In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, **v.** **JOSE LUPERCIO CASARES,** Defendant and Appellant.	**CAPITAL CASE** Case No. S025748

Tulare County Superior Court Case No. VCF02503B-89
The Honorable David L. Allen, Judge

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

By an amended information filed in the Tulare County Superior Court in case number 27503, appellant Jose Lupercio Casares was charged as follows: in count I, with the March 30, 1989, first degree murder of Guadalupe Sanchez (Pen. Code, § 187)[1]; in count II, with the March 30, 1989, first degree attempted murder of Alvaro Lopez (§§ 664/187); in count III, with being a felon in possession of a concealed firearm (§ 12025, subd. (b)); and in count IV, with possession of cocaine (Health & Saf. Code, § 11350.)[2] (2RT 361-365.)

Furthermore, as to count I, it was specially alleged that appellant committed the murder while lying in wait, within the meaning of section 190.2, subdivision (a)(15), and that he personally used a firearm within the meaning of sections 1203.06, subdivision (a)(1), and 12022.5. (2RT 361-362.) As to count II, it was also alleged that appellant used a firearm within the meaning of sections 1203.02, subdivision (a), and 12022.5, and it was further alleged that appellant inflicted great bodily injury during the commission of the offense. (2RT 362.) And lastly, as to counts I and II, it was alleged that appellant had suffered a prior conviction within the meaning of section 667, subdivision(a), and two prior convictions within

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[1] Unless otherwise noted, all statutory references are to the Penal Code. Also, the amended information is not found in the record. However, the prosecutor read the charges to the jury, and those charges are otherwise reflected in the jury's verdicts. The information was amended just prior to trial to delete three counts. (2RT 358.)

[2] Counts III and IV stem from appellant's April 8, 1989, arrest.

the meaning of section 667.5, subdivision (b).[3] (1CT 2-3; 5CT 1226, 1235.)

On October 7, 1991, jury selection commenced.[4] (4CT 970; 1RT 199.)

On November 6, 1991, the jury returned the following verdicts: As to count I, appellant was found guilty of the first degree murder of Sanchez. The jury further found true the lying-in-wait, special-circumstance allegation and the personal-use-of-a-firearm allegation. (4CT 1131-1132.) As to count II, appellant was found guilty of the first degree, attempted murder of Lopez. The jury further found true the personal-use-of-a-firearm allegation, but returned a finding of not true as to the great-bodily-injury allegation. (4CT 1132.) Lastly, the jury returned guilty verdicts on counts III and IV. (4CT 1132.)

As related to his status as a felon for purposes of count III, as well as on the prior-conviction allegations, appellant waived his right to a jury trial. (2RT 355-359; 9RT 1883, 1885.) The court found two of the prior felony-conviction allegations to be true: a robbery conviction from March 19, 1981, and a possession-of-narcotics-for-sale conviction from October 16, 1984. (4CT 1135; 9RT 1883-1888.)

On November 13, 1991, the penalty phase commenced. (4CT 1135.) On November 20th, the jury returned its verdict and recommended a sentence of death. (5CT 1192.)

Pursuant to section 190.4, subdivision (d), appellant filed a Request for Modification of the Verdict. (5CT 1208-1215.) On March 13, 1992,

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[3] The prior-conviction allegations were not read to the jury, nor was that portion of count III that designated appellant as a "felon." (2RT 363.)

[4] Appellant was originally charged with a co-defendant, Ruben Contreras. (Municipal Court CT 170.) Contreras's case was severed on May 13, 1991. (3CT 672-675.)

and after taking the matter under submission, the court issued its ruling denying the motion. (10RT 2315-2321.)

Immediately thereafter, appellant was sentenced in accordance with the jury's verdict. For murder in the first degree and a true finding on the special circumstance, the court imposed a sentence of death. (5CT 1227, 1235-1241; 10RT 2322.) The sentences on all of the remaining counts and enhancements were stayed pursuant to section 654, pending the final outcome of appellant's automatic appeal. (5CT 1227; 10RT 2323-2324.)

STATEMENT OF FACTS

A. Introduction

Appellant Jose Casares stands convicted of the March 30, 1989, special-circumstance murder of Guadalupe Sanchez and has been sentenced to death. Taken in a light most favorable to the verdict, the evidence at trial demonstrated that appellant sought to purchase three ounces of cocaine for a "friend," and he asked Alvaro Lopez and Sanchez to get it for him. When Sanchez and Lopez picked up appellant and Ruben Contreras that evening to take them to appellant's "buyer," appellant was armed with a handgun and Contreras with a kitchen knife. After making a stop at the alleged buyer's house, appellant told Sanchez and Lopez that the buyer had company, and that they would have to wait for him down the road.

Sanchez drove while Lopez sat in the front passenger seat. Appellant sat behind Sanchez and Contreras was behind Lopez. The four proceeded down the road before coming to a stop. Once stopped, appellant immediately put the gun to the back of Sanchez's head and told Contreras to "secure" Lopez, which he did by placing the knife to Lopez's throat. Appellant demanded the drugs. Sanchez complied and handed the drugs back over his shoulder to appellant. Almost immediately, appellant then shot Sanchez one time in the back of his head. Lopez was then stabbed and

a struggled ensued inside and outside the car, which resulted in Lopez suffering a gunshot wound to his arm and at least 10 to 15 stab wounds. Somewhat miraculously, Lopez survived the attack, and he later identified appellant as the man who killed Sanchez and the man who tried to kill him. Lopez's identification of appellant was corroborated, in part, by appellant's bloody palm print found in the back seat of the car, a fingerprint lifted from the car's trunk, and the fact that at the time of his arrest, just over a week later, appellant was in possession of the gun that was used to kill Sanchez. What follows is an accounting of the evidence presented in both phases of appellant's trial.

B. Guilt Phase – Prosecution's Case in Chief

1. Events leading up to the murder of Guadalupe Sanchez and the attempted murder of Alvaro Lopez

Alvaro Lopez and Hidalia Lopez were brother and sister, and murder victim Sanchez was Hidalia's boyfriend.[5] (6RT 1226-1227, 1230.) During March of 1989, they all lived together in Farmersville, which was located in Tulare County. (6RT 1226-1227, 1230.) Alvaro Lopez became acquainted with appellant while they were in jail. (6RT 1255.)

On the afternoon of March 30th, Alvaro Lopez and Sanchez went by appellant's house. While there, appellant asked Lopez for three ounces of cocaine for a friend. (6RT 1251-1252, 1256, 1289-1290, 1295.) Lopez and Sanchez then left, but returned about an hour later. (6RT 1257, 1290-1291.) Lopez explained that it was Sanchez who was to get the cocaine, and that when they returned the second time, it was to assure appellant that

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[5] Many of the witnesses who testified or are referred to during testimony have the same last name. To avoid confusion, the witness's first name is used when appropriate or necessary for the sake of clarity. No disrespect is intended.

Sanchez could get the drugs. (6RT 1257, 1290-1291.) Appellant did not leave with them at this time, and they made a total of three stops at appellant's house that day. (6RT 1291.) It was Lopez's understanding that he and Sanchez would make $150 on the sale. (6RT 1284.)

After they left the second time, Sanchez dropped Lopez off at the house where they lived. (6RT 1294.) Sanchez then drove away in Hidalia's car, which was a tan or beige Concord, mid-sized sedan. (4RT 752-753, 888; 6RT 1226-1228, 1233, 1236, 1251-1252, 1258.) Lopez denied going with Sanchez to get the drugs, and he denied knowing who Sanchez got the drugs from. (6RT 1294, 1313-1316.)

When Sanchez returned with the drugs, the two men left and went to appellant's house. (6RT 1258, 1294.) It was sometime between 6:00 and 7:00 p.m. (6RT 1293.) Lopez was in the front passenger seat and Sanchez was driving. (6RT 1259.) Neither one of them had a weapon. (6RT 1285.) Upon their arrival, appellant was there with Ruben Contreras; appellant told them they had to go to the buyer. (6RT 1258.) This was the first time Lopez had ever met Contreras.[6] (6RT 1293-1294.)

Gilbert Galaviz was living with Maria Lupercio Contreras, and Maria's sister Alicia Lupercio at 202 1/2 Sweet Street address. (5RT 1155, 1171; 7RT 1491-1492.) During this period of time, appellant also stayed at the residence, as he was "in and out." (5RT 1219-1220.) On the afternoon of March 30th, at around 5:30 or 6:00 p.m., Galaviz was in the driveway working on his car, when he saw appellant and Ruben Contreras get into a small, beige colored, four-door car that had pulled up to the driveway.[7]

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[6] Detective Pinon testified that appellant was 34 at the time of the shooting and that Contreras was 19. (4RT 797.)

[7] Galaviz acknowledged that he had previously testified that it was only Contreras who left at this particular moment. (5RT 1198-1199.)

(5RT 1159, 1181-1182.) There were two men in the car, but Galaviz didn't know either one of them. (5RT 1161, 1184.) The men left and then returned about an hour later.[8] (5RT 1163, 1184.)

Just before dark at around 7:00 or 7:30 p.m., Galaviz again saw appellant and Contreras leave in the same car. (5RT 1163, 1185.) Appellant had his gun with him and Contreras had armed himself with a kitchen knife.[9] (5RT 1161, 1182, 1198.) Appellant took the seat behind the driver, while Contreras was seated behind the passenger. (5RT 1163.) It was Galaviz's recollection that appellant was wearing black pants and a Harley Davidson hat at the time, and that Contreras may have been wearing sweats and white tennis shoes. (5RT 1165-1166.)

2. The murder of Sanchez and the attack on Lopez

Consistent with Galaviz's recollection, Alvaro Lopez explained that when they got in the car, appellant sat behind Sanchez and Contreras sat behind Lopez. (6RT 1259.) They then drove on Road 63 to Dinuba, where they were supposed to deliver the cocaine. (6RT 1259.) When they arrived, they parked in front of a store which sat along the highway; the "buyers" house was located nearby. (6RT 1259, 1295-1296.) Lopez went into the store and purchased two beers, while appellant walked over to the house. (6RT 1260, 1296.) When appellant came back, he told them that the alleged buyer had visitors and that they would wait for him up ahead. (6RT 1260-1261.)

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[8] Galaviz recalled that he told a detective that appellant and Contreras took off the first time because they were supposed to sell a gun. (5RT 1207-1208.)

[9] Galaviz testified that he had seen appellant with a gun "many times before," and that appellant had possessed it for a while. (5RT 1183.) Galaviz also said that he had observed appellant cleaning the gun earlier that afternoon. (5RT 1160.)

Sanchez drove the four of them away from the store, turned the corner and went down the road before stopping. (6RT 1298.) Once stopped, appellant put the gun to Sanchez's head and told Contreras to secure Lopez. Contreras did so by putting a knife to the side of Lopez's neck. (6RT 1263.) Appellant then told Sanchez to give him the drugs, and Sanchez retrieved the cocaine from underneath his seat and handed it back to appellant. (6RT 1263, 1299-1300.) Almost immediately, appellant then shot Sanchez in the back of the head and yelled to Contreras to slash Lopez's throat.[10] (6RT 1263, 1320-22.)

At the moment Sanchez was shot, Lopez grabbed Contreras's hand and tried to open the car door. (6RT 1324-1326.) Lopez felt Sanchez's head on his shoulder, when a second shot was fired that struck Lopez in his left arm. (6RT 1264, 1326.) With Contreras stabbing at him, Lopez opened the door and got out of the car. (6RT 1264-1265.) At this point, Lopez fell to the ground along with the knife, and while on the ground, appellant again fired at Lopez; this time the bullet grazed Lopez's leg. (6RT 1265-1266, 1279.) Thinking that they were going to run him over, Lopez got up and ran across the road where he fell to the ground. (4RT 860; 6RT 1279-1280.)

A number of people who lived in the area or were otherwise passing by at the time testified to their observations. At about dusk, John Northcutt

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[10] Lopez testified that "[h]e grabbed it and pulled" the pistol, "[t]he head." (6RT 1263-1264; see also 6RT 1300 [when appellant grabbed the drugs, appellant "pulled the gun."] This phrase may have caused defense counsel some confusion. (See 6RT 1304 [the court and counsel discussed the potential confusion over the phrase].) Lopez later explained that when he said "pulled the pistol," he meant "[h]e pulled the trigger on the pistol, not pulling the pistol, but pulling the trigger in the pistol to fire." (6RT 1318; see also 1319-1320 [questions by the court further clarifying that "pull" the pistol is to "pull the trigger and fire"].) Lopez further stated that Sanchez never grabbed the gun. (6RT 1300-1301.)

was driving his blue, 1981, Toyota pickup with white "Toyota" letters on the back at about 25 miles per hour on Avenue 328, when his 8-year-old passenger Kevin Faulkner said, "[t]hose guys are fighting over there. One guy is stabbing the other one, and it looks like one behind the wheel is dead or sick or something [*sic*]." (4RT 800-801.) Northcutt looked over and saw a brown or tan car with a man in it slumped over the wheel.[11] (4RT 801-802.) He also saw two other "fellows scuffling," and although he didn't see a weapon, it appeared one was stabbing the other. (4RT 801.) Standing in front of the car was another man about 10 feet away from the two men fighting. (4RT 801, 803.) The men looked Hispanic, about 25 to 30 years old, dark hair and medium builds. (4RT 802-803.) Northcutt did not hear any gunfire as he drove by. (4RT 801.)

Now eleven, Kevin Faulkner testified that he was with Northcutt when he saw a car similar in appearance to the one Sanchez was driving stopped with its driver's side doors open. (4RT 834-835, 837, 840.) The car's inside light was on and there was a man inside with his head against the seat. (4RT 835.) Faulkner saw another man near the trunk of the car, and he appeared to be fighting. (4RT 836.) These three people were the only ones he recalled seeing. (4RT 840.)

At about 7:30 that evening, Millie Meek was at home with her husband when she heard the sound of gunfire. (4RT 807.) Mrs. Meek went to her window and saw two "Spanish" or "Mexican boys" running to a car that was parked across the street from her house. (4RT 807-809, 811, 813,

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[11] Northcutt wasn't sure if there were any other cars at the scene, but if there were, they weren't "close enough really for [him] to pay attention." (4RT 802.) When pressed by defense counsel, Northcutt agreed that he had a "feeling" another car was close to him, but that he was looking at the car pointed out by his passenger. (4RT 805-806.) Because of this, he had no idea if the other car was moving or not. (4RT 806.)

816.) While at the passenger side of the car, the two men threw something from the car that looked like trash. (4RT 809-810.) The two-toned, tan or light brown car then fled and turned south. (4RT 810, 815.) Because it was getting dark, Mrs. Meek didn't have a great view of the scene. However, she described the driver of the car as having straight hair that he was "pushing back," and she said that one of the men may have been wearing brown pants. (4RT 812.)

Millie's husband, Otis Meek, testified that he also heard the gunfire, which caused him to go to his front porch. (6RT 1269-1270.) From there, he saw a little brown-reddish car parked about 75 to 80 feet away, across the street from his driveway. (6RT 1269.) Two Mexican men ran toward the car, got in and fled with the car's lights out. (6RT 1270-1271.) The car went east and turned south onto Road 127. The car then turned its lights on before it disappeared out of sight. (6RT 1270, 1272.) Mr. Meek said one of the men had black hair down to his shoulders or below his ears. (6RT 1273.) Mr. Meek did not see any other cars or trucks in front of the car. (6RT 1270.) However, a pickup truck did pull up, but it was approximately 200 feet to the west of where the car was. (6RT 1271.)

Paul Stacey was in his backyard when he heard a pop, followed by a brief pause, and then a couple of more pops. (4RT 824-825.) Concerned, he got up, walked around the corner of his house, and looked down the road. (4RT 824.) Stacey saw a car driving with its lights out. (4RT 825.) The car turned onto Road 127, made a U-turn and stopped. (4RT 825.) The passenger got out of the car and went into the car's trunk. (4RT 825-826.) Stacey was unable to identify the make or model of the car, although he thought it was a mid-size. (4RT 826.)

David McGovern was driving on Avenue 328, when he came across what he thought was a large dead animal on the south side of the road. (6RT 1274-1275.) As he continued down the road, he saw a tan or brown

car parked on the corner of Avenue 328 and Road 127. (6RT 1275-1276.) There were two Mexican males sitting in the front seat, and it appeared the driver had blood on his face. (6RT 1276.) As he passed the car, McGovern looked in his rear-view mirror and saw the men get out and go to the vehicle's trunk. (6RT 1276.)

Rory McCreary lived on Avenue 328, and he was running down the road when he came across what appeared to be a fight. (4RT 856-857, 860.) McCreary then heard four to five gun shots and saw muzzle flashes. To McCreary, the shots seemed to originate over the top of a white car on the driver's side, but they may have been from inside the car.[12] (4RT 857, 863, 868, 870, 872.) Scared that he was being shot at, McCreary backed into the road-side oleander bushes. (4RT 857.) As the car left, he saw an injured man run across the road and then tumble into a bush. (4RT 860.) McCreary ran over and tried to assist him. (4RT 860.)

3. Police arrival to the crime scene

Just after 8:00 p.m., Tulare County Sheriff Detective Pinon arrived at the scene, which was at 12659 Avenue 328, on the north side of Visalia. (4RT 742-743, 749.) Pinon described the area as residential with houses on both sides of the street. (4RT 743.) Pinon observed Sanchez laying on his back on the south side of the roadway with what appeared to be an exit

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[12] McCreary also recalled seeing a buck-skinned Toyota pickup with black lettering on the tailgate nearby, along with a Plymouth Duster with a flat tire about 100 feet away from the car. (4RT 858, 862, 869-870.) McCreary acknowledged that he may have previously testified that the person fired the gun over the hood of the pickup, but he was now certain that the shots were fired over the white car. (4RT 870.) McCreary was also asked if he recalled previously telling defense investigator Wells that the person shot over the hood of the pickup and not the white car, and he said it was Wells that put that idea into his head and he "just gave in and said 'yeah.'" (4RT 871, 873.) He further explained that he was doing drugs during that period of time and could have said that. (4RT 873.)

wound under his right eye. (4RT 743, 750.) There was a knife close to Sanchez's body, and it had blood stains on it. (4RT 749.) A couple of shell casings were also found close to the body. (4RT 750, 780.)

4. Cause of Sanchez's death and Lopez's injuries

The official cause of Sanchez's death was a single gunshot wound to the head. (4RT 934.) The day after the murder, Pathologist Gary Walter performed the autopsy on Sanchez. (4RT 923-924.) Walter found two bullet wounds to Sanchez's head: an entry wound to the back of the head that was located just to the left of midline; and an exit wound on Sanchez's face that was located just below the right eye and right of midline. (4RT 926, 930.) Given these wounds, the bullet traveled from back to front, slightly left to right, and with a slight downward deviation of the tract from horizontal. (4RT 930.) Walter stated that a person shot in this manner would have been incapable of making any real volitional movements after the shot. (4RT 931.)

Walter explained that the entry wound exhibited powder tattooing and thermal burning of the soft tissue underneath. (4RT 927.) The presence of tattooing indicated that the muzzle of the gun was in very close proximity to the skin, and was either touching it or within an inch or so. (4RT 928-929.) Walter said that this could be described as a contact wound. (4RT 929.)

While Sanchez's blood tested negative for the presence of alcohol, Walter explained that people can absorb alcohol differently. (4RT 935, 938.) And that if Sanchez had drank a beer within an hour of his death, Walter would not necessarily have been surprised at the negative result, as Sanchez could have metabolized it. (4RT 939.) Sanchez's drug screen came back positive. (4RT 936.)

Meanwhile, Lopez had been taken to Kaweah Delta Hospital where Dr. Robert Geiger treated him. (5RT 1207-1208; 6RT 1266, 1280-1281.)

Lopez suffered 10 to 15 stab wounds to his chest, abdomen and face, along with a gunshot wound to his left arm. (5RT 1028, 1030.) Three of the wounds were considered life threatening: a knife wound that penetrated his chest and caused bleeding into the lung; a knife wound that went through the colon and entered the big blood vessel of the kidney; and a cut to a large vein beneath the clavicle which bled significantly. (5RT 1029.) Lopez was discharged from the hospital on April 11th. (5RT 1032.)

5. Appellant and Contreras return home that evening

Gilbert Galaviz testified that after appellant and Ruben Contreras left, he took the kids to a nearby park for a short period of time. (5RT 1164.) Upon his return, he stayed up for about an hour before going to bed. (5RT 1164, 1185-1186.) At this time, Maria was already asleep, and Alicia was in the other bedroom. (5RT 1166, 1187.) At around 8:30 p.m., appellant and Contreras returned to the residence on foot. (5RT 1164, 1166, 1186-1187.) Galaviz and Maria were asleep, and Maria answered the door. (5RT 1166-1167.) Galaviz explained that Maria had to answer the door because it was locked, and that appellant and Contreras did not have a key.[13] (5RT 1192.)

Upon their entry, both Contreras and appellant went into the restroom and started to wash up. (5RT 1165.) Contreras had blood all over his clothes, and Galaviz recalled seeing some blood on appellant's upper body or arm. (5RT 1164-1165, 1188, 1214.) Appellant had a gun and was

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[13] Galaviz did not recall previously telling a detective that he was the one who let appellant and Contreras in after they knocked on the door. (5RT 1203-1204.)

cleaning it. (5RT 1167.) He also changed his clothes.[14] (5RT 1189.) Both appellant and Contreras said that they had killed a pig.[15] (5RT 1168, 1194.)

Galaviz went on to testify that when appellant and Contreras left the residence earlier, appellant did not have any cocaine with him, but when they returned, one of them had some and offered it to him.[16] (5RT 1168, 1170.) He also said that from the time of the killing and up until the time of appellant's arrest, he saw appellant with the gun at the house.[17] (5RT 1162.)

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[14] Galaviz did not recall testifying at the preliminary hearing that he had said that appellant had different clothes on when he returned. (5RT 1197.)

[15] Galaviz did not recall testifying at the preliminary hearing or Contreras's trial that Contreras was the one who said they killed a pig. (5RT 1194-1195.) However, he did recall telling Detective Raborn that it was appellant who had said that he killed a pig, and that he almost killed the other one but it got away. (5RT 1210.)

[16] While he testified that he didn't take any cocaine, he also admitted that he could have previously testified that he took some of the cocaine and used it the following day. (5RT 1194.)

[17] At the time of his testimony, Galaviz was incarcerated and serving a 25-to-life term for killing someone. (5RT 1155-1156.) The jury was also aware that Galaviz had been convicted of attempted grand theft in 1982, and two counts of burglary in 1983. (5RT 1772-1173.) Galaviz came forward and contacted police after his April 8, 1989, arrest for petty theft—a crime that he knew could result in prison time given his prior theft conviction; when arrested, he was also due to be sentenced on a burglary charge. (5RT 1156, 1172-1173, 1216.) Galaviz spoke with police in hopes of being released from jail quickly. (5RT 1156, 1174.) After he told police what he knew, and despite a prior failure to appear, he was later released on his own recognizance. (5RT 1157-1158; but see 5RT 1177 [previously testified he wasn't OR'd that day].) And because of his cooperation with police, it was Galaviz's understanding that he received a reduced sentence on the pending burglary charge, but he wasn't sure if the petty theft charge was ever filed. (5RT 1177; see also 5RT 1178-1180, 1217-1219 [counsel's

(continued...)

6. Alvaro Lopez's pre-trial identification of appellant and Mrs. Meek's "tentative" identification

Lopez first spoke with Detective Morales at the hospital. At that time, Lopez simply said that his brother-in-law had been killed and taken away in a car. Lopez further said that it was two Mexican hitchhikers who did it, and that he didn't know them. (6RT 1281, 1305-1306.)

Sometime after his surgery, Lopez again spoke with Detective Morales, along with Detective Pinon. (6RT 1281, 1306.) At that time, he again lied to the detectives because he expected to leave the hospital at some point, and he wanted to kill his attackers. (6RT 1282.) As such, and despite knowing who appellant was, he told the detectives he didn't know his assailants. (6RT 1282.) Instead, Lopez said that he and Sanchez stopped at the market on Highway 63 and purchased beer. (6RT 1306.) When they came out of the market, two Mexican males asked for a ride. (6RT 1307.) Lopez told Pinon that one of the men was about 25 years old, he had a mustache, and he was wearing a white T-shirt and blue pants. (6RT 1307.) This assailant pulled out a gun, put it to Sanchez's head, pulled the trigger, and then told the other assailant to secure Lopez.[18] (6RT

(...continued)
attempt to further clarify Galiviz's understanding].) Lastly, Galaviz testified that he or someone close to him had been threatened in recent days, which had affected his ability to recall or answer questions. (5RT 1222-1223.)

[18] Pinon testified that during this interview Lopez did not give him the name of anyone involved but that he did provide a description. (4RT 770-771.) Lopez told Pinon that there were two Mexican males. One man was approximately 25 years old, with a mustache and wearing a white T shirt and blue pants. (4RT 771, 789.) The second man was about 20 years old, and was wearing a checkered shirt and a Levi jacket. (4RT 771, 789.)
(continued...)

1307.) Lopez repeated a similar statement to Pinon about a week later.[19] (6RT 1307-1310.)

Lopez was shown two photographic lineups while at the hospital. (6RT 1285.) Initially, Lopez did not make an identification. (6RT 1285-1286.) However, after he had been told that suspects had been detained, and after he spoke with Evangelina Avalos who told him to tell the truth, he asked to speak with the detectives.[20] (6RT 1286, 1328.) Lopez then identified appellant from the lineup. (6RT 1310.) Lopez admitted that he only recently told the truth about the presence of drugs, and that he had continued to lie about the drugs each time he talked to the police and when he testified at the preliminary hearing. (6RT 1311.)

(...continued)
Lopez said that they had given the two men a ride and that the men were hitchhikers. (4RT 788-789.)

[19] During this April 6th interview, Pinon said Lopez, again, described the assailants as two Mexican Males. The first man—the shooter—was about 25 years of age, 5'6" to 5'7," medium build, and about 160 to 170 pounds. (4RT 772, 790.) The man had a thick mustache and his hair was combed straight back. (4RT 790-793.) The second man—the man with the knife—was about 5'10," with a medium build, approximately 20 years of age, and he had black hair parted on the side. (4RT 791.) Pinon had personally seen the second subject and, in Pinon's opinion, Lopez's description was consistent with Contreras's appearance. (4RT 772.) Pinon also acknowledged his prior testimony where he described appellant as about 5'5" to 5'6," about 135 pounds, black hair, brown eyes, somewhat dark complexioned and with a small build. (4RT 785-786.)

[20] Avalos testified that she was at the hospital and that she spoke with detectives about Lopez not talking to them. (6RT 1328.) She then spoke with Lopez who told her that he was "gravely ill," and that he might die. (6RT 1329.) Avalos told Lopez that if he was going to die anyway, then he should tell the truth. (6RT 1329.) After they spoke, Lopez told her to call the detectives into the room. (6RT 1328.)

Detective Morales testified to the circumstances of Lopez's identification. Morales said that he watched Lopez closely as Lopez looked over the photo lineup. (4RT 947-494.) Lopez became a little restless or nervous, and his breathing increased a bit as he looked at the photos. (4RT 947-948.) Morales watched Lopez's eyes as they appeared to look toward appellant's photograph. (4RT 949.) Even so, Lopez did not make an identification at that moment. (4RT 950.) It was Morales's opinion that Lopez was "holding back" or "...didn't want to [fully] cooperate at [that] point...." (4RT 950.) The detective then left the room and spoke with Lopez's female friend who was waiting outside. (4RT 950.) When Lopez's friend asked how things were going, he told her that they were at somewhat of a dilemma. (4RT 951.) The woman then said that she wanted to talk to Lopez. (4RT 951.) After she did, Morales went back into the room, and Lopez said he wanted to see the lineups again. (4RT 952.) Morales handed him the lineups, and Lopez immediately identified appellant as the man who killed Sanchez. (4RT 953.)

Mrs. Meek recalled talking to Detective Pinon a few days after the murder, and that she looked at a book and picked out several people that looked similar to the men she saw.[21] (4RT 819.) A few days later, she was shown a photographic lineup, and she, again, picked out two people as looking similar to the people she saw. (4RT 819-820.) Pinon later testified that when shown the lineup, Mrs. Meek pointed to appellant's photo and said that he looked a lot like the driver from the eyebrows down, but that there was something wrong with the hair.[22] (4RT 850-851.) Pinon considered this a "tentative identification." (4RT 850.)

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[21] None of those persons were appellant. (4RT 852.)

[22] It appears that about this same time, Detective Morales also showed Mrs. Meek the same photo-lineup, and Mrs. Meek did not pick out (continued...)

7. Recovery of Hidalia's/Sanchez's car and blood evidence

The car Sanchez was driving was found on March 31, the day after Sanchez's murder. Both Detectives Morales and Pinon went to the scene. (4RT 750-751, 888; 6RT 1228.) The beige, mid-sized sedan was located on the west side of the railroad tracks, and north of Houston and east of Bridge Street. (4RT 751.) This location was about 200 to 250 yards as "the crow flies" from the 202 1/2 Sweet Street address appellant was staying at or about three blocks. (4RT 752, 784; 5RT 1219-1220.)

When found, the car's front windows were rolled down, while the rear windows were up. (4RT 966-977.) The front windshield toward the driver's side had a bullet-hole in it, and the hole was made from the inside out. (4RT 891; 5RT 1068.) There also appeared to be blood sprayed onto the inside of the windshield in the area of the hole. (4RT 892.)

Two, spent nine-millimeter shell casings were found inside the vehicle, along with a nine-millimeter, unexpended bullet. (4RT 895-896; 5RT 975, 994-995.) One casing was found on the driver's side, backseat floorboard, and the other was underneath the carpet of the right front passenger seat. (4RT 794, 797; 5RT 975, 994-995.) The live bullet was found in the area of the rear, driver's side passenger seat. (4RT 794.)

A Harley Davidson ball cap was found on the ground underneath the front, passenger door. (4RT 796, 890.) It was Morales's opinion that the hat could have been placed there anytime after the car was parked. (4RT 963.) The hat was the same kind of hat Galaviz saw appellant wearing when appellant left with Sanchez, Lopez and Contreras the previous evening. (4RT 796; 5RT 1165-1166.)

(...continued)
appellant as being similar to anyone she saw that night. (4RT 848, 851, 961-962.)

Detectives also observed blood throughout the car on both the interior and exterior of the vehicle, which included the seats, the hood, the trunk, the floorboard and side panels, the glove box area, and the door jam between the driver's door and passenger's door. (4RT 751-755, 888, 967-968.) An examination of the trunk revealed that the tire had been moved, and there was a box of ammunition that had a blood smear on the packaging. (4RT 970.)

Gary Cortner of the California Department of Justice's Fresno Regional Laboratory also examined the vehicle and testified, in part, in the area of crime scene reconstruction. (5RT 1065- 1067.) As for the bullet hole in the windshield, it was Cortner's opinion that the hole originated from inside the car, and that the shot was fired from just to the left of the driver's side headrest. (5RT 1069.) Cortner opined that the shooter was holding the gun in his left hand, although it may have been possible to use both hands if he had moved over as far as possible to the left side of the interior of the car.[23] (5RT 1069.) On cross, Cortner further opined that the gun was fired at an upward angle from behind the seat, through the head and then through the window. (5RT 1087.) Cortner did not believe the gun could have been fired from outside the car, as the driver's headrest was very high and the window would have had to have been down.[24] (5RT 1069, 1088.)

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[23] Gilbert Galaviz testified that appellant was right handed. (7RT 1635.)

[24] Gunshot residue (GSR) particles were found in the sample taken from the left headrest area. (4RT 912-913, 920.) Based on this, the gun would necessarily have been in close contact with the headrest or at least within five feet of it. (4RT 914, 918.)

As for the blood, Cortner noted that there was a lot of blood on the inside the car and that some of it had "creeped out" from under the front passenger door and onto the base of the car. (5RT 1071.) This was consistent with someone who bled profusely inside the car. (5RT 1071.) Cortner also observed what appeared to be mostly blood smears and a few splatters on the rear panel of the car. (5RT 1070.) The smear originated from the front passenger side and went towards the back of the car, which appeared to have been made by someone who had rubbed up against it and smeared the side. (5RT 1070.) As compared to the front passenger seat, there was very little blood on the driver's side. (5RT 1071.) Rather, most of the blood was on the passenger seat and door, and mostly in the form of smearing. (5RT 1072.) Cortner opined that given that it was March and in the evening, blood smears would dry within an hour but that pooled blood would take longer. (5RT 1075.)

A number of blood samples were taken from the car. Analyst Rodney Andrus examined the samples and attempted to type them using the PGM system. (5RT 992, 1099-1101.) One swab taken from the right side of the rear seat was confirmed to be human blood with a PGM subtype of two plus one plus.[25] (5RT 1100, 1113-1114.) This sample was consistent with Lopez's blood type, and inconsistent with Sanchez, Contreras or appellant's blood type. (5RT 1116.)

8. The fingerprint evidence

Tulare County Sheriff's Office Crime Lab Detective Eric Grant processed the car and collected numerous fingerprints. (5RT 973-974, 979,

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[25] Andrus explained that the PGM system was a blood typing system similar to the ABO system. (5RT 1114.) PGM blood typing can be broken down to three common types, which can be further sub-typed into 10 common types. (5RT 115.) The "two plus one plus" was simply a designation of the particular blood type. (5RT 115.)

987.) Those prints were first analyzed by Detective Brian Johnson. Johnson had been with the Tulare County Sherriff's Office for approximately 18 years, and almost all of his time was spent in the crime lab. (5RT 1009.) Johnson explained that their lab used a standard of eight to 10 "points" when calling a match between a latent print and a known set of prints, and that he personally liked to see 10 to 12 matching points. (5RT 1013, 1019.) However, Johnson acknowledged that some labs will make comparisons with fewer points than eight points, although he thought eight to ten was a basic standard in the industry. (5RT 1014, 1016, 1019-1020.)

Johnson made comparisons of some of the fingerprints submitted and determined that none of the usable prints located on the car matched Maria Lopez, Hidalia Lopez, Evangelina Avalos or Gilbert Galaviz's known prints. (5RT 1011-1012.) However, three of the latent prints matched Ruben Contreras. (5RT 1012.)

Johnson and his supervisor, Sergeant Hensley, also analyzed the two prints taken from the rear seat and from the lid of the trunk, respectively. (5RT 976-979, 1013.) The print on the driver's side, rear seat was a visual print that was left in suspected blood. Consequently, because it would not lift well, a photograph of the print was made. (5RT 978, 983.) In contrast, the print from the passenger side of the trunk's lid was developed using fingerprint powder. (5RT 977-979.) Both Johnson and Hensley were of the opinion that there were insufficient points to make a comparison. (5RT 1013.) Subsequently, all of the prints obtained by Grant were sent to the Department of Justice's Fresno Regional Lab for further analysis. (5RT 1015, 1033.)

Richard Kinney of the Fresno Lab testified as an expert in latent print analysis. (5RT 1033.) Kinney had been a latent print analyst for the past 17 years, and he had dealt exclusively with ridge structure identification for

the department for over 21 years. (5RT 1033-1034.) Kinney was responsible for training all of the officers in his eight-county jurisdiction to find and preserve fingerprints. (5RT 1034.) Kinney was a certified latent print examiner with the International Association of Identification, a world renowned organization. (5RT 1034-1035.) Kinney's time at the lab was devoted solely to the analysis of fingerprints. (5RT 1039.)

Kinney explained that patent impressions are fixed prints that are laid in blood, dust, grease, etc. (5RT 1050.) These type of prints are photographed, instead of dusted or lifted like a latent print. (5RT 1050.) Kinney said that a print is usable if it has a sufficient number of ridge characteristics or pattern-type formation so that a subject can be eliminated. (5RT 1045.) However, for a print to be an identifiable print, Kinney required seven or eight matching characteristics to the known print. (5RT 1045.) In Kinney's opinion, seven or eight characteristics was "plenty."[26] (5RT 1046.)

Kinney testified that on a daily basis, law enforcement agencies submitted various latent and inked prints for comparison to the Fresno Lab. (5RT 1035.) On occasion, this had included prints that had been previously analyzed by other experts. (5RT 1035.) On numerous occasions, Tulare

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[26] Kinney was asked if it was common for other labs to require a higher number of matching characteristics. (5RT 1047.) In answering yes, Kinney explained that many times the agency sets a standard, and then the analyst simply uses that standard for their entire career. (5RT 1047.) In contrast, analysts at the Fresno lab are trained from the start to generally use eight characteristics, but that they are told that there may be occasions where they can positively identify someone from seven. (5RT 1047.) Kinney went on to say that both his lab and the F.B.I. have used seven and eight characteristics, and that they have gone as low as six. (5RT 1047.) Kinney also said that an analyst may require a higher number of matching characteristics as a matter of comfort to that particular analyst. (5RT 1048.)

County had submitted for analysis fingerprints left in blood.[27] (5RT 1035-1036.) Kinney stated that this type of fingerprint comparisons can be particularly difficult to work with. (5RT 1037.) Kinney explained that patent impressions may represent, not only the elevated portion of a fingerprint—like an inked print—but that they may also present the furrow or valleys in the print. When this happens, the image or print may appeared "flipped" or reversed on all or a portion of the print, which was dependant on how much pressure was applied when the print was left. Kinney stated that this is where confusion can occur for analysts who have not worked often with these type of prints.[28] (5RT 1051-1055.)

