered from classroom C-204B.[108/] (18 RT 4191-4192; see also 13 RT 3047 [Mr. Ledford observed appellant wearing a pouch around his waist]; 14 RT 3283-3284 [Victor Hernandez observed appellant wearing a pouch within which he was carrying ammunition].) Moreover, witness testimony indicated that while carrying out his assault appellant had his .22-caliber rifle strapped to his back with a rifle sling. (See, e.g., 11 RT 2593 [testimony of Rachel Scarberry]; 12 RT 2909 [testimony of Danita Gipson]; 13 RT 3047 [testimony of Robert Ledford].) Thus, a reasonable jury could deduce that appellant purchased ammunition on the morning of May 1, 1992, with a specific purpose in mind: to use it in carrying out his planned assault on Lindhurst High School.

Appellant also argues with respect to the ammunition: "While it is true that Defendant could have purchased less lethal ammunition, the record is devoid of any basis on which it could be inferred that Defendant deliberately

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108. In addition to purchasing ammunition from Peavey Ranch & Home on May 1, 1992, appellant purchased a black pouch of the type that is worn around the waist and holds .22-caliber shells. (17 RT 3872-3875.)

purchased the ammunition he used for its potential lethality." (AOB 357.) Appellant is again wrong. As noted *ante*, the evidence suggested that appellant had researched – and been impressed by – the impact power of the ammunition. Specifically, when appellant arrived at Lindhurst High School he had a paperback book entitled "Modern Law Enforcement Weapons and Tactics" (Exh. 58) on the front passenger's seat of his car. (17 RT 3999-4000.) On multiple pages, text had been circled or underlined, including on page 131, where the following words were underlined: "[L]et's look at the results of some informal shooting experiments that we performed to see if the classic load of #00 is really the best choice for anti-personnel use in law enforcement." (See 17 RT 4000; see also Exh. 58 [page 131].) In addition to double aught buckshot, the chapter or article also discussed number four buckshot and slugs. (Exh. 58 [see, e.g., pages 131, 134, 137].) It concluded: "Bigger buckshot bests the bad guys." (Exh. 58 [page 137].)

In addition to appellant's choice of ammunition, appellant's choice of weapon belies his argument that there was no evidence of a plan to kill. Namely, appellant opted to arm himself with both a shotgun and a .22-caliber rifle when he had another available option: leave the shotgun at home and arm himself with only the .22-caliber rifle. A jury could reasonably deduce from appellant's decision to arm himself not only with the .22-caliber rifle but also with the shotgun that appellant intended to do more than merely injure the persons he shot.

Further support for a finding that appellant's plan was to not just injure but to kill was presented in the form of Exhibit 61-A, one of the restructured notes that was found in pieces in a large cardboard box found in appellant's closet. (16 RT 3734.) Exhibit 61-A included words to the effect that appellant had been fascinated with weapons and with death and had been set on "killing." Appellant argues that the meaning of the sentence fragments contained on

Exhibit 61-A (and also on the reconstructed note found with it (Exhibit 61-B)) is "obscure and speculative" at best. (AOB 358.) Respondent, of course, disagrees and urges that a reasonable jury could infer from Exhibit 61-A that appellant's intention in going to Lindhurst High School on May 1, 1992, was to kill. Appellant points out that he "*chose* to discard" both Exhibits 61-A and 61-B and he urges that "[t]he jury necessarily had to work on pure conjecture as to whether they actually reflected Defendant's thinking at the time or whether they were discarded because the statements did not accurately reflect what Defendant was thinking at the time." (AOB 358.) Respondent again disagrees. A reasonable jury could deduce from appellant's actions on May 1, 1992, that appellant's expression of an intent to kill in drafting Exhibit 61-A was an accurate reflection of his state of mind at the time he wrote the note – and that he continued to be in that state of mind on May 1, 1992, when he went to Lindhurst High School and opened fire with a shotgun.

Finally, appellant argues that the testimony of David Rewerts did not provide any substantial evidence that appellant planned to kill anyone at Lindhurst High School. (AOB 350-351, 383-387.) He urges:

> On cross-examination Rewerts confirmed that [one specific] discussion he related had occurred after he and Defendant had gone to see the movie *Terminator 2.* [Citation.] Rewerts' testimony that Defendant was speaking of shooting people at the school, when placed in the context of a conversation sparked by the movie *Terminator 2*, is, at best, highly ambiguous as to whether any inference can be drawn of a decision to kill people, since . . . the hero in *Terminator 2* shoots people with either the specific intent *not to kill them* or with the specific knowledge that when shooting a specific character in the movie, that character cannot be killed or permanently injured by his shots.

(AOB 350-351.) Appellant's argument misses the mark for multiple reasons.

First, appellant engages in pure speculation insofar as he assumes that the jurors in his case were aware of the plot intricacies of the movie "Terminator 2." The jury was presented with no evidence in that regard.

Second, although not pertinent to the court's ruling on appellant's motion for acquittal, certain defense evidence undercuts appellant's attack on the sufficiency of the evidence in support of his convictions. Appellant neglects to mention the fact that, according to the testimony of his half-brother (Ronald Caddell) and his experts, appellant's particular preoccupation was with the movie "The Terminator," not "Terminator 2." It was the former movie that he saw a total of 23 times and watched the night before his actions of May 1, 1992.[109/] (See 19 RT 4418, 4484; 20 RT 4768.) According to the website that appellant himself relies on in pointing out that the hero in "Terminator 2" shoots people with the intent to injure, not kill, in "The Terminator" that same character (played by the present Governor, Arnold Schwarzenegger) is a "killing machine." (http://www.filmsite.org/term.html.)

2. Motive

Turning to the evidence of motive, appellant explained the reasons for his actions on May 1, 2002, to the students he held hostage in classroom C-204B, to the hostage negotiators, and to Sergeants Downs and Williamson in their post-arrest interview of him.

Beginning with appellant's statements to the students in classroom C-204B, appellant told the students that he had been fired from his job and that it was the school's fault because he did not have a high school diploma. Appellant also told the students that his girlfriend had left him. (See, e.g., 13 RT 3018, 3122; 14 RT 3205-3208, 3267-3269; 15 RT 3361-3362, 3386-3387,

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109. Appellant asserts that, according to the testimony of Caddell, appellant watched the movie "Terminator 2" the night before May 1, 1992. (AOB 384, citing 19 RT 4418, 4437.) In fact, Caddell indicated by his testimony that appellant watched *either* the movie "Terminator 2" *or* "The Terminator" – or perhaps the movie "Predator" – on the night of April 30, 1992. (See 19 RT 4437; see also 19 RT 4418.)

3441-3442, 3537; 16 RT 3607, 3637, 3648, 3659, 3750-3751, 3753, 3775-3776, 3791, 3811; 18 RT 4308-4309.)

Appellant told the students that Mr. Brens was the teacher who had flunked him. (See, e.g., 13 RT 3018-3019, 3122-3123; 14 RT 3205; 15 RT 3441, 3498, 3537; 16 RT 3637, 3751, 3775-3776, 3811; 18 RT 4308-4309.) According to Olivia Owens, appellant told the students he was at the school because he "had a grudge" against Mr. Brens and "he wasn't happy with the way the school system worked." (16 RT 3607; see also 16 RT 3609.) According to Ketrina Burdette, appellant said that he had come to the school to talk with Mr. Brens because "he flunked him, and . . . it ruined his life." (13 RT 3015-3016.) Burdette also heard appellant say that one of the reasons he had come to the school was "because of his – his thoughts about how the school had mistreated students." (13 RT 3032.) According to Johnny Mills, appellant said that "he came in to take out Mr. Brens and then leave." (18 RT 4309.) According to Andrew Parks, appellant said that he wanted to "make Mr. Brens pay." (15 RT 3537.) Also according to Parks, appellant said that he had come to the school to "make a point" and that "he was going to make sure that none of these teachers ever made a mistake again like this." (15 RT 3538.) According to Cole Newland, appellant told the students "the whole reason he was in this mess was because Mr. Brens . . . had betrayed him, that he didn't like him, and that – and that he just had it out for him." (16 RT 3658.)

Although the students were consistent in their report that appellant had expressed that Mr. Brens was the impetus for his actions, the students gave varying accounts as to whether or not appellant expressed clear knowledge of the fact that he had shot Mr. Brens. According to Owens, when the students asked appellant why, if he had a grudge against Mr. Brens, he was not downstairs talking to him, appellant told them "that Mr. Brens was taken care

of already."[110] (16 RT 3609.) According to Parks, appellant said at one point that "Mr. Brens will never do it again. Mr. Brens will not flunk him ever again." (15 RT 3546; see also 16 RT 3600.) According to Eddie Hicks, appellant said that "he shot a teacher downstairs, and that . . . he was there for Mr. Brens." (15 RT 3442.) According to Burdette, appellant said that he had shot Mr. Brens "in the ass." (13 RT 3016; see also 13 RT 3021.) According to Robert Daehn, appellant told the students he had shot Mr. Brens in the stomach but that he was still alive. (16 RT 3751; see also 16 RT 3765-3766.)

According to Victor Hernandez, appellant said he had shot a teacher; when a couple of students said it was Mr. Brens he had shot, appellant said, "[O]h, well, he failed me anyway." (14 RT 3269.) According to Joshua Hendrickson, appellant said that he had shot a teacher, although at the time of trial Hendrickson could not remember whether appellant specified that it was Mr. Brens he had shot.[111] (14 RT 3205-3206, 3237-3238.) Appellant said, however, that he had "wanted to shoot the teacher." (14 RT 3206.)

According to Newland, appellant stated that he had shot a teacher and also a few students. (16 RT 3669.) Appellant related "where the room was that he shot the teacher, and he asked if [the students] could tell him who that

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110. Appellant argues: "There is no evidence in the record to indicate whether this statement [related to the jury by Owens] was made by Defendant before or after he had been told by the students that the teacher he had shot was Brens." (AOB 363.) A reasonable jury could infer, however, that appellant made the statement before the students told him he had shot Mr. Brens. (See 14 RT 3269; see also 16 RT 3669; and see description of the relevant testimony *post.*) This is so because, if the students were aware that appellant had shot Mr. Brens, it would have been unnecessary for them to ask him why he was not downstairs talking to him.

111. The parties stipulated that, before the grand jury, Hendrickson answered "'No'" when asked whether appellant had said "'whether or not he had shot Mr. Brens.'" (21 RT 5080.)

teacher was." (16 RT 3669; see also 16 RT 3690-3691.) The students told appellant that it sounded like it was Mr. Brens and they asked appellant if the teacher he had shot had a beard. (16 RT 3669.) Appellant answered that he did not know, and he added, with a smile, "'But I shot him in the butt. I got right [*sic*] in the butt.'" (16 RT 3670; see also 16 RT 3691.)

As recorded on one of the audiotapes of the hostage negotiations (specifically, Exhibit 85, side A), appellant had the following exchange with certain unidentified students:

> UNIDENTIFIED MALE STUDENT: (Inaudible) one of the teachers.
>
> MR. HOUSTON: I shot one of the teachers, yeah. Everybody was downstairs, and the last one (inaudible).
>
> UNIDENTIFIED MALE STUDENT: Was it Brens?
>
> [¶] . . . [¶]
>
> MR. HOUSTON: I don't think – it might have been Brens.
>
> UNIDENTIFIED MALE STUDENT: Little – little short guy with (inaudible)?
>
> MR. HOUSTON: (Inaudible) because Mr. Brens is the one that fucked (inaudible).
>
> [¶] . . . [¶]
>
> MR. HOUSTON: I think it was.
>
> [¶] . . . [¶]
>
> UNIDENTIFIED MALE STUDENT: (Inaudible) hope it was?
>
> MR. HOUSTON: Shot him in the ass.
>
> UNIDENTIFIED MALE AND FEMALE STUDENTS: (Laughing.) (Inaudible.)

(See 4 CT Supplemental - 6 at p. 1013 [jointly-prepared revised transcript of Exhs. 82-88].)

Turning to statements appellant made to law enforcement as the hostage situation unfolded, at about 2:45 p.m., Sergeant Virginia Black of the Yuba County Sheriff's Department took a telephone call that had come into the Administration Building "over the intercom system set up at the school." (18 RT 4138-4139.) Appellant was the caller; he demanded that the school bells that had started ringing at about that time be shut off immediately as they were interfering with him hearing what was taking place in the building. (18 RT 4139.) Appellant said that if the bells were not turned off "[h]e was going to shoot some kids." (18 RT 4176.) Sergeant Black asked appellant "why he had come to the school, and . . . what it was he needed from us." (18 RT 4139.) Sergeant Black described the conversation that followed:

> He told me that he had lost his job because of Bren [*sic*] and because of Brens he didn't pass and get his diploma, and that's what he was there for. I asked him if he had alot [*sic*] of expenses. He told me he paid $420 a month rent. I asked him who he lived with. He told me he lived with his parent. He then said, "I'll call you back later on channel six." And he hung up the phone, the intercom.

(18 RT 4140; see also 18 RT 4211.)

As recorded on side A of Exhibit 82, the following exchange occurred during the first conversation over the throw phone between appellant and the primary hostage negotiator, Officer Chuck Tracy of the Yuba City Police Department:

> OFFICER TRACY: I'm here to try to help you.
>
> MR. HOUSTON: Yeah.
>
> OFFICER TRACY: Okay?
>
> MR. HOUSTON: You know, Mr. Brens tried to fucking help me, too.
>
> [¶] . . . [¶]
>
> MR. HOUSTON: Yeah, he tried to help me. He tried to help me fucking pass. And he fucking flunked my ass with one fucking grade.

Fucking knocked everything down, all my fucking dreams.

OFFICER TRACY: Okay. It seems like – it's very apparent to me that this upset you, and I'd like to – I'd like to –

MR. HOUSTON: Upset me? It ruined my fucking life. You try getting a fucking job around here without a diploma. I was making just enough money to fucking survive on, let alone trying to go to fucking college. I had everything planned. I had the fucking prom. I had a date. I had everything. And he fucking blew it away.

(See 4 Supplemental CT - 6 at pp. 845-846 [jointly-prepared revised transcript of Exhs. 82-88].) Shortly thereafter, the following exchange occurred:

OFFICER TRACY: It's obvious that you've had some bad raps in life.

MR. HOUSTON: Bad raps? They totally fucked up my life. . . .

[¶] . . . [¶]

Bad fucking raps? With one fucking class he fucking destroyed someone's life. I tried my fucking hardest every fucking day, trying to bust my ass to get just enough grades to pass, and he fucking blew it out of the water.

(See 4 Supplemental CT - 6 at p. 849 [jointly-prepared revised transcript of Exhs. 82-88].) Appellant subsequently added:

MR. HOUSTON: See, I have a learning process [*sic*]. I can learn stuff, but it takes a little bit more than some people, and a lot of teachers just – just didn't understand. They didn't take the time to sit there and teach me. And that's one of the biggest fucking problems, is like people like Mr. Brens. I need to pass – he just looked at me and fucking goes, "You didn't pass," and just like walked on and didn't say fucking nothing, like no fucking – no big deal. And he just totally ruined a fucking kid's whole life, just like it was nothing. He didn't sit down and talk to me about it or nothing. He just says, "You didn't pass."

That means you don't graduate. You don't – it's all the shit you had with the prom – it's all fucked out the door, everything. . . .

(See 4 Supplemental CT - 6 at pp. 852-853 [jointly-prepared revised transcript of Exhs. 82-88].)

Turning lastly to statements made by appellant during his May 2, 1992, interview with Sergeants Downs and Williamson, appellant acknowledged that "he told some people upstairs that [he] wished Mr. Brens was here." (CT Supplemental - 5 at pp. 31-32 [Exh. 89]; CT Supplemental - 5 at pp. 133-134 [jointly-prepared revised transcript].) Appellant also acknowledged that he hated Mr. Brens. (CT Supplemental - 5 at pp. 32, 91-92 [Exh. 89]; CT Supplemental - 5 at pp. 134, 193-194 [jointly-prepared revised transcript].) Appellant further stated, however, that he had gone to the school "[n]ot just because of [Mr. Brens] but everything that got stolen and not just because of the diploma, but everything, all the disappointments in my life and everything else that's been leading up to this, all the disappointments, and my parents, everything else." (CT Supplemental - 5 at p. 33 [Exh. 89]; CT Supplemental - 5 at p. 135 [jointly-prepared revised transcript]; see also CT Supplemental - 5 at p. 92 [Exh. 89]; CT Supplemental - 5 at p. 194 [jointly-prepared revised transcript].)

The evidence as to motive, then, can be summarized as follows: Appellant's actions on May 1, 1992, were driven by his anger and resentment toward Mr. Brens for having given him a failing grade – which, in appellant's mind, had prevented him from getting his high school diploma and, in turn, was the reason for his recent loss of a job and a girlfriend. Appellant's actions were also driven by his overall dissatisfaction with the way the school had treated him as well as by other unspecified "disappointments" in his life.

Appellant urges that the record lacks any evidence to the effect that appellant had a motive to harm any of the victims other than Robert Brens. (AOB 361-366.) Respondent disagrees. As just discussed, the evidence established that appellant was acting out of disdain for Mr. Brens as an individual and also out of his feelings of ill-will toward the school as an institution. A jury could reasonably infer that appellant's act of shooting not

only Mr. Brens but also others associated with the school (i.e., students and teachers) was driven by his desire to exact revenge from the school on the whole.

Appellant also argues with respect to motive:

> While Defendant's statements to the students support a finding that Defendant held animosity toward Brens, they will not support an inference that Defendant calculated and deliberated the killing of Brens or any other individual. The evidence would support a finding that Defendant's intention was to confront Brens with what he had done to Defendant, but not an intention to assassinate him.

(AOB 364.)[112/] Appellant's argument again misses the mark. This Court has indicated that evidence of motive alone is insufficient to support an inference that a killing was premeditated and deliberated. (See *People v. Elliot*, *supra*, 37 Cal.4th at pp. 470-471; *People v. Anderson*, *supra*, 70 Cal.2d at p. 27.) Respondent, though, does not rely on evidence of motive alone. Rather, respondent's position is that the evidence of motive, when viewed in conjunction with the evidence of planning (discussed *ante*) and the manner of the killings (described *post*), served as a sufficient basis for an inference of premeditation and deliberation.

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112. Appellant argues further:

> The entire record describing Defendant's conduct on the second floor, starting within a few minutes of the shootings, indicates a lack of intention to shoot or kill anyone. His behavior in Room C-204b is not supportive of an inference that Defendant had formed a calculated intent to kill when he was shooting on the first floor.

(AOB 365.) As explained *ante* in Argument IV, though, a reasonable jury could deduce that appellant's conduct in classroom C-204B – including his expression of concern over whether the persons he had shot downstairs would live or die – was driven solely by his concern over the penal consequences he would face for his earlier actions downstairs.

3. The Manner Of Killing

Turning finally to evidence of the manner of killing, the facts pertaining to appellant's shooting of the four murder victims are as follows:

On the afternoon of May 1, 1992, Rachel Scarberry and Thomas Hinojosai were in their sixth period United States History class, classroom C-108B. (See 11 RT 2551-2552, 2585-2586, 2591.) Scarberry witnessed appellant appear "in front of the [classroom] door with a gun pointed into the classroom"; she then saw him fire the gun, which in her perception he was holding in the area of his chest or waist and pointing towards her. (11 RT 2587-2588.) Appellant shot Scarberry in the chest. (See 11 RT 2590, 2593.)