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[27] Sergeant Hensley testified during the defense's case. Hensley acknowledged that he had previously sent bloody prints for analysis to Kinney. (7RT 1603.) Hensley also stated that he had known Kinney for a long time and that he considered him to be "...one of the foremost fingerprint technicians in the field." (7RT 1603.) "That is literally all he does is work with fingerprints." (7RT 1603.)

[28] Earlier in his testimony, Kinney explained:

> ...A bloody impression is also known as either a patent or patent impression, and what that primarily means is that a latent impression is simply the recording of the ridge structure formation from the finger onto a surface, whether it be hard or soft, and then that item is processed, and a latent, which means hidden impressions, are rendered rather it be through chemicals or powders versus a bloody impression, one that the impression is made up of the blood that has either been transferred to the subject's finger and then transferred to the surface[,] or the fingers or palm area come into a bloody area making the impression go down through the blood having the ridge structure appear at that point in time.
>
> Now often in that type of impression—again, back to the terminology, a patent impression, you will have a mixing of the ridge pattern being laid. And what I mean by mixing is that often the impression that is laid will be a true example of the finger, meaning if there is an ending ridge and a bifurcation on

(continued...)

Kinney analyzed and compared both the print photographed in the blood on the rear seat and the print lifted from the trunk of the vehicle. (5RT 976-979, 1041.) As for the bloody print, Kinney determined that it had the "exact same ridge characteristics and the exact same placement" as appellant's known print. (5RT 1007-1008, 1045-1046.) Kinney's identification was based on more than 10 matching characteristics. (5RT 1059-1060.) As for the print lifted from the trunk of the car, it matched appellant's palm print and, again, Kinney found at least 10 matching

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(...continued)

> the finger[,] it will appear to be a ridge and bifurcation in the latent impression.
>
> However, in a patent impression there is a good possibility that the ridge structure will be reversed, and this is what I'm talking about in reverse order. There are three basic characteristics that we must look for in fingerprint identification. The two easiest ones to describe, especially in this particular scenario I'm giving you, is an ending ridge which is simply a ridge that ends at any given spot. The second ridge is a bifurcated ridge which that being my hand and my arm and the forking of the fingers making the bifurcation of two ridges.
>
> Now, in a patent impression, the ending ridge will appear to be a bifurcation, and the bifurcation will appear to be an ending ridge. Therefore, making you, the examiner, flip-flop your expertise at that given point allowing you to examine the characteristics, keeping in mind because of the neatness of the pattern of blood that is being transferred, not on all the finger but possibly just a portion thereof, you may start with an ending ridge bifurcation true example, and then you may flip-flop and go the other way and vice versa.
>
> A lot of examiners who do not deal with fingerprints on a daily basis feel very uncomfortable with this point, and that is why it is not uncommon for all bloody prints to be submitted to my agency of which happens to be the Attorney General's Office, State of California, and we have a lot of examiners who basically look at nothing but fingerprints. This is the reason they turn them over.

(5RT 1037-1039.)

characteristics in coming to his conclusion.[29] (5RT 1049-1050, 1059-1060.) Lastly, Kinney examined the fingerprints of Contreras and confirmed the comparisons made by the Sheriff's Office; he also confirmed the analyst's exclusion of certain persons. (5RT 1040-1041.)

9. Appellant's April 8th arrest and the handgun

Appellant was arrested on April 8, 1989, outside of the residence at 100 Strawberry Street. (4RT 874-878.) At that time, officers forced appellant to the ground, and a gun was found underneath his person. (4RT 878-879.) Cortner later examined the nine-millimeter handgun and its magazine, along with the shell casings found at the scene and in the car. (5RT 1076-1083.) Cortner determined that the shell casings found were fired from the gun found in appellant's possession. (5RT 1077-1083.) Cortner also noted that appellant's gun did not possess a "hair trigger," as it required from nine to fifteen pounds of pressure to fire. (5RT 1091, 1093.)

Appellant's jacket was later searched, and two small packages were found in a pocket. (4RT 882.) The packages contained 2.16 and 2.18 grams of cocaine base, respectively. (5RT 1085.)

10. Additional evidence of Lopez's drug dealing

Gracie Mendez and Abundio "Isidrio" Burciaga lived together in a common-law relationship. (5RT 1124.) Mendez had known Burciaga since 1986, and she was aware he sold cocaine. (5RT 1124-1125.) Burciaga had people that worked with him, including Alvaro Lopez whom she had known for a couple of years. (5RT 1125, 1135.) Burciaga obtained his cocaine from Los Angeles, and he would buy $4,000 to $5,000 worth at a time. (5RT 1126, 1135.) Lopez sometimes went with Burciaga

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[29] Kinney said he was aware that the Sheriff's Office had not matched the bloody print from the seat, but that he was under the impression that they had matched the print from the trunk. (5RT 1063.)

on his trips to Los Angeles. (5RT 1136.) However, at one point, Burciaga got rid of Lopez because Lopez was taking money on the side. (5RT 1127-1128.) While Mendez knew Guadalupe Sanchez, she had never seen him involved in drug-dealing activities.[30] (5RT 1123-1124, 1128.)

Mendez said that on the morning of March 30, 1989, both Lopez and Sanchez came to her house to pick up money, and that she saw Burciaga give them a brown paper bag with $4,000 or $5,000 in it. (5RT 1132-1133, 1136.) Sanchez had asked Burciaga for the money or drugs. (5RT 1142.) She described Sanchez as nervous and sweating, and Lopez was trying to persuade him to follow through with it. (5RT 1133-1134.)

Mendez stated that after Lopez stopped working for Burciaga, she never heard Burciaga say that he was going to have Lopez killed for stealing money, or anything to the effect that he was responsible for Sanchez's killing. (5RT 1138-1139.) However, Mendez did acknowledge that she had had two conversations with Burciaga after the killing. During one conversation, Burciaga said "he" meant for Lopez to be killed, and in another conversation, Burciaga said that "they" meant for Lopez to be killed. (5RT 1141-1147.) As to this second conversation, Mendez said that Burciaga had visited Lopez at the hospital, and he then told her that he thought it was "El Capitan" who had tried to kill Lopez.[31] (5RT 1145.)

For his part, Lopez denied ever selling drugs, he denied going to Los Angeles to pick up drugs with Burciaga, and he denied stealing money from Burciaga. (6RT 1313-1316.) Lopez did acknowledge that Burciaga

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[30] Apparently, Sanchez and Burciaga were distant cousins. (5RT 1142; 6RT 1230-1231.)

[31] Along this same line, Mendez also acknowledged that earlier that year, she testified that Burciaga told her that the target of the killing was Lopez and not Sanchez. (5RT 1149-1150.) At the time of trial, Burciaga had been in Mexico for over a year. (5RT 1146.)

may have come to visit him at the hospital, but Burciaga did not tell him to identify appellant as the man who killed Sanchez. (6RT 1313, 1316-1317.)

Hidalia Lopez testified that on March 30, 1989, she loaned her car to Sanchez. (6RT 1233, 1236.) Alvaro Lopez and Sanchez seemed nervous, but Hidalia attributed this to them not having money for lunch. (6RT 1232.)

C. Guilt Phase – The Defense Case

Appellant's defense was predicated on trying to establish that somebody else committed the murder of Guadalupe Sanchez. More specifically, appellant attempted to implicate Gilbert Galaviz in the murder, and he also attempted to establish an alibi.

1. The Strawberry Street apartment and a potential alibi

On March 30, 1989, appellant's cousin Antonio Navarrao Luperico went to an apartment on Strawberry Street, where he saw appellant and Contreras playing cards at around 2:00 p.m. (6RT 1409-1410, 1414.) During this visit, he saw appellant drink one beer, and appellant said that he had a court date on the 31st. (6RT 1411.) Antonio said appellant was still there when he left at 6:00 p.m. (6RT 1410.) However, on cross examination, Antonio admitted that he couldn't remember what date this actually occurred on, but that he was certain appellant had said that he had a court date on the 31st. (6RT 1411, 1418.) He was also not real sure about the times, and he had previously testified that he arrived at 4:30 and left at around 7:30 p.m. (6RT 1412, 1419.)

Ambrosia Martinez and appellant were first cousins, and she was at the Strawberry Street apartment on March 30, 1989. (6RT 1425-1426.) She recalled seeing appellant there that day at around 6:00 or 6:30 p.m., and he told her that he had to go to court the following day. (6RT 1427.) However, on cross examination, Martinez admitted that she wasn't sure she

actually heard appellant say that he had to go to court, and that someone else may have said it. (6RT 1428-1429.) She also admitted that she wasn't sure about the date. (6RT 1429.) Detective Pinon interviewed Martinez on May 8, 1989, and at that time, she said she saw appellant in the front yard of the residence at 7:00 p.m. (7RT 1625.) Martinez told Pinon that she was positive it was at 7:00 p.m., because appellant said he had to go to court the next day. (7RT 1625-1626.)

Appellant's friend Guadalupe Medina also went to the Strawberry Street apartment everyday. (6RT 1433, 1437.) She recalled, "more or less," telling an officer that on one occasion at about 5:30 or 6:00 p.m., she asked appellant if he wanted a beer and he said no because he had court the next day. (6RT 1436-1437; see also 7RT 1624-1625 [statement to Pinon].)

Delia Contreras had known appellant for approximately 15 years. She was the mother of two of appellant's children, and they lived together as man and wife before their relationship ended 10 years ago. (6RT 1441, 1451.) Delia's brother was Ruben Contreras, and Maria Lupercio Contreras and Alicia Lupercio were her sisters. (5RT 1155, 1171; 6RT 1441-1442.) Delia recalled taking appellant and Ruben Contreras to court on March 31st, and picking them up at the 202 1/2 Sweet Street residence at about 7:00 a.m. (6RT 1442, 1445.) She also testified that the night before she took appellant to court, she drove by the Coquillia apartment at about 6:00 or 7:00 p.m. and saw appellant there. (6RT 1451-1453.) She didn't stop. (6RT 1464.)

The parties stipulated that on the morning of March 31, 1989, appellant made an appearance on the morning calendar in the Visalia Municipal Court. (6RT 1469.)

2. The attempt to implicate Gilbert Galaviz

Maria Susie Contreras was Ruben Contreras's sister.[32] (7RT, TR 1096.) In March of 1989, she was living at 202 1/2 East Sweet Street, with her sister Alicia Lupercio, Alicia's kids, her brother in law Manuel Lupercio, and her boyfriend Gilbert Galaviz, with whom she shared a room. (7RT, TR 1096-1097; PX 722-723.) Appellant also stayed at the residence "off and on." (7RT, TR 1097.)

On the afternoon of March 30th, Maria left the residence at about 3:00 p.m., and went to a shopping mall. (7RT, TR 1099.) At the time she left, Ruben, Galaviz and appellant were all outside, and Galaviz was working on the car. (7RT, TR 1100; PX 738.) She returned to the residence at around 9:00 p.m. (7RT, TR 1099; but see PX 723 [returned around 6:30-7:00 p.m.].) When she got home, Maria entered through the back door and went to her room. (7RT, TR 1100.) Because she entered through the back, she didn't know who was home at the time with the exception of her sister and her kids. (7RT, TR 1100, 1104.) Maria then put her daughter to bed and went to sleep as well. (7RT, TR 1100.) Maria said she didn't wake up at anytime during the night, so she had no knowledge of what may have went on at the house. (7RT, TR 1100-1101.) While she acknowledged that she didn't actually know if Galaviz came home, she said that if he had, she would have had to get up and let him in as she always locked the door. (7RT, TR 1101-1102.)

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[32] As Maria Contreras was found to be unavailable as a witness (6RT 1359-1369), her preliminary hearing and her Ruben Contreras-trial testimony was read to the jury. These transcripts are affixed to the back of volume seven of the Reporter's Transcript. Specific page citations to those transcripts are to the number found in the upper right hand corner of each page. Citations to the preliminary hearing transcript contain an additional "PX" in the record cite, while trial transcript has an additional "TR" in the cite.

The next morning, Maria didn't see Ruben or appellant. (7RT, TR 1103.) However, Galaviz returned home sometime after 10:00 a.m. (7RT, TR 1103.) Galaviz was carrying his shirt, his pants were stained and dirty, and there was some blood on his clothing. (7RT, TR 1097, 1103, 1113.) When Maria asked Galaviz what happened, he initially replied "nothing." But when she asked him a second time, she said Galaviz "just came out real smart and said, 'I killed a pig.'" (7RT, PX 745.) Maria offered to wash the clothing, but Galaviz told her no and to get rid of them and to burn them. (7RT, TR 1098.) When she persisted and told him that he could wear the clothes to work, Galaviz again told her to get rid of them. (7RT, TR 1112.) Maria did not get rid of the clothes, and instead, washed them anyway. (7RT, PX 724; but see TR 1112-1113 [didn't wash them, and then not sure if she washed them].) Afterward, Galaviz took the clothes and left. (7RT, PX 725.)

About a week later, Maria learned that Ruben was arrested for the killing of Sanchez and the attempted murder of Lopez. (7RT, TR 1098.) Even though she saw the blood on Galaviz's clothes, she didn't think he was involved because Galaviz often got into fights, and it wasn't the first time that he had come home in that condition. (7RT, PX 744.)

During the time she lived with Galaviz, she saw Galaviz with a black gun that had a clip. (7RT, PX 725.) She last saw the gun in a box that Galaviz used to keep his things in. (7RT, PX 734.) Maria claimed that Galaviz told her that he sold the gun to appellant on April 1st.[33] (7RT, PX 725, 728, 745.)

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[33] Galaviz denied selling a gun to appellant, and he further denied that the gun he saw appellant with on March 30th was actually his gun. (5RT 1202.)

Delia Contreras testified that when she arrived that morning, appellant and Ruben were sleeping in the living room, and her sister and her kids were in one of the two bedrooms. (6RT 1454, 1456-1457.) Maria called her to the bedroom. (6RT 1455, 1457.) Delia did not recall seeing Galaviz at the residence at that time. (6RT 1449-1450.)

Alicia Lupercio testified, and when asked about the events of March 30th, 1989, she repeatedly said she couldn't remember. (7RT 1493-1497.) However, Detective Pinon interviewed Alicia on May 6, 1989, and she told him that on March 30, 1989, appellant, her brother Ruben, and Galaviz were at her home. (7RT 1626.) Appellant and Ruben left at 4:00 p.m., but she didn't see who they left with. (7RT 1626.) Galaviz remained and worked on a car, and Ruben and appellant didn't return until around 10:00 p.m. (7RT 1626-1627.) Alicia said that she didn't recall what they were wearing upon their return or whether or not they had blood on their clothing. (7RT 1627.) Alicia also said that she had never seen appellant or Galaviz with a gun. (7RT 1627.)

Severa De La Rosa was close friends with Ruben Contreras's mother. (6RT 1384-1385.) Estella Lopez and Lolly Lopez were her cousins, and she also knew Galaviz well. (6RT 1384, 1375.) Galaviz had lived with her family up until the time he met, and then married, De La Rosa's niece, Mary Ann Godinez. (6RT 1383.) Galaviz and Godinez had one child together. (7RT 1612.)

De La Rosa testified that on April 1, 1989, she was at a Circle K in north Visalia when she ran into Galaviz and a "white guy." (6RT 1376-1377.) The two were in a small beige or light brown truck that may have been a Toyota or Datsun.[34] (6RT 1376-1377, 1380-1382.) De La Rosa said

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[34] Galaviz denied knowing anyone who owned a tan colored Toyota pickup. (5RT 1202.)

that Galaviz offered to sell her a gun for $80, and he also tried to sell her some rings.[35] (6RT 1377-1378.) Although she hadn't seen Galaviz for a long time, she said as far as she knew, it was usual for him to have a gun in his possession. (6RT 1378-1379.) De La Rosa was later shown a gun catalog by defense investigator Wells. She picked out a black, nine-millimeter gun as looking similar to the one Galaviz had. She based her opinion on the fact that the barrel looked familiar.[36] (6RT 1379; 7RT 1606-1607, 1620-1621.)

Delia Contreras testified that in late February of 1989, she had seen Galaviz in possession of a gun, which was generally the same color and shape as the one found in appellant's possession at the time of his arrest. (6RT 1445-1446, 1468.) She also said that about two days before March 30, 1989, she saw a gun in Galaviz and her sister's bedroom at the Sweet Street address. (6RT 1447-1448, 1462.) The gun was in a box of clothes in the corner, and she just happened to see it. (6RT 1447, 1462.)

3. Gilbert Galaviz's alleged admission

Lolly Lopez testified that she had known Galaviz for about two years. (7RT 1546.) Sometime in October of 1989 or 1990, she was at her mother's house when she had a discussion with Galaviz about a killing that occurred in Visalia. (7RT 1547-1548, 1550, 1552-1553, 1556, 1569.) Lolly said she and Galaviz were alone and Galaviz was working on her

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[35] De La Rosa said that Galaviz told her the stuff in the truck was stolen. She also said that she used to buy things from Galaviz until she got caught for receiving stolen property. (6RT 1385-1386.)

[36] De La Rosa acknowledged that while in Orange Cove in Fresno County about four or five years prior, she was present when Galaviz shot one of her nephews with a .22 rifle. (6RT 1386, 1391.) As a consequence of this incident, her brother received a three-year prison sentence but Galaviz's charge was dismissed. (6RT 1387.)

truck, when Galaviz told her that "Alejandra's son" shot a man in the back of the head. Galaviz said that he and the other man were seated on the back seat. (7RT 1547-1549, 1550, 1562.) While Galaviz told Lolly that money and drugs were involved, he did not say anything about a stabbing or specifically name the shooter.[37] (7RT 1549, 1551, 1555, 1560.)

Lolly had since discovered that Alejandra was Ruben Contreras's mother. However, she acknowledged that she didn't know the size of Alejandra's family or which son Galaviz may have been referring to.[38] (7RT 1550, 1567-1568.) After Galaviz told her this story, Lolly only told her sister Mary about it, along with defense investigator Wells; she didn't tell the police.[39] (7RT 1550-1551.) Lastly, Lolly agreed that no one in her family liked Galaviz, although her sister, Estella, was now married to him. (7RT 1505, 1555, 1558.)

Maria "Mary" Vasquez was Alvaro Lopez's girlfriend, and she testified to a conversation she had with her sister, Lolly. (6RT 1395; 7RT 1550, 1613.) Lolly told Vasquez that Galaviz told her that he was in the backseat of a car when Contreras shot a man in the back of the head and killed him. (7RT 1614.) During this conversation, Lolly also mentioned something about Patterson Tract. (7RT 1614.) Vasquez was "pretty sure"

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[37] Lolly agreed that she did not, and had not, ever had a close relationship with Galaviz. Despite this fact, Galaviz told her about the killing after she simply started a conversation with him. (7RT 1554-1555, 1560-1561.)

[38] Lolly acknowledged that in her previous testimony, she didn't say anything about Alejandra's son being involved. (7RT 1555.)

[39] She also acknowledged that she previously testified that she pretty much kept the information to herself until she talked with Wells in January of 1990. (7RT 1556-1557.)

she had this conversation with Lolly in July of 1989, as it was very warm.[40] (7RT 1615.)

Joann Galaviz lived in the Bakersfield area, and she was Gilbert Galaviz's sister. (7RT 1535.) The two did not have a close relationship, and when Gilbert stopped by her house, it was to ask for money. (7RT 1536.) Joann did not specifically recall Gilbert stopping by with a girl named Helen in September of 1989. (7RT 1536.)

Defense Investigator Dan Wells testified that he first interviewed Joann in June of 1991. (7RT 1578.) Wells said that the interview took place at her house, and that after he identified himself and told her he was working on a homicide that took place in Visalia, he told Joann he wanted to talk to her about Gilbert. (7RT 1579.) The two then discussed three distinct cases. (7RT 1581.) The first was the murder Gilbert committed in Shafter, "where he stabbed a man with a knife[,]" and was subsequently convicted and sentenced to prison. (7RT 1581.) The other two incidents were a shooting in Fresno and the instant killing. (7RT 1582.)

As to the instant incident, Wells claimed that Joann told him that Gilbert and Helen argued, and that Helen was upset with Gilbert because Gilbert had involved her in a murder in Visalia. Helen became involved due to Gilbert taking her along when he shot a man that he didn't know, and that he did the killing at the request of someone else. (7RT 1584.)

However, Joann testified that when Wells came to talk with her, she did tell Wells that Helen and Gilbert argued over a murder in Visalia, but that she thought Wells was talking about the murder in Shafter. (7RT

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[40] Vasquez said that Lolly told her that nobody liked Galaviz, and Vasquez said she didn't like him either. (7RT 1615.) Vasquez explained that this was because of the manner in which Galaviz came to the family (i.e., he became involved with Estella Lopez while she was still married). Nobody in the family liked it, and they still didn't. (7RT 1500, 1616.)

1537.) Joann explained that the murder in Shafter was a fairly recent event, and that that was the reason for her confusion. (7RT 1540.) After she realized her error, she explained this to the D.A. (7RT 1537, 1545.) Joann did not recall telling Wells that during the argument, Gilbert and Helen talked about Gilbert shooting a man because someone told him to do it. (7RT 1538.)

In contrast, Wells testified that Joann was "absolutely not confused" during their conversation. (7RT 1581.) He further stated that when he tried to re-interview Joann, she refused. Instead, Joann told Wells that she was now afraid and that she couldn't be involved because it concerned her brother. (7RT 1585.) Lastly, Wells said that Joann made it very difficult to complete service of the subpoena. (7RT 1586.)

Estella Galaviz, a.k.a. Helen Lopez (i.e., Lolly's sister), married Gilbert in January of the previous year. (7RT 1500, 1505-1506.) Estella acknowledged that she and Gilbert went to visit Joann in Bakersfield in September or October of 1989. (7RT 1501-1504.) However, while there, she and Gilbert did not argue in front of Joann about a killing that occurred in Visalia. Moreover, Estella said that she never told Joann that Gilbert involved her in a shooting or that Gilbert said he shot someone in Visalia. (7RT 1504.) Finally, Estella said she was not with Gilbert when he shot and killed a man in Visalia, and at no time had Gilbert ever told her that he was involved in a shooting that someone else had asked him to commit.[41] (7RT 1504.)

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[41] For his part, Gilbert Galaviz denied admitting to anyone he was involved in the killing of Sanchez and the wounding of Lopez. (5RT 1201.) Along this same line, he further denied asking Contreras and appellant to go to the car and retrieve a knife for him on March 30th, and he denied counsel's accusation that he was, in fact, not at the residence on (continued...)

4. The Relationship between Alvaro Lopez and Burciaga, and Lopez's reputation

Enedina Castro worked at the Siete de Copus bar in Farmersville. (7RT 1511.) During her time there, she became acquainted with Alvaro Lopez, and she also knew of Isidrio Velasquez—a.k.a. Abundio Burciaga or "El Tereque." (7RT 1513, 1526-1527.) Castro said that Burciaga and Lopez knew each other, and appeared to be friends. (7RT 1513, 1523.) She also may have seen Gilbert Galaviz in the bar once or twice, but she didn't recall ever having seen him talk with Lopez. (7RT 1521-1522.) Castro had never observed Lopez sell drugs to anyone; she didn't know if the regular customers thought he sold drugs; and she didn't recall telling Wells that it was common knowledge that Lopez sold drugs.[42] (7RT 1516-1517.)

Carmen Alvarez also worked at the Siete de Copus bar, and she knew who Alvaro Lopez and Burciaga were, but only knew Burciaga by sight. (7RT 1526-1527.) Alvarez did not hear any of the regulars discuss Lopez's reputation for selling drugs, and she denied telling Wells that it was common knowledge that Lopez did. (7RT 1527-1529.) However, she did recall telling Wells that she heard comments related to Burciaga. (7RT 1528-1529.) Lastly, Alvarez did not recall having seen Gilbert Galaviz in the bar, nor did she recall telling Wells that she had.[43] (7RT 1529.)

(...continued)
March 30, 1989, and/or that he was there but left earlier and did not return until around 10:30 or 11:00 that evening. (5RT 1202-1203.)

[42] Wells testified that when he interviewed Castro she told him that Lopez was a known drug dealer in that area. (7RT 1533.)

[43] Wells testified that Alvarez said she had seen Galaviz in the bar on at least one occasion. (7RT 1534.)

Maria Vasquez testified that Alvaro Lopez was poor and didn't have any money. (6RT 1402-1403.) She didn't know if Lopez was involved in drug dealing, and she denied telling police that she thought Lopez was into dealing due to the fact that he had large sums of money with him. (6RT 1399-1401.) In contrast, Detective Pinon testified that Vasquez told him that she suspected Lopez was dealing drugs because, despite not working, he often carried large amounts of money with him. (7RT 1623.)

5. Fingerprint evidence

Tulare County Sheriff's Department Crime Lab Supervisor Vernon Hensley had worked in the crime lab for approximately 30 years, and he had compared thousands of fingerprints. (7RT 1599-1600.) Hensley explained that while eight points was the normal minimum standard used by both the FBI and state justice department to make an identification, eight was not a requirement as it was only necessary for the individual technician be certain that the two prints are identical. (7RT 1601.) Hensley testified that both he and Deputy Johnson reviewed and compared the evidence in the case, and neither one of them were able to match any of the prints to appellant.[44] (7RT 1601.)

6. The mystery truck

Maria Vasquez stated that on the morning of March 30, 1989, she and Alvaro Lopez were at Hidalia's house when she saw a small, brown pickup parked near the residence. (6RT 1395, 1405.) There was a Mexican man, around 30 years of age with a mustache, sitting in the truck. (6RT 1395-1404.) After that day, Vasquez again saw the truck. (6RT 1398.) Once, while Alvaro was in the hospital, she saw it on the street near Hidalia's house, and about a month later, she saw it again by Hidalia's house in

[44] Hensley had had some training on the reversal technique testified to by Kinney, although he couldn't recall ever trying to use it. (7RT 1604.)

Farmersville. (6RT 1397-1398, 1404.) At one point, she followed the truck and got a license plate number which she later gave to a detective.[45] (6RT 1399.)

D. Guilt Phase – Prosecution's Rebuttal Case

Gilbert Galaviz was recalled and he offered a series of denials to the accusations raised in the defense case. Galaviz testified that he had never had a close relationship with Lolly Lopez, and he denied ever having a conversation with her about a murder that took place in March of 1989. In fact, Galaviz couldn't recall ever having any conversations with her. (7RT 1633-1634.) Galaviz denied seeing Severa De La Rosa in Visalia shortly after Sanchez's murder, and he denied ever trying to sell her a gun or ring about that time. (7RT 1634.)

Galaviz acknowledged that he sometimes visited his sister, Joann, in Bakersfield. (7RT 1634.) And while he sometimes took women with him, he could not recall if he ever took Estella, and he did not recall ever having an argument with Estella about a killing that took place in either Tulare or Kern counties. (7RT 1634.) Rather, Galaviz said that he never told Estella anything about the killing of Sanchez. (7RT 1635.)

Consistent with this, Estella testified that Galaviz did not ever tell her anything about a killing that occurred on March 30, 1989, in Patterson Tract. (7RT 1639.) Rather, the argument they had in Bakersfield in front of Joann was in regards to Gilbert having killed someone in Shafter. (7RT 1640.) Gilbert didn't say anything about a killing in Visalia, nor did Estella

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[45] During the prosecution's case-in-chief, Hidalia Lopez also testified about a pickup truck that she saw on March 30th. It was parked in the parking lot of a park, which was located across the street from her house. (6RT 1239-1242.) She further stated that she saw the truck on two other occasions, and one time it followed her to Farmersville. (6RT 1244-1246.)

ever tell Joann that Gilbert had involved her in a situation where Gilbert shot someone or that she was angry because Gilbert shot someone he didn't know. (7RT 1641-1642.)

Detective Pinon tracked down the registered owner of a pickup truck whose license plate number was provided to him by Detective Morales. (7RT 1628-1629.) The owner, Enrique Mayorga, testified that during March of 1989, he was driving his brother's Datsun pickup and he was working in the Farmersville area. (7RT 1636-1637.) Mayorga often parked near a small public park in the area, and he ate his lunch either in the truck or at the park's tables. (7RT 1637.) Mayorga denied ever following a car from Visalia to Farmersville, and no one else used the truck during this period of time. (7RT 1638.) Mayorga had a mustache and sideburns. (7RT 1638.)

E. Penalty Phase – Prosecution's Evidence

1. August 8, 1979, shooting at an occupied vehicle (Incident 2A)[46]

Sometime after midnight on August 8, 1979, Officer Rush Mayberry of the City of Tulare Police Department was parked at the intersection of Pratt and Inyo Avenue. (9RT 1943.) Across the street was a well-lit shopping center, and Mayberry saw two cars parked in the parking lot, along with a white car that was moving. (9RT 1943, 1951-1952.) Appellant was standing near one of the parked cars, and when the white car passed the two cars, appellant went to the back seat of one of the vehicles

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[46] The "Incident" number is from the prosecutor's Notice of Intention to Introduce Evidence in Aggravation. (1CT 122-125.) As appellant uses these numbers throughout his brief, respondent also provides them. Respondent also notes that incident 2A was originally identified as shooting into a dwelling house, but was later clarified as shooting at an inhabited vehicle and/or assault. (1CT 123; 4CT 919-920; 1RT 187-188; 8RT 1860-1861.)

and retrieved a .22-caliber Remington rifle. (9RT 1943, 1948-1950.) Appellant then went to the rear of his car, and from a distance of about 50 feet, he fired twice at the white vehicle. (9RT 1946.) Appellant's shots left one dent in the lower portion of the car's trunk and a second bullet dent in the corner of the bumper. (9RT 1949.)

Mayberry responded to the scene, and detained appellant and two others. (9RT 1947-1948.) The rifle was retrieved from the back seat of the car, and Mayberry found it loaded with two rounds in the magazine and one round in the chamber. (9RT 1948-1950.)

When interviewed, appellant suggested that he acted in self defense. (9RT 1997.) Appellant told detectives that the car had driven by three times that evening, and that the occupants had called him racial slurs and threatened bodily harm. (9RT 1999.) Appellant claimed that at one point, one of the individuals exited the vehicle, walked up to him and said that they had a gun and that they could kill him. (9RT 1998.) However, the occupants never brandished a weapon, and appellant never saw one. (9RT 1998.) Even so, on the car's third pass, one of the occupants motioned appellant over, and appellant assumed they wanted a confrontation. (9RT 2001.) Appellant said he then shot at the vehicle, but only intended to hit the tires. (9RT 1997, 2002.) Appellant also said that he had been drinking that evening. (9RT 1997.)

2. November 26, 1980 – Boas Minnow Farm (Incident 2B)

On November 26, 1980, Paula Estes was working at Boas Minnow Farm, when three Hispanic men walked in and held up the store. (9RT 1988.) Initially, two of the men entered and looked around the store, and they said they were interested in buying handguns. (9RT 1988.) A third man then walked in, pulled a ski mask over his face, and at gun point, told Estes to lay down on the floor. (9RT 1989.) Estes complied; she was then

blindfolded and tied up with her hands behind her back. (9RT 1989.) With Estes secured, the robbers took the guns out of the case and off the rack, and also made off with about $200. (9RT 1990.) Estes described all three as Hispanic men with mustaches, and that they all spoke "very broken English." (9RT 1992-1993.) The men fled in an old station wagon. (9RT 1991.)

As of November of 1980, Delia Contreras owned a green station wagon. (9RT 2009.) Delia said she didn't recall who had the station wagon on the morning of November 26th. (9RT 2010.) When asked if she told Detective Diaz that her common-law-husband, appellant, and others were at her trailer and left in the green station wagon at 7:00 a.m., she replied that she didn't know, they "just took off...," and that she didn't see where they went. (9RT 2011.) When pressed further, Delia acknowledged that they might have left in the station wagon. (9RT 2011-2012.)

3. August 23, 1984 – Possession of a handgun (Incident 2E)

On August 23, 1984, Visalia Police Department narcotics agent Rory Vadnais and other officers went to the Arrow Motel in Goshen, where they made contact with appellant. (9RT 1911-1912.) Vadnais noticed an object in appellant's front pant's pocket that appeared to be the outline of a handgun. (9RT 1912-1913.) Appellant was placed under arrest, and he was, in fact, found to be in possession of a loaded .22-caliber revolver. (9RT 1913.)

4. February 19, 1987 – Possession of a handgun (Incident 2C)

On February 19, 1987, Visalia Police Department Officer Ed Lynn and others contacted appellant at the 101 Strawberry Street address. (9RT 1915-1916.) During a search of appellant, they found a set of car keys on his person. (9RT 1916.) Lynn had noticed a black 1974, Chevy Monte

Carlo in close proximity to the 101 Strawberry Street residence, and on a couple of prior occasions, Lynn had observed appellant in the vehicle (although he had never seen appellant drive it). (9RT 1916-1917, 1921.) Lynn asked appellant about the car, and appellant said that he didn't own a car, and that the Monte Carlo wasn't his. (9RT 1917.)

Agents Vadnais and Jarrett took the keys and went over to the Monte Carlo. (9RT 1922-1923.) The agents used the keys to unlock the car's driver's door. (9RT 1923.) Jarrett then searched the car and found a two-shot, .45-caliber Derringer under the driver's seat. (9RT 1924-1925.)

5. March 16, 1989 – Possession of a handgun (Incident 2D)

On March 16, 1989, Officer Michael Stowe was on patrol in the northern part of Visalia when he noticed a van parked at the Circle K on Old Dinuba Road.[47] (9RT 1926, 1935.) Stowe pulled in behind the car to investigate why it was parked where it was, and he contacted appellant who was seated in the driver's seat. (9RT 1926, 1930.) Stowe asked appellant for identification, and appellant verbally identified himself. (9RT 1926.) Stowe then searched the van for some form of further identification and, in doing so, he found a semi-automatic gun and ammunition on the floor of the right side of the driver's bucket seat. (9RT 1926-1927, 1929-1930.) The gun was loaded and had one round in the chamber. (9RT 1930.) Appellant told Stowe that the van wasn't his. (9RT 1934.) A second person said to be a passenger was also at the scene, although Stowe never saw that person inside the vehicle. (9RT 1934.)

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[47] Officer Stowe's last name has two different spellings in the record. (1RT 5; 9RT 1925.) Consistent with appellant, respondent has chosen to spell it "Stowe."

6. The sexual assaults on Rosa B. (Incident 2F)

Rosa B. was 12 years old when she was living on a ranch in the Mexican state of Michoacan. (9RT 1953-1954.) Her home was relatively close to the ranch where appellant lived, as it was about a two hour walk. (9RT 1953-1954, 1965.) Appellant lived on his ranch with his father and mother. (9RT 1965.) The families were friendly. Rosa's parents served as godparents to appellant, and appellant's sister married into Rosa's family. (9RT 1965-1966.)

At one point, appellant's father (Jose Sr.) came to Rosa's house and told her several times that she was going to be his daughter-in-law.[48] (9RT 1954-1955, 1969, 2136.) Subsequent to this event, appellant asked Rosa to be his girlfriend, but she told him "no." (9RT 1954.) Rosa said that appellant did not appear to be angry with her answer. (9RT 1969.)

About two months after appellant's father's visit, Rosa was staying at her sister's house to help out after the birth of a child. (9RT 1955.) One night, appellant, his father, mother, uncle and at least two other family members came to the house and forcibly took Rosa from the home. (9RT 1955, 1959, 1969.) Some of the group was armed, and Rosa was taken back to appellant's ranch where she was held for approximately five months. (9RT 1955-1956, 1965.)

When they first arrived at the ranch, Rosa was taken to a banana orchard. (9RT 1957, 1972.) She only stayed there a short time as she was moved from place to place, including the house. (9RT 1957.) After her arrival, Rosa was left alone with appellant in the banana grove, and appellant was told by his father to not let her escape. (9RT 1975.) Rosa

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[48] Rosa B. wasn't entirely sure which year these events occurred, but she thought it was 1972. (9RT 1964.)

tried anyway, and appellant's father fired his gun at her. (9RT 1975.) After that, Rosa was not left alone with appellant. (9RT 1975-1976.)

At night, Rosa slept in the house with appellant, appellant's mother and Jose Sr. (9RT 1977.) The house was a one room structure with only one bedroom and "like a hallway," where appellant's father and mother slept. (9RT 1980, 1984-1985, 1987.) The hallway and the main room were separated by a wall, and she only slept with appellant when his father said so. (9RT 1977, 1987.)

Rosa testified that during her time there, she was repeatedly sexually assaulted by appellant, and that each time it was at Jose Sr.'s direction.[49] (9RT 1956-1958, 1961, 1972.) At the outset, the assaults occurred out of doors. (9RT 1961.) Appellant's father would place appellant and Rosa together in the field, and then wait a short distance away while appellant assaulted her. (9RT 1961.) Later, the sexual assaults occurred in the house. (9RT 1961.) There, Jose Sr. would send Rosa to go lay down with appellant, and order appellant to have sex with her. (9RT 1972.) According to Rosa, appellant's father gave orders for everything. (9RT 1972.)

Rosa testified that appellant never hurt or abused her, and that it was her opinion that appellant was forced to have sex with her. (9RT 1973-1974.) When Rosa asked appellant why he didn't defend her, appellant said it was because his father would kill him. (9RT 1979-1980.) However, Rosa acknowledged that, during the two months after she rejected appellant's request to be his girlfriend and up until the time she was taken from her sister's house, she didn't talk with appellant, and he didn't warn her that she might be taken away if she didn't agree. (9RT 1959.) At one

[49] When asked how often this occurred, Rosa responded that "[she] could not count them." (9RT 1957.)

point, appellant did tell Rosa that he never wanted to take her from her home. (9RT 1978-1979.)

While Rosa did not willingly have sex with appellant, she did so because Jose Sr. threatened to kill her.[50] (9RT 1983.) On several occasions, Rosa heard appellant's father threaten to kill appellant if he didn't do as told, and in one instance, he threatened to kill him with a machete. (9RT 1974.) According to Rosa, appellant's father threatened everyone, and it was appellant's mother who was physically abused the most. (9RT 1972, 1974, 1986.) As for appellant, in addition to the threats, his father verbally humiliated him. (9RT 1986-1987.) On one occasion after she first arrived, appellant was unable to get an erection during an assault, so his father verbally chastised him in front of his mother.[51] (9RT 1981.)

Rosa was eventually rescued by her brothers. (9RT 1980.) One morning as they returned from picking corn, Rosa's brother appeared and shot Jose Sr. (9RT 1963.) After that, she only saw appellant once more about two months later, and she had not had any contact with him since. (9RT 1980.)

Detective Pinon testified in rebuttal that on November 17, 1989, he talked with Rosa for about an hour to an hour and a half. (10RT 2189.) During that conversation, Rosa told him that she was taken to an orchard on the ranch where she stayed for several days until she was raped by appellant. (10RT 2189-2190.) At this point during their conversation, Rosa had not said anything about the whereabouts of appellant's father.

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[50] And because Rosa obeyed the orders of appellant's father, appellant did not have to forcibly rape her. (9RT 1963.)

[51] Rosa said that unbeknownst to appellant, appellant's father also had sex with her on seven different occasions. (9RT 1976.)

(10RT 2190.) As they continued to talk, Rosa did not tell Pinon that appellant's father had been present at all times or that he forced appellant to sexually assault her. (10RT 2190.)

Rosa also told Pinon that appellant had came to her ranch and asked her to be his girlfriend, and that she told him no. (10RT 2190-2191.) She said that when she was subsequently kidnapped, appellant's father was the instigator, and that she had sex with appellant out of fear because the father said he would kill her if she did not. (10RT 2191.) Rosa told Pinon that appellant's father threatened her on a daily basis, threatened to kill her if she left, and that the one time she tried to escape, the father almost killed her. (10RT 2191.)

F. Penalty Phase – Defense Evidence

1. Appellant's father and his physical and mental abuse

Appellant's younger sister, 29-year-old Maria Delores Lupercio, testified to appellant's upbringing and their father's abuse of the family. (9RT 2135, 2143-2144.) In sum, Jose Sr. used to hit appellant "a lot," and he physically abused everyone in the family. (9RT 2136.) Maria said that her mother was beaten on a daily basis and that the lacerations on her back never went away. (9RT 2138.) Sometimes, her father used a rope and a rafter in the home to hang her mother by her neck to the point where she fainted. (9RT 2138.) Maria recalled that her father did a similar thing to her sister Amelia, after Amelia put on weight and Jose Sr. suspected she was pregnant. Jose Sr. did this in order to get Amelia to tell the truth. (9RT 2139, 2142.) Maria said that appellant was there during the beatings.[52] (9RT 2139.)

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[52] Maria said that the house consisted of one large room and a little room or hallway where their mother and father slept. (9RT 2142.)

Maria was around 12 years old when 13-year-old Rosa B. was brought to the ranch. (9RT 2143.) The family all slept in one room, and on more than one occasion, her father ordered appellant to "make [Rosa] his." During at least one assault, Jose Sr. forced appellant's mother to remain in the room. (9RT 2140.) Per Maria, appellant didn't want to assault Rosa, and when he couldn't, their father verbally chided him and sometimes beat him. (9RT 2140.) On occasion, Maria went with her father and Rosa to the banana grove, where her father would leave Maria in one area and then take Rosa and "make her his...." (9RT 2143.)

Appellant's cousin, Antonio Lupercio Navarro, grew up with appellant in Mexico, and the two were good friends. (9RT 2144-2145.) He and appellant used to work in the fields, and he considered appellant to be a hard worker who stayed out of trouble. (9RT 2146.) Antonio said that appellant's father used to beat appellant, and on one occasion, he beat him unconscious. (9RT 2145.) Appellant was very afraid of his father, and he didn't resist him or fight back. (9RT 2145-2146.) Appellant's father use to hit the whole family. (9RT 2147.)

Antonio was a distant cousin to Rosa B., and he was aware of how she came to live at the ranch. (9RT 2146, 2153.) Appellant's father had said that when Rosa grew up, he was going to steal her for appellant. (9RT 2147.) Although appellant never told Antonio that his father forced him to help, Antonio said that appellant went with his father because he was very afraid of him. (9RT 2147.)

Appellant's uncle, Alfredo Navarro, had known appellant since he was very small. (9RT 2151-2152.) Appellant started working in the fields at the age of five, and he never got into trouble with the law. (9RT 2152-2153.) Even so, Jose Sr. treated appellant "very badly," and appellant was very afraid of him. (9RT 2152.) Alfredo saw Jose Sr. strike appellant with

pieces of wood and other objects, and he struck him "very hard." (9RT 2152.)

2. Testimony of licensed psychologist Dr. Richard Blak

Licensed psychologist Dr. Richard A. Blak testified on behalf of appellant. (9RT 2017.) Blak was retained to evaluate appellant's mental and emotional condition. (9RT 2021.) In doing so, Blak initially reviewed the documentation provided by counsel, which included, in part, crime reports, family background and investigative reports from both the prosecution and defense, and summaries of interviews conducted by investigator Wells. (9RT 2021-2022.)

After reviewing the documentation, it was Blak's opinion that appellant had experienced a "very intense, longstanding history of victimization." (9RT 2026.) In support, Blak noted that appellant had been abused by his father for a long period of time very early in life, and that he was exposed to a significant level of violence within his own family and from the general area in which they lived. (9RT 2026.) Blak stated that when a child who was only five is severely beaten, it is common for the child to develop a depressive reaction to life, and without treatment, the child typically can develop an on-going and chronic emotional problem. (9RT 2027.)

Blak discussed appellant's relationship with his father. It was his "sense" that it was "very impoverished from an emotional point of view," and that appellant had experienced a "great deal of punishment in his life." (9RT 2031.) For instance, when appellant was five, if his father didn't like the way appellant planted beans or corn in the field, his father hit him with a stick or his fist. (9RT 2031.) In another instance, it was reported that appellant's father beat his mother severely because she failed to obtain his permission to take a bath and wash her hair. (9RT 2031.) And on two

other occasions, appellant's sister was tied up with her wrists above her head because she was suspected of having an inappropriate romantic encounter, and appellant was beaten to the point that he had to go to a neighbor's house to recuperate. (9RT 2116.) Blak concluded that these types of experiences suggested that appellant had a very harsh and punitive life that lacked basic nurturance, and that he grew up with a "tremendous sense of terror..." in his own home. (9RT 2031-2032, 2116.)

On June 22, 1991, Blak and licensed clinical social worker Art Martinez visited appellant at the jail, where they conducted a psychological examination of appellant over the course of four hours. (9RT 2023-2024.) To this end, Blak interviewed appellant to evaluate his mental and emotional condition, and he also administered two standardized tests. (9RT 2020-2021, 2024.) One test was the Wechsler Adult Intelligence Scale Revised, along with a subtest, which Blak used to determine the level of appellant's intellectual sophistication. (9RT 2024.) From this test, Blak opined that appellant's intellectual functioning was in the low average to borderline average range.[53] (9RT 2025.)

Blak also administered "a clinical inventory" test known as the Millon Clinical Multiaxial Inventory, which Blak said was a standardized psychological measure used to develop a personality profile of an individual. (9RT 2025.) More specifically, Blak said the test was used to identify the presence or absence of personality disorders.[54] (9RT 2096.)

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[53] While Blak didn't administer an actual complete IQ test, based on the tests he did conduct, he estimated appellant's IQ to be around 70 to 75 or below average. (9RT 2067-2068.)

[54] Blak acknowledged that the conditions appellant described in response to questions on the Millon were framed in the present tense, and that it was difficult to attempt to know of if those conditions were present two years earlier. (9RT 2089.)

Lastly, Blak obtained a psychological history from appellant, which consisted of questions to appellant about his background and development, work and relationship history, past contacts with the law, drug use and other things related to his behavior. (9RT 2026.) During this interview, Blak learned that appellant's father was killed in a violent confrontation when appellant was 15 or 16, and that afterward, appellant and his family then relocated to another part of Mexico.[55] (9RT 2117, 2030.)

Based upon his review of the documents and his personal evaluation of appellant, Blak diagnosed appellant with three "axis one" conditions.[56] Blak opined that appellant presented a disthymic condition—i.e., chronic depression—that started in early childhood.[57] (9RT 2028, 2046.) His second diagnosis was that appellant suffered from alcohol abuse and poly-drug abuse, and his third was a diagnosis of a generalized anxiety disorder. (9RT 2036-2037.)

On axis two, Blak looked at long-standing developmental issues. (9RT 2029.) Blak found that appellant presented three personality

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[55] From his interview and review of the documentation, Blak determined that appellant's birthday was likely 5/16/56. (9RT 2030-2031.)

[56] Per Blak, axis one conditions were symptoms that were presently exhibited. (9RT 2029.)

[57] Blak explained that people with this condition are depressed virtually every day of their life. (9RT 2033.) Although they may have a job or family, these individuals typically avoid "real true interaction with others." (9RT 2033.) This condition was indicative of somebody who was very fearful. (9RT 2033.) However, on cross examination, Blak acknowledged that incarceration can produce a degree of emotional impact upon a person, and that people who are incarcerated very often have their feelings of depression exacerbated or heightened. (9RT 2061-2062.) Blak further acknowledged that if a person had been incarcerated for a couple of years, the dysthymia may be more severe than it would have been two years earlier. (9RT 2062.)

disorders: avoidant personality disorder, obsessive compulsive personality disorder, and antisocial personality disorder. (9RT 2029.) Blak testified that personality disorders have their onset early in a person's life and can interfere with healthy functioning. (9RT 2038.)

Blak explained that an avoidant personality disorder was characterized by sensitivity to reproach from authority figures. (9RT 2039.) A person with this disorder would be unwilling to get involved with people unless he was certain of being liked, and that the person typically avoided social or occupational activities that involved significant interpersonal contact. (9RT 2039.) This condition often correlated with alcohol use. (9RT 2040.)

Blak stated that an obsessive compulsive personality disorder had to do with somebody who had to keep everything under control. (9RT 2040-2041.) People with this disorder may also be indecisive decision makers, or they may present a restricted expression of affection. (9RT 2042.) For instance, when appellant talked about sadistic or violent events, he did so with a blank stare and little emotion. (9RT 2042.)

And lastly, Blak explained that an antisocial personality disorder had to do with someone who simply liked to break the rules. (9RT 2043.) In discussing this disorder, Blak observed that, as to Rosa B., even though he was a young man himself and under pressure from his father, appellant still engaged in the behavior.[58] (9RT 2044.)

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[58] Blak further testified that it was his sense that appellant's father was the instigator, but that that didn't mean that appellant did not initiate some of the sexual interaction with Rosa B; in fact, it was Blak's own intuitive sense that there were times that appellant did. (9RT 2105.) However, Blak acknowledged that he did not have any data or evidence from appellant or anyone else as to whether appellant initiated any of the sexual encounters. (9RT 2133.)

Blak's ultimate conclusion was that appellant was a product of his formative years in Mexico and the relationship he had with his father.[59] (9RT 2046.) It was Blak's opinion that appellant currently suffered from a mental disorder or illness, and that he was suffering from these same disorders in 1989. (9RT 2051-2051.) Because of these disorders, Blak stated, appellant was impaired from reaching a decision about the appropriateness of his acts or the quality of his acts.[60] (9RT 2051.) Blak noted that appellant's exposure as a child to the fact that most men were armed with weapons normalized this behavior to him, and it taught him that this was how problems were solved. (9RT 2052.) Blak went on to state that appellant's conditions were treatable, and that it was his opinion that appellant could benefit from a treatment program.[61] (9RT 2053, 2126.)

POINTS AND AUTHORITIES – ARGUMENT

I. SUFFICIENT EVIDENCE WAS PRESENTED TO SUPPORT APPELLANT'S FIRST DEGREE MURDER CONVICTION

Appellant contends that "the state failed to adduce sufficient evidence to support the first degree murder conviction." (AOB 33.) In sum, appellant asserts that there was insufficient evidence to support a finding

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[59] The physical and emotional abuse he suffered at the hands of his father, and appellant's drug and alcohol abuse since entering the United States, were all key elements to Blak's diagnosis. (9RT 2050.) However, Blak acknowledged that he had no way of knowing just how many abused children existed that do not go on to develop pathology. (9RT 2132.)

[60] On cross, Blak acknowledged that the outcome of the administered tests and how he interpreted it, essentially determined his conclusion about appellant's capacity to appreciate the consequences of his behavior on March 30, 1989. (9RT 2100.)

[61] However, Blak admitted that without strong intervention, like treatment, appellant's behavior would continue, and that treatment meant having a willing patient. (9RT 2095.)

that he premeditated or deliberated before killing Sanchez. (AOB 33.) In support, appellant argues that the record "does not contain substantial evidence of planning activity, motive to kill, or an exacting method of execution. Rather, the evidence reveals a rash, impulsive act that occurred over the struggle for the gun, as well as the absence of any of the factors discussed in [*People v. Anderson* (1968) 70 Cal.2d 15 (*Anderson*)]." (AOB 45.) Because of this, appellant reasons, his conviction must be reversed. (AOB 33.) Appellant is mistaken.

The record before this Court contains an abundance of evidence to support the jury's finding that appellant premeditated and deliberated before killing Sanchez. While the *Anderson* factors are not dispositive, there nevertheless exists substantial evidence from which the jury could have concluded that appellant planned to kill Sanchez, that he had a motive to kill Sanchez, and that he certainly used an exacting method of execution when he fired a single bullet into the back of Sanchez's head. Contrary to appellant's assertion, the jury did not have to speculate to come to these conclusions. As such, when the evidence is viewed in the light most favorable to the prosecution, it is evident the jury could have found the essential elements of the crime beyond a reasonable doubt. Therefore, appellant's claim should be rejected.

A. The Facts

As previously detailed in full in the Statement of Facts, the evidence at trial established that on the afternoon of March 30, 1989, Alvaro Lopez and Guadalupe Sanchez went to appellant's house, and at that time, appellant asked Lopez to obtain three ounces of cocaine for a friend. (6RT 1251-1252, 1256, 1289-1290, 1295.) Per Lopez, he and Sanchez then left, and then returned about an hour later. (6RT 1257, 1290-1291.) Lopez explained that when they returned the second time, it was to assure

appellant that Sanchez could get the drugs. (6RT 1257, 1290-1291.) In total, they made three stops at appellant's house that day. (6RT 1291.)

Once Sanchez returned to the house with the drugs, he and Lopez then went to appellant's house. (6RT 1258, 1294.) It was now sometime between 6:00 and 7:00 p.m. (6RT 1293.) Lopez was in the front passenger seat and Sanchez was driving. (6RT 1259.) Neither one of them had a weapon. (6RT 1285.) Upon their arrival, appellant was there with Ruben Contreras; appellant told them they had to go to the buyer. (6RT 1258.)

Gilbert Galaviz testified that on this same afternoon, he saw appellant cleaning his gun at the residence. (5RT 1160.) Later, around 7:00 or 7:30 p.m., Galaviz saw appellant and Contreras leave in a small, beige colored, four-door car. (5RT 1159, 1163, 1181-1182, 1185.) When they left, appellant had his gun with him and Contreras had armed himself with a kitchen knife. (5RT 1161, 1182, 1198.) Appellant took the seat behind the driver, while Contreras was seated behind the passenger. (5RT 1163.)

Consistent with Galaviz's recollection, Lopez testified that when they got in the car, appellant sat behind Sanchez and Contreras sat behind him. (6RT 1259.) They then drove to the location where they were supposed to deliver the cocaine. (6RT 1259.) When they arrived, they parked in front of a store which sat along the highway; the "buyers" house was located nearby, next to the store. (6RT 1259, 1295-1296.) While Lopez went into the store, appellant walked over to the house. (6RT 1260, 1296.) When appellant came back, he told them that the buyer had visitors and that they would wait for him up ahead. (6RT 1260-1261.)

Sanchez then drove the four of them away from the store, turned the corner and went down the road before stopping. (6RT 1298.) Once stopped, appellant immediately put the gun to Sanchez's head and told Contreras to secure Lopez. (6RT 1262-1263.) Contreras did so by putting the knife to the side of Lopez's neck. (6RT 1263.) Appellant then told

Sanchez to give him the drugs, and Sanchez retrieved the cocaine from underneath his seat and handed it back to appellant. (6RT 1263, 1299-1300.) Immediately, appellant then shot Sanchez in the back of the head and directed Contreras to slash Lopez's throat. (6RT 1263, 1320-1322.)

At the moment Sanchez was shot, Lopez grabbed Contreras's hand and tried to open the door. (6RT 1324-1326.) Lopez could feel Sanchez's head on his shoulder, when a second shot was fired that struck Lopez in the left arm. (6RT 1264, 1326.) With Contreras stabbing at him, Lopez opened the door and got out of the car. (6RT 1264-1265.) At this point, Lopez fell to the ground along with the knife, and while on the ground, appellant again fired at Lopez, and this time the bullet grazed Lopez's leg. (6RT 1265-1266, 1279.)

Gilbert Galaviz testified that upon appellant's and Contreras's return home that evening, he saw blood all over Contreras's clothes, and some blood on appellant's upper body or arm. (5RT 1164-1165, 1188, 1214.) Both appellant and Contreras said that they had killed a pig. (5RT 1168, 1194.) Galaviz also recalled previously telling Detective Raborn that it was appellant who had said that he killed a pig, and appellant added that he almost killed the other one, but it got away. (5RT 1210.)

Pathologist Walter testified that the entry wound found on the back of Sanchez's head exhibited powder tattooing and thermal burning of the soft tissue underneath. (4RT 927.) The presence of tattooing indicated that the muzzle of the gun was in very close proximity to the skin, and was either touching it or within an inch or so. (4RT 928-929.) Walter stated that this injury could be described as a contact wound. (4RT 929.) Consistent with this testimony, gunshot residue particles were found in the sample taken from left headrest area. (4RT 912-913, 920.) Based on this, the gun would necessarily have been in close contact with the headrest or at least within five feet of it. (4RT 914, 918.)

B. Law and Argument

> "To determine the sufficiency of the evidence to support a conviction, an appellate court reviews the entire record in the light most favorable to the prosecution to determine whether it contains evidence that is reasonable, credible, and of solid value, from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Tafoya* (2007) 42 Cal.4th 147, 170.) The pertinent inquiry is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.)

(*People v. Romero* (2008) 44 Cal.4th 386, 399.)

To this end, an appellate court must accept logical inferences that the jury might have drawn from the evidence even if the court would have concluded otherwise. (*People v. Streeter* (2012) 54 Cal.4th 205, 241 (*Streeter*).) Also, appellate review does not seek to redetermine the weight of the evidence or the credibility of witnesses.

> Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] Unless it describes facts or events that are physically impossible or inherently improbable, the testimony of a single witness is sufficient to support a conviction. [Citation.]

(*People v. Elliott* (2012) 53 Cal.4th 535, 585, citations and internal quotations omitted.)

Here, the prosecutor's theory of first degree murder was willful, deliberate and premeditated murder, and the jury was so instructed. (8RT 1807-1810.)

> A verdict of deliberate and premeditated first degree murder requires more than a showing of intent to kill. "Deliberation" refers to careful weighing of considerations in forming a course of action; "premeditation" means thought over

> in advance. [Citation.] Premeditation and deliberation can occur in a brief interval. The test is not time, but reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly. [Citations.]
>
> *People v. Anderson* (1968) 70 Cal.2d 15, [...] (*Anderson*) discusses three types of evidence commonly shown in cases of premeditated murder: planning activity, preexisting motive, and manner of killing. [Citation.] Drawing on these three categories of evidence, *Anderson* provided one framework for reviewing the sufficiency of the evidence supporting findings of premeditation and deliberation. In so doing, *Anderson*'s goal was to aid reviewing courts in assessing whether the evidence is supportive of an inference that the killing was the result of preexisting reflection and weighing of considerations rather than mere unconsidered or rash impulse. [Citation.] But, as [this Court has] often observed, *Anderson* did not purport to establish an exhaustive list that would exclude all other types and combinations of evidence that could support a finding of premeditation and deliberation. [Citations.]

(*People v. Solomon* (2010) 49 Cal.4th 792, 812-813, citations and internal quotations omitted.)

Here, there is an abundance of evidence to support the jury's finding that appellant premeditated and deliberated before killing Sanchez. First, and in using the *Anderson* factors, there is evidence from which the jury could infer planning. Appellant was seen cleaning his gun earlier that afternoon. He and Contreras armed themselves prior to getting in the car. They then proceeded to the phantom "buyer's" house, before appellant returned and told Sanchez and Lopez that the buyer would meet them up ahead. They then drove to the location where the buyer was supposed to meet them, and once the car stopped, appellant placed a gun to Sanchez's head and directed Contreras to "secure" Lopez. Then, without any warning and after handing the drugs to appellant, Sanchez was immediately shot in the back of the head. As the trial court recognized, this concerted action by appellant and Contreras was solid evidence of a plan. (4CT 1030.) In

short, there was an abundance of evidence from which to conclude that appellant and Contreras planned to rob and kill Sanchez and Lopez.

There is also evidence of motive. Lopez explained that this was supposed to be a drug deal, where three ounces of cocaine was to change hands. (6RT 1251-1252, 1256, 1289-1290, 1295.) It is clear from their actions, and it was reasonable to infer, that appellant's motivation to kill Sanchez and Lopez was to steal the cocaine, to secure their escape, and to ensure that there was no retribution for their actions.

Lastly, and possibly most significantly, the manner in which Sanchez was killed demonstrates premeditation and deliberation. As stated, Sanchez was killed by a single gunshot fired from a gun that was placed against the back of his head or within an inch of it. This Court has held that "this execution-style manner of killing supports a finding of premeditation and deliberation when, as here, there is no indication of a struggle." (*People v. Romero*, *supra*, 44 Cal.4th at pp. 400-401, citing *People v. Stewart* (2004) 33 Cal.4th 425, 495; *People v. Caro* (1988) 46 Cal.3d 1035, 1050; *People v. Bloyd* (1987) 43 Cal.3d 333, 348; see also *People v. Thompson* (2010) 49 Cal.4th 79, 114-115.) Given these facts, there exists substantial evidence to support the jury's verdict.

Even so, appellant attempts to avoid the only reasonable conclusion compelled from the circumstances of his execution-style murder of Sanchez by asserting that there actually was evidence of a struggle over the gun, and that the shooting accidently occurred during this struggle. (AOB 54-56.) In support, appellant points to Lopez's use of the phrase "pulled the pistol" during his testimony, along with the location of Sanchez's watch when his body was found. (AOB 55.) Respondent submits that both of these "points" are not supported by the record, and even if they were, the jury was not required to make the inferences appellant now advocates.

As to the evidence, there was nothing offered to support the conclusion that Sanchez's watch ended up on his palm because of a struggle. Initially, respondent notes that there was expert testimony that established that appellant's gun did not possess a "hair trigger," which undermines appellant's accidental-shooting theory. (5RT 1091, 1093.) But more importantly, Lopez's unrefuted testimony was that appellant shot Sanchez one time in the back of the head, and that he did so immediately upon Sanchez handing appellant the drugs. Lopez was the only witness to testify to the events that transpired in the car, and he said that Sanchez never grabbed the gun. (6RT 1300-1301.) Moreover, even if an explanation for why the watch was where it was must be had, given the state of the evidence, respondent submits that the conclusion logically compelled is that the watch likely moved when Sanchez's body was pulled and dumped from the car.[62]

As for planning, appellant argues that the prosecution's theory was based on an assumption, and was then followed with layers of speculation. (AOB 46.) In short, appellant asserts that the prosecutor asked the jury to assume an intent to kill, and then the prosecutor speculated that appellant

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[62] As for appellant's reliance on Lopez's ambiguous phrase, "pulled the pistol," the record is clear on what Lopez meant as both counsel and the court clarified its meaning. Lopez was describing what appellant did with the pistol, not Sanchez. Again, Lopez testified that "[h]e grabbed it and pulled" the pistol, "[t]he head." (6RT 1263-1264; see also 6RT 1300 [when appellant grabbed the drugs, appellant "pulled the gun."] Lopez later explained that when he said "pulled the pistol," he meant "[h]e pulled the trigger on the pistol, not pulling the pistol, but pulling the trigger in the pistol to fire." (6RT 1318; see also 1319-1320 [questions by the court further clarifying that "pull" the pistol is to "pull the trigger and fire"].) Whatever ambiguity there might have been in Lopez's initial phraselogy, the record establishes that Lopez ultimately clarified that he was referring to appellant's act of pulling the trigger on the gun that he was pointing at Sanchez's head.

and Contreras planned to kill Sanchez and Lopez all along because they needed the car to flee the scene. (AOB 46-47, citing to 8RT 1658-1659.) However, the "substantial evidence" test is not based upon how the prosecutor sums up the evidence in his closing argument. But rather, and as previously set forth, the test is whether the record contains evidence that is reasonable, credible, and of solid value, from which a rational trier of fact could find appellant guilty beyond a reasonable doubt." (*People v. Tafoya* (2007) 42 Cal.4th 147, 170.) Clearly, based on this record, the jury didn't need to "speculate" that appellant intended to kill Sanchez. As demonstrated above, the evidence and the reasonable inferences which flow from it support the inescapable conclusion that appellant and Contreras planned and intended to kill Sanchez and Lopez from the moment they got into the car.

Appellant attempts to dismiss the fact that he and Contreras armed themselves prior to getting into the car by noting that it's not uncommon for people to be armed during drug transactions. (AOB 49.) While that might be so, this isn't a fact to be viewed in isolation. What appellant later did with that weapon and the manner in which he murdered Sanchez and attempted to kill Lopez lead to the reasonable conclusion of premeditation and deliberation.

Appellant next argues that the fact that Sanchez was shot in the middle of a residential area in front of numerous eye witnesses "...strongly militates against a finding that the killing was planned." (AOB 50.) Respondent disagrees. All that demonstrates is that appellant believed that that moment was the opportune time to steal the cocaine and kill Sanchez and Lopez. Whether it was the smartest decision in terms of location in order to perfect his crime is of no moment, and it certainly does nothing to diminish the evidence that was presented. All it demonstrates is a brazen crime.

Next appellant contends that "[m]otive evidence consistent with planning and deliberation was similarly lacking." (AOB 52.) In support, appellant argues that the prosecution's theory that he and Contreras killed to steal the drugs and wanted the car to facilitate their escape is "...contradicted by the record, given that the prosecution presented numerous eyewitnesses to the homicide and its aftermath." (AOB 53.) It appears appellant is asserting that this couldn't have been planned given the existence of potential witnesses. Again, all that potentially demonstrates is that appellant's plan may not have been fool proof. It does little to undermine the prosecutor's theory that one of the motives for killing Sanchez was to take the car to facilitate an escape. In any event, and as set forth above, respondent disagrees with appellant's assertion that motive evidence consistent with planning and deliberation was lacking.

Lastly, appellant contends that if this Court upholds the first degree murder verdict in this case, then "...this Court's precedent violates due process and Eighth Amendment principles...." (AOB 57.) In support, appellant relies upon a law review article and argues that "...this Court's frequent reliance of the 'great rapidity' with which thoughts may ripen into a premeditated and deliberated intent to kill, coupled with the Court's recent interpretation of the *Anderson* factors, have collapsed any meaningful distinction between first and second degree murder." (AOB 57.)

However, as appellant recognizes, this Court has recently rejected an identical claim with its relatively recent decision in *People v. Solomon*, *supra*, 49 Cal.4th 792, 812-813. Respondent submits that the reasoning of *Solomon* is sound and appellant offers no compelling reason to revisit the issue; therefore, appellant's Eighth Amendment and due process claims should also be rejected.

In sum, when viewed in the light most favorable to the prosecution, sufficient evidence was presented from which the jury could have found the essential elements of premeditated and deliberate first degree murder beyond a reasonable doubt. Consequently, appellant's request for relief should be denied.[63]

II. SUFFICIENT EVIDENCE WAS PRESENTED TO SUPPORT THE LYING-IN-WAIT SPECIAL CIRCUMSTANCE; THE SPECIAL CIRCUMSTANCE WAS NOT UNCONSTITUTIONALLY VAGUE OR OVERBROAD, AS APPLIED

Under this heading, appellant makes two claims as related to the lying-in-wait special circumstance. (§ 190.2, subd. (a)(15).) First, appellant contends that the evidence was insufficient to support the jury's finding of lying-in-wait. (AOB 62.) In sum, appellant asserts that there was insufficient evidence: that he concealed a deadly purpose; that there was a substantial period of watchful waiting for an opportune time to attack; and that there was a surprise attack immediately after a period of watching and waiting. (AOB 65, 70, 77.) And second, appellant contends that, as applied, the lying-in-wait special circumstance is unconstitutionally vague and overbroad. (AOB 80.) Respondent disagrees with both of appellant's contentions.

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[63] Respondent notes that appellant has also asserted that the trial court erred in even providing an instruction to the jury on the theory of premeditated and deliberate first degree murder. (AOB 45.) However, appellant recognizes that this issue turns on whether there was sufficient evidence to support the murder conviction, and consequently, "[f]or the sake of brevity," he only discusses the issue in the context of the sufficiency of the evidence. (AOB 45.) To the extent this bare assertion can be considered a free-standing claim, it is without merit since clearly premeditation and deliberation was an issue raised by the evidence presented. (*People v. Taylor* (2010) 48 Cal.4th 574, 623 [trial court has a duty to instruct on the general principles of law relevant to the issues raised by the evidence].)

In short, sufficient evidence was presented to support each of the elements of the lying-in-wait special circumstance. There was substantial evidence from which the jury could reasonably conclude: (1) that appellant planned and intended to kill both Sanchez and Lopez from the moment he got into the car; (2) that he watched and waited for an opportune time; and (3) that appellant surprised Sanchez when he put his gun to Sanchez's head from behind and then almost immediately shot him. Given this reality, appellant's insufficiency of the evidence claim fails, as does his claim that the special circumstance was unconstitutionally vague and overbroad, as applied.

A. Law and Argument

The inquiry for a sufficiency of the evidence claim as related to a special circumstance is the same as that for the underlying conviction. (*People v. Clark* (2011) 52 Cal.4th 856, 943.) That is:

> To determine the sufficiency of the evidence to support a conviction, an appellate court reviews the entire record in the light most favorable to the prosecution to determine whether it contains evidence that is reasonable, credible, and of solid value, from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] The pertinent inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. [Citation.]

(*People v. Romero*, *supra*, 44 Cal.4th at p. 400, citations and internal quotations omitted.)

To this end, an appellate court must accept logical inferences that the jury might have drawn from the evidence even if the court would have concluded otherwise. (*Streeter*, *supra*, 54 Cal.4th at p. 241.) Also, "[c]onflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the

trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.]" (*People v. Elliott*, *supra*, 53 Cal.4th at p. 585.)

> The lying-in-wait special circumstance requires "an intentional murder, committed under circumstances which include (1) a concealment of purpose, (2) a substantial period of watching and waiting for an opportune time to act, and (3) immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage...." (*People v. Morales* (1989) 48 Cal.3d 527, 557; [citation].)

(*People v. Carpenter* (1997) 15 Cal.4th 312, 388, superseded by statute on other grounds as recognized in *Verdin v. Superior Court* (2008) 43 Cal.4th 1096, 1106-1107.)

> [...] The element of concealment is satisfied by a showing that a defendant's true intent and purpose were concealed by his actions or conduct. It is not required that he be literally concealed from view before he attacks the victim. [Citation.] As for the watching and waiting element, the purpose of this requirement is to distinguish those cases in which a defendant acts insidiously from those in which he acts out of rash impulse. [Citation.] This period need not continue for any particular length of time provided that its duration is such as to show a state of mind equivalent to premeditation or deliberation. [Citations.] The factors of concealing murderous intent, and striking from a position of advantage and surprise, are the hallmark of a murder by lying in wait. [Citations.]

(*People v. Mendoza* (2011) 52 Cal.4th 1056, 1073, citations and internal quotations omitted.)[64]

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[64] At the time of appellant's crime, the special circumstance required that the murder be committed "while lying in wait." (§ 190.2, former subd. (a)(15); *People v. Lewis* (2008) 43 Cal.4th 415, 511-512 (*Lewis*).) "In March 2000, the language of the lying-in-wait special circumstance was changed to delete the word 'while' and substitute the phrase 'by means of.' [Citations.]" (*Streeter*, *supra*, 54 Cal.4th at p. 246, fn. 7.)

Here, the evidence supported the finding that appellant asked Lopez and Sanchez to obtain three ounces of cocaine for a "friend," and that on this same afternoon, appellant was observed cleaning his gun. (5RT 1160; 6RT 1251-1252, 1256, 1289-1290, 1295.) When Sanchez and Lopez later came back to appellant's residence, appellant told them that they had to go to the buyer. (6RT 1258.) Apparently, unbeknownst to Lopez and Sanchez, appellant and Contreras had armed themselves. (5RT 1161, 1182, 1198; 6RT 1285.) The four of them then drove to the alleged buyer's house, and appellant went to the door alone. (6RT 1260-1261, 1296.) When he returned to the car, appellant informed Sanchez and Lopez that the "buyer" had company and that they would wait for him up ahead. (6RT 1260-1261.)

With appellant still positioned directly behind the driver Sanchez, the four drove away from the store, turned the corner and went down the road before stopping. (6RT 1259, 1298.) Once stopped, appellant immediately put the gun to Sanchez's head and told Contreras to secure Lopez. (6RT 1262-1263.) Contreras did so by putting the knife to the side of Lopez's neck. (6RT 1263.) Appellant told Sanchez to give him the drugs, and Sanchez retrieved the cocaine from underneath his seat and handed it back to appellant. (6RT 1263, 1299-1300.) Appellant then immediately shot Sanchez in the back of the head and directed Contreras to slash Lopez's throat. (6RT 1263, 1320-22.) As Contreras stabbed Lopez, appellant fired his gun twice at Lopez in an attempt to kill him. (6RT 1264-1266, 1279, 1326.)

From these facts a jury could reasonably conclude that appellant concealed his true purpose from Sanchez: i.e., his intent to kill both Sanchez and Lopez, and steal the cocaine. That this was an intentional killing is evidenced by the fact that appellant armed himself prior to getting into the car, the apparent ruse he used to place Sanchez at a position of

disadvantage, the manner in which he killed Sanchez, appellant's direction to Contreras and the two acting in concert, and appellant's attempt to also kill Lopez. Moreover, whether considered from the first moment they got into the car, or from the moment they left the alleged buyer's house, there was a substantial period of watching and waiting for an opportune time to act, which, in appellant's mind, presented itself when the car stopped alongside the road as nightfall descended. Lastly, the jury could have reasonably concluded that this was an immediate surprise attack on an unsuspecting victim from a position of advantage. In fact, it is difficult to discern a better place for appellant to position himself than behind the defenseless driver Sanchez, and then to launch his attack immediately upon the car coming to a stop. From this, it is evident that sufficient evidence was presented to support the jury's finding that the special circumstance of lying in wait had been proven.[65] (See, e.g., *People v. Jurado* (2006) 38 Cal.4th 72, 120; *People v. Combs* (2004) 34 Cal.4th 821, 853; *People v. Morales*, *supra*, 48 Cal.3d at p. 554.)

Even so, appellant makes a number of arguments which are directed at each of the elements. As for concealment of a deadly purpose, appellant first discusses other cases where other crimes evidence was introduced to help demonstrate concealment of purpose, and then notes that in this case, there was no evidence that he had committed another homicide or attempted homicide before the instant murder was committed. (AOB 67-68.) Similarly, appellant further states that there was an absence of a pre-crime demonstration of the intent to kill, which has also been present in other decisions of this Court. (AOB 68-70.) Lastly, appellant argues that

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[65] At the close of the prosecution's case, appellant brought a section 1118.1 motion directed solely at the special circumstance. (4CT 1028; 6RT 133-1358.) The trial court issued a written ruling which denied that motion. (4CT 1029-1031.)

the evidence that was presented demonstrated an intent to rob, not kill. (AOB 70.)