Hinojosai witnessed appellant shoot Scarberry. (11 RT 2556; see also 11 RT 2557.) He then watched as appellant "swung around in the doorway" and, after pumping the shotgun, shot his teacher, **Robert Brens**, "in the right – in his right ribs, in the right side of his chest." (11 RT 2557, 2564.) When appellant fired the shot he was holding the gun "on his shoulder or chest," and he appeared to Hinojosai to be aiming the gun. (11 RT 2563.)

Mr. Brens was in the front of the classroom, leaning on his desk, when he was shot. (11 RT 2566.) According to Hinojosai, Mr. Brens fell to the ground upon being shot; he then rolled over and crawled to the east wall of the classroom, where there was a podium. Mr. Brens pulled the podium down towards him. (11 RT 2562.) Appellant, meanwhile, followed Mr. Brens over toward the wall. (11 RT 2563.) Appellant then turned around and, after pumping the shotgun again, shot student **Judy Davis** in the face and upper chest from about 10 feet away, causing her to fall over in her seat. (11 RT 2563-2565; see also 11 RT 2588-2589 [according to Scarberry, Davis fell to ground after being shot; she saw Davis lying face down on the floor with puddles of blood forming in the area of her head].) Again appellant had the

gun "towards his shoulder, and he was looking down the barrel" as he fired it. (11 RT 2564.)

After shooting Davis, appellant aimed the shotgun at Hinojosai from about 15 feet away. (11 RT 2565.) Hinojosai fell over and, as a result, when appellant fired the gun the shot went right by Hinojosai's head. (11 RT 2565.) After appellant had left the classroom, Hinojosai crawled over to where Davis was located. (11 RT 2567.) Davis "was wedged in-between the seat and the table, and she was draped over, and her hands, the meat on her hands were [*sic*] gone, and she was dead right then and there."[113] (11 RT 2567.) Next, Hinojosai crawled over to Mr. Brens and asked him if he was all right. (11 RT 2567.) Mr. Brens, who was holding his chest, "was rocking against the back of the wall, and he was groaning and he was just sitting there rocking back and forth."[114] (11 RT 2567-2568.)

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113. An autopsy on Davis determined that she suffered multiple "puncture type" or "projectile type wounds" that "involved the head, face, chest, and hands"; eight of the wounds were to her head, neck and upper chest, and the remaining twelve were to her hands. (11 RT 2644; see also 11 RT 2645.) Davis suffered multiple internal injuries to her chest (including to her lungs and aorta) and died from internal bleeding. (11 RT 2644-2645.) Two projectiles (number four buckshot (18 RT 4113)) were recovered from her body. (11 RT 2645.)

114. An autopsy on Mr. Brens, who was 28 years old at the time of his death, determined that he suffered "multiple puncture type wounds, projectile type wounds predominantly on the right side also involving the back and chest, and also . . . somewhat on the right arm." (11 RT 2636-2637.) He had a total of 51 external injuries, some of which were entry wounds, some of which were exit wounds, and some of which were burns caused by a projectile passing by the skin. (11 RT 2637.) Mr. Brens suffered extensive internal injuries, including injuries to the right lung, the heart, and the liver, and he died from internal bleeding. (11 RT 2637-2638.) Thirteen projectiles (number four buckshot (18 RT 4112)) were recovered from his body. (11 RT 2638-2639.)

At about 2:00 p.m. on May 1, 1992, Kasi Frazier was in Patricia Morgan's sixth period Business Law class, classroom C-107, when he heard what he believed to be three shotgun blasts echo through Building C. (12 RT 2782, 2797.) Frazier went down to the ground, as did his classmates. (12 RT 2782.) Frazier heard footsteps coming up the hallway. (12 RT 2783.) He looked up and saw appellant standing outside the classroom door, having come from the direction of the northeast entrance to the building. (12 RT 2783, 2785.) Appellant aimed a shotgun into the classroom (i.e., he had his head down "looking down the pointer"); Frazier ducked. (12 RT 2783, 2785-2786, 2806-2807.) Frazier then heard another shotgun blast. (12 RT 2783.) When he looked across the classroom he saw **Jason White** lying on the ground. There was blood everywhere, and White was not moving and did not appear to be breathing.[115/] (12 RT 2786-2787.)

Angela Welch was in Robert Ledford's sixth period World Studies class, classroom C-102, when appellant entered Building C and opened fire. Welch observed appellant shoot Wayne Boggess. (See 14 RT 3153-3154, 3157-3160.) She then watched as appellant continued to walk towards her classroom. (See 14 RT 3161.) Right before appellant entered classroom C-102, he stopped and looked right at Welch, making eye contact with her. (14 RT 3161.) **Beamon Hill**, who was standing next to Welch, yelled, "'No.'" (14 RT 3162.) Hill pushed Welch out of the way, causing her to fall to the ground. Appellant shot

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115. An autopsy on White determined that he suffered four "punctated projectile type injuries both . . . of entry and exit wounds"; the wounds were "essentially from the right side" of his body, from the chest cavity to the abdominal cavity. (11 RT 2632-2633.) White died from bleeding due to extensive injuries within both chest cavities. (11 RT 2632-2633.) The injuries were caused by the seven lead pellets (number four buckshot (18 RT 4113)) that were recovered from his body. (11 RT 2633-2635.)

Hill in the head,[116] and then he turned around and walked away.[117] (14 RT 3162-3163, 3165.)

With regard to the ammunition appellant used to shoot Mr. Brens, Judy Davis, Jason White, and Beamon Hill (i.e., number four buckshot), Sergeant Alan Long, the Yuba County Sheriff's Department's firearms instructor, testified with respect to shotgun ammunition that there are multiple types of buckshot. (17 RT 3976.) The majority of law enforcement agencies use double aught buck; some use number four buckshot. (17 RT 3976-3977.) Both are "anti-personnel type rounds," best used for large game, with a "devastating" impact power due to multiple projectiles "hitting you all at the same time." (17 RT 3977.)

Thus, the manner of killing suggested that appellant acted with the intent to kill when he shot and fatally wounded Mr. Brens, Davis, White, and Hill and that the intent to kill was premeditated and deliberate. Using the shotgun with which he had armed himself, appellant shot Mr. Brens and White in the chest, he shot Hill in the head, and he shot Davis in the head and chest. The fact that appellant shot the victims with number four buckshot evinced appellant's intent to kill. So too did the fact that appellant had another option at hand if his intent was merely to shoot to wound: He could have shot the victims with the .22-

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116. According to Mr. Ledford, who witnessed appellant's actions from outside his classroom (i.e., from the hallway), appellant brought the shotgun to his right shoulder, leveled it with his left arm extended, and fired it into classroom C-102. (13 RT 3049.)

117. An autopsy determined that Hill suffered four head wounds: one in the "lower portion"; one in the "mid forehead"; one in the left temple; and one in the mid-scalp region, which appeared to be an exit wound. (11 RT 2639.) "Inside the head the projectile that had progressed from the left temple area had passed through the brain and through the brain stem causing his demise." (11 RT 2640.) One projectile (number four buckshot (18 RT 4113)) was recovered from Hill's brain. (11 RT 2641.)

caliber rifle with which he had also armed himself instead of shooting them with the shotgun. Although this would certainly not have guaranteed that the people he shot would live, it would have at least improved the chances.[118/] Finally, the fact that appellant went shopping for number four buckshot (as well as for double aught buckshot and slugs) on the morning of May 1, 1992, served as evidence that the killings were the result of premeditation and deliberation, not a rash impulse.

Appellant, nonetheless, maintains that "there is no substantial evidence in the manner in which Robert Brens was shot to indicate it was a deliberate premeditated killing." (AOB 373.) He relies on the fact that the evidence showed that, upon entering classroom C-108B, appellant shot at Rachel Scarberry prior to shooting at Mr. Brens. (AOB 367.) Respondent does not understand how the fact that appellant shot at Scarberry prior to shooting Mr. Brens detracts from the above-cited evidence of a premeditated and deliberated intent to kill with respect to Mr. Brens. This is especially true given that, even relying on appellant's "Diagram of Probable Layout of Classroom C-108b as Drawn From Evidence" (AOB 368), a reasonable juror could deduce that Scarberry came into appellant's line of sight before Mr. Brens did.

Appellant also argues that the evidence does not support a finding that he made a calculated decision to kill either Judy Davis, Jason White, or Beamon Hill. (AOB 373-378, 374.) He points to the lack of evidence that he had a pre-

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118. The .22-caliber rifle was inoperable at the time it was recovered from classroom C-204B. (See 18 RT 4114-4115.) In his May 2, 1992, interview with law enforcement, however, appellant made statements that strongly suggested the rifle did not become inoperable until appellant dropped it while climbing up the stairs of Building C (i.e., after shooting the victims downstairs). (See, e.g., CT Supplemental - 5 at pp. 9-11 [Exh. 89 (transcript of Exhs. 57-A & 57-B that was provided to jury)]; CT Supplemental - 5 at pp. 111-113 [jointly-prepared revised transcript].)

existing relationship with any of those persons. (AOB 373-375.) In other words, appellant argues that there was a lack of evidence of motive with respect to Davis, White, or Hill. As explained *ante* in this same argument, though, the evidence suggested that appellant had a motive to shoot teachers and students in general – which would include Davis, White, and Hill. In any event, this Court has indicated that a lack of motive is not fatal to a finding of premeditation and deliberation. (See *People v. Elliot*, *supra*, 37 Cal.4th at pp. 470-471; *People v. Anderson*, *supra*, 70 Cal.2d at p. 27.)

With regard to White, appellant alleges that there is no evidence he aimed the gun at White. (AOB 374-375.) Appellant's argument is misplaced. While there was no affirmative evidence that appellant aimed the gun at White, the jury was free to so infer. By his testimony, Kasi Frazier merely indicated that he did not see one way or the other whether appellant aimed the gun at White as, upon seeing appellant aim a shotgun into classroom C-107, Frazier ducked. (See 12 RT 2786.)

With respect to Hill, appellant asserts: "The evidence adduced in the guilt phase of trial showed that Defendant entered room C-102, raised his gun and fired. As he fired, Beamon Hill pushed Angela Welch to the ground and was struck by the force of the shotgun blast." (AOB 375.) He points out there was no evidence to the effect that appellant had a pre-existing relationship with Welch.[119/] (AOB 375.) He also argues:

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119. In so arguing, appellant appears to implicitly recognize that, unlike the crime of attempted murder, transferred intent applies to the crime of murder, and, more specifically, to the crime of first degree murder based upon premeditation and deliberation. (See *People v. Sears* (1970) 2 Cal.3d 180, 189 ["[I]f a person purposely and of his deliberate and premeditated malice attempts to kill one person but by mistake and inadvertence kills another instead, the law transfers the intent and the homicide so committed is murder of the first degree."].)

> There was no testimony as to exactly where Defendant was pointing the gun when he shot, but the results of the autopsy demonstrate that his shot was not fired directly at Beamon Hill, given that only 3 out of 24 pellets from the shot hit him.

(AOB 378.) Appellant concludes that "there is no evidence in the record to indicate that Defendant had made a calculated decision to kill anyone in C-102 at the point in time when he fired the shot that tragically killed Beamon Hill." (AOB 378.) Appellant's argument again falls flat. First, for the reasons just cited in relation to Davis, White, and Hill, respondent disagrees that there was a lack of evidence of motive with respect to Welch; in any event, as just stated, a lack of motive is not fatal to a finding of premeditation and deliberation. Second, whether or not appellant was aiming at Hill when he fired the fatal shot is simply irrelevant. The evidence indicated that appellant aimed his gun at, and intended to kill, Welch. (See 14 RT 3161-3162.) This was sufficient to support a verdict of murder with respect to Hill. (See fn. 119, *ante*.)

Finally, while appellant acknowledges "that he shot several of his victims at a range and with ammunition that was likely to cause severe injury or death" (AOB 378), he urges that the shots he "fired at reasonably close range must be viewed in context with all of the shots that he fired, where they were fired, and what he appeared to be doing in firing them" (AOB 379). He points specifically to the fact that he shot no one more than once. (AOB 379.) He then argues that the fact that "at least two of the victims seriously wounded by his shots at close range were . . . obviously still alive after he had shot them – Robert Brens and Wayne Boggess," yet he did not shoot them again, "leaves the evidence that he shot [Brens and Boggess] at relatively close range causing serious injury highly ambiguous as evidence from which to infer a deliberate decision to kill." (AOB 379; see also AOB 372.) Respondent once again disagrees with appellant. As stated *ante* in Argument IV, this Court has held that "'"[t]he fact that the shooter may have fired only once and then abandoned

his efforts out of necessity or fear does not compel the conclusion that he lacked the animus to kill in the first instance. . . ." [Citation.]'" (*People v. Smith*, *supra*, 37 Cal.4th at p. 741, quoting *People v. Chinchilla*, *supra*, 52 Cal.App.4th at p. 690.) Here, a jury could reasonably deduce from the evidence that appellant did not pursue any of the victims after his first shot was not instantaneously fatal because to do so, rather than to continue his progression through the building, would have placed him at greater risk for being overtaken by other students and/or teachers.[120/] A jury could also reasonably deduce from the evidence that, because – with the notable exception of Mr. Brens – appellant did not have an apparent reason to select his victims, he could just as satisfactorily fulfill his intent to kill by moving on and firing at other persons within the building. A jury could additionally reasonably deduce from the evidence that upon walking over to Mr. Brens and witnessing the wounds he had inflicted upon him (see 11 RT 2563),[121/] appellant was confident that Mr. Brens would die from his wounds – and perhaps also preferred that Mr. Brens have a slow death rather than the quick one that would result if he shot him again at point-blank range.

E. Conclusion

In sum, both at the end of the prosecution's case-in-chief and at the

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120. This is buttressed by Cole Newland's testimony that, while holding the students hostage upstairs in classroom C-204B, appellant did not explain why he had shot at several people downstairs except to say "that they had come out at him, or that he was afraid that they would try and jump him." (16 RT 3669.)

121. As noted *ante*, an autopsy determined that Mr. Brens suffered "multiple puncture type wounds, projectile type wounds predominantly on the right side also involving the back and chest, and also . . . somewhat on the right arm." (11 RT 2636-2637.) He suffered a total of 51 external injuries in addition to extensive internal injuries. (11 RT 2637-2638.)

conclusion of the guilt-phase evidence, the evidence was substantial enough that a reasonable trier of fact could find appellant guilty beyond a reasonable doubt of each of the charges of first degree murder. Evidence of planning activity, motive, and manner of killing – the three factors under *People v. Anderson*, *supra*, 70 Cal.2d 1 – all pointed to premeditation and deliberation. Alternatively, there was """very strong evidence of planning""" (*People v. Elliot*, *supra*, 37 Cal.4th at p. 470) or """some evidence of motive in conjunction with planning or a deliberate manner of killing""" (*ibid.*), either scenario of which supported an inference that the killings occurred as the result of premeditation and deliberation rather than unconsidered or rash impulse. Thus, the trial court properly denied appellant's motion for acquittal with respect to the first degree murder charges, and appellant's convictions on those charges comport with principles of due process.

VII.

THE TRIAL COURT WAS NOT REQUIRED TO GIVE ACCOMPLICE INSTRUCTIONS WITH RESPECT TO REWERTS'S TESTIMONY AS THE JURY WAS NOT PRESENTED WITH SUFFICIENT EVIDENCE TO SUPPORT A FINDING THAT REWERTS WAS AN ACCOMPLICE; IN ADDITION, THE TRIAL COURT PROPERLY ADMITTED REWERTS'S TESTIMONY THAT, IN HIS OPINION, APPELLANT WOULD HAVE TOLD HIM THAT MR. BRENS HAD MOLESTED HIM IF IN FACT MR. BRENS HAD DONE SO

Appellant argues that the trial court erred by failing to instruct the jury to view Rewerts's testimony with caution in that the jury could have reasonably concluded that Rewerts was an accomplice. (AOB 387-396.) He argues further that the trial court erred by admitting Rewerts's lay opinion that appellant was lying about having been molested by Mr. Brens. (AOB 387, 403-408.) Appellant urges that the errors resulted in a reduction in the prosecution's burden of proof and a violation of his federal constitutional rights to due process, a trial by jury, and reliable verdicts. (AOB 387, 389, 397-402, 408-412.) Both of appellant's claims of error are without merit. The jury was not presented with sufficient evidence to support a finding that Rewerts was an accomplice; accordingly, the trial court had no sua sponte duty to instruct the jury concerning accomplice testimony. Moreover, the trial court properly admitted Rewerts's testimony that, in his opinion, appellant would have told him that Mr. Brens had molested him if in fact Mr. Brens had done so.

A. The Trial Court Was Not Required To Give Accomplice Instructions With Respect To Rewerts's Testimony

Appellant asserts that "Rewerts could have been charged in the instant case as an accomplice, and Defendant's jury should have been so instructed." (AOB 389.) He also asserts that "the jury should have been instructed to view

Rewerts' testimony with caution, particularly insofar as it incriminated Defendant and exonerated himself." (AOB 389; see also AOB 396.) Appellant urges that the trial court's failure to give accomplice instructions with respect to Rewerts's testimony resulted in a reduction in the prosecution's burden of proof and a violation of his federal constitutional rights to due process, a trial by jury, and reliable guilt and penalty verdicts. (AOB 389, 401-402.) Appellant's claim is unavailing as the jury was not presented with sufficient evidence to support a finding that Rewerts was an accomplice.

1. Relevant Evidence

David Rewerts was called as a witness for the prosecution during the guilt phase of appellant's case. (3 CT 829.) Rewerts testified that he had met appellant during his (Rewerts's) freshman, and appellant's sophomore, year in high school (i.e., the school year which started in 1986) and the two became best friends. (18 RT 4060, 4067, 4071.)

Rewerts testified that, about four or five months prior to May 1, 1992 (after appellant and Rewerts had watched the movie "Terminator 2" together (18 RT 4068-4069)), appellant said something to Rewerts about going to Lindhurst High School and, "due to the openness of C Building he would walk in and shoot a couple rounds and go outside the back and off the – around the fence on the back of Lindhurst High School [baseball] field."[122/] (18 RT 4063.) The subject came up two or three times after that, with appellant telling Rewerts "he would like to go to the school and shot [*sic*] a couple of people."[123/] (18 RT

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122. On cross-examination, Rewerts described the conversation as "just idle talk," and he added: "Everybody says that they're going to go out and in anger that they're going to kill a person, but they don't." (18 RT 4068.)

123. On cross-examination, Rewerts described these conversations as "[j]ust talked [*sic*] between friends." (18 RT 4069.) When asked if they were

4062-4063.) On one specific occasion when appellant brought this matter up, Rewerts was staying over at appellant's house. (18 RT 4063-4064.) Rewerts was going through a couple of appellant's books when, as per Rewerts, he (Rewerts) made some "pretty absurd" statements about "destroying things"; appellant responded, "[A]ll I was talking about was going back" to the high school and "shooting a couple people."[124/] (18 RT 4064.) At the time appellant said this he was reading aloud to Rewerts "quotes out of a book and [*sic*] military tactics and police procedures" and "hostage situations." (18 RT 4064.)