Respondent submits that appellant's focus is misplaced, as it is directed at what wasn't presented to the jury, rather than what was. That there was no evidence presented as to other crimes, or a pre-crime demonstration of intent to kill, is of no moment since appellant's actions adequately demonstrated his concealment of purpose. And while the jury may have believed appellant harbored an intent to rob, this intent is not mutually exclusive to an intent to kill. That being so, "[b]ecause each case necessarily depends on its own facts, and because [appellant's] conduct clearly satisfied each of the lying-in-wait requirements, the attempt to contrast this case with others falls short. (See *People v. Thomas* (1992) 2 Cal.4th 489, 516, [...] [comparing facts of different cases did not demonstrate the insufficiency of premeditation evidence in the case at hand].)" (*People v. Mendoza*, *supra*, 52 Cal.4th at p. 1075.)

Appellant next argues that a substantial period of watchful waiting was also absent. (AOB 70.) In doing so, appellant notes that at the time of his crime, the lying-in-wait special circumstance required that the murder must have occurred after a substantial period of watchful waiting and without any cognizable interruption following the period of lying in wait. (AOB 71-72.) Appellant argues that, here, there was a cognizable interruption when the group stopped at the alleged buyer's house and store. (AOB 72.) In appellant's view, "[b]y law, the period of watching and waiting began, at the earliest, only when the four were again together in Sanchez's car." (AOB 73.) From this conclusion, appellant then reasons that this period of time cannot be considered "substantial," as there is no evidence of a pre-homicide expression of intent to kill outside of the fact that he armed himself. (AOB 76-77.)

First, respondent is unaware of a requirement that a pre-homicide expression of intent to kill is necessary before the period of watching and waiting can be considered "substantial." Second, respondent disagrees with appellant's assertion that "by law, the period of watching and waiting began, at the earliest, only when the four were again together in Sanchez' car." "A killer need not view his intended victim during the entire period of watching and waiting." (*People v. Edwards* (1991) 54 Cal.3d 787, 825.) Here, the jury could have reasonably concluded that the stop at the "buyer's" house was all part of appellant's plan and a ruse, and that this stop was part of a continuous flow of on-going concealment and watchful waiting.

That said, and assuming for the sake of argument that appellant's parsing of the watching and waiting period during the car ride is correct, this Court has never required a certain minimum period of time to fulfill the watchful-waiting element. (*People v. Ceja* (1993) 4 Cal.4th 1134, 1145 ["[t]he precise period of time is also not critical."].) Rather, the period of time need only be "not insubstantial." (*People v. Edwards*, *supra*, 54 Cal.3d at p. 823.) Or stated another way, even though a waiting period may be relatively short, the period is sufficient so long as it reasonably shows the murder did not result from panic or sudden impulse. (See *People v. Moon* (2005) 37 Cal.4th 1, 24 ["Although the period of waiting was relatively short, it was sufficient to negate any inference defendant's murder of Rose Greig was the result of panic or sudden impulse."].)[66]

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[66] As related to the special circumstance, the jury was instructed pursuant to CALJIC No. 8.81.15 (1989 rev.). (4CT 1092-1093.) In part, it stated:

> The lying in wait need not continue for any particular period of time provided that its duration is such as to show a state of mind equivalent to premeditation or deliberation. [¶] Thus, for a

(continued...)

Here, and as argued, the evidence supports the conclusion that appellant's killing of Sanchez was not done as the result of panic or sudden impulse. Instead, it was an execution-style murder that was carried out pursuant to a plan. Appellant was waiting from the time they initially got into the car, all the way up until the time they stopped along side the road. Once there, he found his opportune time and launched his attack. Therefore, even if it is assumed that the relevant watching and waiting only began when they started their short drive to the soon-to-be crime scene, "[t]he facts of this case and the jury's conclusion that defendant acted with deliberation and premeditation dispel any inference that he killed as a result of rash impulse." (*People v. Stevens* (2007) 41 Cal.4th 182, 203.) As stated, "[e]ven a short period of watching and waiting can negate such an inference. [Citation.]" (*Id.*, citation omitted; see also *People v. Moon*, *supra*, 37 Cal.4th at p. 23 ["a few scant minutes" can suffice]; *People v. Edwards*, *supra*, 54 Cal.3d at pp. 825-826 [wait was only "a matter of minutes"]; *People v. Superior Court (Lujan)* (1999) 73 Cal.App.4th 1123 [two minutes sufficed].)[67]

(...continued)

> killing to be perpetrated while lying in wait, both the concealment and watchful waiting as well as the killing must occur during the same time period, or in an uninterrupted attack commencing no later than the moment concealment ends. If there is a clear interruption separating the period of lying in wait from the period during which the killing takes place, so that there is neither an immediate killing nor a continuous flow of the uninterrupted lethal events, the special circumstance is not proved.

(8RT 1811-1813.) This instruction is set forth in full in responding to appellant's challenge to the instruction, *post*, heading "IV."

[67] The record does not state exactly how long it took the four of them to make the short drive. However, appellant makes a footnote argument (continued...)

Appellant also disagrees with the assertion that he didn't employ a ruse. From his point of view, there was "simply no evidence" to support this theory "...aside from the prosecution's conclusory allegation that no buyer had ever existed." (AOB 74.) But given that no buyer was ever produced when they went to the "buyer's" house, appellant's obvious lie that they would meet the buyer down the road, and appellant's execution-style murder of Sanchez, it was reasonable for the jury to conclude that the entire story about the "buyer" was made up and part of appellant's plan to rob and kill Sanchez and Lopez.

Appellant next finds deficient the evidence as related to the third element of the lying-in-wait special circumstance. (AOB 77.) In short, appellant contends that there was not a surprise attack which immediately followed a period of watching and waiting. (AOB 77.) In support, appellant argues that there was no evidence Sanchez was surprised, as appellant placed a gun to his head and demanded the drugs. (AOB 78.)

Respondent submits that the jury's finding that Sanchez was surprised cannot seriously be disputed. That being said, and as respondent understands it, what appellant appears to be arguing is that because he didn't shoot Sanchez at the precise moment he put the gun to his head, but instead demanded the drugs, this extremely brief moment was sufficient to

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(...continued)
that the distance from the corner of Highway 63 and the killing site was only .3 miles, and that it could be traveled in approximately 30 seconds by car. (AOB 75, fn. 36.) In support of this assertion, appellant has apparently went outside the record to Google Maps. Respondent objects to consideration of this resource. (*In re Carpenter* (1995) 9 Cal.4th 634, 646 ["[a]ppellate jurisdiction is limited to the four corners of the record on appeal."].) That said, even if appellant was correct with his time estimate, respondent submits that a half a minute is of sufficient duration to support the special circumstance. The precise amount of time is neither fixed nor critical. (*People v. Moon*, *supra*, 37 Cal.4th at p. 23.)

negate the surprise element on an unsuspecting victim. Respondent is unaware of any cases that hold that the brief moment it took Sanchez to hand appellant the drugs was sufficient to make this killing something other than a surprise attack from a position of advantage on an unsuspecting victim. As mentioned earlier, an intent to rob is not mutually exclusive to an intent to kill, and certainly Sanchez was still "surprised" within the meaning of the special circumstance.

Although he does not go into great detail, respondent notes that appellant points to this Court's decision in *Lewis*, *supra*, 43 Cal.4th 415, and states "[a]s in *Lewis*, there was no evidence that the victim was surprised." (AOB 78.) *Lewis* involved a number of robbery-murders, where it was found that the evidence was insufficient to support three of the lying-in-wait special circumstances. (*Id.* at p. 514.) In concluding that the murders did not occur while lying in wait, the *Lewis* Court noted:

> The defendants accomplished the forcible kidnapping of each victim while lying in wait, but then drove the still living victims around in their cars for periods of one to three hours, while withdrawing money from the victims' bank accounts, before killing them. By the time of the killings, the concealment, the watchful waiting, and the surprise attack all had taken place at least one and up to three hours earlier.

(*Id.* at p. 514.) Later, the Court continued:

> Here, there was no evidence that, while concealing his purpose to kill, defendant watched and waited for an opportune time to kill the victims. Rather, the evidence suggests each was killed when, and only when, his or her ATM withdrawal limit had been reached and the victim had been driven to a suitable location for killing. Moreover, there was no evidence that the victims were surprised. Indeed, the evidence suggests each victim must have been aware of being in grave danger long before getting killed. Sams was forced into a dumpster and, according to defendant, pleaded for his life before being shot. According to defendant, Nisbet tried to escape, an indication that she feared for her life. And according to defendant, Denogean said, "I know you are going to kill me" and challenged

> defendant to "go ahead and kill me now." Denogean's comments suggest she was not fooled. [¶] In sum, in each of the cases at issue here, there was a period of watchful waiting culminating in surprise kidnapping, a series of nonlethal events, and then a cold, calculated, inevitable, and unsurprising dispatch of each victim.

(*Id.* at pp. 514-515.)

As can be seen, the facts in *Lewis* share very little resemblance to the facts presented in this case beyond the existence of a killing. Unlike the victims in *Lewis*, Sanchez was shot almost immediately upon having the gun put to the back of his head. There was no discussion on his part, and there was no significant lapse in time from the moment that appellant revealed his true intentions and the moment he shot and killed Sanchez. As such, *Lewis* is of little help to appellant.[68]

Appellant's final attack under this heading is that the lying-in-wait special circumstance is unconstitutionally vague and overbroad, as applied. (AOB 80.) Appellant reasons that, "...in order for this Court to find that there is sufficient evidence...to sustain the...special circumstance, it would have to find that the required element of concealment of purpose does not have to be a murderous one, that a substantial period of watching and waiting can occur in a few seconds and where evidence of premeditation is

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[68] Like his first claim, appellant also asserts that the trial court erred in even providing an instruction on the lying-in-wait special circumstance because of the insufficiency of the evidence. (AOB 64.) However, and again, in recognition that this instructional error claim essentially hinges on his sufficiency of the evidence claim, and "for the sake of brevity," appellant discusses the issue only in the context of the sufficiency of the evidence. (AOB 64.) To the extent this bare assertion can be considered a free-standing claim, it is without merit since clearly the existence of the lying-in-wait special circumstance was an issue raised by the evidence presented. (*People v. Taylor*, *supra*, 48 Cal.4th at p. 623 [trial court has a duty to instruct on the general principles of law relevant to the issues raised by the evidence].)

weak, and that the victim does not have to be...surprised by the attack." (AOB 80.)

First, this Court has repeatedly rejected arguments that the lying in wait special circumstance is unconstitutionally vague (*People v. Carasi* (2008) 44 Cal.4th 1263, 1310; *Lewis*, *supra*, 43 Cal.4th at p. 516), or fails to sufficiently narrow the class of murderers eligible for the death penalty. (*Lewis*, *supra*, at p. 516; *People v. Moon*, *supra*, 37 Cal.4th at p. 44; *People v. Nakahara* (2003) 30 Cal.4th 705, 721.) As for how it was applied in this case, as has been argued, respondent disagrees with virtually all of appellant's factual assertions. More specifically, there was sufficient evidence that this was an intentional killing, that it was planned and premeditated, that the period of watching and waiting was of sufficient duration whether measured in its entirety or from the moment they left the "buyer's" house, and that the victim Sanchez was surprised by the attack. These facts adequately distinguish the instant murder from other first degree murders, and therefore, the special circumstance was not unconstitutionally vague and overbroad, as applied.

Respondent also notes that what appellant is essentially arguing is that the "...lying-in-wait special circumstance is too broad if the facts of this case fall within it." (*Streeter*, *supra*, 54 Cal.4th at pp. 249-250.) This is basically a facial attack on the constitutionality of the statute (*id.*), which is discussed in the next section.

For the foregoing reasons, appellant's request for relief on this claim should be denied.

III. THE LYING-IN-WAIT SPECIAL CIRCUMSTANCE ADEQUATELY PERFORMS THE NARROWING FUNCTION REQUIRED BY THE EIGHTH AMENDMENT OF THE UNITED STATES CONSTITUTION

Appellant contends that "[t]he lying-in-wait special circumstance is unconstitutional because it fails to perform the narrowing function required

by the Eighth Amendment[,] and fails to ensure that there is a meaningful basis for distinguishing those cases in which the death penalty is imposed from those which it is not." (AOB 84.) In support, appellant presents three similar and related arguments, and he repeats his earlier claim that the lying-in-wait special circumstance is overbroad, as applied.[69] In appellant's view, the special circumstance fails to perform the required narrowing function because: (1) there is no distinction between the special circumstance and premeditated and deliberate murder, given the broad interpretation of the special circumstance by this Court (AOB 85-88); (2) there is no distinction between lying-in-wait murder and the lying-in-wait special circumstance (AOB 88-91); and (3) the special circumstance fails to meaningfully distinguish death-eligible defendants from those who are not. (AOB 91-93.)

Respondent disagrees with each of appellant's assertions, and this Court has repeatedly rejected this constitutional challenge to the lying-in-wait special circumstance. As appellant offers no compelling reason to overturn existing precedent, respondent urges the Court to reject this challenge once again.

A. Law and Argument

"To avoid the Eighth Amendment's proscription against cruel and unusual punishment, a death penalty law must provide a 'meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not.'" (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1023, quoting *Furman v. Georgia* (1972) 408 U.S. 238, 313 (conc. opn. of White, J.).) As previously set forth, "[t]he lying-in-wait

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[69] As appellant's "as applied" argument was addressed in the preceding section, that response will not be repeated again, and to the extent it might be deemed necessary, respondent simply asks to incorporate that argument by reference.

special circumstance requires 'an intentional murder, committed under circumstances which include (1) a concealment of purpose, (2) a substantial period of watching and waiting for an opportune time to act, and (3) immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage....'" (*People v. Carpenter*, *supra*, 15 Cal.4th at p. 388, quoting *People v. Morales*, *supra*, 48 Cal.3d at p. 557.)

This Court has repeatedly rejected the claim that the lying-in-wait special circumstance fails to perform the required narrowing function. (See *People v. Moon*, *supra*, 37 Cal.4th at p. 44; *People v. Nakahara*, *supra*, 30 Cal.4th at p. 721, and cases cited.) In doing so, this Court has time and again rejected arguments identical to the ones presented by appellant.

For instance, appellant argues that the lying-in-wait special circumstance does not narrow the class of death-eligible defendants because, in his view, there is no distinction between this special circumstance and premeditated and deliberate first degree murder. (AOB 85.) Similarly, appellant asserts that the special circumstance fails to meaningfully distinguish death eligible defendants from those who are not eligible, because there is "...no reason to believe that murders committed by 'lying-in-wait' are more deserving of the extreme sanction of death than other premeditated killings." (AOB 91-92.).

In *People v. Carasi*, *supra*, 44 Cal.4th 1263, this Court rejected the argument that the lying-in-wait special circumstance fails to adequately narrow the class of death-eligible murders because it applies "to virtually all homicides." (*Id.* at p. 1310.) In doing so, the *Carasi* Court noted:

> ... [A]s this Court has explained many times before, the version of the lying-in-wait special circumstance at issue here is not unconstitutionally overbroad on the ground urged by defendant. It is limited to intentional murders that involve a concealment of purpose and a meaningful period of watching and waiting for an opportune time to attack, followed by a surprise lethal attack on

an unsuspecting victim from a position of advantage. [Citation.]"

(*Id.*)

Respondent asks the Court to follow its well-established precedent and, once again, reject appellant's argument. (See also *Streeter*, *supra*, 54 Cal.4th at pp. 252-253 [summarily rejecting the argument that there is no meaningful distinction between the special circumstance and premeditated, deliberate murder]; *People v. Cruz* (2008) 44 Cal.4th 636, 678 [rejecting the argument that it fails to narrow]; *Lewis*, *supra*, 43 Cal.4th at pp. 515-516 [rejecting arguments that it fails to narrow and fails to provide a meaningful basis for distinguishing cases in which the death penalty is imposed from those in which it is not]; *People v. Mendoza*, *supra*, 52 Cal.4th at p. 1095; *People v. Jurado*, *supra*, 38 Cal.4th at p. 127.)

As for appellant's assertion that a person who commits murder by lying-in-wait is no more deserving of the death penalty than a person who commits premeditated murder, respondent disagrees. As this Court has stated, "[m]urder committed by lying in wait has been '"anciently regarded ...as a particularly heinous and repugnant crime.' (Note, Murder Committed by Lying in Wait (1954) 42 Cal.L.Rev. 337.)" (*People v. Edelbacher*, *supra*, 47 Cal.3d at p. 1023.) Moreover, in *People v. Stevens*, *supra*, 41 Cal.4th 182, this Court noted that the concealment of purpose found in the lying-in-wait special circumstance "...inhibits detection, defeats self-defense, and may betray at least some level of trust, making it more blameworthy than premeditated murder that does not involve surprise." (*Stevens*, at p. 204.)

Appellant also contends that the lying-in-wait special circumstance fails to perform the narrowing function because there is no difference between lying-in-wait murder and the lying-in-wait special circumstance. (AOB 88.) However, appellant acknowledges that this Court has

repeatedly rejected this contention, as well. (See, e.g., *Streeter*, *supra*, 54 Cal.4th at pp. 252-253; *People v. Stevens*, *supra*, 41 Cal.4th at p. 204; *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1148-1149; *People v. Sims* (1993) 5 Cal.4th 405, 434; *People v. Webster* (1991) 54 Cal.3d 411, 448 [lying-in-wait murder requires only a "wanton and reckless intent to inflict injury likely to cause death," while the special circumstance requires the defendant to have "intentionally killed" the victim].) As appellant fails to offer a compelling reason to revisit the issue, this argument should once again be rejected.

For the foregoing reasons, appellant's attack on the constitutionality of the lying-in-wait special circumstance should be rejected.

IV. PURSUANT TO CALJIC NO. 8.81.15, THE JURY WAS CORRECTLY INSTRUCTED ON THE LYING-IN-WAIT SPECIAL CIRCUMSTANCE

Appellant contends that "[t]he lying-in-wait instructions omitted key elements of the special circumstance, and were erroneous, internally inconsistent, and confusing." (AOB 95.) More specifically, appellant argues that CALJIC No. 8.81.15 contained a fatal flaw "under the circumstances of this case," in that "[i]t did not explain that the required concealment of purpose must be an intent to kill[,] and that the act for which the defendant is watching and waiting must be the lethal attack." (AOB 96.) Because of this error, appellant asserts, his Sixth, Eighth and Fourteenth Amendment rights to due process, a fair trial, and an individualized, reliable and non-arbitrary determination of eligibility for the death penalty were violated. (AOB 99-100.)

Respondent disagrees. CALJIC No. 8.81.15 (1989 Rev.), is a correct statement of the law and has been repeatedly upheld by prior decisions of this Court. The facts of this case did not warrant any additional instruction,

nor was any additional instruction asked for at trial. In short, appellant's claim is without merit.

A. The Facts

As to the special circumstance of lying in wait, the jury was instructed pursuant to CALJIC No. 8.81.15 (1989 rev.) (4CT 1092-1093.) As read to the jury, it stated:

> To find that the special circumstance referred to in these instructions as murder while lying in wait is true, each of the following facts must be proved:
>
> First, the defendant intentionally killed the victim, and second, the murder was committed while the defendant was lying in wait.
>
> Now, the term while lying in wait within the meaning of the law of special circumstances is defined as a waiting and watching for an opportune time to act, together with a concealment by ambush or by some other secret design to take the other person by surprise even though the victim is aware of the murderer's presence. The lying in wait need not continue for any particular period of time provided that its duration is such as to show a state of mind equivalent to premeditation or deliberation.[70]
>
> Thus, for a killing to be perpetrated while lying in wait, both the concealment and watchful waiting as well as the killing must occur during the same time period, or in an uninterrupted attack commencing no later than the moment concealment ends. If there is a clear interruption separating the period of lying in wait from the period during which the killing takes place, so that there is neither an immediate killing nor a continuous flow of the uninterrupted lethal events, the special circumstance is not proved.

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[70] The jury had just been instructed pursuant to CALJIC No. 8.20, as to premeditation and deliberation. (4CT 1083-1084; 8RT 1808-1810.) These definitions were provided a second time when the court instructed on Count II. (4CT 1101-1102; 8RT 1816-1817.)

> A mere concealment of purpose is not sufficient to meet the requirement of concealment set forth in this special circumstance. However, when a defendant intentionally murders another person, under circumstances which include a concealment of purpose, a substantial period of watching and waiting for an opportune time to act, and immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage, the special circumstance of murder while lying in wait has been established.

(8RT 1811-1813.)

After receiving instruction on the sufficiency of circumstantial evidence (CALJIC No. 8.83), the jury was also instructed on the requirement of concurrence of act and specific intent as related to the lying-in-wait special circumstance. (4CT 1096 [CALJIC No. 3.31].) As read to the jury:

> Now, in the special circumstance that's charged in Count I of the information, namely, murder while lying in wait, there must exist a union or joint operation of act or conduct and a certain specific intent of the mind of the perpetrator. Unless such specific intent exists, the special circumstance of which relates [*sic*] is not committed. [¶] Now the special circumstance of murder while lying in wait requires the specific intent to intentionally kill a human being.

(8RT 1814.)

B. Law and Argument

> A defendant challenging an instruction as being subject to erroneous interpretation by the jury must demonstrate a reasonable likelihood that the jury understood the instruction in the way asserted by the defendant. [Citation.] The correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction. [Citation.]

(*People v. Solomon*, *supra*, 49 Cal.4th at p. 822, citations and internal quotation omitted.)

Appellant contends that CALJIC No. 8.81.15 contained a "fatal flaw under the circumstances of this case[,]" as the instruction "...did not explain that the required concealment of purpose must be an intent to kill and that the act for which [he was] watching and waiting must be the lethal attack." (AOB 96.) While appellant states that this would not typically be an issue, in appellant's view it was fatal here because the jury could have found that he only harbored an intent to rob when he got into the car with Sanchez. (AOB 97.) And if that was the case, appellant reasons, under this instruction, the jury could have erroneously found the lying-in-wait special circumstance to be true. (AOB 97.) Respondent submits that appellant's "dual intent" argument is without merit, and a very similar challenge to CALJIC No. 8.81.15 was recently rejected by this Court with its decision in *Streeter*, *supra*, 54 Cal.4th 205.

In *Streeter*, the defendant and Yolanda Butler had one child together, Little Howie. (*Streeter*, *supra*, 54 Cal.4th at p. 212.) One day, Butler ended their relationship, and secretly left the defendant while he was away at work. When she left, she took Little Howie and her other two children with her. Subsequently, the defendant contacted Butler, and asked to see his child; Butler agreed to meet the defendant at a pizza parlor. (*Id.*) When Butler arrived, the defendant was waiting for them and he appeared nervous. When Little Howie got out of the car, the defendant took him to his car, and then beat Butler, poured gasoline on her, and set her on fire. (*Id.* at pp. 212-213.) The defendant was subsequently convicted of first degree murder, and the jury found true the special circumstances of lying-in-wait and intentional infliction of torture. (*Id.* at p. 211.)

Like appellant's jury, the *Streeter* jury was instructed pursuant to CALJIC No. 8.81.15 (1989 rev.). (*Streeter*, *supra*, 54 Cal.4th at p. 248.) And like appellant's argument, the defendant contended that the instruction omitted key elements. (*Id.* at p. 251.) More specifically, Streeter asserted

that "...the standard instruction failed to explain to the jury that the concealed purpose must be an intent to kill and that the watchful waiting had to be for a time to launch a lethal attack." (*Id.*) The defendant then argued "...that because the evidence supported a finding that his true concealed intent was to take his son, the instructions would have permitted the jury to find that the concealment and watchful waiting elements were satisfied based only on such a nonlethal intent." (*Id.*)

In rejecting this argument, the *Streeter* Court reasoned:

> CALJIC No. 8.81.15 instructed that "for a killing to be perpetuated while lying in wait": (1) the killing must be *intentional* and (2) "both the concealment and watchful waiting as well as the killing must occur during the same time period, or in an uninterrupted attack commencing no later than the moment concealment ends." In addition, the instruction required an immediate killing or a continuous flow of the uninterrupted lethal events from the period of lying in wait. (*Ibid.*) Finally, the instruction stated that, "[W]hen a defendant *intentionally* murders another person, under circumstances which include (1) a concealment of purpose, (2) a substantial period of watching and waiting for an opportune time to act, and (3) immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage, the special circumstance of murder while lying in wait has been established." (*Ibid.*) Because the instruction required an *intentional* killing and an uninterrupted connection between the *lethal acts* and the period of lying in wait, a reasonable jury would not have believed that the nonlethal act and intent of taking Little Howie would have satisfied the requirements of concealment of purpose and watchful waiting to act.

(*Streeter, supra*, 54 Cal.4th at p. 251, original emphasis.)

Respondent submits that the reasoning in *Streeter* is sound and on point. With this instruction, there is a no chance a reasonable jury could have found that the non-lethal act of robbing Sanchez and Lopez of the cocaine satisfied the instruction's requirements of concealment of purpose and watchful waiting. From a plain reading of the instruction, it is evident

that the jury would have understood that the concealed purpose was to kill, and that appellant's watchful waiting was for the purpose of carrying out his execution-style murder of Sanchez. This is made even more true when it is remembered that the jury was also instructed pursuant to CALJIC No. 3.31, that the special circumstance required a joint operation of act and the specific intent to kill. In sum, appellant's instructional error claim is without merit.

Appellant also argues that when he and Lopez got out of the car when they went to the alleged buyer's house, this constituted a "cognizable interruption" by law and that the instruction failed to inform the jury of this fact. (AOB 99.) While respondent has previously expressed its disagreement with this legal proposition (*ante*, contention "II"), what appellant is now seeking is a pinpoint instruction, as CALJIC No. 8.81.15, accurately describes what is required to prove the special circumstance. (See *People v. Michaels* (2002) 28 Cal.4th 486, 516-517.) Appellant did not request a pinpoint instruction. If he believed that clarifying language was necessary to specifically instruct the jury on this point, he should have proposed that language at trial. Since appellant did not, the issue has been forfeited on appeal. (See, e.g., *People v. Hillhouse* (2002) 27 Cal.4th 469, 503; *People v. Saille* (1991) 54 Cal.3d 1103, 1119.)

In sum, the language of CALJIC No. 8.81.15 has been repeatedly approved of by this Court, either explicitly or implicitly. (See *People v. Sims*, *supra*, 5 Cal.4th at p. 434 [rejecting challenge to CALJIC No. 8.81.15 (1983 rev.)]; *People v. Cruz*, *supra*, 44 Cal.4th at p. 678 [rejecting claim No. 8.81.15, is "impossible to understand and apply"]; *People v. Webster*, *supra*, 54 Cal.3d at p. 448 [finding the jury was correctly instructed and that No. 8.81.15 correctly expressed the temporal relationship between concealment and attack]; *People v. Livingston* (2012) 53 Cal.4th 1145, 1173 [tacit approval of No. 8.81.15 (1989 Rev.).) Appellant's attempt to

inject ambiguity into the instruction notwithstanding, the language of the instruction is straightforward, and it accurately explained to the jury the requirements for a true finding on the lying-in-wait special circumstance. Given this reality, appellant's claim of instructional error should be rejected.

V. THE TRIAL COURT'S SUSTAINING OF AN OBJECTION TO A QUESTION THAT WENT TO THE UNDERLYING FACTS OF A WITNESS'S FELONY CONVICTION WAS PROPER AND DID NOT VIOLATE THE SIXTH, EIGHTH OR FOURTEENTH AMENDMENTS

Appellant contends that the trial court committed reversible error by restricting the cross-examination of Gilbert Galaviz on matters relevant to his credibility. (AOB 104.) More specifically, appellant takes issue with the trial court sustaining the prosecutor's objection to defense counsel's question to Galaviz, which asked Galaviz if he used a knife to commit the murder for which he stood convicted. (AOB 104-105.) Appellant reasons that the answer was relevant to Galaviz's credibility, and whether or not Galaviz was the assailant in the instant case. (AOB 108.) Appellant claims that the trial court's ruling violated his Sixth, Eighth, and Fourteenth Amendment rights to confrontation, to present a defense, to a fair trial, to due process and to reliable determination of guilt, in addition to various provisions of the California Constitution. (AOB 104, citing Cal. Const., art. I §§ 7, 15, & 16.)

Appellant is mistaken for a number of reasons. First, the trial court properly sustained the objection, as the facts underlying Gilbert Galaviz's felony conviction were not admissible for impeachment under state law. Second, even if it was relevant, at the very most, the trial court's ruling amounted to nothing more than an error in state evidentiary law. The ruling certainly did not rise to the level of a constitutional violation. And lastly, even if there was a constitutional violation, any error was harmless beyond

a reasonable doubt as appellant twice presented to the jury the very same evidence he now claims should have been admitted. Consequently, his claim should be rejected.

A. The Facts

During his direct examination, Gilbert Galaviz told the jury that his current residence was state prison and that he was serving a sentence of 25 years to life for killing someone. (5RT 1155-1156.) On cross examination, defense counsel also broached this topic, and he asked Galaviz if he killed the person with a knife. (5RT 1172.) The prosecutor objected, and stated that he didn't think the details of the killing were an appropriate area of inquiry and were irrelevant. (5RT 1172.) The court sustained the prosecutor's objection, and counsel moved on to question Galaviz about his other felony convictions. (5RT 1172-1173.)

However, later during Joann Galaviz's testimony, defense counsel returned to the topic, and he was able to elicit from Joann the very fact he sought to elicit during Gilbert's testimony. In short, Joann testified that Gilbert accomplished the killing by stabbing the person to death. (7RT 1538.) Defense investigator Dan Wells then repeated this fact when he discussed his interview with Joann Galaviz. Wells said that he and Joann discussed three different incidents regarding Gilbert, and that the first was the murder Galaviz committed in Shafter "where he stabbed a man with a knife[,]" and was subsequently convicted and sentenced to prison. (7RT 1581.)

B. Law and Argument

The thrust of appellant's argument appears to be that the trial court's "restriction" of his cross-examination of Gilbert Galaviz violated his Sixth Amendment right to confrontation. (AOB 105-108.)

> A criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from

> engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby, to expose to the jury the facts from which jurors...could appropriately draw inferences relating to the reliability of the witness. [Citations.] However, not every restriction on a defendant's desired method of cross-examination is a constitutional violation. Within the confines of the confrontation clause, the trial court retains wide latitude in restricting cross-examination that is repetitive, prejudicial, confusing of the issues, or of marginal relevance. [Citations.] California law is in accord. [Citation.] Thus, unless the defendant can show that the prohibited cross-examination would have produced a significantly different impression of the witnesses' credibility [citation], the trial court's exercise of its discretion in this regard does not violate the Sixth Amendment. [Citation.]

(*People v. Frye* (1998) 18 Cal.4th 894, 946, overruled on other grounds, *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22, citations and internal quotations omitted.)

Here, there is no chance the trial court's ruling violated the Sixth Amendment or due process principles. First, defense counsel failed to make any argument in support of the excluded evidence based on a federal constitutional provision. As such, he cannot raise the claim for the first time on appeal. (*People v. Davis* (1995) 10 Cal.4th 463, 502, fn. 1.) Second, in California, the right to cross-examine and impeach a witness about a prior felony conviction does not extend to the facts of the underlying offense. (See Evid. Code, §§ 786-787; *People v. Shea* (1995) 39 Cal.App.4th 1257, 1267; *People v. Heckathorne* (1988) 202 Cal.App.3d 458, 462.) Therefore, in terms of attacking Galaviz's credibility, the trial court properly sustained the objection. Moreover, this evidentiary ruling did not offend the Constitution as the application of ordinary rules of evidence generally does not impermissibly infringe upon a capital defendant's constitutional rights. (*People v. Eubanks* (2011) 53 Cal.4th 110, 143; *People v. Fudge* (1994) 7 Cal.4th 1075, 1103 [exclusion of

defense evidence on a minor or subsidiary point does not interfere with due process].)

These points aside, even if it is assumed counsel should have been allowed to ask Galaviz if he used a knife to commit the murder, there was no Sixth Amendment-confrontation violation as there was no chance an affirmative answer would have produced a significantly different impression of Galaviz's credibility. The reason for this is obvious. Defense counsel twice elicited this very fact from two other witnesses: Joann Galaviz and Investigator Wells. (7RT 1538, 1581.) Therefore, the jury had this information to evaluate Galaviz's credibility. Respondent is at a loss to explain, and appellant makes no effort to explain, how hearing it from Galaviz himself could have made a difference in the jury's impression of Galaviz's credibility.

As for appellant's specific assertion that the answer was relevant to his attempt to pin the murder on Galaviz, appellant did not present this theory of admissibility to the trial court. Instead, counsel said nothing after the prosecutor's objection and the court's ruling. He simply moved on to question Galaviz about his other felony convictions. (5RT 1172-1173.) Therefore, appellant has forfeited this argument on appeal. (*People v. Roberts* (2010) 184 Cal.App.4th 1149, 1193.) Even so, it is evident that the ruling did not interfere with appellant's right to present a defense, which generally requires that an accused have the opportunity to present all relevant evidence of significant probative value. (*People v. Babbitt* (1988) 45 Cal.3d 660, 684; *People v. Reeder* (1978) 82 Cal.App.3d 543, 553.) As stated, appellant did present this evidence.

Lastly, even if it is assumed the trial court committed error under state law, or the error rose to the level of a Sixth Amendment violation, any error was harmless under either standard of review. (See *Chapman v. California* (1967) 386 U.S. 18, 24 [beyond a reasonable doubt standard applicable to

constitutional violations]; see also *People v. Geier* (2007) 41 Cal.4th 555, 608; *People v. Cunningham* (2001) 25 Cal.4th 926, 998-999 [noting *People v. Watson* (1956) 46 Cal.2d 818, 836, "reasonably probable" standard applicable to erroneous state evidentiary ruling].) As demonstrated, the very information appellant now asserts should have been presented to the jury was, in fact, brought out on two different occasions. Hearing it one more time simply would not have made a difference. Consequently, for any or all of the foregoing reasons, appellant's request for relief should be denied.

VI. AS THE JURY WAS INSTRUCTED ON THE PRESUMPTION OF INNOCENCE, REASONABLE DOUBT AND THE PEOPLE'S BURDEN OF PROOF, THE GUILT PHASE INSTRUCTIONS DID NOT UNDERMINE THE REQUIREMENT OF PROOF BEYOND A REASONABLE DOUBT

Appellant next contends that "[a] series of guilt phase instructions undermined the requirement of proof beyond a reasonable doubt, requiring reversal of the entire judgment." (AOB 110.) Appellant identifies CALJIC No. 2.01, No. 2.21.2, No. 2.22, No. 2.27, No. 2.51, and No. 8.20 as faulty. (AOB 110.) Appellant asserts that these instructions violated his rights under the Sixth, Eighth and Fourteenth Amendments to the federal Constitution, and his California Constitutional rights under article I, sections 7, 15, 16 and 17. (*Id.*) However, in setting forth these claims, appellant recognizes that this Court has previously rejected many of his arguments, but he asks this Court to reconsider those decisions, and alternatively, he raises them for purposes of exhaustion. (AOB 110-111.)

Respondent disagrees with each one of appellant's contentions and shall briefly address each argument in the order in which appellant presents them. However, it should be noted that appellant failed to object to or request modification of any the instructions he now takes issue with, despite a clear opportunity to do so. (6RT 1373 [indicating he was "fine"

with the prosecutor's proposed instructions].) Because of this, it is respondent's position that he has now forfeited these claims on appeal. (*People v. Moore* (2011) 51 Cal.4th 1104, 1134-1135 [finding forfeiture regarding CALJIC No. 2.01]; *People v. Catlin* (2001) 26 Cal.4th 81, 149.)

Turning to the merits of appellant's claims, generally speaking,

> A defendant challenging an instruction as being subject to erroneous interpretation by the jury must demonstrate a reasonable likelihood that the jury understood the instruction in the way asserted by the defendant. [Citation.] The correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction. [Citation.]

(*People v. Solomon*, *supra*, 49 Cal.4th at p. 822, citations and internal quotation omitted.)

A. CALJIC No. 2.01 Does Not Create an Improper Mandatory Presumption or Undermine the Reasonable Doubt Standard

Appellant's jury was instructed on the sufficiency of circumstantial evidence, generally, pursuant to CALJIC No. 2.01.[71] (4CT 1055.)

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[71] CALJIC No. 2.01 states:

> However, a finding of guilt as to any crime may not be based on circumstantial evidence unless the proved circumstances are not only (1) consistent with the theory that the defendant is guilty of the crime, but (2) cannot be reconciled with any other rational conclusion. [¶] Further, each fact which is essential to complete a set of circumstances necessary to establish the defendant's guilt must be proved beyond a reasonable doubt. In other words, before an inference essential to establish guilt may be found to have been proved beyond a reasonable doubt, each fact or circumstance upon which such inference necessarily rests must be proved beyond a reasonable doubt. [¶] Also, if the circumstantial evidence as to any particular count is susceptible of two reasonable interpretations, one of which points to the defendant's guilt and the other to his

(continued...)