Rewerts testified that he knew appellant owned a shotgun, two .22-caliber semi-automatic rifles, and "a small little like machine gun thing." (18 RT 4066.) On one occasion Rewerts went with appellant to a shooting range in Spenceville to "practice shoot." (18 RT 4066.) On other occasions Rewerts would call over to appellant's residence and appellant's parents would tell him that appellant was out shooting, or appellant would tell Rewerts that he was going to go shooting up at Spenceville. (18 RT 4067.)

When Rewerts was told by a neighbor on May 1, 1992, that there was "a gunman loose" at Lindhurst High School, Rewerts thought "that it could have been [appellant] doing it." (18 RT 4061.) Rewerts called appellant's house and was told he was not home. (18 RT 4061.) Rewerts subsequently called the police department; the police department in turn connected Rewerts with the high school, and Rewerts spoke with Sergeant Virginia Black of the

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"B.S.ing," Rewerts responded in the affirmative. (18 RT 4069.)

124. Respondent disagrees with appellant's characterization of Rewerts's testimony in this regard as ambiguous. (See AOB 393 & fn. 83, 395, 398.) It is clear to respondent that Rewerts's testimony was to the effect that *appellant* said, "[A]ll *I* was talking about was going back" to the high school and "shooting a couple people" (18 RT 4064, italics added) and that appellant was referring to himself when he used the word "I."

Yuba County Sheriff's Department. (18 RT 4061-4062.) Rewerts told Sergeant Black that he believed appellant was the gunman and he told her that, if it was appellant, he could maybe help by talking to him.[125] (18 RT 4062.)

2. Analysis

Section 1111 provides in part as follows: "A conviction can not be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense . . . ." (§ 1111.) Whenever a jury is presented with evidence sufficient to warrant a finding that a witness implicating the defendant was an accomplice, a trial court has a sua sponte obligation [126] to instruct the jury on the principles regarding accomplice testimony. (*People v. Brown* (2003) 31 Cal.4th 518, 555; *People v. Tobias* (2001) 25 Cal.4th 327, 331.) This includes instructions that, to the extent the accomplice's testimony tends to incriminate the defendant, the testimony must be viewed with caution.[127] (*People v. Guiuan* (1998) 18

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125. Sergeant Black testified that, during this conversation, Rewerts told her that appellant "had been talking about going in C Building [and] shooting a few people just to see if he could get away with it." (18 RT 4140.)

126. The defense did not make a request that the trial court give accomplice instructions with respect to Rewerts's testimony. (See, e.g., 21 RT 5075 [at conclusion of discussion of jury instructions, having failed to request accomplice instructions regarding Rewerts's testimony, defense counsel asserted that the defense had nothing further to add]; 22 RT 5164-5165 [following closing arguments, defense counsel raised additional issues regarding jury instructions but again did not request accomplice instructions regarding Rewerts's testimony (or that of any other witness)].)

127. At the time of appellant's trial, CALJIC No. 3.18 specifically instructed:

> The testimony of an accomplice ought to be viewed with distrust. This does not mean that you may arbitrarily disregard such testimony, but you should give to it the weight to which you

Cal.4th 558, 569.)

However, the obligation to give accomplice instructions only arises where there is substantial evidence that the witness was in fact an accomplice. (*People v. Boyer* (2006) 38 Cal.4th 412, 466.) "For instructional purposes, an accomplice is a person 'who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given.' (§ 1111; [citations].)" (*People v. Arias* (1996) 13 Cal.4th 92, 142-143.)

> To be an accomplice, a witness must have "'"guilty knowledge and intent with regard to the commission of the crime. . . ."'" [Citation.] The definition of an accomplice "encompasses all principals to the crime including aiders and abettors and coconspirators." [Citation.] To be an accomplice, one must act "'with knowledge of the criminal purpose of the perpetrator *and* with an intent or purpose either of committing, or of encouraging, or facilitating commission of, the offense.'" [Citation.]

(*People v. DeJesus* (1995) 38 Cal.App.4th 1, 23, original italics; see also *People v. Sully* (1991) 53 Cal.3d 1195, 1227.)[128]

> find it to be entitled after examining it with care and caution and in the light of all the evidence in the case.

(CALJIC No. 3.18 (5th ed. 1988).) CALJIC No. 3.11 instructed in pertinent part:

> A defendant cannot be found guilty based upon the testimony of an accomplice unless such testimony is corroborated by other evidence which tends to connect such defendant with the commission of the offense.

(CALJIC No. 3.11 (1990 rev.) (5th ed. Jan. 1996 Pocket Part).)

128. At the time of appellant's trial, CALJIC No. 3.10 instructed:

> An accomplice is a person who [is] [was] subject to prosecution for the identical offense charged [in Count[s] ____] against the defendant on trial by reason of [aiding and abetting] [or] [being a member of a criminal conspiracy].

"Whether a person is an accomplice is a question of fact for the jury unless there is no dispute as to either the facts or the inferences to be drawn therefrom." (*People v. Fauber* (1992) 2 Cal.4th 792, 834, citing *People v. Tewksbury* (1976) 15 Cal.3d 953, 960.) To put it differently,

> "'Whether a person is an accomplice within the meaning of section 1111 presents a factual question for the jury "unless the evidence permits only a single inference." [Citation.] Thus, a court can decide as a matter of law whether a witness is or is not an accomplice only when the facts regarding the witness's criminal culpability are "clear and undisputed."'"

(*People v. Brown*, *supra*, 31 Cal.4th at pp. 556-557, italics added.) When, as a matter of law, a witness was not an accomplice – or, in other words, where there is insufficient evidence to support a finding that a witness was an accomplice – the trial court has no obligation to give accomplice instructions. (See *People v. Boyer*, *supra*, 38 Cal.4th at p. 466; *People v. Lewis* (2001) 26

(CALJIC No. 3.10 (5th ed. 1988).) CALJIC No. 3.01 instructed:

> A person aids and abets the [commission] [or] [attempted commission] of a crime when he or she,
>
> (1) with knowledge of the unlawful purpose of the perpetrator and
>
> (2) with the intent or purpose of committing, encouraging, or facilitating the commission of the crime, by act or advice aids, promotes, encourages or instigates the commission of the crime.
>
> [A person who aids and abets the [commission] [or] [attempted commission] of a crime need not be personally present at the scene of the crime.]
>
> [Mere presence at the scene of a crime which does not itself assist the commission of the crime does not amount to aiding and abetting.]
>
> [Mere knowledge that a crime is being committed and the failure to prevent it does not amount to aiding and abetting.]

(CALJIC No. 3.01 (5th ed. 1988).)

Cal.4th 334, 369.)

Appellant points to Rewerts's testimony that, prior to May 1, 1992, appellant discussed with him going to Lindhurst High School and opening fire and urges that, "[i]n spite of the prosecutor's efforts to keep the focus on Defendant's statements rather than Rewerts' own role, and Rewerts' characterization of the discussions as 'idle talk,' the jury reasonably could have concluded that in fact Rewerts was a full participant in those conversations, that he may have been the instigator, and that he at least 'encouraged' Defendant to carry out the crime." (AOB 392.) Appellant goes on to allege:

> Thus, based on Rewerts' own testimony and in view of the entire body of evidence introduced at the guilt phase, the jury could reasonably have concluded that he: (1) had *knowledge of Defendant's plan* to shoot people at Lindhurst High School and that he (2) *advised* and/or *encouraged* Defendant, (3) with the *intent* of encouraging the commission of a crime by his *advice, promotion, encouragement, and/or instigation.*

(AOB 393.) Appellant also notes that an aider and abetter is liable for any crime that is a natural and probable consequence of the crime he originally aided and abetted (AOB 393-394, citing *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 106-108) and he then alleges:

> [T]he jury reasonably could have concluded that the murders were natural and probable consequences of a crime instigated and encouraged by Rewerts to go to the school, shoot it up, perhaps even shoot at people, even though Rewerts never actually contemplated or intended to kill anyone.

(AOB 394.)

Despite appellant's best arguments to the contrary, no reasonable jury could have concluded on the evidence that Rewerts was an accomplice to appellant's crimes. The *only* evidence in the record that supports appellant's position is that (1) on one specific occasion when appellant stated his desire to go to Lindhurst High School and shoot a couple of people, his statement was

preceded by Rewerts making some "pretty absurd" statements about "destroying things" (18 RT 4064) and (2) on some unspecified occasion, Rewerts went with appellant to a shooting range to "practice shoot" (18 RT 4066). Taken either separately or together, this evidence manifestly failed to support a finding that Rewerts had """"guilty knowledge and intent with regard to the commission of the crime""""" and that he acted """"with knowledge of the criminal purpose of [appellant] *and* with an intent or purpose either of committing, or of encouraging, or facilitating commission of, the offense."""" (*People v. DeJesus*, *supra*, 38 Cal.App.4th at p. 23.)

Respondent's position is bolstered by appellant's own words by which he refuted any suggestion that Rewerts acted as his accomplice. Namely, in his May 2, 1992, interview with Sergeants Downs and Williamson, appellant acknowledged that about a month or so before he had "told [Rewerts] that [he] had dreams about going into the school and shooting," but appellant said "it was just talk."[129/] (CT Supplemental - 5 at p. 21 [Exh. 89]; CT Supplemental - 5 at p. 123 [jointly-prepared revised transcript]; see also CT Supplemental - 5 at pp. 24, 50 [Exh. 89]; CT Supplemental - 5 at pp. 126, 152 [jointly-prepared revised transcript].) According to appellant, he told Rewerts "it would be so

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129. In his penalty phase testimony, appellant consistently testified that when he spoke with Rewerts about going to Lindhurst High School, it was in "joking terms." (24 RT 5854-2855.) Appellant testified:

> [W]e were just kidding around. He was quite upset about some of his friends, and he wanted to get back at someone. And he thought of some ways to get back at 'em, when I told him that there was [*sic*] a couple other ways that we could get back at him. And he talked about going to the guy's house and shooting it up. And I talked about, well, why don't you just shoot him at the kneecap so it would be a lot easier.

(24 RT 2854-2855.)

easy to just go in there"; Rewerts in turn told him "that it would be easy, he said, he said something like uh, some kind of, bring in some kind of robot or something, some kind of robotech robot and he said that would be more better." (CT Supplemental - 5 at p. 24 [Exh. 89]; see also CT Supplemental - 5 at p. 126 [jointly-prepared revised transcript].) Sergeant Downs subsequently asked appellant if Rewerts was going to help him "do this"; appellant responded: "No. He was just talking about how he would do it if he did it, but he didn't draw any maps or anything . . . ." (CT Supplemental - 5 at p. 50 [Exh. 89]; CT Supplemental - 5 at p. 152 [jointly-prepared revised transcript].)

Appellant argues that, with respect to "Rewerts' involvement," the facts in the case at bar are similar to those in *People v. Beeman* (1984) 35 Cal.3d 547. (AOB 391, fn. 81.) Appellant's reliance on *Beeman* is unavailing. In *Beeman*, Burk and Gray drove from Oakland to Redding, where they robbed defendant's sister-in-law of jewelry, including a 3.5 carat diamond ring. (*People v. Beeman*, *supra*, at p. 551.) When defendant was arrested six days later in Emeryville, he had in his possession several of the less-valuable items of stolen jewelry; defendant provided the police with information that led to the arrest of Burk and Gray. (*Ibid.*) At defendant's trial, Burk and Gray testified that defendant had been extensively involved in planning the robbery. (*Ibid.*) Burk, who had known defendant for over two years and had at times lived with him, testified that defendant had talked to him about his wealthy relatives in Redding and had described an expensive diamond ring. (*Ibid.*) About two and one-half months before the robbery, the feasibility of its commission was first mentioned. (*Ibid.*) The discussions became more specific about one week before the robbery. (*Ibid.*) Defendant gave Burk the victim's address and discussed with him a ruse to gain entrance into the residence. (*Ibid.*) Defendant and Burk decided that defendant would not go to Redding because defendant "wanted nothing to do with the actual robbery and because he feared

being recognized." (*Id.* at pp. 551-552.) The night before the robbery, defendant drew a floor plan of the victim's residence and described where the diamond ring was likely to be located. (*Id.* at p. 552.) Defendant agreed to sell the jewelry for a portion of the proceeds. (*Ibid.*) Gray's testimony "painted a similar picture" to Burk's testimony. (*Ibid.*) However, Gray testified that two days before the robbery defendant told him that he wanted "nothing to do with [it]"; defendant repeated that sentiment the following day, although he also indicated that he would not say anything if Burk and Gray went ahead with the plan. (*Ibid.*) Defendant's "testimony contradicted that of Burk and Gray as to nearly every material element of his own involvement." (*Id.* at p. 552.) In particular, he denied any involvement in the robbery or its planning. (See *id.* at pp. 552-554.)

Defendant in *Beeman* was convicted of, inter alia, robbery. (*People v. Beeman*, *supra*, 35 Cal.3d at p. 550.) At issue on appeal was the adequacy of the pattern jury instructions on aiding and abetting with which the jury had been instructed. (See *id.* at pp. 550-551, 555-556.) This Court held that one of the instructions (CALJIC No. 3.01) was erroneous in that it failed to ensure that an aider and abettor would be found to have acted "with knowledge of the criminal purpose of the perpetrator *and* with an intent or purpose either of committing, or of encouraging or facilitating commission of, the offense." (*Id.* at pp. 551, 560-561.)

Of import for present purposes is that – appellant's protestations to the contrary notwithstanding – the facts in the case at bar with respect to Rewerts's "involvement" are nowhere close to those regarding the involvement of defendant in *Beeman*. Whether or not the jury ultimately believed Burk and Gray,

> [t]he prosecution produced considerable evidence which showed that [defendant] in fact aided the robbery. The prosecution's evidence also

> sought to show that he had participated extensively in the planning of the robbery and agreed beforehand to sell the jewelry for a percentage of its value, but refused to be present when the offenses were committed.

(*People v. Beeman, supra*, 35 Cal.3d at p. 562.) In the case at bar, by contrast, there was no such "considerable evidence" of Rewerts's involvement in appellant's crimes. Namely, there was no "considerable evidence" that Rewerts participated – extensively or otherwise – in the planning. As noted *ante*, appellant himself answered Sergeant Downs's question whether Rewerts was going to help him as follows: "No. He was just talking about how he would do it if he did it, but he didn't draw any maps or anything . . . ." (CT Supplemental - 5 at p. 50 [Exh. 89]; CT Supplemental - 5 at p. 152 [jointly-prepared revised transcript].) Morever, in contrast to defendant in *Beeman* who was arrested six days after the robbery with some of the stolen jewelry in his possession and only then helped the police identify Burk and Gray as the culprits, as soon as Rewerts heard that there was "a gunman loose" at Lindhurst High School on May 1, 1992, he phoned the police to report that appellant may be the gunman. (See 18 RT 4061-4062, 4140.)

In sum, the jury in the case at bar was not presented with sufficient evidence to support a finding that Rewerts was an accomplice. As such, the trial court had no sua sponte duty to instruct the jury with respect to accomplice testimony.

Even assuming the trial court did error, however, appellant was not prejudiced as a result. No prejudice results from the failure to give accomplice instructions "where . . . the witness's testimony was sufficiently corroborated." (*People v. Boyer, supra*, 38 Cal.4th at p. 467, citing *People v. Zapien* (1993) 4 Cal.4th 929, 982.)

> "'Such [corroborative] evidence "may be slight and entitled to little consideration when standing alone. [Citations.]"' [Citation.] 'Corroborating evidence "must tend to implicate the defendant and

> therefore must relate to some act or fact which is an element of the crime but it is not necessary that [such] evidence be sufficient in itself to establish every element of the offense charged." [Citation.]' [Citation.]"

(*People v. Boyer*, *supra*, at p. 467, quoting *People v. Zapien*, *supra*, at p. 982.)

Appellant asserts that "Rewerts' testimony is the *only* evidence in the record suggesting that Defendant's planning of an attack on Lindhurst High School included an intention to shoot people, and not just property." (AOB 388; see also AOB 398.) Even if this Court were to accept the "dubious proposition" that corroboration was required on the specific matter of whether appellant's plan to go to Lindhurst High School included the intention to shoot people (see *People v. Boyer*, *supra*, 38 Cal.4th at p. 468, fn. 38), such corroboration was provided by the fact that, in accordance with the handwritten supply list found in appellant's bedroom (Exh. 31), appellant went shopping on the morning of May 1, 1992, for double aught buckshot and number four buckshot, both of which, according to the testimony of Sergeant Alan Long, the Yuba County Sheriff's Department's firearms instructor, are "anti-personnel type rounds." (17 RT 3843, 3872-3875, 3864-3866, 3870, 3976-3977.) Moreover, a search of appellant's car uncovered a paperback book entitled "Modern Law Enforcement Weapons and Tactics" (Exh. 58) on the front passenger's seat. (17 RT 3999-4000.) On multiple pages, text had been circled or underlined, including on page 131, where the following words were underlined: "[L]et's look at the results of some informal shooting experiments that we performed to see if the classic load of #00 is really the best choice for anti-personnel use in law enforcement." (See 17 RT 4000; see also Exh. 58 [page 131].) This served as sufficient corroborative evidence that appellant's plan to go to Lindhurst High School included the intention to shoot people, not just property. Thus, even assuming the trial court erred by failing to give accomplice instructions with respect to Rewerts's testimony, appellant was not

prejudiced as a result.

Finally, appellant urges that the trial court's failure to give accomplice instructions resulted in a reduction in the prosecution's burden of proof and a violation of his federal constitutional rights to due process, a trial by jury, and reliable guilt and penalty verdicts. (AOB 389, 401-402.) As demonstrated *ante*, however, there was no error; in any event, any error was harmless. Thus, this Court should reject appellant's associated federal constitutional claims. (See *People v. Lewis*, *supra*, 26 Cal.4th at p. 371.)

B. Lay Opinion Evidence

Appellant also argues that the trial court erred by admitting Rewerts's lay opinion that appellant was lying about having been molested by Mr. Brens. (AOB 387, 403-408.) Specifically, he argues:

> The admission of Rewerts' lay opinion that Defendant was not molested because Defendant would have told him of such an event had it occurred was error. Rewerts' opinion was an opinion on Defendant's veracity with respect to his relating experiences of sexual molestation to the experts and to [Ricardo] Borom. A lay witness is not competent to testify as to the veracity of a specific statement of another.

(AOB 406.) Appellant argues further that the erroneous admission of Rewerts's lay opinion resulted in a reduction in the prosecution's burden of proof and a violation of his federal constitutional rights to due process, a trial by jury, and reliable guilt, sanity, and penalty verdicts. (AOB 408-412.) Appellant's claim is without merit. The trial court properly admitted Rewerts's testimony that, in his opinion, appellant would have told him that Mr. Brens had molested him if in fact Mr. Brens had done so.