Appellant contends that this instruction "undermined the reasonable doubt requirement in two separate but related ways...." (AOB 111.) First, appellant argues that "the instruction compelled the jury to find [him] guilty and the special circumstance true using a standard lower than proof beyond a reasonable doubt." (AOB 112.) And second, and similarly, appellant argues that the "instruction required the jury to draw an incriminatory inference when the inference appeared 'reasonable.'" (*Id.*) Thus, he concludes, the instructions "...created an impermissible mandatory inference that required the jury to accept any reasonable interpretations of circumstantial evidence unless [he] rebutted it by producing a reasonable exculpatory interpretation." (*Id.*)

In *People v. McKinzie* (2012) 54 Cal.4th 1302, this Court rejected this very claim that CALJIC No. 2.01 created an improper mandatory presumption that required the jury to draw an incriminating inference if it was merely reasonable. (*Id.* at pp. 1355-1356.) In doing so, the *McKinzie* Court stated that "[t]he challenged CALJIC instructions do not create a presumption, permissive or mandatory, as they do not permit or require any particular ultimate fact to be inferred from any particular predicate fact; they simply direct the jury, in general, to choose a reasonable conclusion over an unreasonable one in evaluating circumstantial evidence." (*Id.*, quoting and citing *People v. Snow* (2003) 30 Cal.4th 43, 95; see *People v. Dement* (2011) 53 Cal.4th 1, 54 [rejecting same claim]; *People v. Verdugo*

(...continued)

> innocence, you must adopt that interpretation which points to the defendant's innocence, and reject that interpretation which points to his guilt. [¶] If, on the other hand, one interpretation of such evidence appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable.

(4CT 1055-1056.)

(2010) 50 Cal.4th 263, 295-296; *People v. D'Arcy* (2010) 48 Cal.4th 257, 295-296.) Respondent submits that these decisions are sound. Moreover, it is questionable whether this instruction was even required in this case, since the prosecution's case rested on direct evidence and not substantially on circumstantial evidence. (*People v. McKinnon* (2011) 52 Cal.4th 610, 676.) Consequently, for either reason, appellant's claim should be rejected.

B. CALJIC No. 2.21.2, No. 2.22, No. 2.27, and No. 8.20 Do Not Impermissibly Dilute the Reasonable Doubt Standard

Appellant's jury was instructed, in part, pursuant to CALJIC No. 2.21.2 (witness willfully false), No. 2.22 (weighing conflicting testimony), No. 2.27 (sufficiency of testimony of one witness), and No. 8.20 (deliberate and premeditated murder). (4CT 1064, 1065, 1067, 1083-1084.) Appellant contends that taken individually and collectively, the instructions "...implicitly replaced the 'reasonable doubt' standard with the 'preponderance of the evidence' test, and violated the constitutional prohibition against convicting a capital defendant on any lesser standard of proof." (AOB 114.)

In *Streeter*, *supra*, 54 Cal.4th 205, this Court rejected the claim that these instructions, taken singly and collectively, impermissibly diluted the reasonable doubt standard. (*Id.* at p. 253.) In doing so, the *Streeter* Court noted that this claim had been repeatedly rejected, and further stated that each of these instructions was unobjectionable when accompanied by the usual instructions on reasonable doubt, the presumption of innocence, and the People's burden of proof. (*Id.*) As CALJIC No. 2.90 [presumption of innocence, reasonable doubt, and burden of proof] was given to appellant's jury (4CT 1074), this Court should, once again, reject this claim. (See also *People v. Parson* (2008) 44 Cal.4th 332, 358; *People v. Whisenhunt* (2008)

44 Cal.4th 174, 220-221; *People v. Howard* (2008) 42 Cal.4th 1000, 1025-1026 & fn. 14; *People v. Kelly* (2007) 42 Cal.4th 763, 792.)

C. CALJIC No. 2.51 Does Not Undermine the Burden of Proof Beyond a Reasonable Doubt

Appellant's jury was instructed on motive pursuant to CALJIC No. 2.51. (4CT 1068.) Under this sub-heading, appellant contends that CALJIC No. 2.51 improperly allowed the jury to determine guilt based upon the presence of an alleged motive, and shifted the burden of proof to appellant to show the absence of motive to establish innocence. (AOB 116-117.) Like his two previous instructional error claims, a claim that No. 2.51 shifts the burden of proof and undermines the reasonable doubt standard has been repeatedly rejected by this Court. (*Streeter*, *supra*, 54 Cal.4th at p. 253, citing *People v. Parson*, *supra*, 44 Cal.4th at p. 358; *People v. Whisenhunt*, *supra*, 44 Cal.4th at pp. 220-221; *People v. Howard*, *supra*, 42 Cal.4th at pp. 1025-1026 & fn. 14; *People v. Kelly*, *supra*, 42 Cal.4th at p. 792.) As appellant's jury was instructed on the presumption of innocence, reasonable doubt, and the People's burden of proof pursuant to CALJIC No. 2.90, and appellant offers no compelling reason to revisit these decisions, appellant's claim should likewise be rejected.

For the foregoing reasons, appellant's claim as related to CALJIC No. 2.01, No. 2.21.2, No. 2.22, No. 2.27, No. 2.51, and No. 8.20, should be denied.

VII. ALL OF THE EVIDENCE OFFERED IN AGGRAVATION AS "FACTOR (B)" EVIDENCE WAS PROPERLY ADMITTED

Turning to the penalty phase of his trial, appellant takes issue with five of the incidents introduced by the prosecution pursuant to section 190.2, subdivision (b). In sum, appellant contends that there was insufficient evidence to support incidents "2F" and "2A," the kidnap and rape of Rosa B., and the Tulare parking-lot shooting, respectively. (AOB

121, 144.) Additionally, appellant contends that mere possession of a firearm is not proper "Factor B" evidence, which renders the evidence as to the Strawberry Street (incident 2C), Circle K (2D), and Arrow Motel (2E), incidents insufficient. (AOB 151.) Appellant also asserts that the prosecution failed to prove actual or constructive possession of the firearm as related to incidents 2C and 2D. (AOB 153.) Therefore, given these alleged evidentiary errors, appellant asks for reversal of the penalty phase of his trial.

Respondent disagrees with appellant's claim of errors. Rather, each of the complained-about incidents was properly admitted as factor (b) evidence during appellant's penalty trial. Moreover, appellant failed to object to the admission of any of the evidence on the grounds that he now complains. Therefore, appellant's claims should be deemed forfeited on appeal.

A. Appellant's Participation in the Kidnap and Rape of Rosa B. Was Properly Admitted As a Factor B Incident in Aggravation

Appellant doesn't appear to actually dispute the fact that sufficient evidence was presented to prove that he repeatedly had sex with the minor Rosa B. against her will, or that the assaults were facilitated by Rosa's fear of appellant's father. Instead, it is appellant's contention that the jury should never have been allowed to consider the conduct, because no rational trier of fact could have found beyond a reasonable doubt that he "...was anything but a victim of grotesque abuse by his father...[,]" and that he was forced to rape Rosa under duress. (AOB 126.) In support and in sum, appellant argues that the evidence "only" supported a finding that both he and Rosa were victims of appellant's father's threats and abuse, and consequently, "...the jury's decision making process was fatally infected by its consideration of otherwise highly mitigating evidence as aggravating."

(AOB 127.) Appellant concludes that consideration of this evidence violated the Eighth Amendment and due process. (AOB 124-127.)

1. The facts

Prior to the start of trial and pursuant to section 190.3, the prosecution filed a Notice of Intention to Introduce Evidence in Aggravation. (1CT 122-125.) As for factor (b) evidence, item number "2F" was an allegation that in 1973, appellant "participated in the kidnapping and repeated rapes of 14 year old Rosa [B.]." (1CT 124.) In response, appellant initially sought an Evidence Code section 402/*Phillips* hearing (*People v. Phillips* (1985) 41 Cal.3d 29 (*Phillips*)), as to the admissibility of the evidence. (3CT 804-805.) In support, and much like his present argument, appellant asserted that substantial evidence of any violation of the Penal Code was lacking, as the reports that had been provided indicated "...that any involvement [he] may have had was forced upon him by his father with threats of physical harm." (3CT 806.) The prosecutor then filed an opposition which argued that, to the extent appellant was to claim that he was coerced by his father, that was a defense that the "jury may choose to disbelieve." (4CT 922.) However, appellant later withdrew his request for a section 402 hearing, stating "...that if the reports we have are to be believed, [then] there would be substantial evidence to go to the jury with." (1RT 187.)

Even so, prior to the start of the penalty phase, the court and counsel again discussed the possible need for a *Phillips* hearing as related to this incident. (8RT 1856-1857.) At that time, defense counsel conceded that there was a "triable issue" based on the victim's statements, and that the prosecution could produce "substantial evidence sufficient to go to the jury with...." (8RT 1862.) Therefore, defense counsel, again, withdrew his request for a hearing. (*Id.*)

As previously detailed, during the penalty phase Rosa B. testified that she was 12 years old when appellant, his father, mother, uncle and at least

two other family members came to her sister's house and forcibly took her from the home. (9RT 1953-1955, 1959, 1969.) Some of the group was armed, and Rosa was taken back to appellant's ranch where she was held for approximately five months.[72] (9RT 1953-1956, 1965.) Prior to this event, appellant's father had told Rosa several times that she was going to be his daughter in law, and appellant had asked her to be his girlfriend; Rosa declined appellant's invitation. (9RT 1954-1955, 1969.)

Rosa B. said that, during her time at appellant's ranch, she was repeatedly sexually assaulted by appellant, and that each time it occurred, it was at appellant's father's direction. (9RT 1956-1958, 1961, 1972.) At first, the assaults occurred out of doors. (9RT 1961.) Appellant's father placed appellant and Rosa together in a field, and then waited a short distance away while appellant assaulted her. (9RT 1961.) Later, the sexual assaults occurred in the house. (9RT 1961.) There, appellant's father had Rosa lay down with appellant, and he ordered appellant to have sex with her. (9RT 1972.) According to Rosa, appellant's father gave orders for everything. (9RT 1972.) Rosa stated that the assaults occurred with such frequency that "[she] could not count them." (9RT 1957-1958.)

Rosa B. explained that appellant never physically hurt or abused her. (9RT 1973.) She only had sex with appellant because appellant's father threatened to kill her. (RT 1983.) And because Rosa obeyed the orders of appellant's father, appellant did not have to use force to rape her. (4RT 1963.) It was Rosa's opinion that appellant was forced to have sex with her

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[72] Appellant's cousin, Antonio Navarro, testified during the defense case that he was aware of how Rosa B. was brought to the ranch. (9RT 2146, 2153.) Navarro explained that appellant's father had said that when Rosa grew up, he was going to steal her for appellant. (9RT 2147.) Although appellant never told Navarro that his father forced him to help kidnap Rosa, appellant went with his father because he was afraid of him. (9RT 2147.)

in the same way she was forced to have sex with him. (9RT 1973-1974.) When Rosa asked appellant why he didn't defend her, appellant said that his father would kill him.[73] (9RT 1979-1980.)

On several occasions, Rosa B. heard appellant's father threaten to kill appellant if he didn't do as told, and in one instance, he threatened him with a machete. (9RT 1974-1975.) According to Rosa, appellant's father threatened to kill everyone, and it was appellant's mother who was physically abused the most. (9RT 1972, 1974, 1986.) As for appellant, in addition to the threats, his father verbally humiliated him. (9RT 1986-1987.) For instance, on one occasion appellant was unable to get an erection during an assault, so his father verbally chastised him in front of his mother.[74] (9RT 1981.)

Detective Pinon testified in rebuttal that on November 17, 1989, he talked with Rosa B. for about an hour and a half. (10RT 2189.) During the conversation, Rosa told Pinon that she was taken to an orchard on the ranch where she stayed for several days, and that she was raped by appellant. (10RT 2189-2190.) At this point in the conversation, Rosa had not said anything about the whereabouts of appellant's father. (10RT 2190.) As

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[73] During the defense case, appellant's sister Maria Lupercio also testified that appellant's father ordered appellant to "make [Rosa B.] his," that appellant didn't want to, and that when he couldn't, their father verbally chided him and sometimes beat him. (9RT 2140.)

[74] As previously detailed, *ante*, during the defense case, numerous family members testified to appellant's fear of his father, the father's threats, and the father's significant physical abuse of appellant and other family members. (See 9RT 2135-2139 [testimony of younger sister Maria Delores Lupercio]; 9RT 2144-2147 [testimony of cousin Antonio Navarro]; and 9RT 2151-2152 [testimony of appellant's uncle Alfredo Navarro].) Defense witness Dr. Blak echoed this testimony in discussing his diagnosis of appellant. (9RT 2026-2031.)

they continued to talk, Rosa did not tell Pinon that appellant's father had been present at all times or that he had forced appellant to sexually assault her. (10RT 2190.) However, Rosa did say that she had sex with appellant out of fear, because appellant's father had threatened to kill her if she did not. (10RT 2191.) Rosa told Pinon that appellant's father threatened her on a daily basis, and that he threatened to kill her if she left. (10RT 2191.)

Prior to the start of the penalty-phase deliberations, the jury was instructed, in part, on the defenses of "threats and menaces" and "necessity" pursuant to CALJIC Nos. 4.40[75] and 4.43,[76] respectively. (5 CT 1179-1180; 10RT 2271-2272.) The jury was also instructed that before it could consider other-crimes evidence as aggravating, the crimes had to be proven beyond a reasonable doubt. (5CT 1172; 10RT 2267.) Both the prosecutor and defense counsel addressed the defenses in their respective summations. (10RT 2210-2213, 2234-2235.)

At the outset of his argument, the prosecutor conceded that appellant's father was a "palpably evil man," and that as an 18-year-old boy, appellant likely did not instigate what had occurred.[77] (10RT 2193, 2210.) Even so,

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[75] CALJIC No. 4.40 provided: "A person is not guilty of a crime when he engages in conduct, otherwise criminal, when acting under threats and menaces under the following circumstances: [¶] (1) Where the threats and menaces area such that they would cause a reasonable person to fear that his life would be in immediate danger if he did not engage in the conduct charged, and [¶] (2) If such person then believed that his life was so endangered. [¶] This rule does not apply to threats, menaces, and fear of future danger to his life." (5CT 1179.)

[76] With this present claim, appellant does not specifically argue the defense of necessity.

[77] Appellant's exact age at the time of the assaults is difficult to precisely discern. Rosa B. was unsure exactly when the kidnapping and assaults took place, but she thought it was in 1972. (9RT 1964.) During the guilt phase, Pinon testified that appellant was 34 at the time of the

(continued...)

it was the prosecutor's position that appellant acted in concert with his father to some degree. In support, he pointed to the fact that appellant asked Rosa B. to be his girlfriend just months before the kidnapping and assaults, and the father's statements to Rosa that she would be his daughter-in-law someday. (10RT 2211.) The prosecutor also argued that, given that Rosa essentially testified that appellant raped her innumerable times, it was difficult to believe that appellant had such a "distaste" for Rosa to the extent that he only committed each and every rape at his father's direction. (10RT 2212.) To this end, the prosecutor noted that Rosa didn't tell Detective Pinon that appellant's father ordered him to rape her or that appellant acted out of fear. (10RT 2210-2211.) The prosecutor also asserted that Dr. Blak shared the opinion that appellant may have initiated some of the assaults.[78] (10RT 2211-2213.)

Defense counsel first addressed Rosa B.'s credibility, and he argued that she didn't tell Detective Pinon about the father's involvement simply

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(...continued)
shooting, which took place in March of 1989. (4RT 797.) If these numbers were accurate, then appellant was 17 or 18 at the time. However, Dr. Blak thought a birthdate of May 16, 1956, was the "most probable" birthdate, which, if accurate, meant appellant was around 15 or 16 at the time. (9RT 2030-2031.)

[78] As previously detailed, defense witness Dr. Blak diagnosed appellant with an antisocial personality disorder, which Blak characterized as someone who broke the rules. (9RT 2043.) In support of his diagnosis, Blak observed that, as to Rosa B., even though he was a young man himself and under pressure from his father, appellant still engaged in the behavior. (9RT 2044.) Blak further testified that it was his sense that the father was the instigator, but that that didn't mean that appellant did not initiate some of the sexual interaction with Rosa; in fact, it was Blak's own "intuitive sense" that there were times that appellant did. (9RT 2105.) However, Blak later acknowledged that he did not have any data or evidence from appellant or anyone else as to whether appellant initiated any of the encounters. (9RT 2133.)

because she wasn't asked. (10RT 2232.) He then asserted that both defenses applied, and he pointed to Rosa's testimony that appellant only raped her out of fear of his father and only at his father's direction. (10RT 2234-2235.) In counsel's view, appellant "...was as much a victim as Rosa [B.] was." (10RT 2234-2235.)

With his motion to modify the verdict, appellant reiterated this argument to the trial court, and wrote that "...the uncontroverted evidence from Rosa [B.] herself, showed that defendant was forced by his father to assist in the kidnapping and in having sexual relations with her." (5CT 1210.) In response, the prosecutor acknowledged Rosa's testimony, but pointed out that Rosa testified she was raped more times than she could count, and that the jury "could have easily discredited the assertion that the father each and every time coerced the defendant, and reasonably concluded he acted at times on his own volition." (5CT 1220.) The trial court denied appellant's motion without specific reference to the Rosa B. incident. (5CT 1228-1232.)

2. Law and argument

Section 190.3, subdivision (b), allows proof of criminal activity which involved the use or attempted use of force of violence or the express or implied threat to use force or violence. (§ 190.3, subd. (b); *People v. Lewis* (2006) 39 Cal.4th 970, 1052.) "Such other violent crimes are admissible regardless of when they were committed or whether they led to criminal charges or convictions, except as to acts for which the defendant was acquitted. [Citation.]" (*Lewis*, at p. 1052.) In admitting this type of evidence, "[t]he penalty instructions must make clear that an individual juror may consider other violent crimes in aggravation only if he or she is satisfied beyond a reasonable doubt that the defendant committed them. [Citations.]" (*Id.*) A trial court's ruling on the admissibility of evidence generally is reviewed for abuse of discretion, and this standard applies to

evidence of other violent criminal activity. (See, e.g., *People v. Ochoa* (1998) 19 Cal.4th 353, 449.)

At the outset, respondent notes that appellant failed to object in the trial court to the introduction of this evidence, nor did he ask to have it stricken once the content of Rosa B.'s testimony became known. In fact, prior to presentation of the evidence, appellant conceded the evidence's admissibility, and appellant's own expert later referred to the events to support his diagnosis of an antisocial personality disorder. A defendant must object to introduction of other-violent-crimes evidence to preserve the issue for appeal. (Evid. Code, § 353; *People v. Catlin*, *supra*, 26 Cal.4th at p. 172; *People v. Visciotti* (1992) 2 Cal.4th 1, 71; *People v. Ashmus* (1991) 54 Cal.3d 932, 985.) Since appellant did not object to the presentation of the evidence, the issue has not been preserved, and the instant claim should be rejected. (*People v. Livingston*, *supra*, 53 Cal.4th at p. 1175; *People v. Lewis*, *supra*, 39 Cal.4th at p. 1052; *People v. Huggins* (2006) 38 Cal.4th 175, 241, fn. 18.) That said, and alternatively, respondent submits that appellant's claim fails on its merits.

As set forth above, the prosecution introduced evidence of appellant's role in the gun-point kidnapping and repeated sexual assaults of Rosa B. Undeniably, appellant's participation in these crimes was proper factor (b), evidence, as the assaults were on a minor and were facilitated by Rosa's fear of appellant's father. (See, e.g., *People v. Griffin* (2004) 33 Cal.4th 536, 587 [lewd act on a child properly admitted where acts accomplished by express threat to use violence], disapproved on other grounds, *People v. Riccardi* (2012) 54 Cal.4th 758, 824, fn. 32.) Given that the jury was properly instructed that it could not consider the evidence as aggravating unless the conduct was proven beyond a reasonable doubt, respondent submits that the evidence was properly submitted to the jury.

However, appellant contends that the jury should have never been allowed to consider the evidence under factor (b), because he had a complete defense as a matter or law—a defense of duress. (AOB 125-127.) Section 26, sets forth the requirements for a claim of duress. As relevant, it states:

> All persons are capable of committing crimes except those belonging to the following classes:
>
> [...]
>
> Six – Persons (unless the crime be punishable with death) who committed the act or made the omission charged under threats or menaces sufficient to show that they had reasonable cause to and did believe their lives would be endangered if they refused.

(See also *People v. Vieira* (2005) 35 Cal.4th 264, 289-290.)

"Duress is an effective defense only when the actor responds to an immediate and imminent danger. A fear of future harm to one's life does not relieve one of responsibility for the crimes he commits. [Citations.]" (*People v. Heath* (1989) 207 Cal.App.3d 892, 900.) "Because of the immediacy requirement, a person committing a crime under duress has only the choice of imminent death or executing the requested crime." (*People v. Petznick* (2003) 114 Cal.App.4th 663, 676.) "Decisions upholding the duress defense have uniformly involved a present and active aggressor threatening immediate danger. [Citation.]" (*Id.*, internal quotations omitted; see also *People v. Hamlin* (2009) 170 Cal.App.4th 1412, 1460.)

As did the prosecutor, respondent acknowledges that the evidence presented at the penalty phase established that appellant was subject to physical abuse by his father, and that appellant's father apparently had a penchant for threatening to kill everyone in the household. (9RT 1974-1975.) But physical abuse and general threats of harm or death is not enough for a defense of duress. To establish the defense, appellant had to

have acted each and every time under the threat of imminent death.[79] However, appellant assaulted Rosa over the course of five months, and he did so so many times that she couldn't count them. The sheer number of assaults over a significant duration of time strongly cuts against a claim of duress. This conclusion is even more reasonable when it is recalled that just prior to the kidnapping, appellant expressed his affinity for Rosa when he asked her to be his girlfriend, and that appellant apparently had enough interest in Rosa to enable him to complete the sex acts on most occasions. From this, it was reasonable to infer that appellant was complicit in the assaults to some degree. Moreover, that appellant wasn't acting under threat of imminent death is further evidenced by the testimony of both Rosa and appellant's sister, Maria, who stated that when appellant couldn't complete the assault, he was only verbally chided or, at most, physically abused. (9RT 1981, 2140.) Given these facts, it was proper to leave the question of duress in the hands of the jury, and the trial court did not abuse its discretion.

Next, appellant appears to move from a claim regarding the sufficiency of the evidence, to an assertion that he cannot "...be sent to his death based upon criminal acts in which his abusive father forced him to engage." (AOB 136.) In support, appellant points to the Ninth Circuit's decision in *Beam v. Paskett* (9th Cir. 1993) 3 F.3d 1301 (*Beam*) (overruled on other grounds in *Lambright v. Stewart* (9th Cir. 1999) 191 F.3d 1181). (AOB 135.)

In *Beam*, at the punishment phase of the trial, the prosecution introduced evidence that Beam was a victim of incest, had engaged in

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[79] To the extent appellant advocates a standard of threats of "death *or serious bodily harm*" (see AOB 134), respondent disagrees that a threat of "serious bodily harm" is sufficient to establish a claim of duress. As set forth above, *ante*, a claim of duress requires a threat of imminent death.

homosexuality, and had "abnormal sexual relations with women both older and younger" than himself in order to show that Beam deserved the death penalty. (*Beam*, *supra*, 3 F.3d at p. 1308.) All of the evidence concerned acts that were "non-violent, consensual, or involuntary conduct." (*Id.*) The trial court then made three findings to justify Beam's sentence of death. (*Id.* at pp. 1307-1308.)

One finding was that Beam posed a "continuing threat" to society, which was based upon the judge's determination that Beam's "prognosis for rehabilitation [was] non-existent." (*Beam*, *supra*, 3 F.3d at p. 1307.) The Ninth Circuit determined that this finding, in turn, was based substantially on Beam's past non-violent, consensual or involuntary sexual conduct, (*id.* at pp. 1308), which according to the presentence report took place when "...Beam's father forced Beam and his [mentally disabled] older brother to have sex with Beam's mother while Beam's father watched. If anyone refused, Beam's father would beat the recalcitrant party." (*Id.* at p. 1308, fn. 6.) The other conduct included evidence of homosexuality and "abnormal sexual relations with women of ages different than himself...." (*Id.* at p. 1309.)

The Ninth Circuit found that the Idaho's sentencing court's reliance on this conduct violated the Eighth Amendment, because the state failed to demonstrate a close link between that history and the defendant's future dangerousness. (*Beam*, *supra*, 3 F.3d at p. 1309.) Rather, the *Beam* Court determined that any link appeared "...to be the product of the trial judge's arbitrary pre-conceived attitudes[,]" that his incestuous relationship with his mother was forced upon him, and that nothing in Beam's history indicated a propensity for force or violence. (*Id.* at p. 1310.) Consequently, the Ninth Circuit determined that Beam's sentence was handed down in violation of the Eighth Amendment. (*Id.*)

Respondent disagrees that appellant's situation is just like the defendant's in *Beam*. In *Beam*, the trial court used what was entirely non-violent and/or legal conduct to form what was essentially a moral opinion about Beam's actions and used to it evaluate Beam's future dangerousness to society. This was done without making any finding that the evidence was relevant to the ultimate determination. However, here, the conduct was neither non-violent nor legal. Rather, it was the repeated sexual assault or rape of a child. If the jury found the acts to be true beyond a reasonable doubt, and if the jury determined that appellant was not acting under duress at all times, then the evidence was proper factor (b) evidence which was demonstrative of appellant's life of crime.

Lastly, appellant contends that because of the error, automatic reversal of his sentence is required, and if not, the error was not harmless beyond a reasonable doubt. (AOB 140-141.) In support, appellant argues that: the murder was drug-transaction related, and therefore, not worthy of the death penalty; the lone special circumstance was lying in wait; there existed a strong case in mitigation; and the length of the juror's deliberations indicate this was a close case. (AOB 141-143.)

Assuming evidence of appellant's sexual assaults of Rosa B. should not have been presented as factor (b) evidence, any error was harmless. "Error in the admission of evidence under factor (b) is reversible only if "there is a reasonable possibility it affected the verdict," a standard that is "essentially the same as the harmless beyond a reasonable doubt standard of *Chapman v. California* (1967) 386 U.S. 18, 24." (*People v. Collins* (2010) 49 Cal.4th 175, 220.) Here, the jury was properly instructed that is could consider the rape evidence only if the crime was proven beyond a reasonable doubt. As such, no reasonable juror would have considered the evidence as aggravating if they, in fact, believed appellant's actions were dictated solely by his father or that appellant acted under duress. Moreover,

three other incidents of gun possession were properly presented to the jury, a fourth gun-incident where appellant fired the weapon at a moving vehicle was presented, the jury was aware of appellant's two prior felony convictions, and the circumstances of the instant case represented an exceptionally cold and calculated execution-style murder which exhibited no regard for the value of human life. Given these facts, respondent submits that any error was harmless. (See, e.g., *People v. Barnett* (1998) 17 Cal.4th 1044, 1172-1173 [where the evidence was insufficient to prove defendant committed a prior rape, reversal was not required in light of the jury instruction to consider the rape evidence only if the crime was proven beyond a reasonable doubt].)

B. Appellant's Shooting at an Occupied Vehicle Was Properly Admitted As a Factor B-Incident in Aggravation

Appellant contends that the evidence was insufficient to support incident in aggravation 2A—appellant's shooting at an occupied vehicle in a parking lot. (AOB 144.) In short, appellant asserts that his statement to the officer established a viable claim of self defense, and that the prosecution presented no evidence to the contrary. (AOB 144-145.) As such, appellant concludes, "...the prosecution failed to establish criminal conduct upon which the factor (b) finding could be based." (AOB 145.)

Respondent disagrees. First, appellant failed to object to the admissibility of the evidence on the grounds he now asserts on appeal. Therefore, he has waived the claim. And second, the jury was not required to accept appellant's self-serving statement that he acted in self defense. Consequently, the evidence was properly admitted.

1. The facts

With its Notice of Intention to Introduce Evidence in Aggravation, as Item "2A," the prosecution indicated that it intended to prove that "[on] or

about August 8, 1979, [appellant] participated in the crime of attempt murder [*sic*] and shooting into a dwelling house in the county of Tulare." (1CT 123.) In response, appellant asked for a *Phillips* hearing, as to the incident's admissibility because the police reports were illegible. (3CT 804-805.) With its opposition, the prosecution clarified that the conduct constituting incident 2A was actually appellant's act of twice firing a rifle at an occupied vehicle. (4CT 919-923.) At a pretrial hearing and after receiving an offer of proof from the prosecutor, defense counsel asked that the matter be taken off calendar. (1RT 187-188.)

However, just prior to the start of the penalty phase, incident 2A was again discussed. (8RT 1857, 1860.) While defense counsel stated that a *Phillips* hearing was not necessary (8RT 1857), counsel objected to the prosecutor's use of the term "attempted murder" to describe the incident. (8RT 1860.) The prosecutor then conceded that he would be unable to prove a specific intent to kill, and he agreed that he would not use the term. (8RT 1860-1861.) Instead, the prosecutor stated that the conduct intended to be proved was an assault with a deadly weapon, shooting at an occupied vehicle, or "something of that nature." (8RT 1861.) Defense counsel then agreed that a *Phillips* hearing was unnecessary, and that he had no objection to the prosecutor presenting this evidence to the jury. (*Id.*)

During the penalty phase, City of Tulare Police Officer Mayberry testified that sometime after midnight on August 8, 1979, he was parked at the intersection of Pratt and Inyo Avenue. (9RT 1943.) Across the street in the well-lit shopping center, Mayberry saw two parked cars, along with a white car that was moving. (9RT 1943, 1951-1952.) Appellant was standing near one of the parked cars, and when the white car passed the two cars, appellant went to the back seat of one of the vehicles and retrieved a .22-caliber Remington rifle. (9RT 1943, 1948-1950.) Appellant then went to the rear of his car, and from a distance of about 50 feet, he fired twice at

the white vehicle. (9RT 1946.) Appellant's shots left one dent in the lower portion of the car's trunk and a second bullet dent in the corner of the rear bumper. (9RT 1949.)

Mayberry responded to the scene, and detained appellant and two others. (9RT 1947-1948.) The rifle was retrieved from the back seat of the car, and Mayberry found it loaded with two rounds in the magazine and one round in the chamber. (9RT 1948-1950.)

When interviewed, appellant suggested that he acted in self defense. (9RT 1997.) Appellant told detectives that the car had driven by three times that evening, and that the occupants had called him racial slurs and threatened bodily harm. (9RT 1999.) Appellant claimed that at one point, one of the individuals exited a vehicle, walked up to him and said that they had a gun and that they could kill him. (9RT 1998.) However, the occupants never brandished a weapon, and appellant never saw a weapon. (9RT 1998.) Even so, on the car's third pass, one of the occupants motioned appellant over, and appellant assumed that he wanted a confrontation. (9RT 2001.) Appellant said he then shot at the vehicle, but that he only intended to hit the tires. (9RT 1997, 2002.)

During closing argument, the prosecution did not specifically mention this incident. (10RT 2192-2226.) However, defense counsel argued that appellant's statement was that he fired out of fear and to chase the people away; the statement was uncontroverted; and therefore, the jury had to accept it. (10RT 2229.) Counsel then argued that this constituted a defense to the conduct alleged, and that the defenses of necessity and threats and menaces applied. (10RT 2230.)

2. Law and argument

Again, at the outset, respondent notes that, like the Rosa B. incident, appellant failed to object in the trial court to the introduction of this evidence on the grounds he now asserts in this appeal. A defendant must

object to introduction of other-violent-crimes evidence to preserve the issue for appeal. (Evid. Code, § 353; *People v. Catlin*, *supra*, 26 Cal.4th at p. 172; *People v. Visciotti*, *supra*, 2 Cal.4th at p. 71; *People v. Ashmus*, *supra*, 54 Cal.3d at p. 985.) Since appellant did not object, the issue has not been preserved, and his claim should be rejected. (*People v. Lewis*, *supra*, 39 Cal.4th at p. 1052; *People v. Huggins*, *supra*, 38 Cal.4th at p. 241, fn. 18.) Alternatively, appellant's claim also fails on its merits.

As previously detailed, *ante*, "[b]efore an individual juror may consider evidence of other violent criminal activity in aggravation, he or she must find the existence of such activity beyond a reasonable doubt." (*People v. Huggins*, *supra*, 38 Cal.4th at p. 239.) Here, the jury heard, through the testimony of Officer Mayberry, that from a distance of approximately 50 feet, appellant fired his rifle two times at the rear of a white vehicle as it slowly passed by, and both times the bullet struck the occupied vehicle. Clearly, this conduct involved the express use of force and violence and constituted proper factor (b) evidence. From the testimony, a reasonable juror could have concluded beyond a reasonable doubt that appellant committed the offense.

Even so, appellant argues that he was entitled to use reasonable force to defend himself from the threats of death leveled at him, and that the prosecution presented no evidence which contradicted his claim of self defense. (AOB 149.) Therefore, he reasons, no rational juror could have found that he committed an assault with a deadly weapon. (AOB 149.)

> To justify an act of self-defense for an assault charge under Penal Code section 245, the defendant must have an honest *and reasonable* belief that bodily injury is about to be inflicted on him. [Citation.] The threat of bodily injury must be imminent [citation], and any right of self-defense is limited to the use of such force as is reasonable under the circumstances. [Citations.]

(*People v. Minifie* (1996) 13 Cal.4th 1055, 1064-1065, citations and internal quotations omitted; italics in original.)

"The question of whether [appellant], as a reasonable man, was justified in believing, under the circumstances of this case, that he was then threatened with imminent danger so as to justify the use of a deadly weapon in necessary self-defense is a problem for the sole determination of the jury. [Citation.]" (*People v. McDonnel* (1949) 94 Cal.App.2d 885, 888.) And even when uncontroverted, where reasonable fact finders could differ on whether the resort to force was permissible or the amount of force was justified, the issue is still a question of fact for the jury. (*People v. Clark* (1982) 130 Cal.App.3d 371, 379.)

Here, on the facts presented, the jurors could have reasonably believed that appellant was not in imminent danger of bodily injury, or that he used more force than reasonably necessary. From the lone percipient witness to testify, there was no evidence that the occupants of the vehicle possessed, brandished, or otherwise used any weapon of any sort to threaten or place appellant in reasonable fear for his life. Also, as appellant's shots hit the trunk and rear bumper, it was reasonable to infer the vehicle was moving away from appellant and did not present a threat. Moreover, by appellant's own admission, he never saw a weapon and one was never brandished. Put simply, the jury was under no obligation to accept appellant's self-serving claim of self defense, and the facts presented undermined this claim. Consequently, any issue of self defense or necessity was properly left to the jury.

However, assuming error, appellant argues that erroneously allowing the jury to consider the evidence was not harmless beyond a reasonable doubt. (AOB 150.) In support, appellant again asserts that the jury clearly struggled over its decision in a close case with "very strong" mitigating evidence. (AOB 150.) Appellant further asserts that this incident was one

of the two most serious factor (b) crimes alleged, and it was critical to the prosecution's narrative in aggravation that there was a series of events where appellant possessed a gun. (AOB 150.)

Once again, the erroneous admission of evidence under factor (b) is reversible only if the error was not harmless beyond a reasonable doubt. (*People v. Collins*, *supra*, 49 Cal.4th at p. 220.) Here, the jury was properly instructed that is could only consider evidence of this shooting if the crime was proven beyond a reasonable doubt. As such, no reasonable juror would have considered the evidence as aggravating if they, in fact, believed appellant acted in self defense or by necessity as urged by defense counsel. Moreover, three other incidents of gun possession were properly presented to the jury, the jury was aware of appellant's two prior felony convictions, and as argued, the circumstances of the instant case represented a cold and calculated execution-style murder. Consequently, respondent submits that any error was harmless.

C. Appellant's Possession of Firearms Were Properly Admitted As Factor (B) Evidence

Appellant next addresses three other incidents where the prosecution contended he was found in possession of a gun: the Strawberry-Street incident; the Circle K-van possession incident; and the Arrow-Motel incident [incidents 2C, 2D & 2E, respectively]. (AOB 151.) In sum, appellant makes three arguments. First, appellant argues that it was error to admit the Strawberry Street or Circle K-van incidents because the prosecution failed to prove actual or constructive possession of the guns. (AOB 153.) Second, appellant argues that the trial court committed error and abused its discretion "...when it submitted to the jury the issue of whether or not [all three] crimes constituted an implied threat to use force or violence without making the legal determination itself." (AOB 153.) And third, appellant argues that the trial court committed error in admitting

all three of the incidents because there was no evidence presented to show that any of the weapons were intended for "imminent actual or implied threats...." (AOB 154.) In addition to violating state law, appellant asserts that the improper admission of these three gun incidents violated his Eighth and Fourteenth Amendment rights because it undermined the reliability of the jury's death verdict and violated his state-law liberty interest. (AOB 154.)

Respondent disagrees. In sum, sufficient evidence was presented to support a finding beyond a reasonable doubt that appellant constructively possessed the guns. Also, the trial court properly determined that each incident constituted an implied threat to use force or violence before submitting the evidence to the jury. And lastly, appellant's status as a felon made possession of any handgun illegal which, in turn, properly allowed for presentation of the incidents as factor (b) evidence.

1. The facts

As previously mentioned, the prosecution filed a Notice of Intention to Introduce Evidence in Aggravation. (1CT 122.) Items 2C [Strawberry-Street incident], 2D [Circle K-van-in-parking-lot incident], and 2E [Arrow-Motel incident], all alleged an intention to prove that appellant was a felon in possession of a firearm. (1CT 124.) In response, appellant filed three separate motions, each of which requested a hearing as to the admissibility of the evidence. (3CT 814, 827, 840.)

As to incident 2C and 2D, appellant objected on the ground that there was insufficient evidence that he possessed the guns found in the vehicles and, alternatively, and as to all three incidents, that mere possession of a gun did not constitute an express or implied threat to use force or violence within the meaning of section 190.3, subdivision (b). (3CT 817-821, 827-834, 842-847; 1RT 127-128.) On August 29, 1991, the prosecution filed an opposition to each of appellant's motions. (3CT 879-887; 4CT 889-896,

898-908.) And on September 9th and 10th of 1991, the trial court held evidentiary hearings as related to incidents 2C and 2D.[80] (1RT 3-52, 55-95.)

a. Incident 2C facts – Strawberry Street

As relevant to the instant issue, at the pretrial evidentiary hearing held on appellant's suppression motion, City of Visalia Police Officer Lynn testified that, on February 19, 1987, he and other officers executed a search warrant for the residence located at 101 Strawberry Street in the city of Visalia. (1RT 56-59.) Appellant was present at the address, and parked directly in front of the residence on the street next to the curb was a 1974, black Monte Carlo. (1RT 58.) On a few prior occasions, Lynn had observed appellant in the vehicle seated in the driver's seat with the door open. (1RT 58-59, 63.) Lynn had not ever seen appellant drive the car, nor had he ever seen anyone else in or around the car. (1RT 59, 63.)

Lynn conducted a patdown search of appellant and discovered a set of keys in his pocket. (1RT 60.) Through Detective Gonzales, Lynn asked appellant in Spanish if he owned any vehicles, and appellant said he did not. (1RT 60.) Lynn then asked appellant specifically about the Monte Carlo, and appellant said it was not his vehicle. (1RT 61.) Officer Jarrett then took the keys found in appellant's pocket, and he used them to unlock the driver's side door and trunk. (1RT 69.) Under the driver's seat, Jarrett found a small, .45-caliber Derringer. (1RT 69.)

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[80] These hearings were held for the purpose of litigating various suppression motions filed by appellant. (1RT 3-4, 55, 96-98.) And while it appears the parties contemplated the need for a further evidentiary hearing on these incidents before they could be presented to the jury (see 1RT 136), because of the suppression hearings, the court was clearly aware of the facts as related to the Strawberry-Street and Circle-K incidents when making its rulings. Consequently, respondent has briefly set forth those facts that are relevant that were developed at the suppression hearings.

At the penalty phase, Officer Lynn offered testimony similar to that presented at the suppression hearing. (9RT 1915-1916.) Namely, that on February 19, 1987, he contacted appellant at 101 Strawberry Street. (9RT 1915-1916.) During a search of appellant, they found a set of car keys on his person. (9RT 1916.) Lynn had noticed a black, 1974 Chevy Monte Carlo in close proximity to the 101 Strawberry Street residence, and on a couple of prior occasions, Lynn had observed appellant in the vehicle, although he had never seen appellant drive it. (9RT 1916-1917, 1921.) Lynn asked appellant about the car, and appellant said that he didn't own a car and that the Monte Carlo wasn't his. (9RT 1917.)

Agents Vadnais and Jarrett then took the keys and went over to the Monte Carlo. (9RT 1922-1923.) The agents used the keys to unlock the driver's door. (9RT 1923.) Jarrett then searched the car and found a two-shot, .45-caliber Derringer under the driver's seat. (9RT 1924-1925.)

b. Incident 2D facts – Circle K

Again, as relevant to the instant issue, at the pretrial evidentiary hearing held on appellant's suppression motion, Officer Stowe of the Visalia Police Department testified that on the evening of March 16, 1989, he was on Highway 63, when he noticed a van parked in the dark on the north side of a Circle K convenience store. (1RT 5-6, 14.) Finding this unusual, Stowe stopped and contacted the car's only occupant, appellant, who was seated in the driver's seat.[81] (1RT 7-11.) Stowe asked appellant for identification, but appellant didn't have any. (1RT 11.) After

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[81] Stowe testified that he contacted the only occupant in the vehicle, and that occupant was "seated behind the driver's seat." (1RT 10.) All parties interpreted this phrase as appellant was in the driver's seat. (1RT 12 [Stowe asked "the driver to step out of the vehicle...."]; 1RT 15 ["had the driver made an identification..."]; 1RT 20 [defense counsel asked Stowe if he asked the "driver, Mr. Casares, for identification...."]

determining that appellant was not the registered owner of the vehicle, Stowe asked appellant to step out of the vehicle. (1RT 11-12.) Stowe then asked for permission to look in the car, and appellant consented. (1RT 12-13.) Stowe found a handgun on the floor board next to the right side of the driver's bucket seat. (1RT 14.)

During the penalty phase, Officer Stowe offered essentially the same testimony. More specifically, Stowe told the jury that he was on patrol in the northern part of Visalia when he noticed a van parked at the Circle K on Old Dinuba Road. (9RT 1926, 1935.) Stowe pulled in behind the car to investigate why it was parked where it was, and he contacted appellant who was seated in the driver's seat. (9RT 1926, 1930.) Stowe asked appellant for identification, and appellant verbally identified himself. (9RT 1926.) Stowe then searched the van for some form of further identification and, in doing so, he found a semi-automatic gun and ammunition on the floor to the right side of the driver's bucket seat. (9RT 1926-1927, 1929-1930.) The gun was loaded and one round was also in the chamber. (9RT 1930.) Appellant told Stowe that the van wasn't his. (9RT 1934.) Stowe said that a second person said to be a passenger was also at the scene, although Stowe never saw that person inside the vehicle. (9RT 1934.)

c. Incident 2E facts – Arrow Motel

On August 23, 1984, Visalia Police Department narcotics agent Rory Vadnais and other officers went to the Arrow Motel in Goshen where they made contact with appellant. (9RT 1911-1912.) Vadnais noticed an object in appellant's front pant's pocket that appeared to be the outline of a handgun. (9RT 1912-1913.) Appellant was placed under arrest, and he was, in fact, found to be in possession of a loaded .22-caliber revolver. (9RT 1913.)

d. The trial court's ruling

In arguing to the court, defense counsel reiterated the arguments set forth in his moving papers: i.e., that the prosecution couldn't provide sufficient evidence of possession as related to the Strawberry-Street incident. (1RT 129.) However, counsel expressly withdrew this possession-argument as related to the Circle-K incident. (1RT 130-131.) As to all three incidents, counsel alternatively argued that simple possession of a gun did not present an implied threat to use force or violence, and therefore, these three incidents did not qualify as factor (b) evidence. (1RT 131-135.) In contrast and in sum, the prosecutor responded that possession of a deadly weapon by a convicted felon was sufficient to support a finding of an implied threat to use force or violence, and therefore, it was proper factor-(b) evidence. (1RT 135-143.)

The court stated:

> It's a pretty close case, but I am partial to the district attorney's argument that if you look at the totality of the circumstances of the evidence the jury will hear in this case regarding Casares, his possession, if they can establish that he had actual or constructive possession, gives rise to an assumption there was an implied threat of violence there. That would be my position on it.
>
> Handguns or most handguns, unless they're clearly for competition like a target pistol, have one purpose. That is either offensive use or defensive use to shoot at somebody. Carrying one around in a car in a position where this gun was found I think can give rise to a reasonable assumption that its purpose involved implied use of violence in the future, some undetermined time point.
>
> Again, it may be a question of fact whether the jury accepts that. I'm not—I don't think simply allowing that evidence to come before the jury, if it gets to a penalty phase, make it per se evidence that the jury has to accept it. I still think that they have a function to decide whether this is a factor that they should consider in the penalty phase.

> I'm simply saying I believe the evidence that the district attorney will be able to offer regarding this, the gun, its whereabouts, when and where it was found and where the defendant was found in proximity to it was enough to get that to the jury, and for him to argue it constitutes an implied threat of violence, and for the defense to argue whatever inferences they wish that they feel the jury should view it as. [¶] Under 402, I will say yes,....

(1RT 146-148.)

2. Law and argument

As previously mentioned,

> [f]actor (b) of section 190.3 permits the introduction of evidence of the presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence. [Citation.] A trial court's decision to admit, at the penalty phase, evidence of a defendant's prior criminal activity is reviewed under the abuse of discretion standard. [Citation.]

(*People v. Bacon* (2010) 50 Cal.4th 1082, 1126-1127.)

Appellant contends that mere possession of a firearm does not constitute an act committed with actual or implied violence. (AOB 151.) Respondent acknowledges that it has been said that "[p]ossession of a firearm is not, in every circumstance, an act committed with actual or implied force or violence [citation]." (*People v. Bacon*, *supra*, 50 Cal.4th at p. 1127.) However, "[t]he factual circumstances surrounding the possession, [...] may indicate an implied threat of violence. [Citation.]" (*Id.*)

Before turning to the question of abuse of discretion, respondent first notes that appellant has asserted that the trial court abdicated its duty to make a determination of whether or not appellant's possession of these firearms constituted an implied threat of force or violence. Appellant argues that, instead, the trial court passed the question off to the jury.

Because of this, and in appellant's view this Court's inability to now make that determination on appeal, the evidence must be stricken. (AOB 166-170.) Respondent disagrees with appellant's interpretation of the trial court's ruling, as the record supports a contrary conclusion.

As set forth above, the trial court entertained argument from both defense counsel and the prosecutor on the issue of whether or not appellant's possession of the guns constituted an implied threat to use force or violence. The prosecutor argued that possession by a convicted felon was sufficient to support this finding, and therefore, it was proper factor (b) evidence. (1RT 135-143.) After argument, the court ruled, stating in part:

> It's a pretty close case, but I am parital to the district attorney's argument that if you look at the totality of the circumstances of the evidence the jury will hear in this case regarding Casares, his possession, if they can establish that he had actual or constructive possession, gives rise to an assumption there was an implied threat of violence there. That would be my position on it.

(1RT 146-148.)

This comment reflects a clear statement that the court considered the evidence to be proper factor (b) evidence, if, in fact, the prosecutor could prove possession beyond a reasonable doubt. That the court subsequently noted that it "...may be a question of fact whether the jury accepts that...," does not change that determination. Rather, it reflects the court's understanding that it would not be dictating to the jury that they must find these incidents as aggravating.

Appellant also contends that the trial court committed error when it allowed admission of the incidents on its belief that there was a "'reasonable assumption' that the weapons would be used in an implicitly threatening manner at some 'undetermined time point' in the future." (AOB 171-172.) Respondent disagrees. In short, the prosecution was not required to prove that appellant actually intended to use the firearms in a

provocative or threatening manner. (*People v. Lewis*, *supra*, 39 Cal.4th at p. 1053; see also *People v. Tuilaepa* (1992) 4 Cal.4th 569, 589; *People v. Hughes* (2002) 27 Cal.4th 287, 383.) Therefore, the trial court's comment does not amount to error. With these two points aside, the next question is whether the trial court abused its discretion in making its finding. Respondent submits that it did not.

In *People v. Bacon*, *supra*, 50 Cal.4th 1082, this Court found no abuse of discretion where the trial court permitted as evidence in aggravation the defendant's possession of a handgun while on parole in Arizona. (*Id.* at p. 1126.) In doing so, the *Bacon* Court first noted that

> ...[i]n a series of cases, [this Court has] held that the possession of a weapon in a custodial setting—where possession of any weapon is illegal—involves an implied threat of violence even when there is no evidence defendant used or displayed it in a provocative or threatening manner. [Citation.] [The court further stated that e]ven in a *noncustodial* setting, illegal possession of potentially dangerous weapons may show an implied intention to put the weapons to unlawful use, rendering the evidence admissible pursuant to section 190.3 factor (b). [Citation.]

(*Id.* at p. 1127, citations and internal quotations omitted, emphasis in original.)

The Court then went on to state that the question of admissibility did not turn on whether appellant's constructive custody was identical for all legal purposes to actual custody. "Rather, the question [...was] whether the trial court abused its discretion in ruling that the circumstances of defendant's gun possession while under constructive custody involved a threat of violence under factor (b)." (*People v. Bacon, supra*, 50 Cal.4th at p. 1127.) In finding no abuse of discretion, the Court stated: "The criminal character of defendant's possession of a loaded firearm, at a time when he

was subject to parole searches in Arizona, [was] sufficient to permit a jury to view his possession as an implied threat of violence. [Citation.]" (*Id.*)

In *People v. Michaels*, *supra*, 28 Cal.4th 486, this Court also found the existence of an implied threat from the possession of weapons in a noncustodial context. There, the defendant was convicted of the murder and robbery of JoAnn Cemons in October of 1988, along with the burglary of her apartment. (*Id.* at p. 500.) The jury also found true that the defendant personally used a knife during all three crimes. (*Id.*) During the penalty phase, the prosecution presented three incidents in aggravation: one, that the "defendant was arrested in Texas for possession of a double-edged dagger with a seven-inch blade and a butcher knife with an eight-inch blade, both of which were illegal under Texas law[;]" two, that the defendant was arrested "in California for illegal possession of knives[;]" and three, the day after a robbery, the "defendant was found in a parking lot with a concealed handgun in the glove box." (*Id.*)

In finding that the evidence was properly admitted, the *Michael*'s Court reasoned in part:

> Three cases discuss implied threats under section 190.3, factor (b) in a noncustodial setting. In *People v. Belmontes* (1988) 45 Cal.3d 744, [...], the prosecution presented evidence that the defendant had slapped his side indicating that "he had a handgun in his waistband, while stating that he had 'all the protection he needed.'" (*Id.* at p. 809 [...].) We held that it was error to admit this evidence: "Although such [conduct] is arguably an 'express or implied threat to use force or violence' (§ 190.3), it was not directed at a particular victim or victims, and did not amount to criminal conduct in violation of a penal statute." (*Ibid.*) Defendant here relies on *Belmontes* to support his contention that the challenged evidence was improperly admitted, but *Belmontes* turned on the fact that the conduct there was not criminal. By contrast, here in each instance defendant's possession was illegal. His possession of knives in Texas was illegal, both because the blades exceeded five inches and because the dagger was double-edged. His possession of knives

and a firearm in California were concealed, making the possession illegal under California law. (§ 12020, subd. (a).)

Two other cases have found an implied threat in a noncustodial context. In *People v. Clair* (1992) 2 Cal.4th 629, 676, [...], the defendant carried a knife while committing a burglary, but did not use it. The court held that his action was "an implied threat to use the knife against anyone who might interfere." (*Id.* at p. 677 [...].) In *People v. Garceau* (1993) 6 Cal.4th 140 [...], a search of the residence of the defendant, an ex-felon, turned up a machine gun, a silencer, and concealable handguns. The defendant's possession of these firearms was illegal. We held that the evidence was properly admitted. (*Id.* at pp. 203-204 [...].)

Defendant's possession similarly shows an implied intention to put the weapons to unlawful use. On two occasions the weapons defendant possessed were knives with seven-to-eight-inch blades; in *People v. Ramirez*, *supra*, 50 Cal.3d at pages 1186-1187, [...], we said that "such an implement is a 'classic instrument[ ] of violence' [citation] that is 'normally used only for criminal purposes.'" Indeed JoAnn Clemons was killed with a similar knife. The concealed firearm found on defendant was the same gun he had used to rob Chad Fuller the previous day.

We conclude that the criminal character of defendant's possession of knives and firearms, and the evidence of defendant's use of those or similar weapons to commit crimes, is sufficient to permit a jury to view his possession as an implied threat of violence. [Citation.]

(*People v. Michaels*, *supra*, 28 Cal.4th at pp. 536, parallel citations omitted.)

Turning back to the instant case, as of March of 1981, appellant was a convicted felon, and evidence of appellant's status as a felon was admitted into evidence during both the guilt and penalty phases. (9RT 1886-1888; 10RT 2167-2168, 2188.) Consequently, from that time on, it was illegal for appellant to possess a firearm, which included August of 1984, at the Arrow Motel, February of 1987, at the Strawberry Street residence, and

March 16, 1989, at the Circle K. In fact, the Circle K incident occurred just two weeks before the murder of Sanchez, and appellant used a handgun to kill Sanchez. Also, while not a handgun, appellant used a firearm in the 1979 incident in the parking lot where he fired at an occupied vehicle. Respondent submits that appellant's illegal possession of the handguns, and use of firearms to commit other crimes, showed an implied intention to put the guns to unlawful use. Consequently, the trial court did not abuse its discretion in admitting the evidence.

Next, appellant contends that, as related to incidents 2C, the Strawberry Street incident, and 2D, the Circle K incident, the prosecution failed to prove knowing possession of guns beyond a reasonable doubt, and consequently, admission of these two incidents as factor-(b) evidence was error. (AOB 160.) First, respondent notes that appellant expressly withdrew his possession-argument as related to the Circle-K incident. (1RT 130-131.) Since appellant did not object to the admissibility of the incident on the grounds now asserted, he has forfeited the claim on appeal. (*People v. Lewis*, *supra*, 39 Cal.4th at p. 1052; *People v. Huggins*, *supra*, 38 Cal.4th at p. 241, fn. 18.) Even so, appellant's claim fails on its merits, as sufficient evidence was produced to support a finding that appellant constructively and knowingly possessed both weapons.

"To establish constructive possession, the prosecution must prove a defendant knowingly exercised a right to control the prohibited item, either directly or through another person. [Citations.] Possession may be shared with others. [Citation.] But mere proximity to the weapon, standing alone, is not sufficient evidence of possession. [Citation.]" (*People v. Sifuentes* (2011) 195 Cal.App.4th 1410, 1417.) However, in some instances, the necessary additional circumstances to establish knowledge may be slight. (*People v. Zyduck* (1969) 270 Cal.App.2d 334, 336.)

Turning first to the Circle K incident, when appellant was contacted, he was seated in the driver's seat of the van. (9RT 1926, 1930.) After appellant was only able to provide a verbal identification, Officer Stowe searched the van and found a loaded, semi-automatic gun and ammunition on the floorboard next to the driver's bucket seat, and, more precisely, between the seat and the center hump that separated the two front seats. (9RT 1926-1927, 1929-1930, 1935.) Given appellant's actual possession of the vehicle and the location of the firearm right next to appellant's seat, this evidence was sufficient to support an inference of knowing-constructive possession of the gun.

As to the Strawberry Street incident, Officer Lynn testified that when he arrived at the residence appellant was there, and that the Monte Carlo was parked in close proximity to the residence. (9RT 1916.) Flynn had observed appellant seated in the vehicle on a couple of occasions in the days or weeks before, although he had never seen appellant drive it. (9RT 1917, 1921-1922.) When appellant was searched, the keys to the Monte Carlo were found in his pocket, and a search of the car revealed a two-shot Colt Derringer, .45-caliber handgun under the driver's seat. (9RT 1924-1925.) Given appellant's close proximity to the vehicle, Flynn's prior observations of appellant seated in the vehicle, and appellant's possession of the keys which opened the driver's side door (9RT 1923), there were sufficient facts to support the inference that appellant was knowingly in constructive possession of the derringer.

Moreover, as to both vehicles, appellant made it a point to tell the officer that the car wasn't his prior to any search. (9RT 1917, 1934.) From this, and the attending circumstances, it could be inferred that appellant knew there was a firearm in the vehicle, that it was about to be discovered, and that he needed to issue a preemptive denial. But more significantly, and along this same line, it was relevant that these were not isolated

incidents of gun possession. (See, e.g., *People v. Williams* (2009) 170 Cal.App.4th 587, 607.) The jury was aware of appellant's use of a rifle that he had retrieved from a car, his possession of a handgun at the Arrow Motel, his possession and use of a handgun to kill Sanchez, and his possession of a handgun upon his arrest about a week after the murder. Given these other instances of actual firearm possession, it becomes difficult to believe that appellant was simply unlucky enough to have actual or constructive possession of two different vehicles on two different occasions, where the registered owner was careless enough to leave their handgun either next to or under the driver's seat.

Even so, appellant argues that the evidence was insufficient, and he points, in part, to the fact that he wasn't the registered owner, and that there wasn't any evidence that he had exclusive access to the cars. (AOB 161.) However, exclusive access isn't required, but is only one circumstance to be considered. That said, appellant argues that the facts of his Strawberry Street and Circle K incidents are similar to three cases in which the Court of Appeal found insufficient evidence of knowledge due to the lack of exclusive access to the illegal item. (AOB 161, citing *People v. Boddie* (1969) 274 Cal.App.2d 408; *People v. Antista* (1954) 129 Cal.App.2d 47; and *People v. Bledsoe* (1946) 75 Cal.App.2d 862.) Respondent submits that each of these cases is distinguishable, and unique to its facts.

In *Boddie*, the defendant challenged the sufficiency of the evidence to support his conviction for possession of heroin. Boddie was a passenger in car being driven erratically, when it was then stopped by police. (*People v. Boddie*, *supra*, 274 Cal.App.2d at p. 410.) When the driver was asked for his driver's license, he fumbled through his pockets, and then said it was in the glove box. The driver told Boddie to get out of the vehicle, and then moved to the passenger side. (*Id.*) The driver attempted to open the glove box, but it would not open. He then reached under the right front seat,

grabbed two yellow balloons and swallowed them. The driver was arrested, as was Boddie, who was standing on the sidewalk noticeably swaying. (*Id.*) A search of the glove box revealed a balloon which contained heroin. (*Id.* at pp. 410, 412.)

Both Boddie and the driver were examined by a narcotics expert, who determined that both were under the influence of a narcotic, and that it was probably heroin. (*People v. Boddie*, *supra*, 274 Cal.App.2d at p. 410.) Boddie had approximately 13 scabs on his arm, including one puncture site that had fresh dried blood on it. The registered owner was in custody at the time of trial on unrelated charges for sale and possession of heroin, and it was stipulated he would have testified that he loaned the car to the driver about an hour prior to the arrests. (*Id.*)

In finding the evidence insufficient to support Boddie's possession conviction and in attempting to distinguish its case from *People v. Roberts* (1964) 228 Cal.App.2d 722, the Court of Appeal reasoned:

> In our case we have no evidence of unusual conduct, of admissions or contradictory statements by defendant. There was no evidence as to how long he had been in the car, or his purpose for being therein. In short, all we have is evidence that defendant, while under the influence of narcotics, was a passenger in an automobile being driven by a person also under the influence of narcotics, in which car narcotics were found in the glove compartment. We conclude that there was insufficient evidence, direct and circumstantial, to establish that defendant had knowledge of the presence of the narcotics, an essential element to the charge of possession.

(*People v. Boddie*, *supra*, 274 Cal.App.2d at pp. 411-412.)

In *People v. Antista*, *supra*, 129 Cal.App.2d 47, police went to defendant Antista's apartment at about 12:30 a.m., and found co-defendant Rivers and a man named Poocho on the couch. (*Id.* at p. 48.) An officer searched the apartment, and in a cupboard he found a paper bag with loose, green leafy material, an ash tray containing three cigarette butts and some

packages of wheat straw paper. (*Id.*) Upon arrival, Antista denied knowledge of items. A further search of the apartment revealed a Band-Aid package containing green leafy material and wheat straw paper in a broken radio in an unused bedroom or storeroom. Both of the green leafy substances, as well as the cigarette butts, were later determined to be marijuana. (*Id.*)

Antista testified that he left his apartment that afternoon and returned to find Rivers, Poocho and the officer in his apartment. He denied all knowledge of the presence of marijuana, he explained that he had not used the storeroom for months, and he said he was a nonsmoker due to a medical condition. (*People v. Antista*, *supra*, 129 Cal.App.2d at p. 48.) He further testified that he customarily left his key to the apartment under the mat outside the door for friends that frequently came over, and that Rivers had slept in the apartment the previous night. Rivers denied telling the officer that she had been living at the apartment for about 10 days, but stated that she had only slept at the apartment the preceding night. (*Id.* at pp. 48-49.) No evidence was presented that Antista had any prior connection to marijuana, but Rivers had been previously convicted of the use of heroin. (*Id.* at p. 49.)

In finding the evidence insufficient to support a finding of knowledge on the part of Antista, the Court of Appeal noted what it deemed a unique set of facts (*People v. Antista*, *supra*, 129 Cal.App.2d at p. 52), and reasoned, in part:

> The case of the state was incomplete in that there was insufficient evidence of knowledge on the part of the defendant. The fact that defendant's denial of knowledge may not have been convincing to the court did not supply the missing element. Defendant did not have the burden of establishing lack of knowledge. The burden was on the state to prove facts from which knowledge could fairly be inferred. It may be that evidence that defendant had substantially exclusive access to the

> apartment would have been sufficient. The evidence of the state established that others, also, had access. It may be that a false explanation of the presence of the marihuana, or conflicting statements of the defendant, would have been sufficient. If the substance had been found in the personal effects of the defendant that would have been a potent circumstance indicating knowledge of its presence, ownership and control. Such is the nature of the circumstantial evidence found in many of the cases. But we believe no precedent will be found for the affirmance of a conviction in the absence of some comparable circumstances. We hold that if it is established that one accused of possession returned to his apartment, or to his automobile, and found it occupied by a user of narcotics, and a narcotic was found in it, and if there is no evidence that it was there before that time, the fact of its presence, without any other fact or circumstance of an incriminating nature, is legally insufficient to prove a charge of possession.

(*Id.* at p. 53.)

In *Bledsoe*, the defendant reported his car missing at about 6:00 p.m., and he reported this fact to the police. (*People. v. Bledsoe*, *supra*, 75 Cal.App.2d at p. 863.) Early the following morning, he found the car parked near where he had left it. The following afternoon, he and a friend were seated in it, when two police officers approached and inquired about a robbery that had taken place the previous night in which a car similar to the defendant's had been used. (*Id.*) Later, when officers searched the car, they found a package of marijuana cigarettes stuffed down along side cushion of the right side of the front seat. (*Id.*) The defendant denied ownership of the cigarettes, and the prosecution acknowledged that another party who had been convicted of the robbery testified that he used the defendant's car that night. (*Id.*) The Court of Appeal found the evidence to be insufficient, and stated in part:

> It may be conceded that the story of the appellant seems highly fantastic, but the state had the witnesses and the records to disprove the essential parts of the story and failed to do so. This is not, however, a case where the finding of the trial court is

> conclusive because of conflicting evidence, but it is one of a failure of the state to prove the essential elements of the crime. Since the undisputed evidence shows that the car in which the drug was found had been used by another in the perpetration of a robbery in another city, that appellant had not used it since it had been returned, that others beside appellant had occupied the car at the time of and immediately following the arrest, the evidence wholly fails to show appellant's knowledge "of the presence" of the drug to justify a finding of "knowledge" to satisfy the terms of the statute.

(*Id.* at p. 864.)

All three of these cases that appellant relies on present fairly unique circumstances. In *Boddie*, the defendant was a passenger in someone else's car; the driver swallowed two balloons at the scene; the glove box was apparently, at best, difficult to open, and the registered owner of the vehicle loaned it to the driver just an hour before the police contact and was currently in custody for possession of heroin. In *Antista*, there was joint access to the living areas; the defendant had been gone much of the day when police arrived; and the apartment was occupied at the time by a known drug user and her friend. And in *Bledsoe*, the defendant's car had been stolen the previous day and used in a robbery; the defendant hadn't used the car since; and the marijuana was found stuffed down along side the cushion on the right side of the front seat. In each of these cases, it was reasonably plausible that the contraband was not the defendant's, but that it belonged to one of the other persons present or a person who had very recent access to the area. Because of the lack of exclusive access and the attendant circumstances, the appellate courts deemed mere access, without more, insufficient evidence to support knowing possession.

Here, however, and as set forth above, appellant was the lone occupant in the van when the officer arrived; he had obviously been using the van that night; and the gun was found right next to his seat. If this evidence was truly insufficient to support a finding of knowing possession,

all one would have to do to avoid liability for illegal gun possession is to borrow a friend's car, place the weapon between the seats out of plain site, and then disavow knowledge of the gun upon the gun's discovery. As to the Monte Carlo, the state of the evidence was such that appellant was the only one with access to the vehicle as he was the person with the keys. Also, and as argued, more than mere access was presented to the jury, as multiple instances of gun possession were proven.

However, even if there was a lack of proof on the part of the prosecution to prove knowing possession of either the gun from the van or the Monte Carlo, this lack of proof does not require reversal of the penalty phase. The jury was instructed that it could only consider the evidence if the crimes were proven beyond a reasonable doubt, and they were also instructed on the definitions of actual and constructive possession. (5CT 1172-1173, 1178.) If the evidence was insufficient, as instructed, a reasonable juror wouldn't have considered it. (See, e.g., *People v. Barnett*, *supra*, 17 Cal.4th at pp. 1172-1173.) As has been repeatedly observed, jurors are presumed to understand and follow the instructions given. (*People v. Holt* (1997) 15 Cal.4th 619, 662.) Alternatively, and for the reasons previously discussed, *ante*, in addressing appellant's other factor-(b) claims, any erroneous admission of either instance of gun possession was harmless beyond a reasonable doubt, given the circumstances of the instant offense, appellant's criminal history, and in light of the other acts of prior criminal behavior that were properly admitted. (*People v. Collins*, *supra*, 49 Cal.4th at p. 220.)

For the foregoing reasons, appellant's request for reversal of the penalty phase should be denied.

VIII. THE TRIAL COURT PROPERLY DENIED BOTH OF APPELLANT'S SUPPRESSION MOTIONS RELATED TO THE STRAWBERRY STREET AND CIRCLE K GUN POSSESSION INCIDENTS

Returning to the Strawberry Street and Circle K gun-possession incidents, appellant contends that the trial court erroneously denied his motions to suppress evidence. (AOB 176.) As to the Strawberry Street incident (incident 2C), appellant argues that the trial court incorrectly concluded that he lacked standing to challenge the search due to his denial of a possessory interest in the vehicle, and that the subsequent search of the car exceeded the scope of the search warrant that was issued for the apartment. (AOB 176-177.) As to the Circle K-van incident (incident 2D), appellant argues that the facts did not give rise to a reasonable suspicion to detain him, that the trial court correctly ruled that the search of his person was unlawful, and that his subsequent consent to search the van was rendered invalid given its temporal proximity to the unlawful search of his person. (AOB 177-178.) Consequently, he concludes, evidence of the two guns should have been suppressed due to Fourth Amendment violations. (AOB 177-178.)

Respondent disagrees with each of appellant's contentions.

A. The Exclusionary Rule Should Not Apply to the Penalty Phase of a Capital Trial When the Prosecutor Seeks to Introduce Factor (B) Evidence

At the outset, respondent observes that it does not appear that this Court has ever expressly ruled on the applicability of the exclusionary rule at a capital sentencing proceeding. In *People v. Huggins*, *supra*, 38 Cal.4th 175, this Court assumed for the purposes of argument that the Fourth Amendment could be invoked in an attempt to exclude evidence that the prosecution wanted to present solely at the penalty phase. (*Id.* at p. 241.) However, in doing so, the *Huggins* Court noted the Tenth Circuit's decision

in *United States v. Ryan* (10th Cir. 2001) 236 F.3d 1268, which stated that ordinarily, "the exclusionary rule does not bar the introduction of the fruits of illegal searches and seizures during sentencing proceedings." (*Ryan*, at p. 1271.) The *Ryan* Court further noted that "all nine other circuits to have considered this issue have determined that, in most circumstances, the exclusionary rule does not bar the introduction of the fruits of illegal searches and seizures during sentencing proceedings." (*Id.* at pp. 1271-1272 [citing decisions from each circuit].) The rationale for these decisions is the need to obtain an appropriate sentence for the offender, which outweighs any little deterrent effect the exclusionary rule would have on police in this context. Respondent submits that this reasoning is sound, and has applicability to the penalty phase of a capital trial, which is essentially a sentencing hearing.

"The exclusionary rule was adopted to effectuate the Fourth Amendment right of all citizens to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures...." (*People v. Sanders* (2003) 31 Cal.4th 318, 324, citations and internal quotations omitted.) "[T]he 'prime purpose' of the [exclusionary] rule, if not the sole one, 'is to deter future unlawful police conduct.' [Citations.]" (*Id.*, quoting *United States v. Janis* (1976) 428 U.S. 433, 446.)

The United States Supreme Court has

> ...emphasized repeatedly that the governments' use of evidence obtained in violation of the Fourth Amendment does not itself violate the Constitution. [Citations.] Rather, a Fourth Amendment violation is "'fully accomplished'" by the illegal search or seizure, and no exclusion of evidence from a judicial or administrative proceeding can "'cure the invasion of the defendant's rights which he has already suffered.'" [Citation.] The exclusionary rule is instead a judicially created means of deterring illegal searches and seizures. [Citation.] As such, the rule does not "proscribe the introduction of illegally seized evidence in all proceedings or against all persons," [citation], but

> applies only in contexts "where its remedial objectives are thought most efficaciously served[.]" [Citations.] Moreover, because the rule is prudential rather than constitutionally mandated, [the Supreme Court has] held it to be applicable only where its deterrence benefits outweigh its "substantial social costs." [Citation.] [¶] Recognizing these costs, [the high court has] repeatedly declined to extend the exclusionary rule to proceedings other than criminal trials. [Citations.]

(*Pennsylvania Bd. of Probation and Parole v. Scott* (1998) 524 U.S. 357, 362-363.)

Respondent submits that the exclusionary rule has very little deterrent value at the penalty phase of a capital trial, where the purpose "...is to enable the jury to make an individualized determination of the appropriate penalty based on the character of the defendant and the circumstances of the crime." (*People v. Cowan* (2010) 50 Cal.4th 401, 499.) It is very unlikely law enforcement would be deterred from conducting unreasonable searches and seizures because of the remote possibility the evidence could not be used during the penalty phase in an unrelated prosecution occurring potentially years down the road. Rather, the deterrence is found in the immediacy that the evidence won't be admissible in the instant case, and that the offender could go unpunished for the instant offense.

This limited deterrent value is outweighed by the costs to society if the relevant evidence is excluded from the penalty phase. The penalty phase "...is not simply a finding of facts which resolves the penalty decision, but the jury's moral assessment of those facts as they reflect on whether the defendant should be put to death. [Citation.]" (*People v. Bacigalupo* (1993) 6 Cal.4th 457, 469.) In making this assessment, the jury should be entitled to assess all of the defendant's criminal activities that qualify as factor (b) evidence, and not just that evidence obtained in compliance with the Fourth Amendment. Only with this complete picture can the jury truly make an individualized determination of the appropriate

penalty based on the character of the defendant and the circumstances of his crime. For these reasons, respondent submits that the exclusionary rule should not apply in this context.

That said, respondent moves on to the merits of appellant's claims.

B. The Trial Court Properly Denied Both of Appellant's Motions to Suppress Evidence.

1. Standard of review

> An appellate court's review of a trial court's ruling on a motion to suppress is governed by well-settled principles. [Citations.] [¶] In ruling on such a motion, the trial court (1) finds the historical facts, (2) selects the applicable rule of law, and (3) applies the latter to the former to determine whether the rule of law as applied to the established facts is or is not violated. [Citations.] The [trial] court's resolution of each of these inquiries is, of course, subject to appellate review. [Citations.] [¶] The court's resolution of the first inquiry, which involves questions of fact, is reviewed under the deferential substantial-evidence standard. [Citations.] Its decision on the second, which is a pure question of law, is scrutinized under the standard of independent review. [Citations.] Finally, its ruling on the third, which is a mixed fact-law question that is however predominantly one of law,... is also subject to independent review. (*People v. Alvarez* (1996) 14 Cal.4th 155, 182 [...].)

(*People v. Ayala* (2000) 23 Cal.4th 225, 255, internal quotations omitted.)

"All presumptions favor the trial court's exercise of its power to judge the credibility of the witnesses, resolve any conflicts in the testimony, weigh the evidence, and draw factual inferences, 'and the trial court's findings on such matters, whether express or implied, must be upheld if they are supported by substantial evidence.'" (*People v. Werner* (2012) 207 Cal.App.4th 1195, 1203, quoting *People v. Leyba* (1981) 29 Cal.3d 591, 596-597; see also *People v. Lawler* (1973) 9 Cal.3d 156, 160.) If there is no controversy concerning the underlying facts, this Court's task is simplified. "The only issue is whether that rule of law, as applied to the

undisputed historical facts, was or was not violated." (*Werner*, at p. 1203.) This is an issue for the appellate court's independent review. (*Id.* at p. 1204, citing *People v. Thompson* (2006) 38 Cal.4th 811, 818.)

2. The Strawberry Street incident

a. The facts

Prior to trial, appellant moved for suppression of the gun found in a vehicle parked in front of the Strawberry Street address. (3CT 784-795.) The search conducted at the residence was done pursuant to a warrant, and appellant asserted, in part, that the evidence seized from the vehicle was beyond the scope of the warrant because the vehicle wasn't actually on the premises. (3CT 794-795.) The prosecution filed its response, which asserted, in part, that entry into the car to look for proper identification of the car was "a rational if not constitutionally permissible act," but primarily asserted, that appellant lacked standing to contest the search since he disclaimed any interest in the vehicle. (3CT 874-876.)