1. Relevant Evidence

On re-direct examination during her guilt-phase testimony on appellant's behalf, Dr. Rubinstein was asked whether it would be unusual if appellant had

not told his mother, his brother, or David Rewerts about the acts of molestation Mr. Brens had allegedly perpetrated against him. Dr. Rubinstein answered: "Teen-agers don't talk. They don't report sexual molestations, especially homosexual molestations. No." (20 RT 4821.)

Rewerts was subsequently called by the prosecution as a rebuttal witness. (3 CT 851.) Rewerts testified that he first met appellant in 1986, when he (Rewerts) was in the middle of his freshman year at Lindhurst High School and appellant was in the middle of his sophomore year at the same school. (21 RT 4916-4917.) They became best friends. (21 RT 4916.) Up until appellant's senior year, when they had a falling out (due to the fact that appellant was dating Rewerts's ex-girlfriend whereas Rewerts wanted to have an "exclusive homosexual relationship" with appellant (21 RT 4922-4923)), the two spent a lot of time together, both at school and after school. (21 RT 4917.) They "went out to the movies a lot and did a lot of things together." (21 RT 4917.) Appellant and Rewerts discussed the goings-on in each others' lives, including their sexual desires and sexual experiences. (21 RT 4918-4919.)

About seven or eight months after Rewerts graduated from high school (as a member of the class of 1990), appellant telephoned Rewerts late one night, and they proceeded to reestablish a relationship and again became best friends. (21 RT 4916, 4918.) Again they discussed what was occurring in each others' lives, including their sexual desires and sexual experiences. (21 RT 4919.) On July 4, 1991, Rewerts's relationship with appellant became more intimate as the two had sexual contact with one another on that date (for the one and only time). (21 RT 4919-4920.) The two remained good friends up until May 1, 1992. (21 RT 4920.)

At no time during their friendship did appellant say anything to Rewerts about Mr. Bren having touched him in a sexual manner. Nor did he say anything about appellant having touched Mr. Brens in a sexual manner. (21 RT

4920-4921.) Given the nature of their relationship, Rewerts believed that if either of these things had occurred, appellant would have told him about it. (21 RT 4920-4921.) In particular, Rewerts testified as follows on direct examination:

> Q. In your opinion based upon the relationship and the type of relationship you had with Mr. Houston, is that the type of thing, having sexual contact with Mr. Brens, that the defendant would have talked to you about had it occurred?
>
> A. Yeah. We were friends. I believe that he would have told me such a thing about Mr. Brens touching him or doing anything else. I believe that he would have told me.

(21 RT 4921.)

2. Analysis

As an initial matter, appellant's claim that Rewerts's testimony constituted inadmissible lay opinion evidence is not cognizable on appeal. Appellant forfeited his claim by failing to object to his testimony on that specific ground.

Pursuant to Evidence Code section 353, subdivision (a), a judgment may be reversed due to the erroneous admission of evidence only if an objection to the evidence or a motion to strike it was "timely made and so stated as to make clear the specific ground of the objection." (Evid. Code, § 353, subd. (a).) This Court has """consistently held that the 'defendant's failure to make a timely and specific objection' on the ground asserted on appeal makes that ground not cognizable."'" (*People v. Demetrulias* (2006) 39 Cal.4th 1, 20, quoting *People v. Partida* (2005) 37 Cal.4th 428, 433-434.)

Prior to the prosecution calling Rewerts as a witness in its rebuttal case, defense counsel "request[ed] an offer of proof so that we can determine whether this is genuine rebuttal or if it is a matter that should have been elicited on the prosecution's case in chief." (21 RT 4857-4858.) The prosecutor

informed the court that he intended to elicit the following testimony from Rewerts: (1) Rewerts was appellant's best friend from Rewerts's freshman year in high school until May 1992, "there was no subject matter which was not discussed between the two," including sexual matters, and appellant never told him that Mr. Brens had touched him in a sexual manner; and (2) testimony as to Mr. Brens's reputation among the community of Lindhurst High School as to engaging in sexual activity with male students. (21 RT 4858.) With regard to the first offer of proof, defense counsel initially objected that the evidence would not be "rebuttal to anything that's been testified to by anyone." (21 RT 4859.) He then objected that such evidence "requires Mr. Rewerts to speculate on what could have been revealed to him by Mr. Houston. Testimony from Dr. Rubinsein certainly, at the least, was that this is a subject that is a deep – deeply held secret by persons and is not necessarily revealed, even to parents." (21 RT 4860-4861.) The court ultimately ruled that Rewerts could be called for the "first purpose" (i.e., "the lack of conversations with the defendant about something which the prosecution believes it can prove would have been discussed if it were true") but not for the second (i.e., "the reputation evidence respecting Mr. Brens' conduct with students at Lindhurst High School"). (21 RT 4861-4864.)

During Rewerts's subsequent rebuttal testimony, defense counsel raised no objection to the pertinent testimony on the ground that it constituted an improper lay opinion. (See 21 RT 4920-4921.) In fact, other than interposing premature objections ("requires speculation" and "[l]acks foundation")[130/] to two of the prosecutor's unfinished questions – objections which counsel did not renew after the questions had been completed – defense counsel did not object

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130. Prior to the start of evidence, the court had granted appellant's motion that it deem all defense objections "to be under the Federal and State Constitution." (11 RT 2428-2429.)

to the testimony appellant seeks to challenge on appeal. (See 21 RT 4920-4921.) Thus, appellant's claim is not cognizable.

In any event, the claim fails on its merits. Evidence Code section 800, which limits the opinion testimony of lay witnesses, provides as follows:

> If a witness is not testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is permitted by law, including but not limited to an opinion that is:
>
> (a) Rationally based on the perception of the witness; and
>
> (b) Helpful to a clear understanding of his testimony.

(Evid. Code, § 800.)

Rewerts's testimony that, in his opinion, his relationship with appellant was such that appellant would have told him if Mr. Brens had in fact molested him fell within the parameters of Evidence Code section 800. Namely, it was not only rationally but *explicitly* based on Rewerts's perception of the nature of the friendship he and appellant shared. (21 RT 4921.) Also, it was helpful to a clear understanding of his testimony in that it helped explain the significance of the fact that appellant had never told him that Mr. Brens had touched him in a sexual manner. (21 RT 4920-4921.) Its helpfulness was particularly acute given that it was offered in rebuttal of Dr. Rubinstein's testimony that it would not be unusual if appellant had not told Rewerts about the acts of molestation Mr. Brens had allegedly perpetrated against him. (20 RT 4821.) After all, Rewerts, unlike Dr. Rubinstein, had direct knowledge of the nature of the relationship Rewerts and appellant shared with one another.

Appellant cites *People v. Melton* (1988) 44 Cal.3d 713, 744, for the proposition that "lay opinion about the veracity of particular statements by another is inadmissible." (AOB 406-407.) In *Melton*, this Court explained the reasons behind the inadmissibility of such evidence as follows:

> With limited exceptions, the fact finder, not the witnesses, must draw the ultimate inferences from the evidence. Qualified experts may express

> opinions on issues beyond common understanding (Evid. Code, §§ 702, 801, 805), but lay views on veracity do not meet the standards for admission of expert testimony. A lay witness is occasionally permitted to express an ultimate opinion based on his perception, but only where "helpful to a clear understanding of his testimony" (*id.*, § 800, subd. (b)), i.e., where the concrete observations on which the opinion is based cannot otherwise be conveyed. [Citations.] Finally, a lay opinion about the veracity of particular statements does not constitute properly founded character or reputation evidence (Evid. Code, § 780, subd. (e)), nor does it bear on any of the other matters listed by statute as most commonly affecting credibility (*id.*, § 780, subds. (a)-(k)). Thus, such an opinion has no "tendency in reason" to disprove the veracity of the statements. (*Id.*, §§ 210, 350.)

(*People v. Melton*, *supra*, at p. 744.)

Appellant argues that "Rewerts' lay opinion that his relationship with Defendant was such that Defendant would have confided in him if Defendant had been molested by Brens was objectionable" under *Melton*. (AOB 407-408.) At issue in *Melton* was the testimony of a defense investigator (Carpenter) to the effect that he had not made efforts to follow up on a statement by a key prosecution witness (Boyd) implicating a person other than defendant (a person by the name of Charles) in the victim's killing. (See *People v. Melton*, *supra*, 44 Cal.3d at pp. 742-743.) This Court found "that Carpenter's testimony about his lack of response to Boyd's information was, for the most part, irrelevant and incompetent" in that "[e]vidence of what Carpenter *did not do* to follow up on Boyd's claims, had, in and of itself, no 'tendency in reason' (see Evid. Code, §§ 210, 350) to establish that Charles did not exist or was not responsible for [the victim's] murder." (*Id.* at pp. 743-744.) The Court then observed that the prosecutor's principal purpose in eliciting the testimony at issue was to simply suggest that Carpenter did not personally believe Boyd. (*Id.* at p. 744.) After setting forth the reasons behind the inadmissibility of lay opinion about the veracity of particular statements by another (quoted in full *ante*), this Court stated:

> The instant record does not establish that Carpenter is an expert on judging credibility, or on the truthfulness of persons who provide him with information in the course of investigations. He knew nothing of Boyd's reputation for veracity. He was able to describe his interviews with Boyd in detail, leaving the factfinder free to decide Boyd's credibility for itself, based on such factors as his demeanor and motives, his background, his consistent or inconsistent statements on other occasions, and whether his statements to Carpenter had the essential "ring of truth." The trial court thus erred insofar as it admitted Carpenter's testimony to indicate his assessment of Boyd's credibility.

(*People v. Melton*, *supra*, at pp. 744-745.)

Appellant's reliance on *Melton* is unavailing. This Court in *Melton* recognized that "[a] lay witness is occasionally permitted to express an ultimate opinion based on his perception, but only where 'helpful to a clear understanding of his testimony' ([Evid. Code], § 800, subd. (b))." (*People v. Melton*, *supra*, 44 Cal.3d at p. 744.) In finding Carpenter's testimony inadmissible, this Court implicitly found that it did not fit within the parameters of Evidence Code section 800. This conclusion was undoubtedly driven by the fact that Carpenter had no personal knowledge of the facts; once Carpenter had given detailed descriptions of his interviews with Boyd, the jury was in as good a position as Carpenter to assess Boyd's credibility. In the case at bar, by contrast, no testimony by Rewerts could have left the jury in as good a position as Rewerts to assess whether appellant would have told him if Mr. Brens had in fact molested him. Rewerts could – and did – inform the jury how long he and appellant had been best friends, that they had discussed with one another their sexual desires and sexual experiences, and that they had on one occasion engaged in sexual activity with one another. (See 21 RT 4916-4923.) Such a recitation of historical facts, however, could not serve to fully convey to the jury the nature of their relationship and what intimate information appellant was and was not likely to share with Rewerts.

Thus, the trial court properly admitted Rewerts's testimony that, in his opinion, appellant would have told him that Mr. Brens had molested him if in fact Mr. Brens had done so. Even assuming for the sake of argument the testimony was erroneously admitted, though, the error was harmless.

Generally, a judgment will not be set aside on the ground of the improper admission of evidence "unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." (Cal. Const., art. VI, § 13; see also Evid. Code, § 353.) A miscarriage of justice occurs when an examination of the entire record indicates a reasonable probability a more favorable result to the appealing party would have been reached in the absence of the error. (*People v. Watson*, *supra*, 46 Cal.2d at pp. 836-837.) However, admission of evidence that violates a defendant's constitutional rights requires reversal unless the admission of such evidence was harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 36.)

As noted *ante*, appellant argues that the erroneous admission of Rewerts's testimony resulted in a reduction in the prosecution's burden of proof and a violation of his federal constitutional rights to due process, a trial by jury, and reliable guilt, sanity, and penalty verdicts. (AOB 408-412.) Even assuming that any error violated appellant's constitutional rights, the error was harmless beyond a reasonable doubt.

Rewerts's guilt-phase testimony that, in his opinion, appellant would have told him that Mr. Brens had molested him if in fact Mr. Brens had done so was countered by the expert testimony of Dr. Rubinstein. Specifically, Dr. Rubinstein testified that it would not be unusual if appellant had not told

Rewerts about the acts of molestation.[131] (20 RT 4821.) Moreover, Dr. Rubinstein testified on cross-examination that her diagnoses would "change . . . not at all" if the molestations in fact had not occurred. (20 RT 4818.) Furthermore, as appellant acknowledges (AOB 410-411), the prosecution did not rely in any part on Rewerts's opinion testimony in arguing its case to the jury. (See 21 RT 5082-5094; 22 RT 5143-5163.) In addition, the trial court instructed the jury as follows:

> In determining the weight to be given to an opinion expressed by any witness who did not testify as an expert witness, you should consider his or her credibility, the extent of his or her opportunity to perceive the matters upon which his or her opinion is based and the reasons, if any, for it.
>
> You are not required to accept such an opinion, but should give it the weight, if any, to which you find it entitled.

(22 RT 5192.) For all of these reasons, any error in the admission of Rewerts's opinion testimony was harmless beyond a reasonable doubt with respect to the verdicts of guilt.

Turning to the potential for prejudice during the sanity phase, Dr. Groesbeck testified on appellant's behalf that, even if told Mr. Brens had in fact not molested appellant, his diagnoses of appellant would be unaffected. (22 RT 5349.) Furthermore, the prosecution again did not rely in any part on Rewerts's opinion testimony in arguing its case to the jury; in fact, the prosecution did not

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131. In the portion of his argument pertaining to the trial court's failure to instruct on accomplice testimony, appellant seems to suggest that a properly instructed jury would have rejected Rewerts's testimony that appellant did not tell him that Mr. Brens had molested him. (See AOB 400-401.) Even if this Court were to accept the "dubious proposition" that corroboration was required on this specific matter (see *People v. Boyer, supra*, 38 Cal.4th at p. 468, fn. 38), Dr. Rubinstein's testimony corroborated Rewerts's testimony in this regard. This is so even though Dr. Rubinstein and Rewerts had contrasting opinions as to whether, if in fact Mr. Brens had molested appellant, appellant would have revealed that fact to Rewerts.

so much as broach the topic of whether or not the molestations had occurred in its argument.[132/] (See 23 RT 5668-5673.) Any error in the admission of Rewerts's opinion testimony was harmless beyond a reasonable doubt with respect to the jury's finding that appellant was sane at the time he committed his crimes.

Turning lastly to the penalty phase, appellant explained to the jury on cross-examination why he had not told Rewerts's about the molestations. (24 RT 5901.) Specifically, he testified: "I – I didn't tell anybody about it. I wasn't going to. That was something I was going to take up to Lindhurst probably when I got shot and was going to die with me." (24 RT 5901.) In addition, the prosecution once again did not rely in any part on Rewerts's opinion testimony in arguing its case to the jury. (See 24 RT 5956-5961, 5967-5974, 5989-5991.) Any error in the admission of the testimony was harmless beyond a reasonable doubt with respect to the jury's determination that the penalty shall be death.

In sum, appellant forfeited his claim that the trial court improperly admitted Rewerts's testimony that, in his opinion, appellant would have told him that Mr. Brens had molested him if in fact Mr. Brens had done so. Even if not forfeited, the claim lacks merit as Rewerts's testimony was properly admitted. And even assuming the testimony was erroneously admitted, the error was harmless.

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132. Moreover, one of the prosecution's two expert witnesses on the question of sanity, Dr. Thompson, testified on cross-examination that he believed appellant's disclosure to him that Mr. Brens had molested him. (22 RT 5458.)

VIII.

THE TRIAL JUDGE IN NO WAY EXPRESSED TO THE JURY THAT HE HELD A "SCORNFUL" OPINION OF MENTAL HEALTH TESTIMONY

Appellant contends that the trial judge "fatally poisoned" all three phases of the jury trial proceedings by stating his alleged "scornful" opinion of mental health testimony during the guilt-phase testimony of defense expert Dr. Helaine Rubinstein. (AOB 413-431.) He urges: "The trial judge's disparagement of the defense expert and the trial judge's comments had the effect of undermining the defense case, violating the right to counsel, to compulsory process and the right to a jury trial, and rendered the trial fundamentally unfair and unreliable" in violation of his rights under the United States Constitution. (AOB 417; see also AOB 418.) He further alleges: "The judge's unfair and biased comments violated Defendant's due process rights." (AOB 418.) Appellant's argument must fail as the trial judge did not express to the jury a "scornful" opinion of mental health testimony.

A. Relevant Remarks

Dr. Helaine Rubinstein testified for the defense during the guilt phase of appellant's trial. (3 CT 839-841.) The following exchange took place during direct examination of Dr. Rubinstein by defense counsel:

> Q. You were asked yesterday about the relative number of criminal cases that you had examined or patients that you had examined as opposed to non-criminal cases.
>
> Does that – is that significant or is it for your purposes a matter of a brain is a brain is a brain?
>
> A. A brain is a brain is a brain. I don't believe a heart surgeon needs to know whether his patient has been accused of a crime or not to perform the procedures that he's been trained to perform.

THE COURT: *Is that Gertrude Rubinstein?*

I'm sorry. Go ahead with your answer, Doctor.

(20 RT 4722-4723, italics added.)

Subsequently during direct examination, the following exchange took place:

> Q. There is oft times a criticism of psychiatry and psychology that contends that psychology and psychiatry is nothing more than Freud and Freud is nothing more than saying people have problems because they hate their mother or their father.
>
> You may have heard that in different forms. How do you respond to that?
>
> [PROSECUTOR]: Your Honor, I'm going to object to the question. It's leading. Quite frankly as far as I can tell is leading.
>
> THE COURT: Well, I'm going to overrule the objection. It is proper to ask an expert a leading question. And I think it's an understandable question. *It's really all the psychology stuff is mumbo jumbo stuff.*
>
> Would you please answer the question.

(20 RT 4724-4725, italics added.)

B. Analysis

As an initial matter, appellant forfeited his claim of judicial misconduct with respect to the two remarks in question by failing to object to the remarks and request admonitions to the jury. (*People v. Sturm* (2006) 37 Cal.4th 1218, 1237; *People v. Melton*, *supra*, 44 Cal.3d at p. 753.) Appellant attempts to avoid this result by arguing that no post-remark admonitions could have cured the prejudicial effect of the trial judge's remarks. (AOB 429-431; see *People v. Sturm*, *supra*, at p. 1237 ["[A] defendant's failure to object does not preclude review 'when an objection and an admonition could not cure the prejudice caused by' such misconduct, or when objecting would be futile."].) He urges that any objection and request for admonition would only have highlighted the

fact that the trial judge – the central figure in the courtroom – held a scornful opinion of mental health testimony. (AOB 429.) Respondent disagrees with appellant's assessment that the trial judge's brief and isolated remarks were of such a nature that, to the extent they were improper, admonitions could not have cured any prejudice. This is especially true given that, as will be explained *post*, it is unlikely the remarks conveyed to the jury a sense that the trial judge held any sort of "scornful" opinion of mental health testimony.[133]

Turning to the merits of appellant's argument, appellant urges that by the trial judge's first remark ("Is that Gertrude Rubinstein?"), the trial judge "disparaged Dr. Rubinstein by associating her with the avant-garde poet and bohemian Gertrude Stein." (AOB 414-415.) He asserts that the judge's remark "unfortunately implied that Dr. Rubinstein would be talking gibberish or deliberately attempting to confuse." (AOB 419.) Appellant's argument is

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133. Appellant cites to *People v. Mahoney* (1927) 201 Cal. 618 and argues that "[i]n *Mahoney* the Court found far more oblique comments than those in the present case fatal to the judgment despite the lack of objection." (AOB 430.) What appellant overlooks, however, is that at issue in *Mahoney* were "*twenty-three* utterances by the trial judge and numerous instances where he took to himself the task of examining witnesses, which, [defendant] says, conveyed to the mind of the jury the impression that the judge was convinced of the guilt of the defendant and that his sympathy was wholly with the prosecution." (*People v. Mahoney, supra*, at pp. 621-622, italics added.) It was in that context that this Court in *Mahoney* found that an effort to prevent and correct the errors when they occurred would have been "entirely fruitless; no retraction sufficient to undo the harm; and the effort made might result in further error." (*Id.* at p. 622.) This Court also observed that, in *Mahoney*, it was "evident from the attitude of the trial judge, as shown by the record, that any assignment of misconduct would have been disregarded. Counsel for [defendant], by making an assignment [of error], would have brought upon himself further attack." (*Ibid.*) The case at bar is clearly distinguishable from *Mahoney*. At issue in the case at bar are two remarks made by the trial judge, not 23 as was the situation in *Mahoney*. In addition, the record in the case at bar, unlike in *Mahoney*, does not evince that the trial judge's attitude was such that any objection would have been disregarded.

untenable.