At the evidentiary hearing, Officers Lynn, Vadnais, and Jarrett from the Visalia Police Department testified. (1RT 56, 65, 68.) Officer Lynn stated that on February 18, 1987, he obtained a search warrant for the residence at 101 Strawberry Street in the city of Visalia. (1RT 56-58.) The residence was a tri-plex, which consisted of three apartments side by side in a single building. (1RT 62.) Parking for the complex was found in an alley located on the west side of the complex. (1RT 67.)

On February 19th, officers executed the warrant, and appellant was at the address. (1RT 58.) Out front of the residence was a 1974, black Monte Carlo. (1RT 58.) The car was parked on the street next to the curb and directly in front of the residence's front door. (1RT 62-63.) On a few prior occasions, Lynn had observed appellant in the vehicle seated in the driver's seat with the door open. (1RT 58-59, 63.) Lynn had never seen appellant

drive the car, nor had he ever seen anyone else in or around the car. (1RT 59, 63.)

Lynn conducted a patdown search of appellant and discovered a set of keys in his pocket.[82] (1RT 60.) Through Detective Gonzales, Lynn asked appellant in Spanish if he owned any vehicles, and appellant said that he did not. (1RT 60.) Lynn then asked appellant specifically about the Monte Carlo, and appellant said it was not his vehicle. (1RT 61.) Officer Vadnais removed the keys from appellant's pocket and confirmed that they worked in the Monte Carlo. (1RT 66-67.) Officer Jarrett then took the keys and unlocked the driver's side door and trunk. (1RT 69.) Under the driver's seat, Jarrett found a small, .45-caliber Derringer. (1RT 69.)

During argument to the court, both the prosecutor and defense counsel reiterated their respective arguments as set forth in their initial briefs. (1RT 76, 83-84.) More specifically, defense counsel argued that the search of the Monte Carlo was beyond the scope of the warrant because the vehicle was parked on a city street and not on the premises. (1RT 76, 83-84.) As to the issue of standing, defense counsel took the position that the prosecutor couldn't have it both ways: i.e., on the one hand claim appellant possessed the gun, but on the other "disallow his standing to attack the search that retrieved the weapon." (1RT 89.) In response, the prosecutor relied primarily on the argument that appellant lacked standing, but he did note that, alternatively, a vehicle which was in close proximity to the premises "...might be searched." (1RT 85-86.)

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[82] The affidavit for the warrant was People's number one at the suppression hearing. (1RT 57.) From the record, it appears appellant was not specifically named in the search warrant, but the warrant permitted a search of vehicles found on the property. (1RT 63.) The warrant also contained a provision for keys. (3CT 874; 1RT 60.)

On the issue of standing, the court initially expressed some agreement with appellant's position, and questioned whether appellant's statement to police acted as an "outright waiver." (1RT 89.) The court then noted that the warrant permitted a search of any vehicles on the premises, and then questioned whether the fact that it was parked at the curb on city property was a "technical point," which was enough to find the search invalid. (1RT 90.) After further argument on the issues of possible consent and standing, the court took the matter under submission. (1RT 92-95.)

Subsequently, the court issued its ruling, which read in full: "Defendant's motion to suppress the evidence is denied. He has no standing to claim a Fourth Amendment right to privacy in a vehicle over which he claims no ownership or right to possession." (4CT 961.) The court's ruling cited to *People v. Dasilva* (1989) 207 Cal.App.3d 43, and *Rakas v. Illinois* (1978) 439 U.S. 128. (4CT 961.)

b. Law and argument

Assuming for the sake of argument the search of the Monte Carlo was beyond the scope of the warrant or otherwise done without probable cause, evidence obtained in a warrantless search shall be excluded only if one having a legitimate expectation of privacy in the area searched shows deprivation of Fourth Amendment rights. (*Rakas v. Illinois*, *supra*, 439 U.S. at pp. 143, 148.) "To obtain suppression of evidence discovered in an unlawful search, a defendant has the burden of proving that he had a legitimate expectation of privacy. (*Rawlings v. Kentucky* (1980) 448 U.S. 98, 104.)" (*People v. Tolliver* (2008) 160 Cal.App.4th 1231, 1239.) "Whether the defendant had a legitimate expectation of privacy is subject to a two-part test: (1) did the defendant manifest a subjective expectation of privacy in the object of the search? and (2) is society willing to recognize the expectation of privacy as legitimate? (*California v. Ciraolo* (1986) 476 U.S. 207, 211 [...].)" (*Tolliver*, at p. 1239.)

"'It is settled law that a disclaimer of proprietary or possessory interest in the area searched or the evidence discovered terminates the legitimate expectations of privacy over such area or items.' (*People v. Stanislawski* (1986) 180 Cal.App.3d 748, 757, citing *United States v. Hawkins* (11th Cir. 1982) 681 F.2d 1343, 1345.)" (*People v. Dasilva, supra*, 207 Cal.App.3d at p. 48.) California law does not "permit a defendant who disclaims possession of an object to take a contrary position in an effort to attain standing to seek to exclude that object from evidence." (*Id.* at p. 49.)

Here, appellant failed to carry his burden of demonstrating a legitimate expectation of privacy, as when asked, he disclaimed any proprietary or possessory interest in the area searched.[83] More specifically, when asked if he owned any vehicles, appellant replied that he did not. And when asked specifically about the Monte Carlo, appellant told the officer that it was not his vehicle. At no time, let alone prior to the search or at the suppression hearing, has appellant ever asserted ownership of the vehicle or gun, or even a right of access. This complete disavowment of any proprietary interest, and the absence of any claim of a possessory interest, support the trial court's ruling that appellant lacked "standing" to contest the search of the Monte Carlo.[84]

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[83] As noted by this Court, since the time of appellant's trial, the United States Supreme Court has largely abandoned the use of the word "standing" in Fourth Amendment analysis, and this Court has discouraged use of the word to avoid confusion. (*People v. Ayala, supra*, 23 Cal.4th at p. 254, fn. 3.) However, the nature of the inquiry has not changed. (*Id.*)

[84] Appellant appears to find it significant that the question about the Monte Carlo by police was done through an interpreter. (AOB 183.) However, even if there is some significance to this fact, a second officer who spoke some Spanish, and who testified at the hearing, stated that he

(continued...)

Appellant argues that there wasn't a total disclaimer of any interest in the area searched or the item seized, as he possessed the keys to the Monte Carlo and police had seen him sitting in the car on prior occasions. (AOB 182-183.) Appellant further criticizes the prosecution taking, what he deems, contradictory positions of using the keys and police sightings to establish possession of the gun on the one hand, but then ignore these facts to deny him a reasonable expectation of privacy on the other. (AOB 183-184.) In support, he points to *People v. Dees* (1990) 221 Cal.App.3d 588. (AOB 182-183.)

In *Dees*, the defendant originally claimed ownership of a car. (*People v. Dees*, *supra*, 221 Cal.App.3d at p. 591.) The car was then searched without his consent, and methamphetamine and other indicia were found. (*Id.*) The defendant then sought to dissociate himself from the items, and his ex-wife testified at the preliminary hearing that the car wasn't his. (*Id.* at pp. 591-592.) Another witness testified at the preliminary hearing that he never saw the defendant drive or anywhere near the car during the two weeks prior. (*Id.* at p. 592.) The defendant's suppression motion was submitted on the basis of the preliminary hearing transcripts. (*Id.*) The motion was ultimately denied, with the trial court stating that the defendant's out of court statement introduced by the prosecution was insufficient to confer standing, and it cited a lack of any other proof. (*Id.* at pp. 592-593)

The *Dees* court found the defendant's dissociation from the car was not fatal to his effort to preserve his Fourth Amendment rights. (*People v. Dees*, *supra*, 221 Cal.App.3d at p. 595.) The appellate court reversed the

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(...continued)
understood what was said and that appellant denied ownership of the vehicle. (1RT 70.)

denial of the suppression motion based on prosecutorial self-contradiction. In doing so, the appellate court found that, "[t]he only evidence at the preliminary hearing tying appellant to the contents of the Cadillac was the testimony of officers Gray and Ford that appellant admitted the car was his and questioned their right to search it." (*Id.* at pp. 597-598.) As these facts were sufficient to hold appellant to answer on the underlying charges, they were sufficient to confer standing, and the prosecution was estopped to argue otherwise. (*Id.*)

Unlike *Dees*, appellant did not base his suppression motion on the preliminary hearing transcript, so appellant is not arguing that the prosecution took an inconsistent position at the suppression hearing. More to the point, appellant has never claimed an ownership or possessory interest in either the Monte Carlo or the gun, and this is not a case where the trial court made two diametrically opposed findings based on a single fact: i.e., that his claimed ownership was sufficient to hold the defendant to answer, but insufficient to prove standing. Also, the prosecutor, here, never used the keys or police sightings to prove ownership of the car, nor did the prosecutor present any evidence appellant ever claimed any interest in the car or the gun. Instead, the possession of the keys and police sightings were objective facts used to prove constructive possession of the gun and access to the car. Access does not equate to a reasonable expectation of privacy,[85] nor does it overcome appellant's express disclaimer of any proprietary interest. Lastly, and has been argued, at the penalty phase, the prosecution produced additional evidence of constructive possession of the gun in the form of additional incidents of gun possession. As such, respondent submits that *Dees* is distinguishable.

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[85] Otherwise, persons who steal cars would be given a reasonable expectation of privacy in a vehicle they stole.

Assuming he had standing, appellant contends that, because the trial court failed to rule on the merits of his motion, remand to the superior court is the appropriate remedy. (AOB 184.) In support, appellant reasons that there is a reasonable probability that the trial court would have granted the motion, as this case presents a "textbook example of officers exceeding the scope of the warrant...." (AOB 185.) To this end, appellant asserts that the Monte Carlo was not specifically described in the warrant, and that the vehicle wasn't even on the premises. (AOB 185-186.)

> "The scope of a warrant is determined by its language, reviewed under an objective standard without regard to the subjective intent of the issuing magistrate or the officers who secured or executed the warrant. [Citations.] Phrased differently, 'the scope of the officer's authority is determined from the face of the warrant....' [Citation.] As many courts have observed, 'officers executing a search warrant are "required to interpret it," and they are "not obliged to interpret it narrowly."' [Citation.] To satisfy the objective standard, the officer's interpretation must be reasonable." [Citation.]

(*People v. Rangel* (2012) 206 Cal.App.4th 1310, 1315-1316.)

Respondent acknowledges that technically the Monte Carlo was not on the property, as it was parked directly in front of the residence on the street. Whether this circumstance brought the vehicle outside the scope of the warrant is arguable, as noted by the trial court. However, given its close proximity to the residence and appellant's statement that the vehicle was not his, it was reasonable for the officers to enter the vehicle to possibly determine if it was associated with the residence.

That aside, the officers were confronted with a situation where they were executing a search warrant at a residence as part of an investigation into drug sales. (3CT 788-789, 863-864.) Appellant was at the premises, and he specifically disavowed ownership of the vehicle. However, the keys found in his possession unlocked the driver's door, and appellant had been seen sitting in the car on prior occasions. Appellant's apparent lack of

candor, in conjunction with the fact that the officers were there searching for evidence of narcotics, provided probable cause to believe the vehicle contained evidence of criminal activity. With probable cause, the search of the vehicle was proper. (*Arizona v. Gant* (2009) 556 U.S. 332, 347; *United States v. Ross* (1982) 456 U.S. 798, 820-821.)

For the foregoing reasons, and assuming the exclusionary rule applies in this context, respondent submits that the trial court properly denied appellant's suppression motion.

3. Circle K incident

a. The facts

Prior to trial, appellant moved to suppress the gun found in a van he was seated in while the car was parked next to a Circle-K convenience store. (3CT 774-783.) With his motion, appellant asserted as grounds for exclusion that there was no probable cause to support the detention and investigation conducted by Visalia Police Officer Stowe. (3CT 779.) The prosecution filed its opposition (3CT 852), and an evidentiary hearing was held. (1RT 3-55.)

At the hearing, Officer Stowe testified to the circumstances of his contact and arrest of appellant on March 16, 1989. (1RT 5.) At the outset, Stowe drew a diagram [People's number 1], that that placed Old Dinuba Boulevard or Highway 63, as running north-south, and Sweet Street as east-west. (1RT 5-6, 17.) The Circle-K convenience store was located in the southeast corner of the diagram. (1RT 6.) Parking for the store was located on the west side of the business and out in front of the store; this area was lighted, and the parking spots were delineated by white markings. (1RT 7-9.)

Stowe explained that he frequently passed the Circle-K each night—a minimum of six to twelve times. (1RT 7.) On this evening, at about

10:16 p.m., Stowe drove by the store and noticed something unusual. (1RT 5-6.) A van was parked in a "very dark" area of the lot on the north side of the Circle K, and in an area without parking stalls. (1RT 6-7, 14, 39.) With the exception of a couple of other occasions, Stowe did not ordinarily see cars parked in an area of the business other than the marked stalls, and on this particular evening, there were lots of parking stalls available. (1RT 7-10.) Stowe was aware of, and had responded to, thefts from this particular store where the subjects had exited to the north and fled in a vehicle. (1RT 8-9.) Consequently, as he had done in the past, Stowe stopped to investigate.[86] (1RT 8-10.)

Stowe pulled in behind the west-facing vehicle, approached from the passenger side, and contacted the sole occupant appellant, who was seated in the driver's seat. (1RT 10-12, 15, 17, 20; 4CT 949.) Stowe asked appellant for identification, but appellant said that he didn't have any with him as it was at home. (1RT 11, 16.) Stowe then asked appellant for the vehicle's registration, which appellant handed to him. (1RT 11.) As appellant wasn't the registered owner, Stowe asked appellant for his relationship to the owner. (1RT 12.) Appellant explained that the car belonged to a friend of his, and that the owner was the friend's uncle. (1RT 12.)

It was about this time a second person approached the van, who was then engaged by another officer. (1RT 20-21.) Although Stowe had no indication that anything had been stolen from the store, he felt an obligation to continue his contact with appellant, since appellant had no identification and was in a vehicle that was not his. (1RT 21.) Stowe further explained that the arrival of the other officer would have been visible to the second

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[86] Stowe acknowledged that if all of the parking spots been filled, he probably would not have stopped. (1RT 10.)

person, who then may have simply abandoned any planned criminal activity. (1RT 22.)

Stowe asked appellant to step out of the vehicle, which he did. (1RT 12.) Stowe patted appellant down for officer safety, and when he did, he felt what he thought was a large amount of paper in appellant's right front pocket. (1RT 13.) Stowe thought the item might be identification that appellant was either concealing or had forgotten about, so he retrieved it, but then discovered it was money. (1RT 14.) Stowe was now concerned with having a person with no identification with him, in a vehicle that did not belong to him, and who possessed a large amount of cash. (1RT 24.) Stowe placed the money on an electric utility box that was next to them. (1RT 24.)

While Stowe spoke a little bit of Spanish, he had a "bit of a problem communicating totally with [appellant] because [appellant] spoke primarily Spanish[,]" and did not speak much English. (1RT 12.) Even so, appellant identified himself as Jose Rojas with a date of birth of August 25, 1956. (1RT 15.) The name was then run for warrants, and Stowe tried to verify appellant's identity through the computer. (1RT 16.)

Unsuccessful in his attempt to verify appellant's identity, in English, Stowe asked appellant for permission to look inside the vehicle. (1RT 12.) Appellant told Stowe that he could, and he added that the vehicle wasn't his. (1RT 13.) Appellant readily gave Stowe his permission. (1RT 25.)

Stowe stepped into the van, and once positioned on the seat, he found a handgun on the floorboard to right of the driver's bucket seat. (1RT 14.) More specifically, the gun was located between the center of the hump that extended between the two seats and the driver's seat. (1RT 15.) Stowe then stepped back out of the van, and appellant was arrested. (1RT 15.)

Defense investigator Dan Wells testified on behalf of appellant. (1RT 27.) In sum, Wells stated that six months prior to the hearing he had went

to the Circle K and observed the lighting conditions, as well as the location of the parking spaces. (1RT 28, 33.) Wells stated that there was a light on the north side of the building that lighted up the area, and there were four parking stalls delineated by white lines on the north side of the store. (1RT 32-33.) While the lines looked like they had been there a while, Wells acknowledged that he did not know if they were there as of March of 1989. (1RT 34, 37.) Wells also acknowledged that he didn't know if the lights were on when Officer Stowe contacted appellant. (1RT 36.) Additionally, Wells spoke with an employee to ensure that the photographs he took accurately depicted the appearance of the business during March of 1989. (1RT 29.)

Immediately at the hearing's conclusion, defense counsel argued for suppression of the gun. (1RT 40.) In sum, counsel first argued that there was nothing suspicious about appellant's vehicle being parked where it was, and even if there was, that suspicion was dispelled shortly after Stowe contacted appellant. (1RT 40-43.) And second, counsel contended that there wasn't voluntary consent to search because of appellant's limited English. (1RT 44.) After argument, the court took the matter under submission, and later it issued a written decision. (1RT 53; 4CT 947-951.)

In denying appellant's motion to suppress, the trial court first found that there was a lawful detention of appellant, as under "[t]hese facts" the officer's suspicion was reasonable. (4CT 948.) Likewise, the court found Stowe's pat down search of appellant for weapons to be permissible, but that the seizure of the money was improper and subject to suppression. (4CT 949-950.) The court then turned its attention to the issue of consent, and whether or not it was the product of free will or a submission to an express or implied assertion of authority. (4CT 950.) In finding the consent to be voluntary, the court noted the following: (1) Stowe was not required to tell appellant he could refuse consent; (2) a *Miranda* type

warning was not required; (3) appellant was not in custody or under arrest at the time of consent; (4) there was no evidence of an emotional condition, appellant's age or maturity, or "any apparent vulnerable subjective state" that interfered with appellant's free choice to give consent; (5) appellant's consent was not ambiguous; (6) Stowe asked for permission and did not direct it; (7) there were no threats by the officer that preceded the request to search; and (8) "[t]here was no assertion of authority such as drawing a gun, handcuffing [appellant], or that the unlawful removal of the money from his pocket affected the giving of consent...." (4CT 951.)

It is upon these facts that appellant contends that his Fourth Amendment right was violated. Respondent disagrees.

b. Law and argument

"The Fourth Amendment to the United States Constitution prohibits 'unreasonable searches and seizures.'" (*In re Arturo D.* (2002) 27 Cal.4th 60, 67.)

> "[A]n officer may, consistent with the Fourth Amendment, conduct a brief, investigatory stop when the officer has a reasonable, articulable suspicion that criminal activity is afoot. [Citation.] While 'reasonable suspicion' is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence, the Fourth Amendment requires at least a minimal level of objective justification for making the stop. [Citation.] The officer must be able to articulate more than an 'inchoate and unparticularized suspicion or "hunch"' of criminal activity. [Citation.] [¶] ... An individual's presence in an area of expected criminal activity, standing alone, is not enough to support a reasonable, particularized suspicion that the person is committing a crime. [Citation.] But officers are not required to ignore the relevant characteristics of a location in determining whether the circumstances are sufficiently suspicious to warrant further investigation. Accordingly, [this Court has] previously noted the fact that the stop occurred in a 'high crime area' among the relevant contextual considerations...." (*Illinois v. Wardlow* (2000) 528 U.S. 119, 123-124 [...].) In making such a stop,

police may conduct "a protective patdown search for weapons." (*Id.* at p. 121 [...].)

(*People v. Huggins*, *supra*, 38 Cal.4th at pp. 241-242.)

Here, the circumstances justified an investigative detention of appellant, and the trial court properly found that appellant had consented to a search of the van. First, Stowe was able to articulate exactly why he proceeded with his investigation, and his actions were supported by reasonable suspicion. Appellant and the van were parked in the dark on the side of the convenience store at about 10:15 at night. This was an area of the lot without marked parking stalls, and to Stowe, it appeared that the van had consciously chosen to eschew the well-lit parking lot that was in front of the store. Given these facts, and knowing that this store had been robbed in the past and that the perpetrators had fled to the north, he stopped to investigate.

Once Stowe contacted appellant—the only occupant and the apparent driver—he asked appellant for identification, which appellant was unable to provide. Stowe then learned that appellant wasn't the registered owner of the van, and appellant explained that the van belonged to a "friend" and that the owner was the friend's uncle. It was at this point that he asked appellant to step out of the van, and the detention occurred. Respondent submits that at this juncture, Stowe could have entered the van to look for identification since appellant was the apparent driver and unable to provide a license. (See, e.g., *In re Arturo D.*, *supra*, 27 Cal.4th at p. 67.) Consequently, Stowe's subsequent entry into the van and discovery of the gun could be upheld on this ground alone. Even so, Stowe tried to verify the false name appellant gave him, and only after this unsuccessful attempt did Stowe ask for, and receive, permission to enter the van.

"Whether consent to search is voluntary is a factual issue for the trial court to determine in light of the circumstances." (*People v. Dasilva*,

supra, 207 Cal.App.3d at p. 49, citing *Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 226; *People v. James* (1977) 19 Cal.3d 99, 106.) On appeal, the trial court's finding must be upheld if supported by substantial evidence. (*James*, at p. 107.)

Here, there trial court made a number of findings in ruling on the issue of consent, all of which find support in the record. In short, appellant's consent was not ambiguous, and there is nothing to suggest that it was the product of a show of force or an assertion of authority. Appellant's complaint notwithstanding, appellant's consent did not immediately follow illegal police conduct, and even if it did, his consent wasn't "inextricably bound up with unlawful conduct." (AOB 197.) Certainly Stowe was permitted to pat appellant down for weapons, and in doing so, Stowe felt a large amount of paper in appellant's pocket. Thinking this might be reflective of appellant's identity, Stowe retrieved the item. This was proper. (See, e.g., *People v. Loudermilk* (1987) 195 Cal.App.3d 996, 1002.)

However, even if the retrieval of the money from appellant's pocket should not have occurred, the question to be asked is "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." (*Wong Sun v. United States* (1963) 371 U.S. 471, 488.) Here, appellant's consent was obtained independent and apart from the retrieval of the money, and the trial court properly concluded that the removal of the money had no effect in the issue of consent. Respondent simply disagrees with appellant's assertion that the two events were inextricably bound.

Appellant relies on *People v. Perrusquia* (2007) 150 Cal.App.4th 228 (*Perrusquia*), to support his argument that the Stowe lacked reasonable suspicion to detain him. (AOB 194-195.) In *Perrusquia*, Anaheim Police

Officer Tisdale was on patrol in a high crime area, when he decided to stop at a 7-Eleven to get a cup of coffee. (*Perrusquia*, at pp. 230-231.) Early that day, the officers were briefed on a series of six armed robberies that had taken place at 7-Eleven stores in the city, and they were told by detectives to keep an eye on the stores during patrol. At about 11:30 p.m., Tisdale pulled into the lot and noticed the defendant's car parked facing the street. The car caught his attention because there were spots closer to the store's entrance, and he could see someone seated inside with the engine idling. (*Id.* at p. 231.) Tisdale stood behind the car and watched, and he could see the defendant crouched low in the driver's seat and leaning against the glass; Tisdale found this suspicious. (*Id.*)

After about 45 seconds, Tisdale and a second officer approached the car. Tisdale heard what he described as "fumbling" and a thud. (*Perrusquia*, *supra*, 150 Cal.App.4th at p. 231.) The defendant then turned the engine off, exited the vehicle and quickly tried to walk past Tisdale. (*Id.*) When Tisdale asked defendant what was going on, he replied that he was going into the store, and Tisdale told him to "hang on a second." (*Id.*) Tisdale then asked the defendant for identification, and the defendant again repeated that he was just going to the store. Apparently agitated, the defendant retrieved his identification from the car, and Tisdale asked him if he had any weapons. (*Id.*) Tisdale then asked the defendant if he could do a pat down for weapons, and the defendant said no. When Tisdale repeated his request, the defendant again said no, and he started to walk away toward an adjacent street. At that point, another officer took a hold of the defendant's arms and wrists, and a handgun was discovered in the defendant's waistband. (*Id.* at pp. 231-232.)

In granting the defendant's motion to suppress, the trial court found it significant that the defendant had exercised his option to not consensually remain and talk to the officers, and that the officer's were unable to

articulate facts to support a detention. (*Perrusquia*, *supra*, 150 Cal.App.4th at p. 232.) Ultimately, the Court of Appeal agreed, and upheld the trial court's ruling. (*Id.* at p. 234.) Respondent submits that *Perrusquia* is factually distinguishable.

Here, appellant's van was parked in an area of the business that was "very dark," and per Stowe's testimony, an area with no designated parking spaces. Unlike Tisdale, Stowe had knowledge of specific incidents which occurred at that particular store, and significantly, when Stowe approached and made the initial consensual contact, appellant did not attempt to walk away or express any desire not to talk to the officer. Also, unlike the defendant in *Perrusquia*, appellant was unable to provide any identification, he was in possession of a car that did not belong to him, and he consented to the search of the van. Consequently, *Perrusquia* is easily distinguishable.

Lastly, assuming either suppression motion should have been granted, and for the reasons discussed in responding to appellant's other erroneous admission of factor-(b) evidence claims, *ante*, heading "VII," the jury's consideration of either instance was harmless beyond a reasonable doubt.

For the foregoing reasons, appellant's request for relief on this claim should be denied.

IX. THE TRIAL COURT DID NOT COMMIT *SKIPPER* ERROR WHEN IT SUSTAINED THE PROSECUTOR'S OBJECTION UNDER EVIDENCE CODE SECTION 352, AND EXCLUDED TESTIMONY THAT APPELLANT'S FATHER KIDNAPPED AND ABUSED APPELLANT'S MOTHER WHEN SHE WAS ABOUT THE SAME AGE AS ROSA B.

Appellant contends that "[t]he trial court committed *Skipper* error [*Skipper v. South Carolina* (1986) 476 U.S. 1], in excluding evidence that appellant's father kidnapped and raped appellant's mother in the same manner that he kidnapped and raped Rosa [B.]." (AOB 199.) In support,

appellant asserts that the evidence was relevant as it was mitigating in its own right, it would have rebutted the prosecution's evidence, and it would have lessened the impact of the aggravating evidence. (AOB 205-207.)

Respondent disagrees. The trial court properly sustained the prosecutor's Evidence Code section 352, objection to the testimony as cumulative and irrelevant. Moreover, absent any awareness on the part of appellant of the facts sought to be proved, the offer of proof was simply evidence of family history, which was properly excluded. Also, many of the theories of admissibility and relevance now offered by appellant were not presented to the trial court, and therefore, the arguments have not been preserved on appeal. Alternatively, even if they were preserved, much of the inferences appellant asks this Court to draw from the offer of proof require speculation. Lastly, even if the evidence should have been presented, in light of the evidence that was presented and the circumstances of appellant's instant crimes, any error was harmless.

A. The Facts

Near the close of the defense case during the penalty phase, appellant's aunt, Maria DeJesus Casares DeReyna, was called to testify. (9RT 2148.) DeReyna was the sister of appellant's mother. (9RT 2149.) When defense counsel asked DeReyna if she knew how appellant's mother and father came to be married, the prosecutor objected, stating:

> Well, again, your Honor, I think, you know, family history's all right, but I think we're getting beyond the point where we're dealing with the issues involving the possible trauma to the defendant that resulted in the various disorders, resulting in other things. So I would object to it under 352 of the Evidence Code.

(9RT 2149.)

The trial court sustained the objection and the parties then approached the bench. There, the following exchange took place:

MR. THOMMEN [defense counsel]: She would testify that the father kidnapped Jose's mother the same way that Rosa was kidnapped, about the same age, and continually, the beatings of the mother by the father continued from that point on. I think it's kind of foundational to just kind of set the stage for the type of man he was and the abuse he continued to pour on the mother.

MR. LEDDY [the prosecutor]: I think counsel has not only set the stage, but he has populated it thoroughly with witnesses who all know how bad the man was. Under 352, I would object.

THE COURT: Well, yeah, I think the jury pretty well knows that he was a cruel and sadistic man, you know, with his family and with the defendant as far as mistreating him. And besides, this defendant would not have been percipient to the way he treated the mother, at least until he was born and old enough to perceive it himself.

MR. THOMMEN: Okay.

(9RT 2149-2150.) Thereafter, counsel continued with his examination and the matter was not revisited.

B. Law and Argument

[T]he federal Constitution requires that the sentencer in a capital case not be precluded from considering relevant mitigating evidence. [Citations]. Such evidence includes "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." [Citations.] However, while the range of constitutionally pertinent mitigation is quite broad [citation], it is not unlimited. Both the United States Supreme Court and this court have made clear that the trial court retains the authority to exclude, as irrelevant, evidence that has no logical bearing on the defendant's character, prior record, or the circumstances of the capital offense. [Citations.]

(*People v. Carasi*, *supra*, 44 Cal.4th at p. 1313.)

While appellant obviously had the right to present relevant mitigating evidence, this right did not render useless the ordinary rules of evidence.

(See, e.g., *People v. Gonzales* (2012) 54 Cal.4th 1234, 1286-1287.) Here, the trial court sustained the prosecutor's Evidence Code section 352 objection, and essentially noted that the evidence was irrelevant. Section 352 states:

> The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.

(Evid. Code, § 352.)

As for relevance, Evidence Code section 350 states that, "[n]o evidence is admissible except relevant evidence." "[T]he meaning of relevance is no different in the context of mitigating evidence introduced in a capital sentencing proceeding than in any other context. Relevant mitigating evidence is evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value." (*People v. Gonzales*, *supra*, 54 Cal.4th at p. 1287, citation and internal quotations omitted.)

Turning back to the instant case, as set forth above, appellant sought to have his aunt testify that his father kidnapped his mother in much the say way Rosa B. was kidnapped, that they were about the same age, and that his mother was beaten from that point on. Counsel offered that the testimony was relevant as "foundational to just kind of set the stage for the type of man [appellant's father] was and the abuse he continued to pour on the mother." The trial court observed that at that point in the proceeding the jury already knew that Jose Sr. was a cruel and sadistic man who mistreated appellant and the entire family. The court further noted that this proffered family history was something appellant would not have experienced "at least until he was born and old enough to perceive it himself."

In terms of the court's observations, they were entirely correct. By the time Ms. DeReyna was offered as a witness, the jury had already heard from numerous family members, as well as Dr. Blak, who had described in some detail appellant's life as a child and the beatings he and the family had suffered at the hands of his father. While this testimony has been set forth in detail in the Statement of Facts, *ante*, respondent briefly restates it here.

Appellant's younger sister, Maria Delores Lupercio, testified to appellant's upbringing and their father's abuse of the family. (9RT 2135, 2143-2144.) In sum, she said Jose Sr. used to hit appellant "a lot," and that he physically abused everyone in the family. (9RT 2136.) More specifically, Maria explained that her mother was beaten on a daily basis and that the lacerations on her back never went away. (9RT 2138.) Sometimes, her father used a rope and a rafter in the home to hang her mother by her neck, and she described a similar instance of abuse as related to her sister, Amelia. (9RT 2138-2139, 2142.) Maria said that appellant was there during the beatings. (9RT 2139.)

Another witness, appellant's cousin, Antonio Lupercio Navarro, testified that appellant's father used to beat appellant, and that on one occasion his father beat appellant unconscious. (9RT 2144-2145.) As appellant was very afraid of his father, he didn't resist him or fight back. (9RT 2145-2146.) Navarro said that appellant's father used to hit the whole family. (9RT 2147.)

Appellant's uncle offered similar testimony when he said that Jose Sr. treated appellant "very badly," and that appellant was very afraid of him. (9RT 2152.) Alfredo stated that he saw Jose Sr. strike appellant with pieces of wood and other objects, and that he struck him "very hard." (9RT 2152.)

The testimony of psychologist Dr. Blak echoed that of the percipient witnesses. Blak offered the opinion that appellant had experienced a "very

intense, longstanding history of victimization." (9RT 2026.) In support, Blak noted that appellant had been abused by his father for a long period of time very early in life, and that he was exposed to a significant level of violence within his own family and from the general area in which they lived. (9RT 2026.) For instance, Blak noted that when appellant was five, if his father didn't like the way appellant planted the field, his father hit him with a stick or his fist. (9RT 2031.) In another instance, it was reported that appellant's father beat appellant's mother severely because she failed to obtain his permission to take a bath and wash her hair. (9RT 2031.) And on two other occasions, appellant's sister was tied up with her wrists above her head because she was suspected of having an inappropriate romantic encounter, and appellant was beaten to the point that he to go to a neighbor's house to recuperate. (9RT 2116.) Blak concluded that these type of experiences suggested that appellant had a very harsh and punitive life that lacked basic nurturance, and that he grew up with a "tremendous sense of terror..." in his own home. (9RT 2031-2032, 2116.)

As for the fact that appellant's mother may have been kidnapped and beaten prior to appellant's birth, this was essentially appellant's family background or history. But family background "is of no consequence in and of itself." (*In re Crew* (2011) 52 Cal.4th 126, 152, quoting *People v. Rowland* (1992) 4 Cal.4th 238, 279.) "Rather, it '[was] material if, and to the extent that, it relate[d] to the background of [appellant] himself.' [Citation.]" (*Id.*) Here, the family background testimony as related to appellant's mother, and as offered by counsel, was not connected to appellant. In short, there was no evidence or offer of proof that appellant was even aware of how his mother and father came to be married, or that appellant was aware or affected by events that took place prior to his birth. Absent any demonstration of appellant's awareness, the evidence was irrelevant.

As for the other theories of relevance now offered by appellant (i.e., to demonstrate the nature of the maternal attention he received; to establish the duration of the abuse he suffered and witnessed; to support the theory he wasn't a willing participant in the kidnap and rape of Rosa B.; and to show that he was taught that involuntary sexual relationships were normal), respondent submits that those theories were not offered or explained to the trial court. Instead, counsel offered the testimony as "kind of foundational to just kind of set the stage for the type of man he was and the abuse he continued to pour on the mother." As demonstrated, counsel had clearly accomplished that task prior to calling DeReyna to the stand. After the discussion at bench, counsel made no further offers of proof, and he made no other arguments to demonstrate the relevance of offered testimony. In general, a judgment may not be reversed for the erroneous exclusion of evidence unless "the substance, purpose, and relevance of the excluded evidence was made known to the court by the questions asked, an offer of proof, or by any other means." (Evid. Code, § 354, subd. (a); *People v. Anderson* (2001) 25 Cal.4th 543, 580.) Absent these offers, respondent submits that these issues should be deemed not preserved for appeal. This point aside, respondent now turns to the merits of appellant's additional arguments.

Appellant contends that the evidence of his mother's kidnap had mitigating value as it demonstrated that he was "the product of rape and sexual slavery, which undoubtedly would interfere with his mother's ability to offer him the love and emotional support critical to normal childhood development." (AOB 200.) In support, he states that "[i]t's hardly difficult to conceive how this unimaginable form of abuse would have impacted appellant's mother's ability to love and nurture appellant in a healthy manner." (AOB 204.) While indeed the evidence would have demonstrated that his mother was kidnapped, it is irrelevant absent a

showing appellant had knowledge of this fact. Moreover, it is entirely speculative to conclude that the circumstances of her initiation into the family and the subsequent beatings she suffered interfered with his mother's ability to love and nurture appellant in a healthy manner. Undoubtedly, what interfered with this ability was the very violent environment appellant's father created, facts of which the jury was keenly aware.

Appellant further asserts that the evidence would have been mitigating, as it would have provided the jury with context as to the duration of the violence which appellant's mother and other family members endured. (AOB 205.) Appellant deems "duration" important as it would have shown that "...he never knew anything remotely resembling a normal and nurturing family environment," and it would have shown that appellant suffered the consequences of domestic violence during the critical period of his infancy. (AOB 200, 205.) To this point, appellant also argues that evidence of duration would have strongly suggested that appellant's mother was subject to abuse during appellant's in utero development. (AOB 205.)

As for this latter point, the offer of proof was not that appellant's mother was subject to abuse while she was pregnant with appellant or that she suffered any significant harm while pregnant. Rather, the offer was much more general; i.e., that the mother suffered abuse from the time she entered the relationship and that it continued from that point on. Any specific conclusions to be drawn from any alleged in utero abuse requires speculation that they occurred or that any harm was actually done. As for the "duration" aspect of appellant's argument, to the extent appellant was aware of the abuse, the jury already had ample evidence from which to draw its conclusions.

Appellant next argues that the evidence was relevant to rebut the prosecution's theory that he was a "ready participant" in the kidnapping and rape of Rosa B., as it would have supported the defense theory that his "...sadistic father was the violent force behind the repeat performance of his prior conduct," and, also, strengthened his defense of duress by demonstrating "...the utter dominance [his father] exerted over his family through threatening and violent conduct." (AOB 201, 206-207.) Somewhat conversely, appellant further argues that, if the jury somehow felt he was a willing participant, the evidence would have then mitigated his involvement, as it would have provided the jury with an explanation for his actions: i.e., that appellant was taught that involuntary sexual relationships were normal. (AOB 207.)

Again, as demonstrated above, the jury was already very aware of the "utter dominance" appellant's father exerted over the family through his threatening and violent conduct. This much was clear. Consequently, given the evidence presented, this additional information about the relationship between appellant's parents would not have added anything to the appellant's mitigating case.