As this Court has stated: "Well-conceived judicial humor can be a welcome relief during a long, tense trial. Obviously, however, the court should refrain from joking remarks which the jury might interpret as denigrating a particular party or his attorney." (*People v. Melton*, *supra*, 44 Cal.3d at pp. 753-754.)

There was no reasonable likelihood the jury might interpret the trial judge's play on Dr. Rubinstein's name as denigrating either her personally or the defense in general. Appellant takes great pains to educate this Court as to the public perception of Gertrude Stein. (See AOB 419-421 & fns. 90-91.) Notably, however, appellant makes no mention of the fact that Gertrude Stein was the author of the sentence "Rose is a rose is a rose is a rose." According to Wikipedia, Gertrude Stein wrote that sentence

> as part of the 1913 poem *Sacred Emily*, which appeared in the 1922 book *Geography and Plays*. . . . Stein later used variations on the phrase in other writings, and ***"A rose is a rose is a rose"*** is probably her most famous quote, often interpreted as "things are what they are."

(http://en.wikipedia.org/wiki/Rose_is_a_rose_is_a_rose_is_a_rose, as last modified on 17 July 2008, at 00:37.)

With that background in mind, it becomes reasonably likely that any member of the jury who (1) was aware that, by jokingly asking Dr. Rubinstein if her name was "Dr. Gertrude Rubinstein," the trial judge was alluding to the poet Gertrude Stein, and (2) was aware of Gertrude Stein's reputation as an "avant-garde poet," (3) would also have been aware that Gertrude Stein was the source of the famous quote "A rose is a rose is a rose." It is also reasonably likely that any such juror would have immediately taken the trial judge's remark for what it was: a play on names given Dr. Rubinstein's testimony that "A brain is a brain is a brain." (20 RT 4722-4733.) By contrast, it is unlikely that a juror with knowledge of Gertrude Stein's reputation and work would have

jumped to the conclusion that, by his joke, the trial judge meant to convey to the jury an opinion that, similar to Gertrude Stein, Dr. Rubinstein should be viewed as an "avant garde" in her profession and her credibility should be scrutinized on that basis.[134/] As such, it is unlikely the jury interpreted the trial judge's play on Dr. Rubinstein's name as denigrating either her personally or the defense in general. (Cf. *People v. Geier* (2007) 41 Cal.4th 555, 614 ["Associating one mitigation witness, Eric Grantham, with a dim-witted fictional character [Forrest Gump] and suggesting that the personal life of Sandra Hoyt, another mitigation witness, was the stuff of tabloid television [*Oprah*] could have been perceived by jurors as derogatory comments on the credibility of those witnesses."].)

In any event, the trial judge's brief, isolated play on Dr. Rubinstein's name, even if improper, "'fall[s] short of the intemperate or biased judicial conduct which warrants reversal.'" (*People v. Geier*, *supra*, 41 Cal.4th at p. 614, quoting *People v. Melton*, *supra*, 44 Cal.3d at p. 754.) Furthermore, the trial judge specifically instructed the jury:

> I have not intended by anything I have said or done, or by any questions that I may have asked, or by any ruling I may have made, to intimate or suggest what you should find to be the facts, or that I believe or disbelieve any witness.
>
> If anything I have said or done has seemed to so indicate, you will disregard it and form your own opinion.

(22 RT 5224.) It is presumed the jurors followed this instruction. (See *People v. Sanchez* (2001) 26 Cal.4th 834, 852.) Finally, as mentioned *ante* in footnote

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134. To the extent there may have been members of the jury (1) who were unaware that, by jokingly asking Dr. Rubinstein if her name was "Dr. Gertrude Rubinstein," the trial judge was alluding to the poet Gertrude Stein, and/or (2) who were unaware of Gertrude Stein's reputation as an "avant-garde poet," those jurors' evaluation of Dr. Rubinstein's credibility could not possibly have been affected by the trial judge's remark.

134, to the extent there were members of the jury who were (1) unaware that, by jokingly asking Dr. Rubinstein if her name was "Dr. Gertrude Rubinstein," the trial judge was alluding to the poet Gertrude Stein, and/or (2) unaware of Gertrude Stein's reputation as an "avant-garde poet," those jurors' evaluation of Dr. Rubinstein's credibility could not possibly have been affected by the trial judge's remark. For all of these reasons, even if the trial judge's remark was improper, it was harmless even under the most stringent beyond-a-reasonable-doubt standard of prejudice. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.)

Turning to the second remark by the trial judge with which appellant takes issue ("It's really all the psychology stuff is mumbo jumbo stuff."), appellant asserts that, by that remark, "the trial judge made a highly dismissive characterization of Dr. Rubinstein's field of practice." (AOB 415.) Specifically, he alleges that, by his "off-hand comment," the judge expressed his opinion that the subject matter of Dr. Rubinstein's expert testimony (i.e., psychology) was "'mumbo-jumbo'" or "unintelligible gibberish." (AOB 421.) Appellant's argument falls flat.

"A 'trial court commits misconduct if it persistently makes discourteous and disparaging remarks to defense counsel so as to discredit the defense or create the impression it is allying itself with the prosecution.'" (*People v. Sturm*, *supra*, 37 Cal.4th at p. 1233, quoting *People v. Carpenter* (1997) 15 Cal.4th 312, 353.) As this Court has explained:

> Jurors rely with great confidence on the fairness of judges, and upon the correctness of their views expressed during trials. (*People v. Mahoney*[, *supra*,] 201 Cal. [at pp.] 626-627.) When "the trial court persists in making discourteous and disparaging remarks to a defendant's counsel and witnesses and utters frequent comment from which the jury may plainly perceive that the testimony of the witnesses is not believed by the judge . . . it has transcended so far beyond the pale of judicial fairness as to render a new trial necessary." (*Id.* at p. 627.)

(*People v. Sturm*, *supra*, at p. 1233, parallel citations omitted.) This Court

"'evaluate[s] the propriety of judicial comment on a case-by-case basis, noting whether the peculiar content and circumstances of the court's remarks deprived the accused of his right to trial by jury.'" (*People v. Sanders* (1995) 11 Cal.4th 475, 531-532, quoting *People v. Rodriquez* (1986) 42 Cal.3d 730, 770.) "'The propriety and prejudicial effect of a particular comment are judged both by its content and by the circumstances in which it was made. [Citation.]'" (*People v. Sanders*, *supra*, at p. 532, quoting *People v. Melton*, *supra*, 44 Cal.3d at p. 735.)

If viewed in a vacuum, the remark at issue ("It's really all the psychology stuff is mumbo jumbo stuff.") could well cause concern that, with it, the trial judge conveyed to the jury a personal disdain for Dr. Rubinstein's field of practice. But viewed in context, it is unmistakable that, with that remark, the trial judge was merely paraphrasing the preceding question posed by defense counsel to Dr. Rubinstein:

> Q. There is oft times a criticism of psychiatry and psychology that contends that psychology and psychiatry is nothing more than Freud and Freud is nothing more than saying people have problems because they hate their mother or their father.
>
> You may have heard that in different forms. How do you respond to that?

(20 RT 4724-4725.) The prosecution objected to this question on the ground that it was leading; the prosecutor added that the question was leading "as far as I can tell," indicating that, to the prosecutor at least, the question was confusing. (20 RT 4725.) The trial judge overruled the prosecution's objection, stating that "[i]t is proper to ask an expert a leading question." (20 RT 4725.) The trial judge at that point added: "And I think it's an understandable question. *It's really all the psychology stuff is mumbo jumbo stuff.*" (20 RT 4725, italics added.) In this context, no reasonable juror would have confused the trial judge's remark to be an indication that, in his opinion,

the field of psychology is "mumbo jumbo stuff."

In sum, by failing to object to the remarks in question and by not requesting admonitions to the jury, appellant forfeited his related claims of judicial misconduct. In any event, the trial judge's remarks did not convey to the jury a "scornful" opinion of mental health testimony. Appellant's eighth claim on appeal accordingly must fail.

IX.

THE TRIAL COURT CORRECTLY STATED THE LAW REGARDING INSANITY IN INSTRUCTING THE JURY AT THE SANITY PHASE

Appellant argues that he was denied the right to present a defense – and a litany of other constitutional rights – due to the trial court allegedly misinstructing the jury on the law regarding insanity. (AOB 431-450.) He asserts first that the trial court "erroneously told the jury that, in order to be found legally insane, Defendant was required to prove that he was unable to understand the difference 'between right and wrong,' rather than whether *his conduct* was wrong." (AOB 432; see also AOB 433-434.) He also states that, "although . . . the evidence adduced in the guilt and sanity phases showed that Defendant suffered from a plethora of mental defects and diseases . . . , the jury was instructed that they needed to find that Defendant's incapacity resulted from *either* a mental disease '*or*' a mental defect, rather than allowing consideration of evidence that his incapacity was the result of a *combination* of the diseases and defects presented in the evidentiary record." (AOB 432; see also AOB 444-446.) Appellant's argument is without merit. The trial court correctly stated the law regarding insanity in instructing the jury at the sanity phase.

A. Procedural Background

On July 27, 1993, at the commencement of the trial on the sanity phase of appellant's case, the court pre-instructed the jury that the question before it was whether appellant "as a result of mental disease or defect was incapable of knowing or understanding the nature and quality of his acts or incapable of distinguishing right from wrong at the time of the commission of the crime." (22 RT 5321.) The court informed the jury, however, that it was not to

substitute the pre-instruction for the formal legal instructions it would subsequently be giving them. (22 RT 5321.) Defense counsel approved of the court's pre-instruction. (See 22 RT 5320-5321.)

Later that same day, after the defense had presented the testimony of Dr. Groesbeck, the court discussed with counsel the matter of what instructions it would be giving the jury and the number of verdict forms. (See 22 RT 5397-5402.) The court stated it would put the instructions together in draft form for counsels' review (as it had done in the guilt phase). (22 RT 5402.)

On July 29, 1993, at the close of evidence, a jury instruction conference was held. (4 CT 1151; 23 RT 5604-5612.) Defense counsel was provided with a copy of the first draft of jury instructions. (23 RT 5604-5605.) One of the two attorneys for appellant (Mr. Braccia) stated he believed the draft instructions were "fine." (23 RT 5605.) The other (Mr. Macias) expressed some concern over CALJIC No. 4.05 and, specifically, whether an instruction on irresistible impulse was applicable. (23 RT 5605-5607.) He then stated: "As to the others, we have no objection. I believe we have already agreed or reviewed all of those." (23 RT 5607.) The court thereafter stated that it would be giving two instructions proposed by the defense, to read as follows:

> "Wrong refers to both legal wrong and moral wrong. Wrong in the sanity phase of a trial means the violation of generally accepted standards of moral obligation. A defendant who could comprehend that his act was unlawful but was incapable of understanding that his act was morally wrong could be legally insane."

(23 RT 5608.)

On August 9, 1993, the court again asked whether counsel were satisfied with the proposed jury instructions. (23 RT 5618-5619.) Defense counsel raised two issues. First, counsel asked that the court instruct the jury pursuant to CALJIC No. 17.40 as to the duty of each individual juror to deliberate. (23 RT 5619-5620.) Second, counsel asked that the court modify the defense's

second proposed instruction so that it ended with the words "was morally wrong is legally insane" rather than "was morally wrong could be legally insane." (23 RT 5620.) The court ultimately proposed that it, in accordance with the defense's proposed instructions, it instruct the jury as follows:

> How about having it say, quote, wrong, unquote, refers to both – refers both to legal wrong and moral wrong. Quote, wrong, unquote, in the sanity phase of a trial means the violation of generally accepted standards of moral obligation. Paragraph. A person who understands that his act is against the law but is incapable of distinguishing whether it is morally right or wrong is legally insane.

(23 RT 5621.) Defense counsel responded: "That's fine." (23 RT 5621.) Defense counsel thereafter reiterated that the defense was "fine" with, and had no objection to, the instructions in their final form. (23 RT 5622.)

The court ultimately instructed the jury on the defense of insanity pursuant to CALJIC No. 4.00, the standard instruction on the insanity defense, in pertinent part as follows:

> A person is legally insane when by reason of a mental disease or mental defect he was incapable of knowing or understanding the nature and quality of his act or incapable of distinguishing right from wrong at the time of the commission of the crime.

(23 RT 5680-5681; see also 4 CT 1152.)[135/] In accordance with the defense's

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135. At the time of appellant's trial, CALJIC No. 4.00 read in pertinent part:

> A person is legally insane when by reason of mental disease or mental defect [he] [she] was incapable of knowing or understanding the nature and quality of [his] [her] act or incapable of distinguishing right from wrong at the time of the commission of the crime.

(CALJIC No. 4.00 (5th ed. 1988).) The instruction given in the case at bar differed from the standard instruction only by the addition of the word "a" before the phrase "mental disease or mental defect." (4 CT 1152; 23 RT 5680-5681.)

proposed instructions, the court instructed the jury on the definition of "wrong" as follows:

> Wrong refers both to legal wrong and moral wrong. Wrong in the sanity phase of a trial means the violation of generally accepted standards of moral obligation. A person who understands that his act is against the law but is incapable of distinguishing whether it is morally right or morally wrong is legally insane.

(23 RT 5681; see also 4 CT 1154.)

B. Analysis

In arguing that the trial court misinstructed the jury on the law regarding insanity, appellant asserts first that the court "erroneously told the jury that, in order to be found legally insane, Defendant was required to prove that he was unable to understand the difference 'between right and wrong,' rather than whether *his conduct* was wrong." (AOB 432; see also AOB 433-434, citing, e.g., *Clark v. Arizona* (2006) 548 U.S. 735, 747 [test for moral incapacity under *M'Naghten's Case* (1843) 10 Clark & Fin. 200 [8 Eng. Rep. 718] is "whether a mental disease or defect leaves a defendant unable to understand that his action is wrong"]; *People v. Skinner* (1985) 39 Cal.3d 765, 780-782 [under California formulation of *M'Naghten* test, insanity defense applies to person who, because of mental illness, is incapable of appreciating that his conduct is wrong].) In support appellant argues:

> If the jury believed that although Defendant did not realize that his actual shooting of people was wrong, he *could* "distinguish between right and wrong" in the abstract, then under the instruction as given, the jury would have been compelled to conclude that he was sane.

(AOB 436.) This Court rejected the same claim in *People v. Jablonski* (2006) 37 Cal.4th 774.

At issue in *Jablonski* was the following instruction, which, like the instruction in the case at bar, was in the language of CALJIC No. 4.00: "'A

person is legally insane when by reason of mental disease or mental defect he was incapable of knowing or understanding the nature and quality of his act or incapable of distinguishing right from wrong at the time of the commission of the crime.'" (*People v. Jablonski, supra*, 37 Cal.4th at pp. 830-831.) Defendant argued on appeal that the instruction misstated the *M'Naghten* test for legal insanity, from which it was derived, because it failed "to inform the jury that a defendant's incapacity to distinguish right from wrong at the commission of the crime must be in relation to that act, and not a general inability to do so." (*Id.* at p. 831, citing *People v. Kelly* (1973) 10 Cal.3d 565, 574.) This Court rejected defendant's claim as follows:

> In assessing a claim of instructional error, "we must view a challenged portion 'in the context of the instructions as a whole and the trial record' to determine '"whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way" that violates the Constitution.'" (*People v. Reliford* (2003) 29 Cal.4th 1007, 1013, quoting *Estelle v. McGuire* [(1991)] 502 U.S. [62,] 72.) Here, immediately before the jury was given CALJIC No. 4.00, it was instructed that "You may consider evidence of [defendant's] mental condition before, during, and after the time of the commission of the crime as tending to show the defendant's mental condition *at the time the crime was committed.*"[136] Immediately following the giving of CALJIC No. 4.00, the jury was additionally instructed: "In determining if the defendant was capable of distinguishing right from wrong, the term 'wrong' refers to both legal wrong and moral wrong. If *during the commission of the crime* the defendant was incapable of understanding that his act was morally wrong or was incapable of understanding that his act was unlawful, then he is not criminally liable." Even if we assume that defendant's strained reading of CALJIC No. 4.00 is plausible, any ambiguity in that instruction is resolved when it is considered in context of these further instructions because they clearly

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136. As in *Jablonski*, the jury in the case at bar was instructed that it "may consider evidence that of [*sic*] [appellant's] mental condition before, during, and after the time of the commission of the crime as tending to show [appellant's] mental condition at the time the crimes were committed." (23 RT 5680; see also 4 CT 1152.)

> focus the jury's attention on defendant's capacity to distinguish right from wrong at the time of the commission of the crimes. We therefore reject defendant's claim of instructional error.

(*People v. Jablonski*, *supra*, at pp. 831-832, parallel citations omitted.)

Appellant acknowledges that this Court's decision in *Jablonski* runs counter to his argument. (AOB 438-439.) He urges, however, that *Jablonski* "should be reconsidered." (AOB 439.) He alleges:

> [T]he *Jablonski* court did not actually address the problem with CALJIC No. 4.00 identified in that case and in the instant case. Defendant does not contend that the instructions at his trial failed to focus the jury on *when* his incapacity occurred. The point is that the instruction failed to focus the jury on the *nature* of the incapacity that would justify a verdict of insanity. The question was whether Defendant was unable to recognize that his own conduct was wrong, while he was committing the criminal acts, and not merely whether he could distinguish right from wrong without reference to his own conduct. . . .

(AOB 438, citing *People v. Skinner*, *supra*, 39 Cal.3d at p. 779.)

Respondent disagrees with appellant's assessment that, in *Jablonski*, this Court neglected to address the crux of the defendant's claim: whether CALJIC No. 4.00 adequately informed the jury that the question before it was whether defendant had the capacity to distinguish right from wrong in relation to his conduct. True, this Court in *Jablonski* specifically focused on those portions of the instructions that conveyed to the jury that at issue was defendant's ability to distinguish right from wrong at the time of the crimes. This, however, is a distinction without difference. A reasonable juror would have understood that, by specifically focusing on defendant's ability to distinguish right from wrong at the time of the crimes, the instructions meant to convey that the issue before the jury was defendant's ability to distinguish right from wrong in relation to the conduct in which he was then engaged (i.e., his criminal conduct). (See *People v. Arias,* supra, 13 Cal.4th at p. 142 [inquiry is how reasonable jury would have understood instructions].) Conversely, a reasonable juror would

not have believed that the jury was being asked to determine whether, at the time of the crimes, defendant was in the abstract able to distinguish right from wrong.

This is particularly true considering the language of CALJIC No. 4.00 in its entirety. The instruction states first that a person is legally insane when, by reason of a mental disease or mental defect, he or she was "incapable of knowing or understanding the nature and quality" of his or her "act." The instruction thereby begins by placing the focus squarely on the defendant's mental condition in relation to his or her conduct. The instruction states next that a person is also legally insane when he or she was "incapable of distinguishing right from wrong at the time of the commission of the crime." A reasonable juror would understand that in this portion of the instruction the focus remains on defendant's mental condition (specifically, his or her ability to distinguish right from wrong) in relation to defendant's criminal conduct.

In any event, in the case at bar, immediately after reading CALJIC No. 4.00 to the jury, the trial court instructed the jury at the defense's request that "[a] person who understands that *his act* is against the law but is incapable of distinguishing whether *it* is morally right or morally wrong is legally insane." (23 RT 5681, italics added; see also 4 CT 1154.) Appellant acknowledges that this "sentence . . . was a correct statement of the law," but he suggests that the instruction was inadequate to cure the problem of which he complains given that, at the time the jury was given this "correct statement of the law," "the jury had already been told that the test for insanity based on moral capacity was whether Defendant was 'incapable of distinguishing right from wrong,' with no reference to his conduct." (AOB 435.) Respondent disagrees and urges instead that, even assuming appellant's "strained reading of CALJIC No. 4.00 is plausible" (*People v. Jablonski*, *supra*, 37 Cal.4th at pp. 831-832), any ambiguity in the instruction is resolved when it is considered in the context of

the instruction given immediately after it. Simply put, viewing CALJIC No. 4.00 in the context of the instructions as a whole, there is no reasonable likelihood that the jury failed to understand that, to justify a verdict of insanity, a defendant's inability to distinguish right from wrong at the time of his crime must be in relation to his conduct.

Turning now to appellant's second basis for arguing that the trial court misstated the law regarding insanity, appellant alleges: "[A]lthough . . . the evidence adduced in the guilt and sanity phases showed that Defendant suffered from a plethora of mental defects and diseases . . . , the jury was instructed that they needed to find that Defendant's incapacity resulted from *either* a mental disease '*or*' a mental defect, rather than allowing consideration of evidence that his incapacity was the result of a *combination* of the diseases and defects presented in the evidentiary record." (AOB 432; see also AOB 444-446.) Appellant raises an argument akin to one which this Court has previously rejected. Namely, in *People v. Kelly* (1992) 1 Cal.4th 495, this Court held:

> Defendant . . . contends that the reference to a "mental disease or mental defect" prevented the jury from considering the effects of both in combination. This is an unreasonable interpretation of the instruction. Although the court did not expressly state the jury could consider both a disease and a defect, it did not prohibit such consideration. No reasonable juror would believe an insanity finding could be based upon a mental defect or upon a mental disease, but not both. If defendant believed the instruction was incomplete or needed elaboration in this regard, it was his responsibility to request an additional or clarifying instruction. (*People* v. *Bell*[, *supra*,] 49 Cal.3d [at p.] 550 [no penalty phase error in referring to "mental disease" without also referring to "mental defect"].)

(*People v. Kelly*, *supra*, at pp. 535-536, parallel citations omitted.)

Appellant does not acknowledge this Court's holding in *Kelly*, much less explain why the reasoning is not dispositive of his claim. Respondent urges that the reasoning in *Kelly* does in fact dispose of appellant's claim. Despite the

reference to "a mental disease or mental defect" (4 CT 1152; 23 RT 5680-5681), no reasonable juror would have interpreted the insanity instruction given in this case to mean that an insanity finding could be based upon a mental defect or upon a mental disease, but not both. Nor would a reasonable juror have interpreted the instruction to mean that an insanity finding could only be based upon a single defect or disease (in contrast to a combination of defects or diseases). Accordingly, appellant's claim must fail.

X.

THE PROSECUTOR DID NOT COMMIT PROSECUTORIAL MISCONDUCT BY REFERRING TO APPELLANT'S LACK OF REMORSE DURING HIS GUILT PHASE AND PENALTY PHASE CLOSING ARGUMENTS TO THE JURY

Appellant contends that the prosecutor committed prejudicial misconduct when he commented on appellant's lack of remorse during his guilt phase and penalty phase closing arguments. (AOB 450-459.) Appellant's argument is unavailing. By failing to object at trial to the comments at issue, appellant forfeited his right to challenge them on appeal. In any event, the prosecutor did not commit prosecutorial misconduct.

A. The Law Regarding Prosecutorial Misconduct

This Court has summarized the law regarding prosecutorial misconduct as follows:

> "The applicable federal and state standards regarding prosecutorial misconduct are well established. '"A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct so 'egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.'" [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves '"'the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.'"' [Citation.]

(*People v. Navarette* (2003) 30 Cal.4th 458, 506.)

B. Analysis Of Guilt Phase Argument

In his closing argument during the guilt phase of appellant's case, the prosecutor responded to the defense's closing argument in pertinent part as follows:

> And if you've noticed throughout this trial, during defense counsel's opening statement and during their argument, the defendant cried. But when we talked about Bob Brens, and Judy Davis, and Jason White, and John Kaze, and Sergio Martinez, and Wayne Boggess, and Beamon Hill, or Patti Collazo, or Mireya Yanez, or Jose Rodriguez. There was no emotion. Because all Eric Houston cares about is Eric Houston. . . .

(22 RT 5160.)

Appellant urges that, by this argument, the prosecutor "necessarily focused the jury's attention on the failure of Defendant to testify at guilt [*sic*]." (AOB 452.) He argues that, as a result, his constitutional right not to incriminate himself was violated. (AOB 451; see also AOB 453-455.) He argues further that the prosecutor's reference to his courtroom demeanor violated his due process right to have his guilt or innocence determined solely on the basis of evidence adduced at trial and, as a result, his due process right to a fair and reliable determination of guilt in a capital case was violated. (AOB 451; see also AOB 453-455.) Appellant's argument is untenable.

As an initial matter, appellant did not object to the prosecutor's argument. (See 22 RT 5160.) His claim of prosecutorial misconduct was thus not preserved for appeal. (See *People v. Rundle*, *supra*, 43 Cal.4th at p. 161; see also *People v. Pinholster* (1992) 1 Cal.4th 865, 941-942 [as a general rule, defendant cannot complain on appeal of misconduct by prosecutor unless in a timely fashion he objected and requested that the jury be admonished to disregard the impropriety].)

In any event, appellant's claim fails on its merits. This Court has held: "[C]omment during the guilt phase of a capital trial on a defendant's courtroom demeanor is improper unless such comment is simply that the jury should ignore a defendant's demeanor." (*People v. Boyette* (2002) 29 Cal.4th 381, 434, citations omitted.) Thus, to the extent that, by his argument, the prosecutor urged the jury to ignore the tears appellant had shed during defense counsel's

opening statement and closing argument, the argument was proper. (See *People v. Price* (1991) 1 Cal.4th 324, 454 ["The prosecutor's remark did not urge the jury to draw any adverse inference from defendant's courtroom behavior. On the contrary, it advised the jury, in effect, to ignore defendant's courtroom demeanor and to determine his guilt or innocence on the basis of the evidence. The comment was not improper."].)

To the extent the prosecutor commented on appellant's lack of emotion during the prosecution's discussion of the victims, that brief remark, even if improper, did not rise to the level of prosecutorial misconduct under either the federal or state standard. Appellant does not suggest the remark was anything more than an isolated comment, much less part of a pattern of egregious conduct that infected his trial with such unfairness as to deny him due process. (*People v. Navarette*, *supra*, 30 Cal.4th at p. 506.) In addition, nothing in the record suggests the prosecutor used the remarks in a deceptive or reprehensible attempt to persuade the jury of appellant's guilt so as to violate state law. (*Ibid.*)

With respect to appellant's claim that the prosecutor's argument violated his right not to incriminate himself (AOB 451-452), this Court has summarized the relevant principles of law as follows:

> The Fifth Amendment to the United States Constitution prohibits a prosecutor from commenting on a criminal defendant's invocation of his constitutional right to remain silent in the face of criminal charges. (*Griffin v. California* (1965) 380 U.S. 609 (*Griffin*).) At the guilt phase of a trial, "[d]irecting a jury's attention to a defendant's failure to testify at trial runs the risk of inviting the jury to consider the defendant's silence as evidence of guilt." (*People v. Lewis*[, *supra*,] 25 Cal.4th [at p.] 670.) . . .

(*People v. Boyette*, *supra*, 29 Cal.4th at p. 453, parallel citations omitted.)

Here, in commenting on appellant's lack of emotion, the prosecutor did not refer to appellant's failure to testify.[137] (See 22 RT 5160.) Thus, appellant's related claim of misconduct must fail.[138] (See *People v. Combs* (2004) 34 Cal.4th 821, 866-867 [prosecutor argued during penalty phase closing argument that jury could consider that defendant had not shown any remorse for murder; remarks were proper as they did not call attention, either directly or indirectly, to defendant's failure to testify]; *People v. Boyette, supra*, 29 Cal.4th at p. 455 [prosecutor's penalty phase argument that facts of case failed to show defendant exhibited any remorse was permissible as she did not refer to defendant's failure to testify]; cf. *People v. Boyette, supra*, at p. 454 [at different point in penalty phase closing argument, prosecutor argued that defendant's prior convictions would assist jury in assessing defendant's credibility "'if he were to – somehow, God forbid take the stand and say he was sorry, which you didn't see'"; prosecutor's argument ran afoul of the rule prohibiting a prosecutor from urging that the defendant should have testified at

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137. Appellant urges that, "[b]y characterizing Defendant's non-testimonial behavior as inconsistent with feelings of compassion or remorse for his victims, the prosecutor was directly implying that Defendant had lied to the [defense] experts [and to the students who had testified that appellant had expressed concern for the victims] but would not take the stand to say the same things to the jury directly." (AOB 453-454.) Respondent counters that it is not reasonably likely the jury understood the prosecutor's comments in the manner described by appellant. Specifically, it is not reasonably likely the jury would have interpreted the prosecutor's comment on appellant's in-court displays of emotion (or lack thereof) as a reference to the fact that appellant had not testified in his defense. (See *People v. Ayala* (2000) 24 Cal.4th 243, 288 ["'When we review a claim of prosecutorial remarks constituting misconduct, we examine whether there is a reasonable likelihood that the jury would have understood the remark to cause the mischief complained of.'"].)

138. Appellant's claim fails for another reason as well. Appellant did not object below on the ground of *Griffin* error and thus the claim was not preserved for appeal. (See *People v. Turner* (2004) 34 Cal.4th 406, 421.)

penalty phase to express remorse].)

Finally, insofar as appellant argues that the prosecutor's reference to his courtroom demeanor violated his due process right to have his guilt or innocence determined solely on the basis of evidence adduced at trial (AOB 451), appellant's claim for relief falls flat on that basis as well. To the extent the prosecutor's comment on appellant's lack of emotion was improper, it was an impropriety akin to the admission of inadmissible evidence that casts a defendant's character in a negative light. As such, any error was not of a constitutional magnitude, and the question is whether a more favorable verdict was reasonably probable absent the error. (*People v. Watson*, *supra*, 46 Cal.2d at p. 836; see *People v. Garcia* (1984) 160 Cal.App.3d 82, 93 & fn. 12.) Even assessing the error under the more stringent federal standard (*Chapman v. California*, *supra*, 386 U.S. at p. 36), however, it would be unreasonable to conclude that the prosecutor's brief and isolated reference to appellant's lack of emotion had any effect on the verdict in this case. As appellant himself suggests (AOB 455), the jury was able to observe appellant's courtroom demeanor for itself and draw its own conclusions therefrom. Perhaps more importantly, before counsel argued their cases to the jury, the court advised the jury that "the attorneys aren't witnesses in this case. What they say isn't evidence, and so their arguments are not part of the evidence . . . ." (21 RT 5080.) Also, the court subsequently instructed the jury as follows pursuant to CALJIC No. 1.02: "Statements made by the attorney during the trial are not evidence . . . ." (22 RT 5181; see also 4 CT 868.) It is presumed the jury followed this instruction. (See *People v. Sanchez*, *supra*, 26 Cal.4th at p. 852.)

For all of these reasons, appellant's claim for relief based on the prosecutor's guilt phase argument must fail.

C. Analysis Of Penalty Phase Argument

Turning to the penalty phase, appellant testified on his own behalf during that phase of the trial. (5 CT 1192.) On direct examination, defense counsel (Mr. Braccia) asked appellant the following series of questions, and appellant gave the following answers:

> Q And throughout this trial, your actions – the deaths of these people, children who have been shot, Mr. Martinez taking the witness stand – and throughout that entire period of time, there's been almost virtually no emotional reaction from you throughout this entire trial. Can you tell us why?
>
> A (Shakes head.) I don't know why.
>
> Q Okay.
>
> A I'm not – I don't think I can comprehend it, what's happened. I mean it was two or three seconds of something I don't remember. I can remember the hostage part, but I cannot remember hurting anybody, shooting anybody.
>
> Q When Mr. Macias [defense counsel] gave his opening statements and talked about the molest of Mr. Brens, you cried during that period of time.
>
> A Right.
>
> Q During both Mr. Macias' closing argument and my closing argument in the guilt phase, you cried. The logical conclusion to that is the only person you care about is Eric Houston?
>
> A (Shakes head.)
>
> Q Can you tell these twelve people and this court why they shouldn't think the only person you care about is Eric Houston?
>
> A That's wrong.
>
> Q Okay, why is it wrong? Do you feel emotions when you're not in this courtroom about what you've done and what's happened?
>
> A Every day. Every day that's all I ever think about. What if I did this, what if I did that, what if I didn't have a gun, or –
>
> Q Okay, when you go back to your cell, you feel things that you

don't express here?

A Yeah.

Q Like what?

A Thinking about what they have to go through, the parents of the kids that are deceased, that hurts.

Q When you say it hurts, how badly does it hurt?

A Can't put words on it.

(24 RT 5887-5889.) Appellant went on to state that he was sorry for what he had done on May 1, 1992, at Lindhurst High School; he was sorry for what he had done to the victims' families; he was sorry for what he had done "[t]o the children"; and he was sorry "[t]o Sergio Martinez who gets up here and testifies he has to pull his arm back." (24 RT 5889-5890.)

On August 12, 1993, the prosecutor gave his first argument with respect to the penalty phase. The prosecutor argued in pertinent part as follows:

> And Eric Christopher Houston would like you to have sympathy for him. He didn't show very much sympathy for the people who were in Building C on May the 1st, 1992.
>
> As a matter of fact he has shown absolutely no remorse during this entire trial as to what happened to those kids and teachers at Lindhurst High School on May the 1st, 1992. Not even when he took the stand yesterday and was given the opportunity did he show any real remorse. Any real I'm sorry for what I did type attitude.

(24 RT 5957.) Later in his argument, the prosecutor asserted:

> And to this day, [appellant] has not shown any remorse for any one of those individuals who were injured on May the 1st, 1992. He has not shown any emotion about their loss of life. His whole concentration has been on Eric Houston and Eric Houston's family.
>
> If you remember Edith Houston, when she testified yesterday, stated or was asked if Mr. Houston had ever talked about the victims, and her answer was he was just sorry for what he did to the family.

(24 RT 5971.)

Appellant contends that, by these remarks, the prosecutor improperly argued evidence of appellant's lack of remorse as a non-statutory aggravating factor and, as a result, his death sentence is unconstitutional. (AOB 455-459.) Appellant's argument is without merit.

Initially, appellant did not object to the complained-of remarks or seek an admonition to the jury to disregard them. (See 24 RT 5957, 5971.) He is thus precluded from challenging them on appeal. (See *People v. Hinton* (2006) 37 Cal.4th 839, 908; *People v. Boyette*, *supra*, 29 Cal.4th at p. 456, fn. 16; *People v. Lewis*, *supra*, 25 Cal.4th at p. 673.)

Appellant fares no better on the merits. This Court has consistently held that the absence of remorse is a factor that is relevant to the jury's determination of penalty. (See, e.g., *People v. Bonilla* (2007) 41 Cal.4th 313, 356; *People v. Hinton*, *supra*, 37 Cal.4th at p. 907; *People v. Combs*, *supra*, 34 Cal.4th at p. 866; *People v. Lewis*, *supra*, 25 Cal.4th at p. 673.) "'A prosecutor may properly comment on a defendant's lack of remorse, as relevant to the question of whether remorse is present as a mitigating circumstance, so long as the prosecutor does not suggest that lack of remorse is an aggravating factor. [Citations.]'" (*People v. Combs*, *supra*, at p. 866, quoting *People v. Mendoza* (2000) 24 Cal.4th 130, 187; see also *People v. Bonilla*, *supra*, at p. 356; *People v. Cook* (2006) 39 Cal.4th 566, 611; *People v. Hinton*, *supra*, pp. 907-908; *People v. Boyette*, *supra*, 29 Cal.4th at p. 456, fn. 16.)

Here, no reasonable juror would have construed the prosecutor's comments as suggesting that lack of remorse is an aggravating factor. The prosecutor certainly did not use the words "aggravating factor" in conjunction with his discussion of appellant's lack of remorse. (See 24 RT 5957, 5971; cf. *People v. Keenan* (1988) 46 Cal.3d 478, 508, 510 [prosecutor explicitly, and improperly, argued that defendant's lack of remorse was an aggravating factor].) Perhaps more importantly, when the prosecutor went on to explicitly

argue that the circumstances in aggravation outweighed those in mitigation, the prosecutor cited a single factor in aggravation: the circumstances of the crime. (See 24 RT 5973-5974 ["We submit to you ladies and gentlemen that the scope of this crime, the enormity of this crime and the effect it has on the victims and the families is so significant that the only appropriate penalty in this case is death . . . ."]; 24 RT 5990-5991 ["The gravity of his crime is so great that even if you take whatever emotional problems he was undergoing, and obviously people who commit murder have some kind of emotional problems, and if you take his age, the nature of the crime so outweighs those factors that it leaves you very little room to decide that the factors in aggravation outweigh those in mitigation substantially."].) As the prosecutor said nothing to suggest that lack of remorse is an aggravating factor, his argument was proper. (See *People v. Combs*, *supra*, 34 Cal.4th at pp. 866-867 [prosecutor argued during penalty phase closing argument that jury could consider that defendant had not shown any remorse for murder; argument was proper as he "never suggested that the jury should consider defendant's lack of remorse as an aggravating circumstance. He simply reminded the jury that [the victim] had been brutally murdered and argued that, when the jury considered all the evidence, aggravating evidence so substantially outweighed mitigating evidence that the jury could reach only one verdict – death."].)