Appellant contends that the trial court should not have excluded the evidence as cumulative, as it "...was not 'cumulative' at all." (AOB 210.) Appellant points to the fact that there was no evidence regarding his mother being subject to a combination of physical, psychological and sexual abuse represented by his father's act of kidnapping his mother as a child to take as a "wife." (AOB 210.) As has been demonstrated, respondent disagrees that the evidence of abuse, as offered, was not cumulative. Also, and as argued, the evidence of his mother's kidnapping was irrelevant absent a showing of appellant's awareness. For the foregoing reasons, respondent submits that the trial court did not abuse its discretion, and the evidence was properly excluded.

Lastly, and assuming the trial court properly excluded the evidence pursuant to Evidence Code section 352, appellant contends that the exclusion of the evidence constituted *Skipper* error, which was not harmless beyond a reasonable doubt. (AOB 211-212.) In support, appellant argues that the exclusion "...deprived the jury of an accurate depiction of [his] tragic and violent life circumstances, vital to its solemn task of deciding whether appellant should live or die." (AOB 212.)

Respondent disagrees. In arguing in support of the trial court's ruling, respondent has pointed to the cumulative nature of the offered evidence, the slight probative value it may have presented, and the otherwise lack of relevance absent a showing that the evidence related to the background of appellant himself. As has been discussed, appellant presented an abundance of evidence as related to his violent upbringing and the circumstances surrounding his home life. Certainly from the evidence that was presented, the jury was presented with an "accurate depiction" of appellant's character. For these reasons, and in light of the circumstances of appellant's instance crimes, if the trial court abused its discretion, any error was harmless and there was no reasonable possibility the trial court's ruling could have altered the jury's penalty verdict. (*People v. Eubanks*, *supra*, 53 Cal.4th at p. 152 ["in the interest of complete review" applying both *Chapman v. California*, *supra*, 386 U.S. at p. 24, standard and *People v. Watson*, *supra*, 46 Cal.2d at p. 836, to claim of evidentiary error in the penalty phase].)

X. APPELLANT'S PARTICIPATION IN THE KIDNAPPING AND REPEATED SEXUAL ASSAULTS OF ROSA B. WAS NOT IMPROPERLY ADMITTED AS AGGRAVATING EVIDENCE SIMPLY BECAUSE APPELLANT WAS A JUVENILE AT THE TIME OF THE EVENTS

Returning to his participation in the kidnapping and rape of Rosa B., appellant contends that the evidence was improperly introduced as evidence

in aggravation because he was a juvenile at the time of the events. (AOB 214.) In appellant's view, admission of this evidence violated the Eighth Amendment, as well as his constitutional rights to equal protection and due process. (AOB 214-215.) Respondent disagrees.

Put simply, this Court has repeatedly rejected the claim that admission of violent juvenile misconduct violates the Constitution. Since appellant offers no compelling reason to overturn existing precedent, respondent asks this Court to reject the argument once again.

A. The Facts

As previously mentioned, *ante*, footnote 77, appellant's exact age at the time of the kidnapping and assault of Rosa B. is not entirely certain, although it appears he was a juvenile. Rosa was unsure exactly when the kidnapping and assaults took place, but she thought it was in 1972. (9RT 1964.) During the guilt phase, Detective Pinon testified that appellant was 34 at the time of the shooting, which took place in March of 1989. (4RT 797.) If Pinon was correct, then appellant was 17 or 18 at the time of the events. However, Dr. Blak thought a birthdate of May 16, 1956, was the "most probable" birthdate, which, if accurate, meant appellant was around 15 or 16 at the time. (9RT 2030-2031.) That being said, and assuming appellant was a juvenile at the time he committed the offenses, there was no error.

B. Law and Argument

At the outset, respondent notes that appellant failed to object to the admission of this evidence on the ground that he was a juvenile at the time he committed the offenses. Appellant's failure to object on this ground forfeits the claim on appeal. (*People v. Avena* (1996) 13 Cal.4th 394, 426.) However, even if appellant has not forfeited the claim, it is without merit.

"Section 190.3, factor (b) provides that, in determining whether to sentence [a] defendant to death or life imprisonment without the possibility of parole, the jury may consider '[t]he presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence.'" (*People v. Bivert* (2011) 52 Cal.4th 96, 122.) This Court has repeatedly held that evidence of violent juvenile misconduct that would have been a crime if committed as an adult is admissible under factor (b) as evidence in aggravation. (*Id.* at p. 122; *People v. Lee* (2011) 51 Cal.4th 620, 649; *People v. Bramit* (2009) 46 Cal.4th 1221, 1239; *People v. Lewis* (2001) 26 Cal.4th 334, 378-379.) And use of juvenile misconduct as aggravating evidence does not violate a defendant's constitutional rights. (*Bivert*, at p. 114; *Lee*, at p. 649; *People v. Raley* (1992) 2 Cal.4th 870, 909.) Consequently, appellant's claim should be rejected.

Even so, appellant contends that the evidence of juvenile misconduct should not have been considered "...because such misconduct cannot serve as a sufficient basis for concluding that the death penalty would be appropriate to serve society's legitimate interest in retribution." (AOB 214.) In support, appellant points to "well-understood differences between minors and adults[,]" which have been recognized to justify the inability to impose the death penalty on a minor. (AOB 215, citing *Roper v. Simmons* (2005) 543 U.S. 551, 574 (*Roper*) [death penalty is a disproportionate penalty for offenders under the age of 18].) Because of these differences, appellant reasons, it is inappropriate to use evidence of juvenile misconduct as evidence in aggravation. (AOB 215.)

However, as appellant acknowledges, this Court has specifically rejected the application of *Roper* to factor-(b) evidence of juvenile misconduct. (See *People v. Lee*, *supra*, 51 Cal.4th at p. 649, citing *People v. Bramit*, *supra*, 46 Cal.4th at p. 1239; *People v. Taylor*, *supra*, 48 Cal.4th

at p. 652.) This is so, because "*Roper* 'says nothing about the propriety of permitting a capital jury, trying an adult, to consider evidence of violent offenses committed when the defendant was a juvenile.'" (*Lee*, at p. 649, quoting *Bramit*, at p. 1239.) Therefore, the decision in *Roper* is of no help to appellant, and this argument should, once again, be rejected.

For the foregoing reasons, appellant's request for relief on this claim should be denied.

XI. THE LYING-IN-WAIT SPECIAL CIRCUMSTANCE IS NOT DISPROPORTIONATE OR ARBITRARILY APPLIED

Appellant contends that his "...death sentence is based on a lying-in-wait special circumstance that is disproportionate and arbitrarily applied." (AOB 217.) In support, and in sum, appellant argues: that the lying-in-wait special circumstance, as defined by this Court, fails to "substantially" narrow the subclass of murders eligible for the death penalty (AOB 221-224); that there is a "stark statistical disparity" between the number of defendants eligible for death under this special circumstance and the number of defendants sentenced to die based *solely* on this special circumstance (AOB 220, 240-242); that there is no national consensus that death is an appropriate sentence for concealment of purpose-lying in wait (AOB 226); and that the moral culpability of those who kill while lying in wait is relatively low. (AOB 227.) Appellant then concludes that, "[b]ecause of this disparity, and in the absence of a compelling argument or evidence suggesting that 'lying-in-wait' is considered among the most reprehensible forms of murder, the imposition of the death penalty based solely upon a finding of 'lying-in-wait' has become an arbitrary and disproportionate punishment." (AOB 221.)

Respondent disagrees. While appellant presents his argument in terms of the lying-in-wait special circumstance as being disproportionate and arbitrary applied, as respondent understands it, the basic premise

underlying each of his arguments is his first assertion—that the lying-in-wait special circumstance is overbroad as interpreted by this Court, and therefore, fails to adequately narrow the subclass of murders eligible for the death penalty. However, as argued, *ante*, heading "III," and as appellant acknowledges, this Court has repeatedly rejected the contention that the lying-in-wait special circumstance fails to adequately narrow. Appellant's additional arguments notwithstanding, his claim of disproportionate and arbitrary application of the special circumstance should be rejected.

A. Law and Argument

As previously set forth, *ante*, heading "III," "[t]o avoid the Eighth Amendment's proscription against cruel and unusual punishment, a death penalty law must provide a 'meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not.'" (*People v. Edelbacher*, *supra*, 47 Cal.3d at p. 1023, quoting *Furman v. Georgia*, *supra*, 408 U.S. at p. 313.)

Appellant first argues that the lying-in-wait special circumstance fails to "substantially" narrow the subclass of murderers eligible for the death penalty, and therefore, increases the risk of arbitrary punishment in violation of the Eighth and Fourteenth Amendments. (AOB 221.) In support, appellant asserts that this special circumstance lies at "...the constitutional floor of narrowing[,]" as it appears to apply to virtually all intentional murders. (AOB 224.) In appellant's view, because of this "undeniable breadth," "...the risks of arbitrary punishment imposed through a sole 'lying-in-wait' special circumstance are greatly increased." (AOB 225.)

However, as noted in addressing appellant's claim "III," *ante*, this Court has repeatedly rejected the claim that the lying-in-wait special circumstance fails to perform the required narrowing function. (See *People*

v. Carasi, *supra*, 44 Cal.4th at p. 1310 [rejecting the argument that the lying-in-wait special circumstance fails to adequately narrow the class of death-eligible murders because it applies "to virtually all homicides"]; *People v. Moon*, *supra*, 37 Cal.4th at p. 44; *People v. Nakahara*, *supra*, 30 Cal.4th at p. 721.) Respondent submits that this conclusion does not change simply because appellant's death-eligibility was based solely on the lying-in-wait special circumstance. (See, e.g., *People v. Jurado*, *supra*, 38 Cal.4th at p. 127 [upholding death sentence where lying-in-wait was the only special circumstance].) Appellant's complaint notwithstanding, the special circumstance passes constitutional muster. Even so, appellant presses on.

Appellant next asserts that the lying-in-wait special circumstance, "...as broadly construed by this Court, fails to limit capital punishment to the most heinous crimes for which death is appropriate[,] and therefore allows for a disproportionate penalty." (AOB 227.) In support, appellant makes two arguments. First, appellant argues that there is no national consensus that "lying in wait" by concealment of purpose is any more heinous than ordinary murder. (AOB 228.) To this end, he notes that: (1) only three other states that have the death penalty have a special circumstance of lying in wait, and California may be alone in allowing a theory of "concealment of purpose" lying in wait (AOB 228-229); (2) there have been only two other cases in California where the lying-in-wait special circumstance was the only special circumstance found true (AOB 230-231); (3) since 1978, no one has been executed in California where the lying-in-wait special circumstance has been found to be true (AOB 232.); and (4) the "direction of change" supports the conclusion of no national consensus, as Indiana and, to a lesser extent Colorado, have rejected California's "concealment of purpose." (AOB 233-234.)

Appellant's second disproportionate-argument is that there is no moral justification that a true finding on a lying-in-wait special circumstance, as broadly defined by this Court, warrants a sentence of death. (AOB 234.) However, in making this second argument, appellant acknowledges that this Court has found a sufficient distinction between intentional murder and "lying-in-wait" murder, so as to satisfy the Eighth Amendment's narrowing requirement. (AOB 236.) Even so, appellant counters that this Court "has not expressly considered whether the 'lying-in-wait' special circumstance imposes a constitutionally disproportionate punishment based on the lack of national consensus and other indicia of evolving standards of decency." (AOB 236-237.) Therefore, appellant continues, a sentence of death based on the lying-in-wait special circumstance cannot be morally justified as, in sum, there is little moral distinction between the special circumstance and other first degree murderers. (AOB 238-239.)

As for appellant's broad contention that the lying-in-wait special circumstance "...fails to limit capital punishment to the most heinous crimes for which death is appropriate and therefore allows for a disproportionate penalty," this argument is, again, premised on the belief that the special circumstance fails to adequately narrow, which clearly it does. While appellant may not deem murder committed by lying-in-wait as significantly heinous, California has appropriately determined otherwise, and it has provided a statute that has repeatedly passed constitutional challenges. As this Court has recognized, "[m]urder committed by lying in wait has been 'anciently regarded...as a particularly heinous and repugnant crime.' [Citation.]" (*People v. Edelbacher*, *supra*, 47 Cal.3d at p. 1023; see also *People v. Stanley* (1995) 10 Cal.4th 764, 795.) As such, California can properly designate lying-in-wait by concealment of purpose a special circumstance that warrants death, despite appellant's claim that other states

appear to reject this definition. Appellant's disagreement notwithstanding, there is a legitimate moral distinction between the instant murder and other first degree murders.

In again attacking the scope of the special circumstance, appellant next argues that the breadth of the lying-in-wait special circumstance increases both the disproportionality and the risk of arbitrariness. (AOB 240.) In support, appellant asserts that there were thousands of murders since 1978, to which the lying-in-wait special circumstance applied, but only two prior cases of this Court have had the lying-in-wait special circumstance as the lone special circumstance. (AOB 241.) Appellant reasons that this "...minuscule number of death penalty cases resting solely on the 'lying in wait' special circumstance in comparison with the large number of death eligible offenses attests to the absence of a moral distinction between murder and capital murder based on 'lying-in-wait.'" (AOB 241-242.)

Respondent disagrees. Even assuming appellant's assumption about the number of homicides that the lying-in-wait special circumstance could apply to was correct, appellant's attempt at comparing his case to others hints at intercase proportionality review, which is not constitutionally required. (*People v. Virgil* (2011) 51 Cal.4th 1210, 1287.) That said, even if appellant's compilation is accurate, use of the lying-in-wait special circumstance, in of itself, is not all that rare, as appellant notes at least 27 other cases where the lying-in-wait special circumstance was found true.[87]

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[87] Appellant asserts that the 27 other California cases that have found a lying-in-wait special circumstance to be true, are not relevant as they also had true findings on at least one other special circumstance. (AOB 230-231.) Respondent disagrees. Much of appellant's argument is an attempt to portray the lying-in-wait special circumstance as seldom used, when in (continued...)

(AOB 230, fn. 52.) It matters not that in only a few of these cases was lying-in-wait the only special circumstance. Rarity of circumstance does not equate to inequality or disproportionality. (See, e.g., *People v. Dennis* (1998) 17 Cal.4th 468, 513.) Since the lying-in-wait special circumstance properly narrows the subclass of offenders eligible for the death penalty, appellant's complaint about its breadth is without merit.

Next, appellant contends that even if the lying-in-wait special circumstance is constitutional, it is disproportionate and arbitrary as applied to him. (AOB 243.) While appellant concedes, as he must, that the murder and attempted murder for which he now stands convicted reflect a high degree of moral culpability, he argues that his case is different from many cases in which death sentences have been upheld. (AOB 244.) In support, appellant argues: that the evidence of lying in wait was weak; that it was the sole special circumstance to be found true; that he presented powerful mitigating evidence; that the victims were engaged in inherently dangerous and illegal conduct; and that the co-defendant who was tried separately was acquitted of lying in wait. (AOB 244.)

Although this Court has rejected the argument that intercase proportionality review is constitutionally required, when a defendant claims intracase proportionality review, this Court reviews "...the particular facts of the case to determine whether the death sentence is so disproportionate to the defendant's personal culpability as to violate the California Constitution's prohibition against cruel or unusual punishment." (*People v. Virgil*, *supra*, 51 Cal.4th at p. 1287, citation and internal quotation omitted.) In making this determination,

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(...continued)
fact, and as appellant has pointed out, it is used with some frequency, albeit, most often in conjunction with another special circumstance.

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

(*Id.*, citations and internal quotations omitted.)

Respondent submits that appellant's death sentence is not grossly disproportionate to his personal culpability or arbitrarily applied as to him. From the evidence presented, it is clear that appellant was a major participant, if not outright directing the crime, that the murder was committed in an especially cold and callous manner, and that it was done while lying in wait. Unbeknownst to the victim Sanchez, appellant had armed himself with a handgun before getting into the car, and he then waited until the opportune moment to act. Appellant positioned himself behind Sanchez, which basically left Sanchez defenseless. When the right moment arrived, the 34-year-old appellant revealed his true intentions by putting the gun to the back of Sanchez's head and directing his younger 19-year-old-cohort Contreras to secure Lopez. After demanding and receiving the cocaine, appellant immediately executed Sanchez with a single gunshot to the back of Sanchez's head, and then he and Contreras unsuccessfully tried to kill Lopez. This vicious murder was done simply to steal three ounces of cocaine and facilitate an escape. In short, appellant's calculated actions left one man dead, and a second man with life-threatening stab wounds.

As for his personal characteristics, as stated, appellant was not particularly youthful at the time of the murder, as he was approximately 34 years of age. (4RT 797.) Appellant's criminal history consisted of two prior felony convictions—one for robbery and a second for possession of heroin for sale.[88] (9RT 1885-1888.) For each of these crimes, appellant was sentenced to a prison term. (*Id.*) At the penalty phase, evidence was presented that, as a youth, appellant participated in the kidnap and repeated sexual assaults of the child Rosa B. Also, on four different occasions appellant was found in possession of a firearm, and on one of those occasions, appellant used the firearm to twice shoot at an occupied vehicle. From these facts the jury could have easily inferred that appellant presented a significant danger to society, and that his acts of violence were increasing in severity.

Respondent acknowledges evidence that, in contrast, by all accounts appellant was subjected from a very early age to physical and verbal abuse from his father. Respondent further acknowledges that appellant presented evidence that he suffered from three different personality disorders, and that Dr. Blak thought appellant's intellectual functioning to be "...in the borderline to very low average range." (RT 2025.) Even so, considering all of the circumstances of the offense and appellant's personal characteristics, appellant's sentence of death does not shock the conscience or offend fundamental notions of human dignity.

Lastly, as has been argued throughout, respondent disagrees with appellant's assertion that the evidence of lying-in-wait was weak. Rather, the evidence was quite strong when considered in light of the manner of

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[88] As submitted to the jury, appellant's robbery conviction, which stemmed from the Boas Minnow Farm incident, was presented as a felony conviction for section 211 only, without the accompanying section 12022-firearm enhancement. (10RT 2169-2170, 2188, 2198, 2203, 2208.)

killing, the evidence of planning, and the concerted action on the part of appellant and Contreras. Also it matters not that lying-in-wait was the sole special circumstance found to be true, since the circumstance adequately narrows the subclass of murderers eligible for the death penalty. And as for appellant's reliance on the outcome of his co-defendant Contreras's trial, it is of no consequence. As this Court has explained, "the disposition of a codefendant's case is not relevant to the decision at the penalty phase, which is based on the character and record of the individual defendant and the circumstances of the offense." (*People v. Howard* (2010) 51 Cal.4th 15, 39-40, citation and internal quotations omitted.)

Consequently, for the foregoing reasons, appellant's claim that the lying-in-wait special circumstance is disproportionate and arbitrary applied should be rejected.

XII. CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED BY THIS COURT AND AS APPLIED, DOES NOT VIOLATE THE UNITED STATES CONSTITUTION

Under his final main heading, appellant makes a number of familiar challenges to the constitutionality of California's death penalty statute. (AOB 246.) In doing so, appellant recognizes that each of his arguments has been previously rejected by this Court. (*Id.*) Consequently, pursuant to this Court's directive set forth in *People v. Schmeck* (2005) 37 Cal.4th 240, "...appellant briefly presents the following challenges in order to urge reconsideration and to preserve these claims for federal review." (*Id.*)

Respondent submits that, consistent with its holdings in prior cases, this Court should reject each of these claims. Moreover, in each instance in which appellant failed to object or request a clarifying instruction (which is all of the following instructional error claims), the claim is not preserved

for review.[89] (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1192.) Nevertheless, and assuming for the sake of argument the following claims are properly preserved, they are without merit.

A. Section 190.2 Adequately Distinguishes Capital Murders from Non-Capital Murders, and Consequently, Those Eligible for the Death Penalty

Appellant contends that section 190.2 is impermissibly broad, as it fails to "...meaningfully narrow the pool of murderers eligible for the death penalty." (AOB 246-247.) However, appellant acknowledges that "[t]his Court routinely rejects challenges to the statute's lack of any-meaningful narrowing." (AOB 247.) Appellant asks the Court to reconsider its holding in *People v. Stanley*, *supra*, 10 Cal.4th at pages 842-843, and to strike down section 190.2, as in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. (AOB 247.)

Respondent submits that *Stanley* and those cases that have followed were properly decided, and appellant offers no compelling reason for reconsideration. (See, e.g., *People v. Romero*, *supra*, 44 Cal.4th at pp. 428-429 [death penalty law not unconstitutional for failing to adequately distinguish the cases in which death is imposed from the cases in which it is not]; *People v. Watson* (2008) 43 Cal.4th 652, 703; *People v. Bolden* (2002) 29 Cal.4th 515, 566.) Therefore, appellant's claim should be denied.

B. Permitting the Jury to Consider the Circumstances of the Crime Pursuant to Section 190.3, Factor (a), Does Not Violate the Fifth, Sixth, Eighth, or Fourteenth Amendments

Appellant contends that the broad application of section 190.3, factor (a), violates the Fifth, Sixth, Eighth and Fourteenth Amendments

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[89] With the exception of CALJIC No. 8.86 (conviction of other crimes – proof beyond a reasonable doubt), appellant did not object to any of the instructions given during the penalty phase. (10RT 2156-2179.)

because it permits the jury to assess death based solely upon the particular set of circumstances surrounding the instant murder without some sort of narrowing principle. (AOB 248.) However, "[a]ppellant is aware that the Court has repeatedly rejected the claim that permitting the jury to consider the 'circumstances of the crime' within the meaning of section 190.3 in the penalty phase results in the arbitrary and capricious imposition of the death penalty." (AOB 248, citing, in part, *People v. Kennedy* (2005) 36 Cal.4th 595, 641, disapproved on other grounds in *People v. Williams* (2010) 49 Cal.4th 405, 459.) Even so, appellant asks the Court to reconsider these holdings. (AOB 248.) Respondent submits that, on this point, the decision in *Kennedy* was correctly decided. As such, appellant's claim and request for reconsideration should be denied. (See also *People v. Romero*, *supra*, 44 Cal.4th at p. 428 [sentencing factor allowing the jury to consider the circumstances of the crime does not result in the arbitrary or capricious imposition of the death penalty]; *People v. Loy* (2011) 52 Cal.4th 46, 78.)

C. California's Death Penalty Statute and Instructions Properly Set Forth the Appropriate Burden of Proof

Appellant's next heading presents eight sub-headings under the general premise that "[t]he death penalty statute and accompanying jury instructions fail to set forth the appropriate burden of proof." (AOB 249.) As to this broad statement, respondent disagrees, since appellant's contention has been repeatedly rejected by this Court. (See, e.g., *People v. Romero*, *supra*, 44 Cal.4th at pp. 428-429.) Even so, each of appellant's individual complaints shall be briefly addressed.

1. California's death penalty scheme is not unconstitutional simply because it does not require use of the proof-beyond-a-reasonable-doubt standard (except as to proof of prior criminality)

Appellant contends that his "...death sentence is unconstitutional because it is not premised on findings made beyond a reasonable doubt." (AOB 249.) In support, appellant points to the decisions in *Blakely v. Washington* (2004) 542 U.S. 296, *Ring v. Arizona* (2002) 536 U.S. 584, and *Apprendi v. New Jersey* (2000) 530 U.S. 466. (AOB 249.) However, appellant acknowledges that this Court has held that the imposition of the death penalty does not constitute an increased sentence within the meaning of *Apprendi* (AOB 250, citing *People v. Anderson*, *supra*, 25 Cal.4th at p. 589, fn. 14), and he is "mindful" that this Court has rejected the argument that *Blakely*, *Ring*, and *Apprendi* imposed a reasonable-doubt standard on California's capital penalty-phase proceedings. (AOB 250, citing *People v. Prieto* (2003) 30 Cal.4th 226, 263.)

Appellant is correct. This Court has previously and repeatedly rejected these precise arguments. (See *People v. Romero*, *supra*, 44 Cal.4th at pp. 428-429; *People v. Loy*, *supra*, 52 Cal.4th at p. 78; *Lewis*, *supra*, 43 Cal.4th at p. 534.) Even so, "[a]ppellant urges the Court to reconsider its holding in *Prieto* so that California's death penalty scheme will comport with the principles set forth in *Apprendi*, *Ring*, and *Blakely*." (AOB 250.) Respondent submits that appellant offers no compelling reason to overturn existing case law. As such, his claim should be denied.

Under the same heading, appellant puts "...aside the applicability of the Sixth Amendment...," and he "...contends that the sentencer of a person facing the death penalty is required by due process and the prohibition against cruel and unusual punishment to be convinced beyond a reasonable doubt[,] not only that the factual bases for its decision are true,

but that death is the appropriate sentence." (AOB 250.) As appellant is aware, this Court has rejected the claim that the Due Process Clause or the Eighth Amendment require a jury to be instructed that it must decide beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors. (*People v. Blair* (2005) 36 Cal.4th 686, 753; *People v. Watson*, *supra*, 43 Cal.4th at p. 703.) Since appellant offers no compelling reason why these cases should be overturned, his claim should also be denied.

2. The jury was properly instructed as to the burden of persuasion regarding the existence of aggravating factors, whether aggravating outweighed mitigating factors, the appropriateness of the death penalty, and the presumption of life

Appellant contends that CALJIC Nos. 8.85 and 8.88, failed to provide the jury with the guidance legally required for administration of the death penalty in violation of the Sixth, Eighth, and Fourteenth Amendments. (AOB 251.) More specifically, appellant argues that the jury "...should have been instructed that the state had the burden of persuasion regarding the existence of any factor in aggravation, whether aggravating factors outweighed mitigating factors and the appropriateness of the death penalty, and that it was presumed that life without parole was an appropriate sentence." (*Id.*) As appellant acknowledges, this Court has repeatedly held otherwise. (See *People v. Loy*, *supra*, 52 Cal.4th at pp. 78-79; *People v. Romero*, *supra*, 44 Cal.4th at pp. 428-429; *People v. Watson*, *supra*, 43 Cal.4th at pp. 703-704; *People v. Lenart* (2004) 32 Cal.4th 1107, 1136-1137; *People v. Arias* (1996) 13 Cal.4th 92, 190.) Respondent submits that these decisions are sound, and appellant's claim should also be rejected.

Alternatively, appellant argues that "[e]ven presuming it were permissible not to have any burden of proof, the trial court erred

prejudicially by failing to articulate that to the jury." (AOB 252.) Appellant is mistaken. (See *People v. Romero*, *supra*, 44 Cal.4th at p. 429 ["At the penalty phase, the trial court need not and should not instruct the jury on the burden of proof."].) As such, this claim should also be rejected.

3. California's death penalty statute is not unconstitutional due to the lack of an unanimity requirement as related to aggravating factors

Appellant next contends that the failure to require unanimity with respect to aggravating factors violates the Equal Protection Clause, as well as the Sixth, Eighth, and Fourteenth Amendments. (AOB 252-253.) Appellant also specifically singles out unadjudicated criminal activity, and argues that the failure to require unanimity for this factor violated due process and the Fifth, Sixth, Eighth, and Fourteenth Amendments. Therefore, he concludes, the jury rendered an unreliable death sentence. (AOB 254.) Again, appellant recognizes that this Court has repeatedly rejected these arguments, and he asks the Court to reconsider those holdings. (See *People v. Watson*, *supra*, 43 Cal.4th at pp. 703-704; *People v. Loy*, *supra*, 52 Cal.4th at p. 78; *People v. Romero*, *supra*, 44 Cal.4th at pp. 428-429.) Respondent submits that these decisions are sound, and since appellant fails to offer a compelling reason to overturn existing case law, appellant's claim should be denied.

4. CALJIC No. 8.88's use of the phrase "so substantial" does not create an unconstitutionally "vague and directionless" standard

Under his next subheading, appellant contends that the phrase "so substantial," as found in CALJIC No. 8.88, is impermissibly broad and "... violates the Eighth and Fourteenth Amendments because it creates a standard that is vague and directionless." (AOB 255.) Again, appellant recognizes that this claim has been previously rejected in *People v. Breaux* (1991) 1 Cal.4th 281, 316, fn. 14, but asks that this decision be

reconsidered. (*Id.*) Respondent submits that *Breaux* was correctly decided, and appellant's claim should be denied. (See also *People v. Loy*, *supra*, 52 Cal.4th at p. 78; *People v. Romero*, *supra*, 44 Cal.4th at p. 429; *People v. Watson*, *supra*, 43 Cal.4th at p. 704.)

5. The instructions did not improperly fail to inform the jury that the central determination during the penalty phase was whether death was the appropriate punishment

Appellant contends that the instructions, and in particular CALJIC No. 8.88, failed to inform the jury that the central determination was whether death was the appropriate punishment, and therefore, violated the Eighth and Fourteenth Amendments. (AOB 255-256.) However, appellant recognizes that this Court has previously rejected the claim, but he asks this Court to reconsider that ruling. (AOB 256.) This Court has recently rejected this very claim, and respondent submits that it should continue to do so. (See *People v. Valdez* (2012) 55 Cal.4th 82, 179 [court need not instruct the jury that the central determination is whether death is the appropriate penalty].)

6. The instructions did not improperly fail to inform the jury that if they determined that the evidence in mitigation outweighed the evidence in aggravation, then they were required to return a sentence of life without parole

Appellant contends that the instructions, and in particular CALJIC No. 8.88, failed to inform the jurors that if they determined that the evidence in mitigation outweighed the evidence in aggravation, then they were required to return a sentence of life without parole. (AOB 256.) However, appellant recognizes that this Court has held that, "since the instruction tells the jury that death can be imposed only if it finds that aggravation outweighs mitigation, it is unnecessary to instruct on the converse principle." (AOB 257, citing *People v. Duncan* (1991) 53 Cal.3d

955, 978.) Appellant asserts that the holding in *Duncan* conflicts with due process principles, and conflicts with other cases that have disapproved of instructions that emphasized the prosecution's case while minimizing the defense theory. (AOB 257.) Respondent submits that *Duncan* was correctly decided, and appellant's claim should also be denied. (See also *People v. Valdez*, *supra*, 55 Cal.4th at p. 951 [trial court need not instruct the jurors that they should impose life imprisonment without the possibility of parole, if they find that the mitigating circumstances outweigh the aggravating circumstances].)

7. The trial court was not required to instruct on a standard of proof and the lack of unanimity as to mitigating circumstances

Appellant contends that "[t]he jury instructions violated the Sixth, Eighth and Fourteenth Amendments by failing to inform the jury regarding the standard of proof and the lack of need for unanimity as to mitigating circumstances." (AOB 257.) Respondent disagrees, as the trial court was not required to instruct the jurors that their findings regarding mitigating circumstances need not be unanimous or beyond a reasonable doubt. (See *People v. Valdez*, *supra*, 55 Cal.4th at p. 951; *Lewis*, *supra*, 43 Cal.4th at p. 534.) Therefore, this claim should also be rejected.

8. The trial court was not required to instruct the jury on the presumption of life

Appellant contends that "[t]he trial court's failure to instruct the jury that the law favors life and presumes life imprisonment without parole to be the appropriate sentence violated [his] right to due process of law (U.S. Const. 14th Amend.), his right to be free from cruel and unusual punishment and to have his sentence determined in a reliable manner (U.S. Const. 8th & 14th Amends.)[,] and his right to the equal protection of the laws (U.S. Const. 14th Amend.)." (AOB 259.) That said, appellant

acknowledges that this Court has held that an instruction on the presumption of life is not necessary in California. (See *People v. Valdez*, *supra*, 55 Cal.4th at p. 951; *People v. Loy*, *supra*, 52 Cal.4th at p. 78.) As appellant does not offer a compelling reason to overturn these decisions, his claim should also be rejected.

D. The Lack of a Requirement for Written Findings Does Not Violate Appellant's Right to Meaningful Appellate Review, or His Rights under the Sixth, Eighth, and Fourteenth Amendments

Appellant contends that the "[f]ailure to require written or other specific findings by the jury deprived [him] of his rights under the Sixth, Eighth, and Fourteenth Amendments..., as well as his right to meaningful appellate review...." (AOB 260.) As appellant acknowledges, this Court has previously rejected this argument. (See *People v. Valdez*, *supra*, 55 Cal.4th at p. 180, citing *People v. Cook* (2006) 39 Cal.4th 566, 619.) Since appellant offers no compelling reason to overturn these decisions, this claim should also be denied.

E. The Jury Was Properly Instructed on Mitigating and Aggravating Factors Pursuant to CALJIC No. 8.85

Under this heading, appellant presents three contentions aimed at CALJIC No. 8.85.

1. The terms "extreme" and "substantial" in CALJIC No. 8.85 did not impede the jury's ability to consider mitigating evidence

Appellant contends that the use of the adjectives "extreme" and "substantial" in CALJIC No. 8.85, "...acted as barriers to the consideration of mitigation in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments." (AOB 260.) Appellant asks for reconsideration of *People v. Avila* (2006) 38 Cal.4th 491, 614-615. (*Id.*) Respondent submits that *Avila* was properly decided, and appellant offers no compelling reason to

the contrary. Therefore, this claim should be denied. (See also *People v. Valdez*, *supra*, 55 Cal.4th at p. 180; *People v. Romero*, *supra*, 44 Cal.4th at p. 429.)

2. The "failure" to delete inapplicable sentencing factors did not violate appellant's "constitutional rights"

Appellant contends that the failure to omit inapplicable sentencing factors set forth in CALJIC No. 8.85, likely confused the jury and prevented it from making a reliable determination of the appropriate penalty. (AOB 261.) He asks for reconsideration of *People v. Cook*, *supra*, 39 Cal.4th 566, 618. (*Id.*) Respondent submits that *Cook* was properly decided and, therefore, appellant's claim should also be denied. (See also *People v. Valdez*, *supra*, 55 Cal.4th at p. 180.)

3. The trial court was not required to instruct the jury that certain factors were relevant only as mitigators

Appellant contends the failure to instruct that factors (d) through (h), and (j), were relevant solely as possible mitigators violated his Eighth and Fourteenth Amendment rights. (AOB 261-262.) As appellant acknowledges, this Court in *People v. Hillhouse*, *supra*, 27 Cal.4th at page 509, approved of this practice. (See also *People v. Valdez*, *supra*, 55 Cal.4th at p. 180; *People v. Romero*, *supra*, 44 Cal.4th at p. 429.) As appellant offers no compelling reason to overturn these decisions, this claim should be denied.

F. The Constitution Does Not Require Inter-Case Proportionality Review

Appellant contends that "[t]he failure to conduct inter-case proportionality review violates the Fifth, Sixth, Eighth, and Fourteenth Amendment prohibitions against proceedings conducted in a constitutionally arbitrary, unreviewable manner or that violate equal

protection or due process." (AOB 262.) As appellant acknowledges, this Court in *People v. Fierro* (1991) 1 Cal.4th 173, 253, held that inter-case proportionality review is not required. (*Id.*) Respondent submits that *Fierro* and the many other cases with the same holding were properly decided and, consequently, appellant's claim should be denied. (See, e.g., *People v. Valdez*, *supra*, 55 Cal.4th at p. 180; *People v. Romero*, *supra*, 44 Cal.4th at p. 429.)

G. California's Death Penalty Scheme Does Not Violate the Equal Protection Clause

Appellant contends that California's Death Penalty Scheme Violates the Equal Protection Clause. (AOB 262.) In support, appellant argues that non-capital defendants receive greater procedural protections because any true finding on a sentencing enhancement must be unanimous and beyond a reasonable doubt, where as in a capital case, there is no burden of proof at all, and the jury need not agree on what aggravating circumstances apply. (AOB 262-263.) As appellant acknowledges, this Court has previously rejected this equal protection argument. (See *People v. Valdez*, *supra*, 55 Cal.4th at p. 180; *People v. Loy*, *supra*, 52 Cal.4th at p. 79.) Respondent asks that the Court do so once again.

H. California's Use of the Death Penalty Does Not Violate International Law, the Eighth or Fourteenth Amendments and/or "Evolving Standards of Decency"

With his final claim, appellant asks this Court to reconsider its repeated rejection of the argument that the death penalty violates international law, the Eighth and Fourteenth Amendments, or "evolving standards of decency." (AOB 263.) Respondent submits that those cases were properly decided, and that appellant's claim should likewise be denied. (See *People v. Duenas* (2012) 55 Cal.4th 1, 28; *People v. Valdez*,

supra, 55 Cal.4th at p. 180; *People v. Cook*, *supra*, 39 Cal.4th at pp. 619-620

CONCLUSION

For the foregoing reasons, appellant's first degree murder conviction and sentence of death should be affirmed.

Dated: February 21, 2013

Respectfully submitted,

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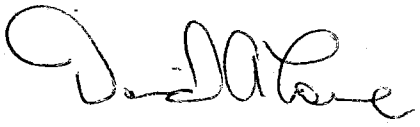

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CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S BRIEF** uses a 13-point Times New Roman font and contains 50,388 words.

Dated: February 21, 2013

KAMALA D. HARRIS
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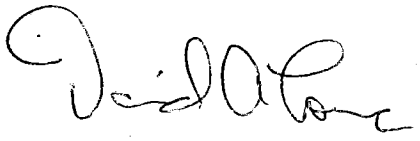

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Casares** No.: **S025748**

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

On February 21, 2013, I served the attached **RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 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 February 21, 2013, at Sacramento, California.

_____
Declarant

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