Appellant's claim for relief based on the prosecutor's penalty phase argument fails for an additional reason as well. Appellant put the issue of remorse in issue at the penalty phase through his own testimony (24 RT 5887-5890) and also through the testimony of his mother (24 RT 5770-5771). The fact that appellant did so left the prosecutor free to address the issue of appellant's remorse (or lack thereof) during argument. (See *People v. Heishman* (1988) 45 Cal.3d 147, 197.)

For all of these reasons, just like his claim for relief based on the prosecutor's guilt phase argument, appellant's claim for relief based on the prosecutor's penalty phase argument must fail.

XI.

CALIFORNIA'S DEATH PENALTY LAW COMPORTS WITH THE UNITED STATES CONSTITUTION

Appellant argues that California's death penalty law, as interpreted by this Court and applied at his trial, violates the United States Constitution. (AOB 459-504.) In so arguing, appellant reiterates numerous constitutional challenges to the law – all of which this Court has repeatedly rejected and should reject again.

A. California's Death Penalty Law Adequately Narrows The Class Of Death-Eligible Defendants

Appellant argues first that California's death penalty law fails to "genuinely narrow, by rational and objective criteria, the class of murderers eligible for the death penalty." (AOB 462.) He urges that this is so because the special circumstances set forth in section 190.2 "are so numerous and so broad in definition as to encompass nearly every first-degree murder." (AOB 462-463.) Appellant argues that, as a result, this Court should strike down the death penalty law as "so all-inclusive as to guarantee the arbitrary imposition of the death penalty in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution and prevailing international law." (AOB 463.) This Court has consistently and repeatedly rejected this same challenge to the death penalty statute. (See, e.g., *People v. Watson* (2008) 43 Cal.4th 652, 703; *People v. Zamudio* (2008) 43 Cal.4th 327, 373; *People v. Prince* (2007) 40 Cal.4th 1179, 1298; *People v. Jablonski*, *supra*, 37 Cal.4th at p. 837; *People v. Stitely* (2005) 35 Cal.4th 514, 573.) Appellant provides no persuasive reason why this Court should reexamine its decision.

B. Section 190.3, Factor (a), Which Directs The Jury To Consider In Determining Penalty "Circumstances Of The Crime," Does Not Result In An Arbitrary Or Capricious Penalty

Determination

Appellant argues next that his death penalty is invalid because section 190.3, factor (a), as applied allows arbitrary and capricious imposition of death and thus violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. (AOB 464-466.) Specifically, he claims that factor (a)

> violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution in that it has been applied in such a wanton and freakish manner that almost all features of every murder, even features squarely at odds with features deemed supportive of death sentences in other cases, have been characterized by prosecutors as "aggravating" within the statute's meaning.

(AOB 464.)

This Court has repeatedly upheld factor (a) against challenges like appellant's. It has squarely held: "Section 190.3, factor (a), is not overbroad, nor does it allow for the arbitrary and capricious imposition of the death penalty. [Citations.]" (*People v. Manriquez* (2005) 37 Cal.4th 547, 589; see also, e.g., *People v. Watson*, *supra*, 43 Cal.4th at p. 703; *People v. Zamudio*, *supra*, 43 Cal.4th at p. 373; *People v. Rundle*, *supra*, 43 Cal.4th at p. 198.) This Court has further observed: "'[A] statutory scheme would violate constitutional limits if it did *not* allow such individualized assessment of the crimes but instead mandated death in specified circumstances. [Citation.]' [Citation.]" (*People v. Harris* (2005) 37 Cal.4th 310, 365, italics added.) Again appellant provides no persuasive reason why this Court should reexamine its decision.

C. California's Death Penalty Law Is Not Unconstitutional For Failing To Require Certain Procedural Safeguards

Appellant argues that California's death penalty law violates the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution in that "there are none of the safeguards common to other death penalty sentencing

schemes to guard against the arbitrary imposition of death." (AOB 466.) Respondent will address each of the alleged procedural deficiencies in turn.

Appellant contends first that his constitutional right to a jury determination beyond a reasonable doubt of all facts essential to the imposition of a penalty of death was violated in that his death verdict was not premised on findings beyond a reasonable doubt by a unanimous jury that one or more aggravating circumstances existed and that those circumstances outweighed mitigating circumstances. (AOB 467-471.) However, as appellant acknowledges (AOB 467-468), in *People v. Fairbank* (1997) 16 Cal.4th 1223 this Court held that "neither the federal nor the state Constitution requires the jury to agree unanimously as to aggravating factors, or to find beyond a reasonable doubt that aggravating factors exist, [or] that they outweigh mitigating factors." (*People v. Fairbank, supra*, at p. 1255; see also *People v. Zamudio, supra*, 43 Cal.4th at p. 373; *People v. Prince, supra*, 40 Cal.4th at p. 1297.)

Appellant argues that this Court's pronouncement in *Fairbank* "has been squarely rejected" by the following United States Supreme Court decisions: *Apprendi v. New Jersey, supra*, 530 U.S. 466 (*Apprendi*); *Ring v. Arizona* (2002) 536 U.S. 584 (*Ring*); *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*); and *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856] (*Cunningham*). (AOB 468.) This Court has repeatedly ruled, however, that the *Apprendi-Ring-Blakely* line of cases – generally requiring "beyond a reasonable doubt" proof for findings of fact that increase the maximum sentence beyond that allowed solely on the basis of the underlying conviction – does not require imposition of a reasonable-doubt burden of proof on the prosecution under the California death penalty scheme. (See, e.g., *People v. Rundle, supra*, 43 Cal.4th at pp. 198-199; *People v. Morrison* (2005) 34 Cal.4th 698, 731; *People v. Prieto* (2003) 30 Cal.4th 226, 263; *People v. Anderson* (2001) 25 Cal.4th 543,

589-590, fn. 14.) This is so because, in California, capital defendants become eligible for the statutory maximum punishment of death only upon proof beyond a reasonable doubt of the charged murder and only upon proof beyond a reasonable doubt of the special-circumstance allegation at the death-sentence "eligibility" phase of the trial.[139] (§ 190.2.) That special-circumstance finding itself qualifies as an aggravating factor that may suffice to support a discretionary decision to sentence the defendant to death at the later sentence-selection phase. (See § 190.3, subd. (a) [in determining penalty, trier of fact shall take into account "the existence of any special circumstances found to be true"].) Under the governing state statutes, then, no further proof of any fact beyond the murder and the special circumstance is required as support for a death sentence. Because appellant's jury under state law was at least authorized to sentence him to death upon proof that he was a special-circumstance murderer – without needing to find any further historical facts beyond those found beyond a reasonable doubt in the guilt and special-circumstance determinations – the jury's sentence fully comported with any *Apprendi-Blakely-Ring* command.

Appellant urges that, in the wake of *Cunningham*, this Court should reconsider its holding that the *Apprendi-Ring-Blakely* line of cases does not require imposition of a reasonable-doubt burden of proof on the prosecution under the California death penalty scheme. (AOB 477.) As this Court has

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139. The Arizona death penalty law at issue in *Ring* is distinguishable from California's death penalty statute. In *Ring*, the factor at the penalty phase which the defendant had a right to have a jury unanimously determine beyond a reasonable doubt was the *eligibility* factor in addition to being a sentencing factor. (*People v. Prieto, supra*, 30 Cal.4th at p. 262.) *Ring* does not affect a California penalty phase because a jury unanimously determines beyond a reasonable doubt, at the guilt phase, that a defendant is eligible for death. (*Id.* at p. 263.)

observed, however, "[t]he *Cunningham* decision involves merely an extension of the *Apprendi* and *Blakely* analyses to California's determinate sentencing law [DSL] and has no apparent application to the state's capital sentencing scheme." (*People v. Prince*, *supra*, 40 Cal.4th at p. 1297; see also *People v. Salcido* (2008) 44 Cal.4th 93, 167.) This observation is borne out when it is considered that key to the decision in *Cunningham* was the fact that, at the time of the decision, an upper-term sentence could only be imposed under California's DSL when the trial court found an aggravating circumstance beyond the elements of the charged offense. If the trial court did not find an aggravating circumstance, it was required to impose the middle term. (See *Cunningham v. California*, 549 U.S. at pp. __ [127 S.Ct. at pp. 861-862, 868-871].) As demonstrated *ante* in the preceding paragraph, California's death penalty law does not feature the characteristics that drove the opinion in *Cunningham*. Namely, no further proof of any fact beyond the murder and the special circumstance – facts that have been found true beyond a reasonable doubt by the fact-finder at the guilt-phase trial – is required as support for a death sentence. Thus, appellant's reliance on *Cunningham* is unavailing.

Appellant argues next that, even if the trial court was not required to instruct the jury to use the reasonable doubt standard in finding the presence of aggravating factors, whether those factors outweigh mitigating factors, and whether death is the appropriate penalty, its failure to instruct the jury with the preponderance of the evidence standard both violated his "right under the Due Process clause to the correct application of state law in a capital sentencing proceeding" and "resulted in a death verdict that is unreliable and violates the Eighth Amendment." (AOB 473.) Again, this Court has previously, and repeatedly, rejected appellant's claim. (See, e.g., *People v. Watson*, *supra*, 43 Cal.4th at p. 703; *People v. Zamudio*, *supra*, 43 Cal.4th at p. 373; *People v. Rundle*, *supra*, 43 Cal.4th at p. 199.) And again appellant provides no

persuasive reason why this Court should reexamine its decision.

With respect to the decision whether aggravating factors outweigh mitigating factors, appellant argues that "[a] determination that the aggravating factors substantially outweigh the mitigating factors – a prerequisite to imposition of the death sentence – is the functional equivalent of an element of capital murder, and is therefore subject to the protections of the Sixth Amendment," that is, a jury must make the determination beyond a reasonable doubt. (AOB 480.) He goes on to assert: "This Court's refusal to accept the applicability of *Ring* to the eligibility components of California's penalty phase violates the Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution." (AOB 481.) As noted *ante*, however, this Court has repeatedly and consistently held that the *Apprendi-Blakely-Ring* line of cases does not affect California's death penalty law, including the decision whether aggravating factors outweigh mitigating factors. (See, e.g., *People v. Rundle*, *supra*, 43 Cal.4th at pp. 198-199; *People v. Morrison, supra*, 34 Cal.4th at p. 731.) This Court has further stated that, because the determination of penalty is essentially moral and normative (and thus different in type than the determination of guilt), the United States Constitution does not require the prosecution to bear either the burden of proof or the burden of persuasion at the penalty phase. (See *People v. Rundle*, *supra*, at p. 199; *People v. Sapp* (2003) 31 Cal.4th 240, 317.)

Appellant argues next that, "[a]side from the question of the applicability of the Sixth Amendment to California's penalty phase proceedings, the burden of proof for factual determinations during the penalty phase of a capital trial, when life is at stake, must be beyond a reasonable doubt. This is required by both the Due Process Clause of the Fourteenth Amendment and the Eighth Amendment." (AOB 482-483.) This Court has squarely held, however:

> Failure to require that the jury unanimously find the aggravating circumstances true beyond a reasonable doubt, to find unanimously and beyond a reasonable doubt that aggravating circumstances outweigh mitigating circumstances, or to require a unanimous finding beyond a reasonable doubt that death is the appropriate penalty does not violate the Fifth, Eighth, or Fourteenth Amendment guarantees of due process and a reliable penalty determination.

(*People v. Prince*, *supra*, 40 Cal.4th at p. 1297, citing *People v. Box* (2000) 23 Cal.4th 1153, 1217.) Once again appellant provides no persuasive reason why this Court should reexamine its decision.

Appellant next claims:

> Since the prosecution has the burden of persuasion with regard to sentence in non-capital cases (Rule 4.420(b), Calif. Rules of Court), to provide *less* protection to a defendant in a capital case violates the Equal Protection [*sic*] under the Fourteenth Amendment. (See *Bush v. Gore* (2000) 531 U.S. 98, 104-105; *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417 [state rule must be applied evenhandedly].)

(AOB 485-486.) This Court has repeatedly held, however, that "California's death penalty statute does not violate equal protection by denying capital defendants certain procedural safeguards . . . while affording such safeguards to noncapital defendants." (*People v. Watson*, *supra*, 43 Cal.4th at pp. 703-704; see also *People v. Zamudio*, *supra*, 43 Cal.4th at p. 373; *People v. Rundle*, *supra*, 43 Cal.4th at p. 198.) This is so "[b]ecause capital defendants are not situated similarly to noncapital defendants." (*People v. Rundle*, *supra*, at p. 198.)

Appellant argues next that, "assuming *arguendo* that the federal constitution did not require the prosecution to carry the burden of proof with regard to sentencing, the jurors should have been told that neither side carried a burden of proof or persuasion." (AOB 486.) He urges that the lack of such an instruction violated his Fourteenth Amendment right to due process and his right under the Eighth and Fourteenth Amendments to a reliable penalty verdict.

(AOB 486.) This Court has squarely held, however, that "[e]xcept as to 'other crimes' evidence under section 190.3, factors (b) and (c), the court need not instruct regarding any burden of proof, *or instruct the jury that there is no burden of proof* at the penalty phase." (*People v. Rundle*, *supra*, 43 Cal.4th at p. 199, italics added; see also *People v. Carpenter*, *supra*, 15 Cal.4th at p. 418 ["Except for the other crimes, the court should not have instructed at all on the burden of proving mitigating or aggravating circumstances."].)

Appellant argues next that, by failing to require that the jury base any death verdict on written findings regarding aggravating factors, the California death penalty law violates "federal due process and Eighth Amendment rights to meaningful appellate review." (AOB 487.) He further argues that the failure to require written findings violated the Sixth Amendment right to trial by jury. (AOB 489-490.) As appellant acknowledges (AOB 488), however, this Court has consistently held that "[t]he California death penalty statute is not unconstitutional in failing to require the jury to make written findings concerning the aggravating circumstances it relied upon, nor does the failure to require written findings preclude meaningful appellate review." (*People v. Prince*, *supra*, 40 Cal.4th at p. 1297; see also, e.g., *People v. Zamudio*, *supra*, 43 Cal.4th at p. 373; *People v. Rundle*, *supra*, 43 Cal.4th at p. 198; *People v. Manriquez, supra*, 37 Cal.4th at p. 590; *People v. Stitely, supra*, 35 Cal.4th at p. 574; *People v. Morrison, supra*, 34 Cal.4th at p. 730.) Appellant provides no persuasive reason why this Court should reexamine its decision.[140/]

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140. The premise of appellant's Sixth Amendment claim would appear to be that, without written findings, a reviewing court cannot assess whether the jury unanimously agreed beyond a reasonable doubt on the truth of any aggravating factors or whether the jury determined aggravating factors outweighed mitigating factors beyond a reasonable doubt. As set out *ante*, though, it is well-established that no such unanimity or beyond-a-reasonable-doubt findings are applicable in the capital sentence

Appellant additionally argues:

> In a non-capital case, the sentencer is required by California law to state on the record the reasons for the sentence choice. (Penal Code Section 1170, subd. (c).) Capital defendants are entitled to *more* rigorous protections than those afforded non-capital defendants. [Citation.] Since providing more protection to a non-capital defendant than a capital defendant would violate the equal protection clause of the Fourteenth Amendment [citations], the sentencer in a capital case is constitutionally required to identify for the record the aggravating circumstances found and the reasons for the penalty chosen.

(AOB 488-489.) As stated *ante*, however, this Court has repeatedly held that "California's death penalty statute does not violate equal protection by denying capital defendants certain procedural safeguards . . . while affording such safeguards to noncapital defendants." (*People v. Watson*, *supra*, 43 Cal.4th at pp. 703-704; see also *People v. Zamudio*, *supra*, 43 Cal.4th at p. 373; *People v. Rundle*, *supra*, 43 Cal.4th at p. 198.) This Court has explicitly stated that its holding extends to written jury findings. (See *People v. Watson*, *supra*, at pp. 703-704.)

Appellant argues next that this Court's interpretation of California's death penalty law so as to forbid inter-case proportionality review violates the Eighth Amendment as inter-case proportionality review is necessary under California's death penalty law to safeguard against arbitrary, discriminatory, or disproportionate impositions of the death penalty. (AOB 490-492.) This Court, however, has repeatedly considered and consistently rejected this same claim, finding that comparative inter-case proportionality review is not required by the United States Constitution.[141] (See, e.g., *People v. Watson*, *supra*, 43 Cal.4th

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selection context.

141. This Court has also stated, in words that are equally applicable to the argument made by appellant in the case at bar (see AOB 492): "Defendant fails to support his assertion that this court has categorically forbidden [inter-

at p. 704; *People v. Zamudio*, *supra*, 43 Cal.4th at p. 373; *People v. Prince*, *supra*, 40 Cal.4th at p. 1298; *People v. Jablonski*, *supra*, 37 Cal.4th at p. 837; *People v. Stitely, supra,* 35 Cal.4th at p. 574.) Appellant provides no persuasive reason why this Court should reexamine its finding in this regard.

Appellant's next attack on the constitutionality of California's death penalty law is that the "use of unadjudicated criminal activity by the jury as an aggravating circumstance under section 190.3, factor (b), violates due process and the Fifth, Sixth, Eighth, and Fourteenth Amendments, rendering a death sentence unreliable." (AOB 493.) This Court has previously held, however, that "the jury may consider unadjudicated offenses under factor (b) as aggravating factors without violating a defendant's rights to a fair trial, confrontation, an impartial and unanimous jury, due process, and a reliable penalty determination." (*People v. Rundle*, *supra*, 43 Cal.4th at p. 198; see also *People v. Prince*, *supra*, 40 Cal.4th at p. 1297.)

Undaunted, appellant cites to *Apprendi*, *Ring*, and *Blakely*, and also *United States v. Booker* (2005) 543 U.S. 220, and argues:

> [E]ven if it were constitutionally permissible to rely upon alleged unadjudicated criminal activity as a factor in aggravation, such alleged criminal activity would have to have been found beyond a reasonable doubt by a unanimous jury [to comport with the due process clause of the Fourteenth Amendment and the Sixth Amendment jury trial guarantee]. Defendant's jury was not instructed on the need for such a unanimous finding; nor is such an instruction generally provided for under California's sentencing scheme.

(AOB 493.) Appellant's argument is unavailing.

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case proportionality] review; in the only case to which he refers, we considered the showing of alleged disproportionality and found it insufficient. (*People v. Marshall* (1990) 50 Cal.3d 907, 947.)" (*People v. Harris* (2008) 43 Cal.4th 1269, 1323, parallel citations omitted.)

First, contrary to appellant's suggestion, before any juror can consider a prior crime as an aggravating factor, that juror must find the prior crime true beyond a reasonable doubt. (See *People v. Gray* (2005) 37 Cal.4th 168, 235.) Second, unanimity as to the aggravating factor (b), prior unadjudicated criminal conduct, is simply not constitutionally required. As noted *ante*, this Court has repeatedly held "neither the federal nor the state Constitution requires the jury to agree unanimously as to aggravating factors." (*People v. Fairbank*, *supra*, 16 Cal.4th at p. 1255; see also *People v. Zamudio*, *supra*, 43 Cal.4th at p. 373; *People v. Prince*, *supra*, 40 Cal.4th at p. 1297.) And as also noted *ante*, this Court has specifically held that *Apprendi*, *Ring*, and *Blakely* do not change that result. (See *People v. Rundle*, *supra*, 43 Cal.4th at pp. 198-199; *People v. Morrison*, *supra*, 34 Cal.4th at p. 731; *People v. Prieto*, *supra*, 30 Cal.4th at p. 263; *People v. Anderson*, *supra*, 25 Cal.4th at pp. 589-590, fn. 14.)

Appellant argues next that "[t]he inclusion in the list of potential mitigating factors of such adjectives as 'extreme' (see factors (d) and (g)) and 'substantial' (see factor (g)) acted as barriers to the consideration of mitigation in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments." (AOB 494.) Once again appellant's argument is unavailing.

Under factor (d), the jury may consider "[w]hether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance"; under factor (g), the jury may consider "[w]hether or not defendant acted under extreme duress or under the substantial domination of another person." (§ 190.3, subds. (d) & (g).) This Court has repeatedly held that the use of these adjectives is within constitutional parameters. (See, e.g., *People v. Watson*, *supra*, 43 Cal.4th at p. 704; *People v. Zamudio*, *supra*, 43 Cal.4th at p. 373; *People v. Prince*, *supra*, 40 Cal.4th at p. 1298; *People v. Manriquez*, *supra*, 37 Cal.4th at p. 590; *People v. Harris*, *supra*, 37 Cal.4th at p. 365; *People v. Morrison*, *supra*, 34 Cal.4th at pp. 729-

730.) Appellant provides no persuasive reason why this Court should reexamine its decision.

Finally with respect to procedural safeguards, appellant argues that, because the mitigating factors listed in subdivisions (d), (e), (f), (g), (h), and (j) of section 190.2 are prefaced by the words "whether or not," the jury

> was left free to conclude that a "not" answer as to any of those "whether or not" sentencing factors could establish an aggravating circumstance, and was thus invited to aggravate the sentence upon the basis of non-existent and/or irrational aggravating factors, thereby precluding the reliable, individualized capital sentencing determination required by the Eighth and Fourteenth Amendments. [Citations.]
>
> Further, the jury was also left free to aggravate a sentence upon the basis of an *affirmative* answer to one of these questions, and thus, to convert mitigating evidence . . . into a reason to aggravate a sentence, in violation of both state law and Eighth and Fourteenth Amendments.

(AOB 495-496.) As appellant acknowledges (AOB 496), this Court has previously rejected this same claim. (See, e.g., *People v. Page* (2008) 44 Cal.4th 1, 61; *People v. Gray*, *supra*, 37 Cal.4th at p. 236; *People v. Morrison*, *supra*, 34 Cal.4th at p. 730.) Once again appellant provides no persuasive reason why this Court should reexamine its decision.

D. California's Death Penalty Law Does Not Violate Principles Of Equal Protection Even Thought It Does Not Provide The Same Procedural Safeguards To Capital Defendants That Are Afforded To Non-Capital Defendants

Appellant argues that California's death penalty scheme violates the equal protection clause of the United States Constitution in that it provides greater protection to non-capital defendants than to capital defendants. (AOB 498-501.) He specifically cites the fact that, "[i]n a capital sentencing context . . . there is no burden of proof except as to other-crime aggravators, and the jurors need not agree on what facts are true, or important, or what aggravating circumstances apply." (AOB 500.) He further cites the fact that "no reasons

for a death sentence need be provided." (AOB 500-501.)

As stated *ante*, however, this Court has repeatedly considered and decided this issue against appellant, holding that "California's death penalty statute does not violate equal protection by denying capital defendants certain procedural safeguards . . . while affording such safeguards to noncapital defendants." (*People v. Watson*, *supra*, 43 Cal.4th at pp. 703-704; see also, e.g., *People v. Zamudio*, *supra*, 43 Cal.4th at p. 373; *People v. Rundle*, *supra*, 43 Cal.4th at p. 198.) This Court should so hold again as "capital defendants are not situated similarly to noncapital defendants." (*People v. Rundle*, *supra*, at p. 198.)

E. A Penalty Of Death Imposed Pursuant To California's Death Penalty Law Is Not Cruel And Unusual Punishment Per Se

Next, appellant argues that, as a general matter, a penalty of death imposed pursuant to California's death penalty law violates the Eighth Amendment in that it constitutes cruel and unusual punishment. (AOB 501-502.) As appellant acknowledges (AOB 501, fn. 119), however, this Court has repeatedly rejected this same argument. (See, e.g., *People v. Zambrano* (2007) 41 Cal.4th 1082, 1187; *People v. Manriquez*, *supra*, 37 Cal.4th at p. 590; *People v. Moon*, *supra*, 37 Cal.4th at pp. 47-48.) Appellant provides no persuasive reason why this Court should reexamine its decision.

F. Capital Punishment In California Does Not Violate International Law; Nor Do The International Norms Asserted By Appellant Render The Death Penalty Unconstitutional

Appellant's final attack on California's death penalty scheme is that "the very broad death scheme in California and death's use as regular punishment violate both international law and the Eighth and Fourteenth Amendments." (AOB 504.) Once again, appellant raises an argument that this Court has

repeatedly and consistently rejected. (See, e.g., *People v. Harris*, *supra*, 43 Cal.4th at p. 1323; *People v. Zamudio*, *supra*, 43 Cal.4th at p. 373; *People v. Bonilla*, *supra*, 41 Cal.4th at p. 360.) As this Court has explained:

> [Defendant's] argument that "the use of capital punishment 'as *regular punishment* for substantial numbers of crimes' violates international norms of human decency and hence the Eighth Amendment to the United States Constitution fails, at the outset, because California does not employ capital punishment in such a manner. The death penalty is available only for the crime of first degree murder, and only when a special circumstance is found true; furthermore, administration of the penalty is governed by constitutional and statutory provisions different from those applying to 'regular punishment' for felonies. (E.g., Cal. Const., art. VI, § 11; §§ 190.1-190.9; 1239, subd. (b).)" [Citation.]

(*People v. Bonilla*, *supra*, at p. 360.) Once again appellant provides no persuasive reason why this Court should reexamine its decision.

XII.

ARTICLE I, SECTION 27 OF THE CALIFORNIA CONSTITUTION VIOLATES NEITHER THE DUE PROCESS, EQUAL PROTECTION, NOR GUARANTEE CLAUSES OF THE UNITED STATES CONSTITUTION

Appellant contends that article I, section 27 of the California Constitution, enacted by plebiscite vote on initiative Proposition 17, is unconstitutional in that it violates the due process, equal protection, and guarantee clauses of the United States Constitution. (AOB 505-513.) Specifically, he alleges that it (1) "[p]urports to eliminate the fundamental substantive constitutional 'right' to life (no death penalty as punishment) legally established under state law in" *People v. Anderson* (1972) 6 Cal.3d 628; (2) "[u]ses the anti-republican process of a popular majority vote (plebiscite) to eliminate the fundamental constitutional right"; and (3) "[c]ombines the enactment of statutes (a legislative function) and mandates how those statutes were to be construed in reference to the State Constitution by the judicial branch (a judicial function)." (AOB 507-508.) Appellant's arguments are unavailing in that article I, section 27 violates neither the due process, equal protection, nor guarantee clauses of the United States Constitution.

In 1972, this Court held that California's death penalty violated the cruel or unusual punishment clause of the California Constitution, article I, section 6.[142/] (See *People v. Anderson, supra*, 6 Cal.3d 628, 645-657.) Later that same year, California voters approved Proposition 17 by an initiative vote; the voters thereby amended the California Constitution to specifically authorize the death penalty. Proposition 17 is now in the California Constitution as article I,

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142. Effective November 5, 1974, the California Constitution's prohibition on cruel or unusual punishment is found in section 17 (not section 6) of article I.

section 27, which provides as follows:

> All statutes of this state in effect on February 17, 1972 requiring, authorizing, imposing, or relating to the death penalty are in full force and effect, subject to legislative amendment or repeal by statute, initiative, or referendum.
>
> The death penalty provided for under those statutes shall not be deemed to be, or to constitute, the infliction of cruel or unusual punishment within the meaning of Article I, Section 6 nor shall such punishment for such offenses be deemed to contravene any other provision of this constitution.

(Cal. Const., art. I, § 27.)

Appellant urges first that "Proposition 17, as it undertook to contravene Anderson [*sic*] and eliminate the fundamental substantive right found by the *Anderson* court by the anti-republican process of a majority vote on a privately sponsored ballot measure in an election," violated both the due process and guarantee clauses of the federal Constitution. (AOB 508-509.) Appellant thereby appears to argue that article I, section 27 violates the United States Constitution in two respects: (1) it purports to eliminate the "fundamental substantive right" to life (i.e., no death penalty as punishment) established by *Anderson*; and (2) its enactment by the "anti-republican process of a majority vote" violated the guarantee clause. In *Murtishaw v. Woodford* (9th Cir. 2001) 255 F.3d 926, 960-961, a case neither cited nor discussed by appellant in the context of this argument, the Ninth Circuit Court of Appeals rejected both of these federal constitutional claims. Although this Court is not bound by decisions of the lower federal courts, even on federal questions (*People v. Crittenden* (1994) 9 Cal.4th 83, 120, fn. 3), such decisions provide persuasive authority. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1292.)

In rejecting Murtishaw's claim that article I, section 27 deprived him of a "right" to be free of the death penalty, the Ninth Circuit asserted:

> In making this claim, Murtishaw is unclear about what type of "right" he is asserting. It is beyond doubt that all people protected by the [United States] Constitution have a right not to be deprived of their lives without due process of law. *See* U.S. Const. amend. 5, 14. However, Section 27 did not deprive Murtishaw of that right, just as it did not deprive any other California resident of that right.
>
> Rather than depriving him of a "right to life," Section 27 deprived Murtishaw of an interpretation of the unamended California Constitution that would have been favorable to him. *Anderson* held that the sentence of death was "cruel" and thereby prohibited by the California Constitution, before it was amended by Section 27. *See Anderson*, 6 Cal.3d at 653-56. Section 27 amended the state constitution, such that the imposition of the death penalty was no longer "cruel." Murtishaw is objecting to this change. Murtishaw's claimed "right," when properly construed, is therefore not a right to be free of the death penalty, but rather is a claimed "right" to have a constant interpretation of the California Constitution without amendment. There is, however, no support for an argument that federal due process demands constant interpretation of a state constitution, and Murtishaw does not assert any. His claim therefore fails.

(*Murtishaw v. Woodford*, *supra*, 255 F.3d at p. 960, parallel citations omitted.) In rejecting Murtishaw's claim that the initiative method by which article I, section 27, was enacted violated the guarantee clause of the federal Constitution, the Ninth Circuit declared: "A challenge based on the Guarantee Clause . . . is a non-justiciable political question." (*Id.* at p. 961, citing *New York v. United States* (1992) 505 U.S. 144, 184, and *Pacific States Tel. & Tel. Co. v. Oregon* (1912) 223 U.S. 118, 146.)

As did Murtishaw, appellant also argues that article I, section 27 "violates the separation of powers principle because it combines both the legislative . . . and the judicial function . . . in a single measure enacted by a single body (a majority of the voters voting in a general election)." (AOB 509-510.) Appellant continues: "Article I, Section 27, . . . independently violates the separation of powers principle and the subsumed doctrine of Judicial Review by purporting to mandate . . . how the judiciary was to construe and

apply Art. I, Sec. 6 (now 17) in reference to the enacted statutes." (AOB 510.) He concludes: "Article I, Section 27, . . . by violating the separation of power principle . . . also violates Due Process in the 14th Amendment to the United States Constitution"; he further suggests that this violation of the separation of powers principle amounts to a violation of the guarantee clause. (AOB 511.) The Ninth Circuit rejected both of these federal constitutional claims in *Murtishaw*.

In rejecting Murtishaw's due process claim based on an alleged violation of separation of powers principles, the Ninth Circuit asserted:

> Murtishaw next argues that Section 27 violated California's separation of powers principles because it purported to enact laws and to demand a specific interpretation of those laws. According to Murtishaw, this alleged violation of California's separation of powers principles consequently violates federal due process.
>
> Murtishaw's first premise, that Section 27 violated the separation of powers principle embodied in the California constitution, is wrong. The California Supreme Court has held that Section 27 did not exempt California's death penalty statute from judicial review under the California Constitution; rather, Section 27 "states simply that 'such punishment' – i.e., death – shall not be deemed to contravene state constitutional provisions." *People v. Superior Court (Engert)*, 31 Cal.3d 797, 807 (1982). Moreover, Murtishaw's second premise – that a state's violation of its own separation of powers principles is a violation of federal due process – lacks support. Murtishaw cites Supreme Court precedent that recognize the importance of separation of powers principles, *see Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 217 (1995)[143]; but this precedent can hardly be said to establish a substantive federal right in every citizen to have a state government that honors separation of powers principles. Section 27 does not violate federal due process.

(*Murtishaw v. Woodford*, *supra*, 255 F.3d at pp. 960-961, parallel citations omitted.) The court went on to reject Murtishaw's claim that the alleged

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143. Appellant cites this same authority. (See AOB 510-511.)

separation of powers violation contravened the guarantee clause of the federal Constitution for the reason that "[a] challenge based on the Guarantee Clause . . . is a non-justiciable political question." (*Murtishaw v. Woodford*, *supra*, at p. 961, citing *New York v. United States*, *supra*, 505 U.S. at p. 184, and *Pacific States Tel. & Tel. Co. v. Oregon*, *supra*, 223 U.S. at p. 146.)

Like Murtishaw, appellant raises one other federal constitutional attack on article I, section 27: that it "violates the equal protection clause of the 14th Amendment to the U.S. Constitution in that it deprives all defendants prosecuted under the statutes enacted by Section 27 . . . , as distinguished from all other defendants, of the protection provided by all the other provisions of the California Constitution." (AOB 511-512.) He elaborates:

> It was the clear intention of Proposition 17 to have the validity of the enacted statutes deemed valid under all the provisions of the California Constitution. Without the availability of independent review under the state constitution, California death penalty statutes could only be reviewed or invalidated under federal law. . . .

(AOB 512.) In *Murtishaw*, the Ninth Circuit rejected this claim too. The court ruled as follows:

> Finally, Murtishaw argues that Section 27 denies him equal protection because it subjects him to a law that cannot be challenged under the state constitution, whereas other individuals are subject to laws that can be challenged under the state constitution. Again, the California Supreme Court has held that the California death penalty statute is reviewable under the California Constitution. *See People v. Superior Court (Engert)*, 31 Cal.3d 797, 807 (1982). Because Murtishaw is not in fact subject to a state law that cannot be reviewed under the state constitution, his equal protection claim fails.

(*Murtishaw v. Woodford*, *supra*, 255 F.3d at p. 961, parallel citations omitted.)

For the reasons set forth in *Murtishaw*, appellant's attack on article I, section 27, should fail. Article I, section 27 violates neither the due process, equal protection, nor guarantee clauses of the United States Constitution.

XIII.

TO THE EXTENT ANY ERRORS OCCURRED, EVEN VIEWING THE ERRORS CUMULATIVELY APPELLANT RECEIVED A FAIR TRIAL

Appellant's thirteenth and final argument on appeal is that the cumulation of error infected all three phases of his trial, and he urges that the end result of many errors reinforcing the prejudice of the other errors was a fundamental denial of due process and a miscarriage of justice. (AOB 513-527.) In support of his argument, appellant points specifically to the alleged errors that underlie Arguments I, VII, VIII, IX, and X in his opening brief.[144/] (AOB 519-523, 525-527.) As discussed *ante* in Arguments I, VII, VIII, IX, and X, though, no errors occurred. As also discussed *ante* in those arguments, to the extent any errors occurred, the errors were harmless. Respondent urges that even if any errors are viewed cumulatively, they "do not compel the conclusion that [appellant] was denied a fair trial." (*People v. Rundle*, *supra*, 43 Cal.4th at p. 199; see also *People v. Watson*, *supra*, 43 Cal.4th at p. 704 ["Whether considered independently or together, any errors or assumed errors are nonprejudicial and do not undermine defendant's conviction or sentence."]; *People v. Carter*, *supra*, 36 Cal.4th at pp. 1212-1213 ["Having determined that defendant's trial was nearly devoid of any error, and that to the extent any error

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144. In support of his cumulative error argument, appellant also points to Argument V of his opening brief and alleges that he discussed therein that "the instructions given for the attempted murder counts were faulty and misled the jury as to what it was necessary for them to find before they could convict on those counts." (AOB 518.) Respondent can find no such discussion in appellant's Argument V. (See AOB 329-334.) Nor does respondent find anywhere else within appellant's opening brief (including Argument IV) a challenge to the jury instructions on the crime of attempted murder. (See, e.g., fn. 88, *ante* [noting that, on appeal, appellant raises no claim that the trial court improperly instructed the jury on the elements of the crime of attempted murder].)

was committed it was clearly harmless, we conclude that defendant's contention as to cumulative error lacks merit."].)

Finally, appellant argues that California's death penalty law fails to sufficiently narrow the class of murderers eligible for the death penalty. (AOB 523-525.) Appellant raises this same argument in Argument XI of his opening brief, in which he brings a multi-pronged attack on the constitutionality of California's death penalty statute.[145/] (See AOB 460-463.) For the reasons set forth *ante* in Argument XI, appellant's claim should fail.

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145. Appellant appears to raise within his cumulative error argument a claim that he does not raise elsewhere in his opening brief. Specifically, he argues that "the quality and quantum of proof distinguishing deliberate premeditated murder from second degree murder as defined by this Court is both undefined and undecipherable" and, as a result, the distinction between first degree deliberate and premeditated murder and second degree murder, "as construed and applied by this Court," is "void for vagueness." (AOB 523.) Appellant's failure to identify this issue in a separate heading or subheading, as required under rule 8.204 (a)(1)(B) of the California Rules of Court, means that this issue is forfeited on appeal. (See *Heavenly Valley v. El Dorado County Bd. of Equalization* (2000) 84 Cal.App.4th 1323, 1345, fn. 17 [refusing to address an argument appearing under a subheading inappropriate to that argument].) Respondent is also of the opinion that appellant does not develop this claim in a manner sufficient for respondent to provide a meaningful response. Most notably, he provides no citations to the decisions by this Court to which he refers when he states that this Court has failed to adequately define the distinction between first degree deliberate and premeditated murder and murder in the second degree.

CONCLUSION

For the foregoing reasons, respondent respectfully requests that the judgement be affirmed.

Dated: August 13, 2008

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S BRIEF** uses a 13 point Times New Roman font and contains 103,464 words.

Dated: August 13, 2008

Respectfully submitted,

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: ***People v. Houston*** No.: **S035190**

I declare:

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

On August 14, 2008, I served the attached **RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 1300 I Street, P.O. Box 944255, Sacramento, California 94244-25501300 I Street, P.O. Box 944255, Sacramento, California 94244-2550, 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 August 14, 2008 at Sacramento, California.

_____
Declarant